



# Policy and Procedure

Policy Number

11.14

Chapter Law Enforcement Operations

Article Eyewitness Identification

Authorized By:

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## PURPOSE

The purpose of this policy is to set forth eyewitness identification protocols that will result in strong, reliable evidence while observing relevant constitutional and statutory protections. The safeguards incorporated into these protocols are intended to prevent the possibility of Department personnel inadvertently or intentionally suggesting a positive identification to an eyewitness.

## POLICY

It is the policy of the Department to minimize the risk of wrongful convictions and to maximize the detection and apprehension and prosecution of offenders through witness identification evidence that is reliable and legal. <CRS § 16-1-109> <CRS § 16-1-110>

## DEFINITIONS

An **administrator** is the person who is conducting an identification procedure.

**Blind** means the administrator of a live lineup, photo array, or show-up does not know the identity of the suspect.

**Blinded** means the administrator of a live lineup, photo array, or show-up may know who the suspect is but does not know in which position the suspect is placed in the photo array when it is viewed by witnesses.

**Double Blind** means a lineup procedure in which both the witness and the lineup administrator are unaware of which lineup member is the suspect under investigation.

A **confidence statement** is a statement by an eyewitness immediately following an identification regarding his or her confidence in the identification's accuracy.

An **eyewitness** is a person who observed another person at or near the scene of an offense.

A **filler** is a person or photograph of a person who is not suspected of the offense in question and is included in an identification procedure.

A **live lineup** is a live identification procedure in which a group of persons, including the suspected perpetrator of an offense and other persons who are not suspected of the offense, is shown to an eyewitness to determine if the eyewitness identifies the suspect as the perpetrator.

A **photo array (photo lineup)** is an identification procedure in which an array of photographs, including a photo of the suspected perpetrator of an offense and additional photographs of other persons who are not suspected of the offense, is shown to an eyewitness either in hard copy form or via electronic means for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.



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

## GENERAL GUIDELINES

### PHOTO ARRAY (PHOTO LINEUP)

- **Creating the Photo Array** <CALEA 42.2.9 (a)>

Instructions to the officer/investigator creating the photo array:

- Fillers should be similar in appearance to the suspect and to the eyewitness' original description of the suspect. Similarities should include gender, age, race, height, hair color, facial hair, clothing and distinctive physical features.
- At least five fillers should be included in each photo array, in addition to the suspect. Administrators should not include fillers who are known to the eyewitness.
- Only one suspect should be included in a photo array. If there is more than one suspect in an investigation, a separate photo array should be made for each suspect. Different fillers should be used in the separate arrays.
- Photos used in an array should be of consistent size, quality, color and background. Photos should not contain stray markings or information about the subject. Any markings or identifying information should be covered. If one photo in the array is covered in any manner, all the photos should be similarly covered.

- **Communicating with the Eyewitness**

Instructions for the officer/investigator communicating with the eyewitness:

- When contacting an eyewitness to arrange for viewing a photo array, the officer/investigator should advise only that he/she intends to conduct a photo identification procedure.
- Avoid addressing whether a person is in custody or whether other supporting evidence about the suspect has been obtained (such as statements, physical evidence, and other identifications).
- When an eyewitness arrives to view the array, he/she should be prevented from speaking to any other eyewitnesses about the identification procedure.

- **Photo Array Instructions** <CALEA 42.2.9 (d)>

The administrator will provide the following or substantially similar instructions (Photo Array-Witness Instruction form) to an eyewitness before displaying a photo array:

- The eyewitness is being asked to view a photo array as part of an ongoing investigation into a crime that occurred on (date) at (location), to see if the eyewitness recognizes anyone involved with the crime.
- The eyewitness should not assume the administrator knows who the suspect is, or seek assistance from the administrator or anyone else present in making an identification.
- The suspect may or may not be pictured in the array.
- Individuals pictured in the photo array may not look exactly as they did on the date of the incident. Some features – like hairstyle or facial hair – are subject to change.
- Photos do not necessarily depict the true complexion of a person; it may be darker or lighter than appears in the photo.



