

**SAN DIEGO POLICE DEPARTMENT
PROCEDURE**

DATE: MARCH 19, 2020
NUMBER: 4.02 – LEGAL
SUBJECT: EYEWITNESS IDENTIFICATION
RELATED POLICY: 4.02
ORIGINATING DIVISION: CENTRALIZED INVESTIGATIONS
NEW PROCEDURE:
PROCEDURAL CHANGE: **EXTENSIVE CHANGES**
SUPERSEDES: DP 4.02 – 04/30/2018

I. PURPOSE

This Department procedure establishes guidelines for conducting eyewitness identifications.

II. SCOPE

This procedure applies to all members of the Department.

III. BACKGROUND

NEW

Eyewitness identification procedures are among the most important procedures that law enforcement agencies employ to apprehend and convict criminals. They must be reliable and fair. Police procedures that suggest the guilt of a suspect to an eyewitness is improper and must be avoided, even where there is other evidence to connect the suspect to the crime. The eyewitness' recollection, unaided by outside influence, must govern the identification.

This procedure is intended to comply with Senate Bill 923, codified in California Penal Code section 859.7.

IV. DEFINITIONS

NEW

A. Blind Administration - the administrator of the identification procedure does not know the identity of the suspect.

NEW

B. Blinded Administration - the administrator of an identification procedure may know who the suspect is, but does not know where the suspect or suspect's photograph has been placed or positioned in the identification procedure through the use of any of the following:

1. An automated computer program which prohibits the presenter from seeing which photograph the witness is currently viewing until after the procedure is completed.
2. A method where the photographs are randomly placed in folders, which are shuffled and shown to the witness in a manner which does not allow the presenter to see or track which photograph the witness is viewing until the completion of the procedure.
3. Any other procedure that achieves neutral administration and prevents the presenter from knowing where the suspect or suspect's photograph is during the identification procedure. The procedure shall be documented in detail by the presenter.

C. Curbside Line-up (aka "Show-Up") - an identification procedure in which a suspect is presented singly to the victim or witness shortly after a crime takes place and is conducted in the field. Its purpose is to quickly identify or release the suspect.

NEW

D. Eyewitness – a person whose identification of another person may be relevant in a criminal investigation.

NEW

E. Identification Procedure – procedure for showing a witness a live line-up, photographic line-up, or sequential photographic line-up. (Does not include a curbside line-up).

NEW

F. Live Line-Up - an identification procedure in which a suspect is placed in a live group setting and presented to a witness. If a line-up is to be conducted, it should take place as soon as practicable after the arrest of the suspect.

G. Photographic Line-Up - an identification procedure in which a suspect's photograph is placed with other photographs and presented to a witness.

H. Sequential Photographic Line-Up - a method of presenting a photographic line-up where witnesses view only one member of a line-up at a time. Witnesses view all persons/photographs even if an identification was made before all photographs have been viewed.

V. LIVE LINE-UP PROCEDURES

NEW

A. Prior to conducting an identification procedure, and as close in time to the incident as possible, the eyewitness shall provide the description of the suspect.

NEW

B. All eyewitnesses shall be separated when viewing an identification procedure.

NEW

C. An eyewitness shall be instructed of the following, prior to any identification procedure:

1. The perpetrator may or may not be among the persons in the identification procedure.
2. The eyewitness should not feel compelled to make an identification.
3. An identification, or failure to make an identification, will not end the investigation.

NEW

D. Never tell the eyewitness:

- a. You caught (or think you caught) the person who committed the crime.
- b. The eyewitness' property was in the suspect's possession.
- c. The suspect made admissions or confessed to the crime.
- d. The person to be observed is a "suspect" (do not use the word "suspect" at all).

NEW

E. All line-ups shall be presented using a blind or blinded administration. If a blind or blinded administration is not used, the investigator **must** document the reasons in writing.

NEW

F. All line-ups should consist of at least four persons in addition to the suspect. Only one suspect should be included in any identification procedure.

