

NORTH CAROLINA ACTUAL INNOCENCE COMMISSION RECOMMENDATIONS FOR EYEWITNESS IDENTIFICATION

The following recommendations are the results of a study conducted by the North Carolina Actual Innocence Commission. Information used by the Commission in reaching its recommendations included the U.S. Department of Justice research report, *Eyewitness Evidence, A Guide for Law Enforcement* (October 1999); the New Jersey Division of Criminal Justice training manual, *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (August 2001); a survey and study of the identification procedures currently followed by North Carolina's law enforcement; and presentations and consultations by experts Professor Gary Wells, Distinguished Professor of Psychology at Iowa State University and expert on eyewitness memory; Professor Brian Cutler, Chair of the Department of Psychology at UNC-Charlotte and expert on eyewitness memory; and New Jersey Deputy Attorney General, Lori Linskey, who was responsible for the statewide implementation of revised identification procedures in that state. The recommendations cover the most important aspects of "best practices" in witness identification procedures; however, they leave the details of implementation of these practices to the discretion of law enforcement.

The recommendations made herein are not intended to create, do not create, and may not be relied on to create, any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Jurisdictional or logistical conditions may preclude the use of particular procedures.

I. COMMISSION OBJECTIVES

All recommended procedures

- a) identify practices that will produce more reliable and accurate eyewitness evidence while improving or eliminating practices that can undermine eyewitness reliability and accuracy;
- b) are supported by expert social science research;
- c) combine best workable police practices and psychological research;
- d) consider the diverse perspectives of researchers, police, judiciary, prosecutors, defense attorneys and victim advocates;
- e) assume good faith of law enforcement and do not flow from fear of misconduct;
- f) consider budgetary restrictions and result in minimal incremental costs.

II. SUMMARY OF LINEUP PROCEDURE RECOMMENDATIONS

- a) Lineups should be presented sequentially (individuals or photos are shown to the witness one at a time) rather than simultaneously (individuals or photos are shown at the same time). Presentation in this manner reduces misidentifications resulting from witnesses making identifications by comparing members of the lineup to determine which one looks the most like the perpetrator.
- b) The individual conducting the photo or live lineup should not know the identity of the actual suspect. This is called a double-blind procedure and addresses

misidentifications resulting from unintentional influences from those conducting the identification procedure.

- c) Witnesses should be instructed that the suspect may or may not be in the lineup.
- d) A minimum of eight photos should be used in photo identification procedures.
- e) A minimum of six individuals should be used in live identification procedures.
- f) Witnesses should not receive any feedback during or after the identification process.
- g) Witnesses should be asked to give feedback in their own words regarding their level of confidence in their identification.

III. IDENTIFICATION PROCEDURE DETAIL

1. General Instructions for all Identification Procedures:

- a) Separate all witnesses. Each witness should be given instructions regarding the identification procedures without other witnesses present. Witnesses should not be allowed to confer with one another either before, during, or after the procedure.
- b) Use an independent administrator. The individual conducting the photo or live lineup should be someone who does not know which member of the lineup is the suspect. When it is not possible to conduct a lineup with an independent investigator, the primary investigator must exercise extreme caution to avoid inadvertent signaling to the witness of the “correct” response. Technological tools, such as computer programs that can run photo lineups and record witness identifications without the presence of an investigator, may assist agencies with resource constraints. Additionally, agency personnel can be trained to assist with identification procedures.
- c) The administrator should avoid saying anything to the witness that may influence the witness’s selection.
- d) There should not be anyone present during the lineup procedure who knows the suspect’s identity, except counsel, as required by law.
- e) Include a minimum of seven fillers (non-suspects) per photo identification procedure and five for live lineups.
- f) If there is more than one suspect that fits the description of the perpetrator, there can be more than one suspect in the lineup; however the number of fillers should be increased to a minimum of seven (or five for live lineups) per suspect. Whether to include one suspect and seven fillers per line-up, or to include more than one suspect and increase the number of fillers to keep the proportion of suspects to fillers constant at 1 to 7, is a discretionary decision. By keeping the proportion of fillers to suspects constant, the reliability of the identification remains constant.
- g) Fillers should resemble the witness’s description of the perpetrator in significant features (face, profile, height, weight, build, posture, gait, voice, specific articles of clothing, etc.) or, in the case where a composite is used, based on their resemblance to a composite. If the perpetrator was described as having an