- The eyewitness should pay no attention to any markings on the photos or any differences in the style/type of the photos.
- If the eyewitness makes an identification, the eyewitness will be asked about his/her level of certainty. The administrator will ask the eyewitness to choose whether he/she is confident, somewhat confident or not confident about his/her identification.
- The investigation will continue, regardless of whether the eyewitness makes an identification.

- **Administering the Photo Array** <CALEA 42.2.9 (d)>

The following or substantially similar steps will be taken in administering the photo array: <CALEA 42.2.11 (f)>

- When practicable, a blind administrator is recommended for all photo arrays.
- When use of a blind administrator is impractical, blinded administration of the photo array should be used.
- Examples of methods for blinded administration may include, but are not limited to, the following:
  - 1) The photo array is created by an officer other than the administrator and then placed in a folder. The administrator gives the folder to the eyewitness, who looks at the array within the folder, so that the administrator cannot see the photos during the identification.
  - 2) The administrator makes multiple arrays, placing the suspect's photo in different positions in each. The same fillers may be used in the multiple arrays. The arrays are then placed in separate, closed folders and the witness selects which one to view. The eyewitness looks at the array within the folder, so that the administrator cannot see the photos while the eyewitness is viewing them.
- During all photo array procedures, the administrator should stand out of the eyewitness' line of sight during the viewing of the array, but in a position where he/she can observe and hear the eyewitness. <CALEA 42.2.9 (f)>
- If multiple eyewitnesses are viewing a photo array, they should be prevented from speaking to one another about the identification procedure. Each eyewitness must view the array separately and be admonished not to discuss the identification procedure with any other eyewitness. <CALEA 42.2.9 (c)>
- The administrator should always remain neutral during the identification procedure, so as not to suggest a particular photo to the eyewitness. <CALEA 42.2.11 (f)>
- If both practicable and available, administrators are encouraged to video record the photo array procedure and confidence statement. Audio recording is an acceptable alternative if video recording is not practicable. <CALEA 42.2.11 (b)>
- After viewing the array, the administrator should ask the eyewitness the following questions. If the eyewitness' answers are unclear, the administrator should ask the eyewitness what he/she meant by the answers. <CALEA 42.2.9 (e)>
  - 1) Do you recognize anyone?
  - 2) If so, what number do you recognize?
  - 3) From where do you recognize this person?
- If the eyewitness makes an identification, in addition to recording or memorializing any spontaneous statements made by the eyewitness, the eyewitness should be asked about his/her level of certainty. The administrator should ask the eyewitness to choose which of the



following statements best describes his/her level of certainty in the identification: <CALEA 42.2.11 (e)>

- 1) I am confident that is the person I saw.
  - 2) I am somewhat confident that is the person I saw.
  - 3) I am not confident at all that is the person I saw.
- The administrator should not comment, nod or make gestures (either positive or negative) on whether the eyewitness picked the suspect. If asked by the eyewitness, the administrator should explain he/she is not allowed to provide feedback. <CALEA 42.2.9 (f)>
  - Once the procedure is concluded and fully documented (see below), the administrator can talk to the eyewitness about the next steps in the case. The eyewitness should be instructed not to discuss the identification procedure with other eyewitnesses. Also, the administrator should not discuss any other identification procedures viewed by other eyewitnesses. <CALEA 42.2.9 (c)>

- **Documenting the Photo Array** <CALEA 42.2.9 (g)>

Administrators will document the following or substantially similar information using appropriate forms or notes:

- Where the procedure took place, who was present, the date and time it was administered.
- Any statements, comments or physical reactions of the eyewitness while viewing the array.
- Each eyewitness should complete the appropriate portions of the Administrator/Confidence Statement form that records their identifying information and the results of the procedure after viewing the array. The eyewitness should sign and date the array itself, or a copy supplied to document the identification procedure. <CALEA 42.2.9 (c)>
- The eyewitness' confidence statement, including any spontaneous statements, should be documented word for word.
- Preserve the photo array in the original form that was shown to each eyewitness. A copy of the photo array should be included with the case report.