NEW

G. Persons placed in the line-up should be of approximately similar physical characteristics previously described by the eyewitness.

1. Factors such as age, height, weight, hair length/color, and physical build should be considered.
2. Sex and race should be the same for all participants, except in unusual cases where the characteristic is difficult to determine (e.g., female impersonator, Asian suspect who looks like a Native American).

H. Persons placed in the line-up should wear similar clothing.

NEW

1. If an eyewitness describes the suspect as wearing a distinctive item of clothing, and the item is in police custody, the suspect can be compelled to wear the item.
2. Each participant must wear clothing which is similar to that of the suspect.

I. Officers should not say or do anything to distinguish the suspect from the other line-up participants.

J. The non-suspects in the line-up should be instructed that conduct in the line-up should not single out the actual suspect.

NEW

K. The suspect can be instructed to utter specified words, make gestures, or assume a particular pose, if the eyewitness so desires. All participants should do whatever reasonable act is required of the suspect.

NEW

L. The eyewitness(es) will be given the Regional Live Line-Up Admonishment Form (Located in the F Drive; Templates; Investigative Forms; Identifications Procedures) prior to being shown the line-up. At the conclusion of the line-up, if an eyewitness identifies a person he or she believes is the suspect, all of the following shall apply:

1. The investigator shall immediately inquire as to the eyewitness' confidence level in the accuracy of the identification and record in writing, verbatim, what the eyewitness says.
2. Information regarding the identified person shall not be given to the eyewitness prior to obtaining their statement of confidence level and documenting their exact statement.
3. The investigator shall not validate or invalidate the eyewitness' identification.

NEW

M. An electronic recording **shall** be made of the identification procedure, which **includes an audio and video recording**. When it is not feasible to obtain video documentation, audio recordings alone may be used. When audio recordings only are used, the investigator **shall** document in writing the reasons the video recording was not feasible.

1. If a Body Worn Camera (BWC) is used to record the identification procedure, the recording shall be categorized and labeled as an identification procedure. The employee recording the identification procedure using the BWC shall document the recording in their written report.
2. If any other recording device is used, the original copy of the recording shall be impounded and a “working copy” shall be forwarded to the investigative unit per Department Procedure 3.26 – Media Evidence Recovery and Impound/Preserving Procedures.

VI. PROCEDURE FOR ATTORNEYS AT LIVE LINE-UPS

NEW

- A. The suspect is entitled to a lawyer at a Live Line-Up whether charges have been filed or not.
1. The suspect must be advised of the right to have an attorney present at the line-up as soon as possible prior to the line-up and should be asked whether or not an attorney has been retained.
 2. If no attorney has been retained, the suspect should be advised that if he/she cannot afford one, an attorney will be provided free of charge.
 3. If the suspect indicates that counsel can be retained, explain the date and time of the line-up and impress upon the suspect the fact that it is the suspect’s responsibility to have the attorney present.
 4. At least one day before the line-up, the suspect should be re-contacted and asked whether the necessary arrangements for an attorney have been made. If not, contact the Office of the Public Defender, as indicated below.

NEW

- B. If the suspect does not have a lawyer and says he/she cannot afford one, contact the Office of the Public Defender at (619) 338-4700 (during normal business hours) and at (619) 338-4707 (after normal business hours), and notify one of the attorneys of the need for a public defender at the line-up.
1. Contact the District Attorney's Liaison Office. A notice form will be prepared for the Office of the Public Defender to ensure the appearance of an attorney from that agency at the line-up.
 2. If the suspect's lawyer does not appear at the line-up or indicates in any way that an appearance will not be made at the line-up, contact the Deputy District Attorney handling the case or the District Attorney's Liaison before proceeding with the line-up.

3. A suspect may waive the right to an attorney at the line-up, but it must be done freely, intelligently, and in writing.

