



CHEVY CHASE
VILLAGE
POLICE
DEPARTMENT

Police Chief: John Fitzgerald

GENERAL ORDER: 5-31 EYEWITNESS IDENTIFICATION

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I. BACKGROUND

The identification of a suspect by an eyewitness can be an important component of a criminal investigation, but can be equally significant in clearing an innocent suspect. Many people who have been convicted of serious crimes, only to later be exonerated by scientific evidence, were originally convicted based in large part on mistaken identification by a witness. Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in approximately 75% of convictions overturned through DNA testing.¹ The Chevy Chase Village Police Department recognizes that it is as much the responsibility of the police to protect the innocent from conviction as it is to assist in the conviction of the guilty.

The identification of criminal offenders must be approached with extreme caution as the court may exclude eyewitness evidence if it determines that police methods were unnecessarily suggestive.

II. POLICY

It is the policy of the Chevy Chase Village Police Department that:

- A. Identification procedures will avoid undue suggestiveness and will comply with §3-506.1 of the Public Safety Article of the Maryland Code.
- B. Eyewitnesses will be given specific instructions prior to being shown a suspect;
- C. Photo arrays will be conducted using sequential rather than simultaneous presentation; and
- D. Photos arrays and live line-ups will be conducted using blind or blinded administrators.

III. DEFINITIONS

- A. **Administrator:** The person conducting an identification procedure.
- B. **Blind:** The administrator does not know the identity of the suspect.

- C. **Blinded:** The administrator may know who the suspect is but does not know which lineup member is being viewed by the eyewitness.
- D. **Eyewitness:** A person who observes another person at or near the scene of an offense
- E. **Filler:** A person or a photograph of a person who is not suspected of an offense and is included in an identification procedure.
- F. **Folder shuffle method:** A system for conducting a photo lineup that:
 - (i) complies with the requirements of this section; and
 - (ii) is conducted by placing photographs in folders, randomly numbering the folders, shuffling the folders, and then presenting the folders sequentially so that the administrator cannot see or track which photograph is being presented to the eyewitness until after the procedure is completed.
- G. **Identification procedure:** A procedure in which a live lineup is conducted or an array of photographs, including a photograph of a suspect and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness in hard copy form or by computer for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator.
- H. **Identification statement:** A documented statement that is sought by the administrator when an identification is made:
 - (i) from the eyewitness;
 - (ii) in the own words of the eyewitness, describing the eyewitness's confidence level that the person identified is the perpetrator of the crime;
 - (iii) given at the time of the viewing by the eyewitness during the identification procedure; and
 - (iv) given before the eyewitness is given feedback.

- I. Live lineup:** A procedure in which a perpetrator is placed among a group of other persons whose general appearance resembles the perpetrator.
- J. Perpetrator:** A person who committed an offense.
- K. Suspect:** A person who is suspected of committing an offense.
- L. Show-up:** The live presentation of one suspect to an eyewitness shortly after the commission of a crime.

IV. PROCEDURES

A. Right to Counsel After Initial Appearance

- 1. Once a suspect has appeared before a commissioner on a criminal charge, or has been arraigned or indicted, his/her right to have counsel present at a physical line-up procedure attaches. No right to the presence of counsel exists simply because a complaint has been filed, even if an arrest warrant has issued.
- 2. No right to counsel attaches for identification procedures where the suspect is not physically present, such as those involving photographs or composite drawings, whether conducted before or after the initiation of adversarial criminal proceedings.

B. General Considerations

- 1. Due process requires that identifications be conducted in a fair, objective, and non-suggestive manner. Due process is violated when identification procedures conducted by the police are unnecessarily suggestive and conducive to irreparable mistaken identification.
- 2. Upon response to the scene of a crime involving more than one eyewitness, officers must make an effort to prevent eyewitnesses from comparing their recollections of the offender or the incident. Officers may accomplish this by promptly separating the witnesses and interviewing each out of the earshot of the others. Witnesses must not participate in identification procedures together. For example, witnesses should not be transported together to view a suspect during a show-up.
- 3. Officers should use caution when interviewing eyewitnesses. Specifically, they should avoid the use of leading questions.

