

## **Eyewitness Identification Best Practices Toolkit**

### *Resources to Assist Agencies with Adoption of Evidence-Based Procedures*

Eyewitness identification is a valuable tool in conducting investigations. However, it can also be unreliable and is the leading contributing factor to wrongful convictions proven by DNA evidence. In an effort to enhance the evidentiary value of eyewitness identifications and to minimize the risk of wrongful convictions in the state of Nebraska, the Nebraska Crime Commission, State Patrol, Police Chiefs Association, Sheriffs Association and Police Officers Association recently agreed to support statewide adoption of a model policy developed by the Nebraska League of Municipalities.

The model policy includes the “core four” best practices that have been scientifically proven to improve the accuracy of witness identification, many of which are supported by the International Association of Chiefs of Police, the National Academy of Sciences, the U.S. Department of Justice, the American Bar Association and others. The “core four” best practices are:

- *Blind or blinded administration* in which the officer conducting the lineup does not know the suspect’s identity. If this is not practicable, the “blinded” folder shuffle method can be used, in which the administrator may know the suspect’s identity but is blocked from seeing which lineup photo is being viewed by the witness. This removes any risk of suggestiveness or cues.
- *Witness instructions* that the perpetrator may or may not be present.
- *Proper selection of non-suspect fillers* that generally match the witness’ description of the suspect and do not cause the suspect to unreasonably stand out.
- *Witness confidence statements* elicited immediately after an identification is made in which the witness is asked to state, in his or her own words, the level of certainty in the selection.

To help your agency easily adopt evidence-based practices, the following is enclosed in this toolkit:

- I. *Model eyewitness identification policy* developed by the League of Nebraska Municipalities. This policy can be easily added to a department’s patrol guide.
- II. *Detailed description of the folder shuffle method*, which can be employed in instances where blind administration is not feasible (e.g. if your agency has limited manpower or if all of the members of service in your agency know the suspect’s identity).
- III. *Checklist that can be used to ensure that the “core four” reforms* have been followed. This will also inoculate law enforcement from defense challenges.
- IV. *Website links to short training videos* created by law enforcement on how to conduct a blind live line-up, a blind photo array, and a “blinded” photo array (folder shuffle method).

In addition, please stay tuned for eyewitness identification training opportunities in the coming months, which will be available for continuing education credits. We hope that you find these materials useful. If you would like more information on eyewitness identification please contact William Muldoon, Director of the Nebraska Law Enforcement Training Center at [William.Muldoon@nebraska.gov](mailto:William.Muldoon@nebraska.gov).

# I. Model Eyewitness Identification Policy



<b>Identification Process</b>	Related Policies:
<p><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></p>	
<p>Applicable Nebraska Statutes: § 29-3301. § 29-3302. § 29-3303. § 29-3304. § 29-3305. § 29-3306. §29-3307</p>	
<p>CALEA Standard:</p>	
<p>Date Implemented:</p>	<p>Review Date:</p>

**I. Purpose:** The purpose of this policy is to outline the manner in which criminal suspects will be subjected to identification proceedings.

**II.**

**III. 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.

**IV. 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:** An identification procedure in which an array of photographs, including a photograph of the suspected perpetrator of an offense and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator. **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.
- C. 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.

**V. 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 later claim that the officer influenced the witness’ identification of the suspect. Each eyewitness who views a showup, lineup or photo spread shall be read instructions before the procedure begins that contain the following information and shall sign form with this information.

- The suspect might not be in the showup, lineup or photo spread and the eyewitness is not obligated to make an identification.
- The eyewitness should not assume that the person administering the showup, lineup or photo spread knows which person is the suspect in the case.

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

- Witness' opportunity to view suspect at the time of the crime.
- Witness' focus of attention at time of crime.
- Accuracy of witness' description of suspect prior to identification procedure.
- Level of certainty exhibited by the witness in making the identification.
- The length of time that has passed between the crime and the identification.
- 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.

- 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.
- 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:
  - Have suspect standing outside of any law enforcement vehicle rather than in the vehicle.
  - Have the suspect standing without handcuffs or with handcuffs not visible to the witness.
  - The appearance that suspect maintains his or her freedom will undercut suggestiveness.
  - 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.
  - 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:**

- The array must contain at least six photos that are selected to match the witnesses description of the perpetrator and include at least some persons who are similar in appearance i.e. facial hair, glasses, age etc.
- All photos must include persons of the same race and sex as the suspect.
- 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.)
- The officer who conducts the photo-array shall be someone who is not aware of which photo in the array is that of the suspect in the case.
- During the process officers shall not, in any way, prompt the witness toward a particular photo.

- f. Photos will not be shown at the same time as an array or six-pack, instead the photos will be shown from a stack, held by the presenter who shall present the photographs one at a time as if dealing a deck of cards to the witness.
- g. 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.
- h. The presentation/order of presentation must be documented. If the witness makes an identification, the officer shall immediately ask him/her to state in his/her own words the level of confidence in the selection, which shall 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.
- i. Witness instruction: The person viewing the photo-array should be told that the perpetrator may or may not be in the photo-array and the investigation will continue regardless of whether an identification is made or not.
- j. 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:**

- a. A line-up must be conducted with at least six persons who generally match the witness' description of the perpetrator and include at least some persons who are similar in appearance to the suspect i.e. facial hair, glasses, age etc.
- b. All persons in the line-up must be of the same age and sex of the suspect.
- c. The officer who conducts the line-up shall be someone who is not aware of which line-up member is the suspect in the case.
- d. During the process officers shall not, in any way, prompt the witness toward a particular subject in the line-up.
- e. Present each individual one at a time to a single witness. In the case of multiple witnesses, present the lineup to each witness separately.
- f. 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.
- g. Suspects may be required to speak during a line-up for comparison purposes only. If officers are going to require a suspect to speak, they must require all persons participating to speak the same words in turn.
- h. 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.
- i. 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.