NEW

C. Role of the Defendant's Attorney

1. The attorney shall be permitted to observe the procedure but not to control or obstruct the procedure.
2. The attorney must be permitted to be present at the time the eyewitness' conclusion about the line-up is stated.
3. The attorney should be instructed to remain silent during both the line-up and the giving of the eyewitness' conclusion.
4. The attorney may speak with any witness after the line-up, but only if the eyewitness agrees to speak with the attorney.
5. The eyewitness should be told that there is no obligation to speak with the defendant's attorney, but the eyewitness is free to speak with the attorney if the eyewitness wishes.
6. The officer should request to be present during any discussion between any representative of the defendant and the eyewitness.
7. Eyewitnesses should be told that they have the right to have an officer present during any discussion regarding the line-up.

VII. SEQUENTIAL PHOTOGRAPHIC LINE-UP

- A. Except in very rare instances, Photographic Line-Ups should be conducted by investigative personnel only.
- B. Generally, only Sequential Photographic Line-Ups will be used.
- C. All line-ups shall be presented using a blind or blinded administration. If a blind or blinded administration is not used, the investigator must document the reasons in writing.
- D. Prior to conducting the identification procedure, and as close in time to the incident as possible, the witness shall provide the description of the suspect.
- E. All eyewitnesses shall be separated when viewing an identification procedure.

NEW

NEW

NEW

NEW

- F. An eyewitness shall be instructed of the following, prior to any identification procedure:
1. The perpetrator may or may not be among the persons in the identification procedure.
 2. The eyewitness should not feel compelled to make an identification.
 3. An identification, or failure to make an identification, will not end the investigation.

NEW

- G. Never tell the eyewitness:
- a. You caught (or think you caught) the person who committed the crime.
 - b. The eyewitness' property was in the suspect's possession.
 - c. The suspect made admissions or confessed to the crime.
 - d. The person to be observed is a "suspect" (do not use the word "suspect" at all).

NEW

- H. There should be at least four photographs in addition to the suspect's photograph. The suspect's photograph should be arranged in random order with other photographs when the sequential photographic line-up is presented to a victim or witness. Only one suspect shall be included in any identification procedure. The suspect photograph selected should, if practical, resemble his or her appearance at the time of the offense and should not unduly stand out. Filler photographs shall generally fit the eyewitnesses' description of the suspect

NEW

- I. No information concerning previous arrests, or any other writings regarding the suspect shall be visible to the eyewitness during the identification procedure.

NEW

- J. Eyewitnesses should be given the Regional Photo Line-Up Admonishment Form (Located in the F Drive; Templates; Investigative Forms; Identifications Procedures) prior to the identification procedure. After reading the admonishment, each individual photo in the sequential line-up will be shown one at a time. After the eyewitness has had sufficient time to look at a photo, it should be returned to the presenter and then the next photo should be shown.

If an eyewitness identifies a person, he or she believes is the suspect, all of the following shall apply:

1. The investigator shall immediately inquire as to the eyewitness' confidence level in the accuracy of the identification and record in writing, verbatim, what the witness says.
2. Information regarding the identified person shall not be given to the eyewitness prior to obtaining their statement of confidence level and documenting their exact statement.
3. The investigator shall not validate or invalidate the eyewitness' identification.
4. **Even if an identification is made, continue showing all of the remaining photos in the line-up.**

NEW

- K. After one presentation has been completed, do not repeat a second showing unless asked to do so by the eyewitness. If requested, show all photos in the line-up again, in the same order, and document any additional comments.

Only show the sequential line-up two times. If the display is shown more than twice, the witness is likely to be "comparison shopping" i.e., guessing. The case agent or presenter's report must indicate how many times the sequential line-up was shown.

- L. An adequate record of each photograph shown and what order they were shown in must be made. Photographs must be preserved so that the display can be reconstructed at trial.

NEW

- M. Use of a "mug book" is appropriate when there is no particular suspect. To ensure an accurate "mug book" identification, a reasonable number of photographs should be shown to an eyewitness. Even if the suspect is selected, a record of all pictures the eyewitness viewed must be made and this information must be included in the investigative report.