- unusual identifying mark, all fillers should have similar markings or all lineup members should have similar coverings over the described area.
- h) When there is an inadequate description of the perpetrator, or when there is a suspect whose appearance differs from the description of the perpetrator, fillers should resemble the suspect in significant features. For example, if a suspect is identified through fingerprints and the suspect's appearance differs from the witness's description of the perpetrator, fillers should be chosen that resemble the suspect in appearance.
 - i) When showing a new suspect, avoid reusing the same fillers in lineups shown to the same witness.
 - j) In the case of photo lineups, ensure no writings or information concerning previous arrests or previous identification results are visible to the witness.
 - k) Ensure that any identification actions (e.g., speaking, moving) are performed by all members of a live lineup.
 - l) Always lead lineups with a filler. Research suggests that witnesses are reluctant to identify someone in the first position and if it happens to be the culprit, it could contribute to a missed identification.
 - m) Place suspects in different positions in each lineup when there are multiple witnesses in the same case. Position all other members of the lineup randomly. Placement in this way eliminates the possibility that a second or third witness picks someone based on the position number communicated to them by the first witness.
 - n) Individuals or photos should be presented to witnesses "sequentially," rather than "simultaneously." Sequential presentation requires each individual/photo to be presented to the witness separately, in a previously determined order, removing each individual/photo after it is viewed; whereas simultaneous presentation presents all individuals/photos at the same time.
 - o) An independent administrator is the preferred administrator for both sequential and simultaneous presentations. Because there is a greater risk that an administrator may convey unintentional cues during sequential presentations, sequential presentation should only be used if the identification procedure is being conducted by an independent administrator. If an independent administrator is not available, simultaneous presentation of individuals/photos is necessary.
 - p) In the case of sequential lineups, witnesses should not know how many individuals/photos will be shown.
 - q) Presentation administrators should give the identical instruction at the beginning of every identification procedure and should use great care not to influence the witness's selection in any way. (See verbal instructions outlined below.) Administrators should avoid making any comments during the selection procedure and should be aware that witnesses can perceive such things as unintentional voice inflection or prolonged eye contact as messages regarding their selection.
 - r) Each of the witness's responses to the question "Is this the person you saw [insert description of act here]? Yes or no?" should be documented with a reference to the number of the photo or individual being presented and the exact response given. If the witness answers "no" to the question, the next photo or person is

shown. If the witness answers “yes”, the administrator should ask, “Can you describe how sure you are?” The witness’s exact statement should be documented. Witnesses should not be compelled to give an answer to this question.

- s) Witnesses should be shown all photos/individuals, even if they make an identification during the presentation.
- t) If the witness can not make an ID after all photos/individuals are shown, the administrator can ask, “Would you like to view the lineup again?” The fact that the witness did not make an identification the first time through and that the administrator asked the witness if they would like to view the lineup again, as well as the outcome of the second display, must be documented in the record. It is important **not** to tell the witness prior to the complete lineup presentation that they will be allowed to view the lineup a second time if they do not make an ID the first time through.
- u) If a witness asks to see just one specific photo or individual a second time, documentation of that request is required. If a witness asks to see more than one specific photo or individual a second time, the entire array should be shown and the fact that there was a second presentation should be documented.
- v) Ensure identification results are signed and dated by the witness.
- w) Ensure the witness does not write or mark any materials that will be used in other identification procedures.
- x) The lineup administrator should document their name, the procedure employed, the number of photos or individuals shown, sources of all photos used, names of persons present during the lineup, number of times the lineup is viewed and the results of the procedure, including the witness’s own words regarding how certain he/she is of any identification. Any specific words, conduct or gestures required of lineup participants should also be documented. Documentation should include the date, time, and location of the procedure. A standard form should be used by each department for recording lineup results.
- y) Do not give witnesses any feedback regarding the individual he/she has selected or comment on the outcome of the identification procedure in any way.
- z) Document live lineups by photo or video. This documentation should be of a quality that represents the lineup clearly and fairly. Photo documentation can be of either the group or each individual, but should preserve the presentation order of the lineup.
- aa) In the case of photo lineups, after the photographs have been viewed they should be marked denoting the order that they were shown to the witnesses and retained for later use in court.