## LIVE LINEUPS

Consult with the District Attorney's office whenever possible prior to a live lineup.

- **Creating the Live Lineup** <CALEA 42.2.9 (a)>

Instructions to the officer/investigator creating the live lineup:

- Fillers should be similar in appearance to the suspect and to the eyewitness' original description of the suspect. Similarities should include gender, age, race, height, hair color, facial hair, clothing and distinctive physical features.
- At least five fillers should be included in each live lineup, in addition to the suspect. In no case, should less than four fillers be used. Only one suspect should appear per live lineup. Administrators should not include fillers who are known to the eyewitness.
- If necessary, all members of the live lineup should be seated to minimize any height differences.
- If there is more than one suspect, different fillers should be used in each live lineup.
- The suspect should be allowed to select his/her own position in the live lineup. Where the suspect was previously identified in a photo array, that number should be avoided unless insisted upon by the suspect.



- All members of the live lineup should be instructed not to speak or gesture to one another during the procedure. All members of the live lineup should be instructed to remain still and look forward unless otherwise directed by an officer/investigator.

- **Communicating with the Eyewitness** <CALEA 42.2.9 (d)>

Instructions for the officer/investigator communicating with the eyewitness:

- When contacting an eyewitness to arrange for viewing a live lineup, the officer/investigator should advise only that he/she intends to conduct an identification procedure.
- Avoid addressing whether a person is in custody or whether other supporting evidence about the suspect has been obtained (such as statements, physical evidence, and other identifications). <CALEA 42.2.11 (f)>
- When an eyewitness arrives to view the live lineup, he/she should be prevented from speaking to any other eyewitnesses about the identification procedure.
- The administrator will provide the following or substantially similar instructions (Live Line-up Witness Instructions form) to an eyewitness before viewing a live lineup:
  - 1) The eyewitness is being asked to view a lineup as part of an ongoing investigation into a crime that occurred on (date) at (location), to see if the eyewitness recognizes anyone involved with the crime.
  - 2) The eyewitness should not assume the administrator knows who the suspect is, or seek assistance from the administrator or anyone else present in making an identification.
  - 3) The suspect may or may not be present in the lineup.
  - 4) Individuals presented in the lineup may not look exactly as they did on the date of the incident. Some features – like hairstyle or facial hair – are subject to change.
  - 5) The eyewitness can ask the administering officer to have the lineup members move, speak or change clothing. If one lineup member is asked, all the members will be asked to do the same.
  - 6) If the eyewitness makes an identification, the eyewitness will be asked about his/her level of certainty. The administrator will ask the eyewitness to choose whether he/she is confident, somewhat confident or not confident about his/her identification.
  - 7) The investigation will continue, regardless of whether the eyewitness makes an identification.

- **Administering the Live Lineup** <CALEA 42.2.9 (d)>

- A blind administrator is recommended for all live lineups.
- After the administrator instructs the eyewitness, he/she should stand outside the eyewitness' line of sight, while still being in position to observe and hear the eyewitness. <CALEA 42.2.11 (f)>
- If there are multiple eyewitnesses, they must each view the lineup separately. The position of the suspect should be moved each time the lineup is shown to a different eyewitness. Eyewitnesses should be prevented from speaking to each other about the identification procedure. <CALEA 42.2.11 (c)>
- The officer/investigator monitoring the suspect and fillers in the lineup room should remain out of view of the eyewitness to avoid any claims of inadvertent suggestion. <CALEA 42.2.9 (f)>