- N. No person has a right to have an attorney present at any pictorial identification procedure, whether it takes place before or after an arrest or before or after criminal proceedings have been initiated against the suspect.

- O. If a detective from another agency conducts a line-up at your request, be sure to personally speak to the detective prior to any preliminary hearing in the matter so that you will be able to testify to the results of the line-up.

NEW

- P. An electronic recording **shall** be made of the identification procedure, which includes an **audio and video recording**. When it is not feasible to obtain video documentation, audio recordings alone may be used. When audio recordings only are used, the investigator **shall** document in writing the reasons the video recording was not feasible.

1. If a Body Worn Camera (BWC) is used to record the identification procedure, the recording shall be categorized and labeled as an identification procedure. The employee recording the identification procedure using the BWC shall document the recording in their written report.
2. If any other recording device is used, the original copy of the recording shall be impounded and a “working copy” shall be forwarded to the investigative unit per Department Procedure 3.26 – Media Evidence Recovery and Impound/Preserving Procedures.

VIII. CURBSIDE LINE-UP (aka: “Show-up”)

NEW

A. General Procedures

The eyewitness should always be brought to view the suspect. There are three exceptions to the general rule of "bring the witness to the suspect."

NEW

1. Probable Cause to Arrest

If you have probable cause to arrest the suspect, you may transport him to the eyewitness(es) for identification. *In re Rafael*, 132 Cal.App.3d 977 (1982).

Note: If there is any doubt as to whether probable cause to arrest exists, do not move the suspect unless consent is obtained, or it is impracticable to bring the witness (see below).

NEW

2. Consent

If you obtain the valid, voluntary consent of a detainee to move him to the eyewitness for a Curbside Line-Up, the movement is lawful. *People v. Harris*, 15 Cal 3d 384, 391 (1975).

NEW

3. Impracticality

If it is impossible or impractical to bring the eyewitness to the suspect, the courts will often permit the movement of the suspect.

a. The Eyewitness is Injured

If the eyewitness is injured or is otherwise unable to be moved, it is clearly permissible to transport the suspect to the eyewitness. However, the length of detention must be reasonable. *Stoval v. Denno*, 388 U.S. 293 (1967); *In Re Carlos M.*, 220 Cal.App.3d 372 (1990).

b. Availability of Officers is Limited

If the detention occurs in an area where there are not enough officers to secure the scene, chase other suspects, or transport witnesses, etc., courts have permitted the immediate transportation of the suspect to the witness. *People v. Gatch*, 56 Cal.App.3d 505 (1976). However, this option should be avoided unless necessary.

NEW

B. Suggestions

It is unfair, and therefore a violation of due process under the Fifth and Fourteenth Amendments, for you to "suggest in any way" to the eyewitness that a suspect to be observed at a line-up or Curbside Line-Up committed the crime.

NEW

C. Suggestiveness before the Identification

You must avoid any conduct prior to the identification which might be ruled suggestive.

1. Never tell the eyewitness:
 - a. You caught (or think you caught) the person who committed the crime.
 - b. The eyewitness' property was in the suspect's possession.
 - c. The suspect made admissions or confessed to the crime.
 - d. The person to be observed is a "suspect" (do not use the word "suspect" at all).
2. Always tell the eyewitness:
 - a. To keep an open mind.
 - b. The person who committed the crime may or may not be among those present.
 - c. Just because the person is in custody does not mean he/she committed the crime (this applies only in situations where it will be obvious that the person is in custody).
 - d. Not to talk to any other eyewitness about the identification.

NEW

D. Officer Conduct

Officers should not say or do anything during the line-up that would draw the attention of a eyewitness to the suspect. To avoid problems, try not to say or do anything during the identification.

