

MONTPELIER POLICE DEPARTMENT

Identification Process	Related Forms: Witness Instructions for Identification Procedures
<i>This policy is for internal use only and does not enlarge an employee's civil liability in any way. The policy should not be construed as creating a higher duty of care, in an evidentiary sense, with respect to third party civil claims against employees. A violation of this policy, if proven, can only form the basis of a complaint by this department for non-judicial administrative action in accordance with the laws governing employee discipline.</i>	
Applicable Vermont Statutes:	
CALEA Standard: 42.2.11; 42.2.12	
Date Implemented: January 2, 2020	Review Date: January 2, 2020

- I. **Purpose:** The purpose of this policy is to outline the manner in which criminal suspects will be subjected to identification proceedings.
- II. **Policy:** The policy of this department is to respect the rights of all persons who officers come into contact with during any law enforcement operation in which witness identification will be conducted.
- III. **Definitions:**
 - A. **Show-Up/Drive-by:** The process by which a complainant or witness is driven to a suspect who has been stopped in the area of the crime for purposes of excluding or verifying the suspect as the person responsible for the crime through recognition by the complainant or the witness.
 - B. **Photo-Array:** The process by which a complainant or witness is shown a series of photographs which may contain a suspect in the crime for purposes of excluding or verifying the suspect as the person responsible for the crime through recognition by the complainant or the witness.
 - C. **Single Photo Verification:** The process by which a complainant or witness is shown a single photograph due to the fact that they have thorough familiarity with the person who is suspected in the criminal activity and law enforcement is simply verifying that the suspect identified by the police is the same subject known to the witness.
 - D. **Line-up:** The process by which a complainant or witness is allowed to view a group of individuals, in person, for purposes of excluding or verifying the suspect as the person responsible for the crime through recognition by the complainant or the witness.
 - E. **Field View:** The exposure of an eyewitness to a group of people in a public place on the theory that the subject may be among the group. A field view differs from a show-up in that it may be conducted well after the commission of the crime, and may be conducted with or without a suspect in the group.
- IV. **Procedure:** In all identification procedures officers should take steps to ensure that the procedure is not suggestive by the manner in which it is carried out. Thus, officers should use caution as to the manner in which suspects are presented such that a suspect may not later claim that the officer influenced the witness' identification of the suspect. Each

eyewitness who views a lineup or photo spread shall sign a form containing the following information:

- The suspect might not be in the lineup or photo spread and the eyewitness is not obligated to make an identification.
- The eyewitness should be told the officer who is conducting the identification process does not know the identity of the suspect.
- Whether an identification is made or not the investigation into the crime under investigation will continue.

A. The Validity of identification procedures rests on the following considerations:

1. Witness' opportunity to view suspect at the time of the crime.
2. Witness' focus of attention at time of crime.
3. Accuracy of witness' description of suspect prior to identification procedure.
4. Level of certainty exhibited by the witness in making the identification.
5. The length of time that has passed between the crime and the identification.
6. Note-Police should document the existence/lack of existence of these points when compiling reports on identification procedures.

B. Show-Up/Drive-by identification- Although the United States Supreme Court has not affixed a duration of time within which these procedures are to be conducted, generally this type of identification occurs within a short period of the crime and within a reasonable proximity (geographically) from the crime.

1. Unless an extreme emergency exists, the complainant or witness shall be taken to the location where the suspect has been stopped. The movement of the suspect to the witness' location may constitute an arrest for which probable cause is required. To the extent that probable cause is lacking without identification, movement may be determined to have been an unlawful arrest.
2. Suspects should not be brought into a crime scene as contamination may result. For the same reason, clothing articles found at the crime scene should not be placed on or in contact with a suspect. A suspect should not be brought back to the home of a victim or witness unless that was the scene of the crime.
3. Police officers must not do or say anything that might convey to the witnesses that they have evidence of the suspect's guilt. Officers should turn down their radios so that the witness they are transporting does not pick up information about the stop of the suspect.
4. Where multiple witnesses are available to identify the subject, officers should permit the subject to be identified by only one or two. Once one or two witnesses have identified the subject during a show-up, further identifications should be attempted by means of a photo array or line-up.
5. Officers may transport victims or witnesses in police vehicles to cruise the area where a crime has just occurred in order for them to attempt to point out the perpetrator. While checking the area, officers must be careful not to make any statements or comments to the witnesses which could be considered suggestive.
6. To the extent that an officer may safely do so, the officer should take steps to minimize the suggestiveness of the identification. The following should be considered:

1. Have suspect standing outside of any law enforcement vehicle rather than in the vehicle.
2. Have the suspect standing without handcuffs or with handcuffs not visible to the witness.
3. The appearance that suspect maintains his or her freedom will undercut suggestiveness.
4. If items taken or used in the crime have been recovered, do not allow the witness to view or become aware of the recovery until after the identification proceeding is complete.
5. The witness' failure to recognize the subject stopped must be documented and included in any materials forwarded to the prosecutor who ultimately handles the case. Such evidence may be exculpatory to the suspect who is charged with the crime. As such it must be forwarded to the prosecutor. Additionally, if the witness identifies a suspect in the future, this failure to identify the first subject presented to them may add credibility to their identification.

C. Photo-Array/Photo-Pack:

1. The array must contain one suspect and seven fillers (non-suspects) in each array and include at least some persons who are similar in appearance i.e. facial hair, glasses, age etc. Mark the back of each photo with numbers one through eight.
2. All photos must include persons of the same race and sex as the suspect.
3. Create a consistent appearance between the suspect and fillers with respect to any unique or unusual feature such as facial scars or severe injuries by adding or covering the feature
4. Photos should be presented in a way that does not suggest that the subjects in the photos are criminals i.e. mug-shot with numbers (Mug shots may be used, but portions of photo that would indicate that photo is mug-shot should be cropped or hidden from the witness.) Avoid fillers who so closely match the suspect that a person familiar with the suspect would have difficulty distinguishing the filler.
5. The officer who conducts the photo-array should be someone who is not aware of which photo in the array is that of the suspect in the case.
6. During the process officers shall not, in any way, prompt the witness toward a particular photo.
7. Consider changing the order of photos from one witness to the next, or when a witness asks to see the array a second time.
8. When showing a witness an array containing a new suspect, avoid using fillers from a previous array.
9. A second officer who is unaware of which photograph depicts the suspect should actually show the photographs. 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.
10. For the reasons 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. The

investigating officer should leave the room while the array is being shown by the administrator.

11. The officer should show the photographs to a witness one at a time as if dealing a deck of cards and ask the witness whether or not he/she recognizes the person.
12. 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 recognizes the next photograph.
13. The procedure should be repeated until the witness has viewed each photograph. If the witness identifies a subject before all the photographs have been viewed, the officer should remind the witness that he/she is required to show the rest of the photographs.
14. If the witness fails to make an identification, but asks to view the array a second time, the officer administering the identification should ask the witness if he/she was able to make an identification from the original viewing. If the witness is unable to make an identification, but feels that it would be helpful to repeat the procedure, then it is permissible to show the entire array a second time. The order of the photographs should be shuffled before the array is shown for the second time. An array should not be shown more than twice.
15. If the witness identifies the suspect, the officer should ask the witness how certain he/she is of the identification. Officers should ask the witness not to use a numerical scale, but rather his/her own words.
16. If more than one witness is to view an array and a witness has already marked one of the photos, a separate unmarked array shall be used for each subsequent witness.
17. If an independent administrator is not available, the investigative officer shall follow the following procedures:
 - I. Place the suspect photo and filler photos in separate folders. Include four (4) blank folders that contain no photograph for a total of ten (10).
 - II. Shuffle the folders before giving them to the witness.
 - III. The officer administering the array should position himself or herself so that he or she cannot see inside the folders.
 - IV. Allow the eyewitness to open the folders one at a time to view the single photograph.
18. The presentation/order of presentation must be documented. The witness who selects a photo as the suspect should sign and date the photo they have selected with a full signature and initial and date the other photos presented to them.
19. The witness' selection of a photo that is not the suspect must be documented and included in any materials forwarded to the prosecutor who ultimately handles the case. Such evidence may be exculpatory to the suspect who is charged with the crime. As such it must be forwarded to the prosecutor.