- 4. Prior to asking an eyewitness to identify a suspect, police officers should obtain a detailed description of the offender.
- 5. When an identification is made in any identification procedure, the administrator shall document in writing all identification statements made by the eyewitness.
- 6. Officers must document every show-up, photo array, or line-up procedure, whether an identification is made or not, shall be submitted. At a minimum, the report shall include the instructions given to the witness by the officer and the information contained in paragraph F, below.
- 7. Officers shall not provide any feedback—positive or negative—to the eyewitness regarding suspect identification, but shall only document statements made by the eyewitness.

C. Blind or Blinded Administrator Required

- 1. An identification procedure shall be conducted by a blind or blinded administrator.
- 2. An administrator may be blinded through the use of:
 - a. An automated computer program that prevents the administrator from seeing which photos the eyewitness is viewing until after the identification procedure is completed; or
 - b. The folder shuffle method.

D. Use of fillers:

- 1. Each filler shall resemble the description of the perpetrator given by the eyewitness in significant physical features, including any unique or unusual features.
- 2. At least five fillers, in addition to the suspect, shall be included when photographs are displayed to an eyewitness.
- 3. At least four fillers, in addition to the suspect, shall be included in a live lineup.
- 4. If an eyewitness has previously participated in an identification procedure in connection with the identification of another person suspected of involvement in the offense, the fillers in the identification procedure shall be different from the fillers used in any prior identification procedure.

dure.

E. Multiple eyewitness procedures:

1. The identification procedure shall be conducted separately for each eyewitness.
2. The suspect shall be placed in a different position for each identification procedure conducted for each eyewitness.
3. The eyewitnesses may not be allowed to communicate with each other until all identification procedures have been completed.

F. Written record required

1. Except as provided in paragraph (2) of this subsection, the administrator shall make a written record of the identification procedure that includes the following information:
 - all identification and nonidentification results obtained during the identification procedures;
 - the signed identification statement of the eyewitness;
 - the names of all persons present at the identification procedure;
 - the date and time of the identification procedure;
 - any eyewitness identification of a filler; and
 - all photographs used in the identification procedure.
2. If a video or audio record of the identification procedure captures all of the information in paragraph (1) of this subsection, a written record is not required.

G. Witness Instructions

An officer conducting an identification procedure must read the witness a set of instructions from a departmental form (show-up card, or photo array or line-up instruction form). Those instructions should include the following:

1. You are being asked to view (some people or a set of photographs).
 - a. You will be viewing the photographs one at a time in random order.
 - b. Please look at all of them. I am required to show you the entire series.
 - c. Please make a decision about each photograph before moving on to the next one.

2. The person who you saw may or may not be (one of the people or in the set of photographs) you are about to view.
3. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.
4. The officer (showing the photographs or administering the line-up) does not know whether any of the people in the array are the person you saw. (Not for use with show-ups.)
5. The individuals (in the photographs) you view may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change. (Not for use with show-ups.)
6. Regardless of whether or not you identify someone, the police department will continue to investigate the incident.
7. If you select someone, the procedure requires us to ask you to state, in your own words, how certain you are.
8. If you do select someone, please do not ask us questions about the person you have selected, as no information can be shared with you at this stage of the investigation.
9. Regardless of whether you select someone, please do not discuss the procedure with any other witnesses in the case.
10. Do you have any questions about the procedure before we begin?

H. Show-ups

1. Show-up identification procedures should only be used soon after a crime has been committed, typically within two hours, or under exigent circumstances, such as the near death of the only available witness. Show-ups should be conducted live.
2. Every show-up must be as fair and non-suggestive as is practical. Specifically, if the suspect is handcuffed, he/she should be positioned so that the handcuffs are not visible to the witness. The suspect should not be viewed when he/she is inside a police vehicle, in a cell, or in jail clothing.
3. Detaining a person who fits the description of a suspect in order to arrange a show-up is lawful where the officer has reasonable suspicion that

the suspect has committed a crime, even if probable cause to arrest has not yet developed.