2. Verbal Instructions:

Witnesses should be instructed as follows prior to the lineup:

For sequential presentation:

In a moment, I am going to show you a series of photos [or individuals]. The person who committed the crime may or may not be included. I do not know whether the person being investigated is included. Even if you identify someone during this procedure, I will continue to show you all photos [individuals] in the series.

Keep in mind that things like hair styles, beards, and mustaches can be easily changed [(for photo line-ups only) and that complexion colors may look slightly different in photographs].

You should not feel like you have to make an identification. This procedure is important to the investigation whether or not you identify someone.

The photos [individuals] will be shown to you one at a time and are not in any particular order. Take as much time as you need to look at each one. After each photo [or individual], I will ask you "Is this the person you saw [insert crime here]....yes or no?" Take your time answering the question. If you answer "yes", I will then ask you, "Can you describe how sure you are?"

Because you are involved in an ongoing investigation, in order to prevent damaging the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the way the lineup procedure will be conducted and the other instructions I have given you?

For simultaneous presentation:

In a moment, I am going to show you a series of photos [or individuals]. The person who committed the crime may or may not be included. I do not know whether the person being investigated is included.

Keep in mind that things like hair styles, beards, and mustaches can be easily changed [(for photo line-ups only) and that complexion colors may look slightly different in photographs].

You should not feel like you have to make an identification. This procedure is important to the investigation whether or not you identify someone.

Take as much time as you need to look at the photo [or individual] lineup and then tell me whether you see the person who [insert crime here]. If you identify anyone in the lineup, I will then ask you, "Can you describe how sure you are?"

Because you are involved in an ongoing investigation, in order to prevent damaging the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the way the lineup procedure will be conducted and the other instructions I have given you?

Witnesses should be given a written copy of the above instructions and the following statement should be signed and dated by the witness.

"I have read these instructions, or they have been read to me, and I understand the instructions. I am prepared to review the photographs [or individuals] which will be presented to me, and I will follow the instructions provided on this form."

3. Instructions specific to Show-up Procedures:

- a) Show-ups should only be used when circumstances require the prompt display of a single suspect to a witness (e.g., there is no probable cause for detention long enough to construct a proper lineup or there are public safety concerns).
- b) If possible, encourage the suspect to consent to voluntary detainment to participate in a live lineup or to consent to being photographed for use in a photo lineup. A written consent that they are a willing participant in the lineup without promises, threats, pressure, or coercion should be signed and dated by the suspect.
- c) Show-ups should only be conducted when the suspect matching the description of the perpetrator is located in close proximity in time and place to the crime.
- d) A description of the perpetrator should be documented prior to the show-up.
- e) If practical, transport the witness to the location of the detained suspect to limit the legal impact of the suspect's detention.
- f) Show-ups should not be conducted with more than one witness present at a time.
- g) Witnesses should be given a cautionary instruction that the individual may not be the perpetrator.
- h) If there are multiple witnesses and one witness makes an identification during a show-up, reserve the remaining witnesses for another identification procedure.
- i) Words or conduct of any type that may suggest to the witness that the individual is or may be the perpetrator should be carefully avoided.