D. Single-Photo Verification: This process shall only be used where the witness is thoroughly familiar with the suspect and the officer is merely attempting to ensure that the witness and the officer are both referring to the same person.

E. Line-Ups:

1. Line-ups shall be conducted under the direction of a detective supervisor, or in his/her absence the [agency head or designee] and, when feasible, after consultation with the State's Attorney's Office.
2. A suspect cannot be detained and compelled to participate in a line-up without probable cause to arrest. If a suspect refuses to participate in a line-up, the State's Attorney's Office may be asked to apply for a court order to compel the suspect to cooperate.
3. Before any suspect who has been arraigned or indicted is shown to eyewitnesses in a line-up or other live identification procedure, he/she must be informed of his/her right to have an attorney present at the line-up and of his/her right to be provided with an attorney without cost if he/she is unable to afford such legal counsel. Unless a valid waiver is voluntarily and knowingly made, in writing if possible, no such identification may proceed without the presence of the suspect's attorney.
4. A line-up must be conducted with at least six persons and include at least some persons who are similar in appearance to the suspect i.e. facial hair, glasses, age etc.
5. The line-up must include only persons of the same race and sex as the suspect.
6. Because line-ups will be administered by an officer who does not know the identity of the suspect, the fillers selected should not be known to the officer administering the line-up. In selecting line-up fillers, abide by the guidelines for photo array fillers as described above.
7. All persons in the line-up should carry cards that identify them only by number and should be referred to only by their number. As with photo arrays, each witness must view the line-up independently, out of the presence and hearing of the other witnesses.
8. The investigating officer should explain to the witness that a second officer (the line-up administrator) will be conducting the line-up, and that he/she does not know the identity of the people in the photographs.
9. The investigating officer should carefully instruct the witness by reading from a departmental Line-up Instruction Form, and the witness should be asked to sign the form indicating that he/she understands the instructions. The officer should also sign and date the form.
10. The investigating officer should leave the room while the line-up administrator conducts the line-up.
11. The line-up should be conducted so that the suspect and fillers do not actually line up, but rather so that they are displayed to the witness one at a time. This can be accomplished either by having them stand with their back to the witness and then face the witness one at a time, or by having them enter the room individually and leave before the next one enters.
12. The procedure for showing the participants to the witness and for obtaining a statement of certainty is the same as for photo arrays. If practicable, the officer should record the procedure.
13. During the process officers shall not, in any way, prompt the witness toward a particular subject in the line-up.
14. Although suspects do not have a right to refuse to stand in a line-up, a line-up should not be conducted where the suspect's resistant conduct will set him or her apart from the other participants in the line-up.

15. Suspects may be required to put on clothing recovered from the crime for identification purposes. If officers are going to require the suspect to put on the recovered clothing they must require all persons participating in the line-up to put on the clothing in turn.
16. All line-ups must be documented by photographing the line-up as presented to the witness. The photo will document positions of the participants as well as the inclusion of the participants.

F. Attorneys:

1. A suspect does not have a right to counsel at a line-up which is conducted before the suspect has reached a "critical stage" in the justice process. A critical stage is reached when the suspect is arraigned, indicted or otherwise formally charged with a crime.
2. A suspect has the right to counsel at a line-up if the suspect has reached a critical stage in the justice process. When an attorney for the suspect is present, the attorney should be permitted to make reasonable suggestions regarding the composition of the line-up and the manner in which it is to be conducted. Any suggestions made by the suspect's attorney should be included as part of the line-up report.
3. Allow counsel representing the accused sufficient time to confer with his/her client prior to the line-up. Once the line-up is commenced, attorneys should function primarily as observers and he/she should not be permitted to converse with the line-up participants, or with the witnesses, while the line-up is underway. The concept of blind administration requires that no one be present who knows the identity of the suspect. For this reason, the attorney should leave the room before the line-up begins.
4. The suspect's attorney is not legally entitled to the names or addresses of the witnesses attending a line-up if the suspect has not yet been arraigned or indicted. If an attorney in such a situation insists on having information about line-up witnesses, advise him/her to direct his/her request to the State's Attorney's Office.
5. . After a person has been arrested, he/she may be required to participate in a line-up regarding the crime for which he/she was arrested. After arrest, a suspect may lawfully refuse to participate in a line-up only if he/she has a right to have counsel present (post arraignment/indictment) and the counsel is absent through no fault of the suspect or his/her attorney.
6. Line-up participants must not speak during the line-up. If identification of the suspect's voice is desired, a separate procedure must be conducted. (See section on voice identification below.)
7. If the suspect has an attorney but has not yet reached a critical stage, officers should consider allowing the attorney's presence at the identification proceeding. The presence of an attorney undercuts later claims that the process was somehow suggestive with respect to the suspect.