- If both practicable and available, administrators are encouraged to video record the live lineup procedure and confidence statement. Audio recording is an acceptable alternative if video recording is not practicable. If the procedure is not video recorded, the lineup should be preserved by photograph. <CALEA 42.2.9 (b)>
- After an eyewitness views the lineup, the administrator should ask him/her the following questions. If the eyewitness' answers are unclear, the administrator should ask the eyewitness what he/she meant by the answers. <CALEA 42.2.9 (e)>
  - 1) Do you recognize anyone?
  - 2) If so, what number do you recognize?
  - 3) From where do you recognize this person?
- If the eyewitness makes an identification, in addition to recording or memorializing any spontaneous statements made by the eyewitness, the eyewitness should be asked about his/her level of certainty. The administrator should ask the eyewitness to choose which of the following statements best describes his/her level of certainty in the identification: <CALEA 42.2.11 (e)>
  - 1) I am confident that is the person I saw.
  - 2) I am somewhat confident that is the person I saw.
  - 3) I am not confident at all that is the person I saw.
- The administrator should not comment, nod or make gestures (either positive or negative) on whether the eyewitness picked the suspect. If asked by the eyewitness, the administrator should explain he/she is not allowed to provide feedback. <CALEA 42.2.9 (f)>
- There are circumstances where a suspect may have an attorney present during a live lineup. Consult with the appropriate prosecuting attorney's office for guidance regarding a suspect's right to counsel. When in attendance, a defense attorney should be instructed not to speak in the viewing room when the eyewitness is present.

● **Documenting the Live Lineup** <CALEA 42.2.9 (f)>

Administrators will document the following or substantially similar information using appropriate forms or notes:

- Where the procedure took place, who was present in the viewing room and the lineup room, the date and time it was administered. Document the names of any officers/investigators who escorted the eyewitness to and from the viewing room.
- Any statements, comments or physical reactions of the eyewitness while viewing the lineup.
- Anything the lineup members were asked to do, such as speak, move or change clothing.
- Any requests made by defense counsel and whether they were granted.
- Each eyewitness should complete the appropriate portion of the Witness Instruction form that records their identifying information and the results of the procedure after viewing the lineup. <CALEA 42.2.11 (c)>
- The eyewitness' confidence statement, including any spontaneous statements, should be documented word for word.
- If a video recording is not made, preserve a photograph of the lineup.

### **SHOW-UPS/FIELD IDENTIFICATIONS**

A show-up is an identification procedure used when a suspect has been detained soon after the commission of an offense because he or she resembles the description of the perpetrator provided by an eyewitness. The eyewitness is then allowed to view the suspect so that a positive or negative identification can be made.



- **When a Show-up may be Utilized** <CRS 16-1-109> <CRS 16-1-110>

A P.O.S.T certified officer may utilize a show-up only pursuant to the following conditions:

- Following the report of a crime, an officer, acting on reasonable suspicion, has detained a suspect within minutes of the commission of the crime and near the location of the crime;
- Given the circumstances, neither a live lineup nor a photo array are available as a means of identification; and,
- The eyewitness reasonably believes that he or she can identify the subject.

Show-ups may also be used to verify the identity of an intimate relationship, as defined in C.R.S.18-6-800.3(2), in a domestic violence case; or, to confirm the identity of a familial subject, including a parent, child, or sibling known to the eyewitness.

- **Procedures for Conducting a Show-up** <CRS 16-1-109> <CRS 16-1-110>

The following procedures shall be followed by a P.O.S.T certified officer/investigator using a show-up procedure: <CALEA 42.2.10 (a)> <C.R.S. 16-1-109><C.R.S. 16-1-110>