4. If the witness fails to make a positive identification and sufficient other evidence has not developed to provide probable cause to make an arrest, the suspect must be permitted to leave. His/her identity should be recorded and included in the officer's report.
5. If a suspect is stopped within a short time after the commission of the crime, he/she may be detained at the site of the stop and the witness should be taken there to view the suspect. **Do NOT transport the suspect for the show-up** unless there is no other way to conduct the show-up.
6. 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.
7. The suspect should be viewed by one witness at a time and out of the presence or hearing of other witnesses. Witnesses who have viewed the suspect must not be permitted to communicate with those who have not.
8. 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.

I. Preparing a Photo Array

1. Include one suspect and a minimum of five fillers in each array. Mark the back of each photo with sequential numerals. Use a separate array for each suspect.
2. Use photographs of the same size and basic composition. Do not include more than one photograph of the same person.
3. Select fillers who generally fit the witness' description of the offender.
4. Ensure that photos bear no markings indicating previous arrests.
5. Once the array has been assembled, examine it to ensure that nothing about the suspect's photo makes him/her stand out.

6. In cases with multiple witnesses, change the order of photos from one witness to the next.

J. Showing a Photo Array

1. Photo arrays should be shown to witnesses as soon as practical after the commission of a crime.
2. If a photo array is shown by a blind administrator, photos must be shown one at a time to an eyewitness. Before moving to the next photo, the current photo must be moved out of sight. The blind administrator must record what the eyewitness says upon viewing each individual photo.
3. If a photo array is shown by a blinded administrator, the folder shuffle method must be used unless the administrator has the ability to display photo images on a computer so as to remain blinded to which image is being viewed by the eyewitness during the display.
4. Allow each witness to view the photographs independently, out of the presence and hearing of the other witnesses.
5. Never make suggestive statements that may influence the judgment or perception of the witness.
6. The administrator should carefully instruct the witness by reading from a departmental Identification Procedure Instruction Form, and the witness should be asked to sign the form indicating that he/she understands the instructions. The administrator should also sign and date the form.
7. 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.
8. 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. An array may not be shown more than twice. The administrator must record the fact

that the array was shown a second time.

9. 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.
10. The photo array should be preserved as evidence in the same configuration as when the identification was made.
11. If more than one witness is to view an array, a separate unmarked array shall be used for each witness.

K. Line-ups

1. Line-ups shall be conducted under the direction of a detective from an outside agency, and, when feasible, after consultation with the State's Attorney's Office.
2. The detective shall be responsible for recording the procedure.
3. 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.
4. 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. 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.
5. Select a group of at least four fillers who fit the description of the subject as provided by the witness(es). 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.
6. 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.

7. 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 participating.
8. The investigating officer should carefully instruct the witness by reading from a departmental Identification Procedure 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.
9. The investigating officer should leave the room while the line-up administrator conducts the line-up.
10. Unless the detective or the assistant state's attorney direct otherwise, 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 by having them enter the room individually and leave before the next one enters.
11. The procedure for showing the participants to the witness and for obtaining a statement of certainty is the same as for photo arrays.
12. 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.
13. 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 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. An attorney who does not know which person is the defendant may attend the line-up in place of the suspect's attorney.
14. 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 ar-

rained or indicted.⁴ 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.

15. During a line-up, each participant may be directed to wear certain clothing, to put on or take off certain clothing, to take certain positions or to walk or move in a certain way.³ If officers are to ask the participants to wear an article of clothing, they must guard against circumstances where the article only fits the suspect. All line-up participants shall be asked to perform the same actions.
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¹ The Innocence Project

² *U.S. v. Wade*, 388 U.S. 218 (1967)

³ *Id.*

This directive voids the previous version dated
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