- j.** If the witness makes an identification, the officer shall immediately ask him/her to state in his/her own words the level of confidence in the selection, which should be documented.
  - k.** Witness instruction: The person viewing the line-up should be told that the perpetrator may or may not be in the line-up and the investigation will continue regardless of whether an identification is made or not.
- l.** Attorneys:
- i.** 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.
  - ii.** A suspect has the right to counsel at a line-up if the suspect has reached a critical stage in the justice process.
  - iii.** 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.

## II. The Folder Shuffle Method

### Effecting ‘Blinded’ Administration of Eyewitness Procedures for Departments with Limited Manpower

To enhance the accuracy of any eyewitness identification procedure, the officer administering a lineup should not know which lineup member is the police suspect. Eyewitness identification procedures should therefore be conducted by a non-investigating, or ‘blind,’ administrator.

Understandably, small police departments with limited officer manpower – or larger departments with officers conducting identifications in the field - may believe that the requirement of ‘blind administration’ of eyewitness procedures is unfeasible. Yet this need not be the case at all.

Workable solutions have emerged to address this concern. Law enforcement agencies that have implemented this reform report that they are able to ‘blind’ the administrator without expending additional manpower resources. This is done through the time-tested ‘folder system’ or by means of emerging laptop technology.

#### THE FOLDER SYSTEM

The “Folder System” was devised to address concerns surrounding limited resources while allowing for blind administration. Should the investigating officer of a particular case be the only law enforcement personnel available to conduct a photo lineup, the following instructions are recommended:

1. Use one suspect photograph that resembles the description of the perpetrator provided by the witness, five filler photographs that match the description but do not cause the suspect photograph to unduly stand out, and ten folders [four of the folders will not contain any photos and will serve as ‘dummy folders’].
2. Affix one filler photo to Folder #1 and number the folder.
3. The individual administering the lineup should place the suspect photograph and the other four filler photographs into Folders #2-6 and shuffle the photographs so that he is unaware of which folder the suspect is in, and then number the remaining folders, including Folders #7-10, which will remain empty. [This is done so that the witness does not know when he has seen the last photo].
4. The administrator should provide instructions to the witness. The witness should be informed that the perpetrator may or may not be contained in the photos he is about to see and that the administrator does not know which folder contains the suspect.
5. Without looking at the photo in the folder, the administrator is to hand each folder to the witness individually. Each time the witness has viewed a folder, the witness should indicate whether or not this is the person the witness saw and the degree of confidence in this identification, and return the photo to the administrator. The order of the photos should be preserved, in a facedown position, in order to document in Step 6.
6. The administrator should then document and record the results of the procedure. This should include: the date, time and location of the lineup procedure; the name of the administrator; the names of all of the individuals present during the lineup; the number of photos shown; copies of the photographs themselves; the order in which the folders were presented; the sources of all of the photos that were used; a statement of confidence *in the witness’s own words* as to the certainty of his identification, taken immediately upon reaction to viewing; and any additional information the administrator deems pertinent to the procedure.

\* The information described above was informed by “Eyewitness Identification Procedure Recommendations” put forth by a Wisconsin Task Force as well as existing research on the folder shuffle.

### III. Lineup Identification Checklist

**Ensure lineup is conducted with a blind administrator/“blinded” administrator using the folder shuffle method.**

- “Blind” means the administrator does not know the identity of the suspect in the lineup.
- “Blinded” means the administrator may know who the suspect is, but by virtue of the use of procedures and/or technology to accomplish this purpose, does not know which lineup member is being viewed by the eyewitness.

**Provide the following lineup instructions to the witness.**

- The perpetrator may or may not be among the persons in the identification procedure.
- The administrator does not know who the suspect is.
- You should not feel compelled to make an identification.
- The investigation will continue whether or not an identification is made.
- The procedure requires the administrator to ask you to state, in your own words, how certain you are of any identification.
- You should not discuss the identification procedure or its results with other eyewitnesses involved in the case and you should not speak with the media.

**Ensure all fillers/non-suspect photos match the description of the perpetrator provided by the witness.**

- Record the description that the witness gave of the perpetrator. The lineup will be composed of fillers that generally resemble the description of the perpetrator in significant features (i.e., face, weight, build, skin tone, etc.), including any unique or unusual features (i.e., scar, tattoo, etc.).

**Record the witness’ confidence statement**

- If the witness makes an identification, the administrator should document below in the witness’ own words, how confident he/she is that the individual identified is the perpetrator.

#### **IV. Links to Instructional Training Videos**

1. Police Lineup Instructional Video - <http://www.youtube.com/watch?v=HY8NzTCT97Q>
2. Folder Shuffle Instructional Video <https://www.youtube.com/watch?v=i5a75NShfAc>
3. Photo Array Instructional Video -  
<https://www.youtube.com/watch?v=PxQ8bYQNAyg&feature=youtu.be>
4. Additional Training Materials- <http://norwoodpolice.com/chieftainingmaterials.html>