NEW

E. Eyewitness Conduct

1. When more than one eyewitness is to view the Curbside Line-Up, explain that each must view the line-up separately.
2. Do not permit any eyewitness to hear another's comments at the identification or to "compare notes" about the description of the perpetrator(s).
3. One-on-One Confrontations
 - a. A one-on-one confrontation between the suspect and an eyewitness is automatically suggestive just because there is only one person to look at and the suspect is already in police custody.
 - b. Nevertheless, the courts reluctantly make an exception to the general rule (that the suspect deserves a full line-up) because a line-up held shortly after the offense benefits everyone. The eyewitness has the suspect's image fresh in mind, so an innocent suspect gets released immediately, and the police can go on with their investigation while the trail is still fresh. *Stoval v. Denno*, 1967 388 U.S. 293 (1967); *People v. Gomez*, 63 Cal.App.3d 328 (1976).
4. The courts will not uphold a line-up if it was too suggestive. In deciding this question, the Court will look at the totality of the circumstances. Factors a Court considers are:
 - a. The eyewitnesses' opportunity to view the perpetrator at the crime (length of time, lighting, distance, etc.).
 - b. The eyewitnesses' degree of attention at the time of the crime (was he/she concentrating to remember the perpetrator's looks).
 - c. The amount of time that went by between the crime and the line-up (probably this should not be more than an hour or two at the most; however, a four-hour period has been upheld in a case where all of the other factors have been strong).

- d. The physical set-up of the line-up itself (did the officer say "leading" things, how was the suspect positioned, where was he/she located, etc.).
- e. The accuracy and detail of the eyewitnesses' prior description.
- f. The certainty of the eyewitnesses' identification of the line-up. *Neil v. Biggers*, 409 U.S. 188 (1972); *People v. Nash* 1982129 Cal.App.3d 513 (1982).

Example: The eyewitnesses had an excellent chance to look at the robber for 15 minutes from close distances. Circumstances "encouraged" them to remember the suspect's face. The line-up took place within 20 minutes of the crime. Descriptions given were accurate. The identification was upheld. *People v. Smith*, 112 Cal.App.3d 37 (1980).

Example: A line-up took place 45 minutes after a murder. The defendant was on the curb in handcuffs with many officers and patrol vehicles present. However, the police did not use the word "suspect," specifically advised the eyewitnesses that the murderer might not be the person they would be looking at, and reminded them to keep an open mind. The identification was upheld. *People v. Odom*, 108 Cal.App.3d 100 (1980).

Example: A line-up took place less than one hour after a rape. The victim had a "clear view" of the perpetrator in daylight. The line-up took place on a city street with the suspect not handcuffed. The eyewitness had given an accurate description and was positive of her identification. The identification was upheld. *People v. Kilpatrick*, 105 Cal.App.3d 401 (1980).

NEW

F. Suggestiveness after the Identification

- 1. You must avoid any conduct after the identification that might be ruled suggestive.
- 2. If you tell an eyewitness that he/she has picked the "right" (or "wrong") person, it may jeopardize the admissibility of later in-court identification.

NEW

G. Completing Curbside Line-up Form (PD 903-FO) and Arrest Report

- 1. Include in the body of the Arrest Report the location where the Curbside Line Up was conducted, the lighting conditions, and in general how the Curbside Line-Up was conducted (e.g., the suspect stood under a

streetlight in handcuffs and was illuminated by police vehicle headlights; the victim was driven in the front seat of the police car and viewed the suspect from a distance of 20 feet).

2. There is room on the Curbside Line-up Form for these responses either at the beginning of the form or in the narrative section after the victim/witness statement has been written. The extra space can be utilized for these comments. The Curbside Line-up form is located on the LAN at F:\Templates\Patrol Based Forms\Curbside Line-up.

NEW

H. Electronic Recording of Curbside Line-ups

1. Although not required by law, officers are encouraged to make an electronic recording of the curbside line-up.
 - a. If a Body Worn Camera (BWC) is used to record the curbside line-up, the recording shall be categorized and labeled as an identification procedure. The employee recording the identification procedure using the BWC shall document the recording in their written report.
 - b. If any other recording device is used, the original copy of the recording shall be impounded and a “working copy” shall be forwarded to the investigative unit per Department Procedure 3.26 – Media Evidence Recovery and Impound/Preserving Procedures.