- An officer shall transport the eyewitness(es) separately to the location of the suspect for the purpose of the show-up. Suspects do not have the right to refuse to participate in a show-up. <CALEA 42.2.10 (b)>
- The show-up location must be as well-lit as practicable with an unobstructed view of the suspect. If prudent under the circumstances of the case, the eyewitness(es) should not be visible to the suspect. <CALEA 42.2.10 (b)>
- The officer shall not require the suspect to put on described clothing worn by the suspect, speak specific words uttered by the suspect, or perform any specific actions mimicking those of the suspect that occurred during the commission of the reported crime. The officer transporting eyewitnesses to view a show-up should not discuss the suspect or whether other supporting evidence about the suspect has been obtained (such as statements, physical evidence, and other identifications). <CALEA 42.2.10 (b)> <CALEA 42.2.10 (d)>
- The officer shall not show the suspect to the eyewitness(es) while the suspect is in handcuffs or in the back of a patrol vehicle, except in circumstances to prevent an imminent threat of physical harm to an officer or another person or the escape of the suspect.
- When multiple eyewitnesses exist, the officer shall permit only one eyewitness at a time to view the suspect.
- When multiple suspects exist, the officer shall separate the suspects and conduct separate show-ups with each suspect.
- The officer shall separate the eyewitnesses from one another.
- When conducting a show-up with an eyewitness who has limited English proficiency or who is hearing impaired or deaf, the officer, if feasible, shall obtain an interpreter before proceeding with the show-up.
- The officer shall document the time and location of the show-up and read the show-up advisement below to each eyewitness. The officer shall document the procedure in the officer's written statement, and record the show-up in its entirety with the officer's body-worn camera. The officer shall give the following admonition prior to conducting the show-up: <CALEA 42.2.10 (d)>

- 1) You should not assume the person you are about to see has committed a crime;



- 2) We could be showing you a person for many reasons, including to clear the person from investigation;
- 3) Eliminating a person from an investigation serves an equally important purpose as identifying a person who might have been involved in the criminal activity;
- 4) The investigation of this matter will continue whether or not you identify a person;
- 5) Apart from individual assistance and cooperation with law enforcement, we cannot discuss the investigation with you; and
- 6) Please do not discuss what you saw, said, or did during this procedure with any other witness.

The officer shall ask the eyewitness if they understand the instructions, if they agree to comply with the instructions, and if they have any questions before the identification procedures begin. The eyewitness must respond affirmatively in order for the show-up to proceed.

- Using a body-worn camera, the officer shall record a video of the entirety of the show-up procedure including each suspect to preserve a record of the appearance of the suspect at the time of the show-up and the location and conditions of the show-up, the admonition the officer is required to provide to an eyewitness as required by law, and the eyewitness confidence statement required by law.
- If the officer is not required to wear a body-worn camera, prior to the show-up, the officer or another person authorized by the officer shall photograph or use a body-worn camera to capture video that shows clearly and without obstruction each suspect at the place of the show-up to preserve a record of the appearance of the suspect at the time of the show-up.
- The administrator of a show-up identification should document the procedure using appropriate forms and/or notes to record the following or substantially similar information: <CALEA 42.2.10 (g)>
  - 1) The date, time and location of the show-up.
  - 2) The name, gender, age, and race of the suspect and eyewitness(es) in the show-up as determined by the officer's perception or the suspect's identification or retrieved from a database accessible by law enforcement.
  - 3) Who was present to the show-up procedure.
  - 4) The circumstances leading to the show-up procedure and the alleged crime.
  - 5) The outcome of the show-up.
  - 6) Physical circumstances of the show-up - including lighting, weather, approximate distance between the eyewitness and suspect, whether the suspect was handcuffed, physical description of the suspect and the length of time between the suspect's detention and the identification.
  - 7) Any statements, comments or physical reactions of the eyewitness during the identification procedure. <CALEA 42.2.10 (e)>
  - 8) The eyewitness' confidence statement, including any spontaneous statements, should be documented word for word. <CALEA 42.2.10 (e)>
- Each eyewitness should complete the appropriate portions of the Administrator/Confidence Statement form about the results of the procedure after viewing the suspect. <CALEA 42.2.10 (c)>