G. Voice Identification:

1. Although considerably less common than visual identifications, voice identifications may be helpful to criminal investigations where the victim or other witness was blind, the crime took place in the dark, the subject was masked, the witness' eyes were

covered by the perpetrator, or they were never in the same room with the perpetrator but heard 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 detective supervisor, or in his/her absence the [agency head or designee] and, when feasible, the State's Attorney's Office.

2. 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.

3. Where a voice identification is attempted, the following procedures should be employed to the extent possible:

a. As in a line-up, there should be at least six persons whose voices will be listened to by the witness; one-on-one confrontations should be avoided. Because line-ups will be administered by an officer who does not know the identity of the suspect, the fillers should not be known to the officer administering the procedure, and officers should abide by the guidelines for photo array and line-up fillers as described above;

b. The suspect and other participants shall not be visible to the witness; this can be done by using a partition, or by similar means;

c. All participants, including the suspect, shall be instructed to speak the same words in the same order;

d. The words recited by the participants shall not be the ones spoken by the offender during the crime; the line-up participants should speak neutral words in a normal tone of voice;

e. When both a visual and voice line-up are conducted, the witness should be informed that the line-up participants will be called in a different order and by different numbers;

f. If there are two or more suspects of a particular crime, present each suspect to witnesses in separate line-ups. Different fillers should be used to compose each line-up.

g. The investigating officer should carefully instruct the witness by reading from a departmental Voice Identification Line-up Instruction Form, and the witness should be asked to sign the form indicating that he/she understands the instructions. The officer should also sign and date the form. If practicable, the officer should record the procedure.

h. Adhere to the principles of blind administration as described above. As is the case with photo arrays and line-ups, the investigating officer should leave the room while the administrator conducts the procedure.

H. Courtroom Identification:

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

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

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

4. 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.

I. Drawings and Identi-Kit Composites:

1. An artist's sketch, computerized drawing, composite, or other depiction can sometimes aid an investigation, but are most effective when a witness has a good recollection of the offender's facial features. However, research has shown that a person selected based on resemblance to composite is more likely to be mistakenly identified. Additionally, building a composite has been shown to lower a witness' accuracy for identifying the original face.
2. Prior to attempting a sketch or composite, officers should take from the witness and document a full description of the offender.
3. A sketch prepared by a trained artist is preferred over a composite.
4. Sketches and composites should not be attempted prior to the showing of a photo array or line-up.
5. Once the sketch or composite has been completed, the witness should be asked to state in his/her own words how accurately the composite reflects how the suspect appeared during the crime and a report should be prepared regarding the sketch or composite procedure.
6. The fact that a suspect resembles a sketch or composite is not, without more, probable cause to believe that the suspect is the offender.

J. Mug Shots:

1. When an investigation has failed to identify a suspect, it may be advisable to have eyewitnesses come to the police station to look through photographic files.
2. However, officers should not resort to this procedure until other investigative avenues have been exhausted.
3. Remove or hide any information on the photographs that might in any way influence the witness;
4. Ensure that the files contain only one photograph of each individual and that the photographs are reasonably current;
5. Do not refer to the photographs as "mug shots";
6. If photographs of various formats are used, ensure that several of each format are used;
7. Permit the witness to look at a number of photographs before making his/her selection;
8. Do not call to the attention of the witness any particular photograph;
9. 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).
10. Officers should be extremely cautious before charging a subject based on this type of identification alone.

K. 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. 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 [agency head], the State's Attorney's Office, and appropriate hypnosis experts.