EYEWITNESS IDENTIFICATION PROCEDURES: LEGAL AND PRACTICAL ASPECTS

This Article consists of materials compiled from a variety of sources by John R. Wasberg, a former Senior Counsel in the Washington Attorney General's Office, retired. Mr. Wasberg updates the Article at least annually and posts the updated version on the Criminal Justice Training Commission's Internet page for the Law Enforcement Digest (LED). This version is updated through July 1, 2026. No significant changes were made for this 2026 version. One significant change was made in 2022. That change is the discussion at pages 1 and 2 of State v. Derri, a June 23, 2022, decision of the Washington Supreme Court. No other changes have been needed in the past several years. The Article is provided as a research source only, is not intended as legal advice, and should not be relied on without independent research and legal analysis. Any views expressed are those of Mr. Wasberg alone and do not necessarily reflect the opinions of any other person or any government agency.

TABLE OF CONTENTS

I. INTRODUCTION AND DEFINITIONS 1

II. GENERALITIES REGARDING EFFECT OF SUGGESTIVENESS OF PROCEDURES ON ADMISSIBILITY OF IDENTIFICATION TESTIMONY 4

III. SUGGESTIVENESS SHOULD BE AVOIDED AT ALL STAGES OF ALL IDENTIFICATION PROCEDURES 5

A. Avoid suggestiveness *before* the identification 6

B. Avoid suggestiveness *during* the identification 6

C. Avoid suggestiveness *after* the identification 12

D. Assess and report the level of certainty 13

E. Recording identification results 13

F. Overcoming suggestiveness at trial by proving reliability of the identification testimony 13

IV. MUG BOOKS AND COMPOSITE SKETCHES 14

V. SEARCH AND SEIZURE ISSUES 15

VI. RIGHT TO AN ATTORNEY—SIXTH AMENDMENT AND WASHINGTON COURT RULES 16

A. There is no Sixth Amendment right to counsel in 1) a pre-arrest showup or 2) photographic lineup whenever conducted. 16

B. There is a right to an attorney in some live lineup circumstances. 17

1. Basic rights under the federal constitution 17

2. Possible enhancement of counsel-rights under Washington court rules CrR 3.1/CrRLJ 3.1 18

3. Defense counsel's role at the live lineup is observer. 19

4. Waiver of counsel right. 19

VII. NO SELF INCRIMINATION ISSUES ARE PRESENTED IN EYEWITNESS IDENTIFICATION PROCEDURE CASES.....20

VIII. THE SUPPRESSION HEARING.....20

IX. IDENTIFICATION TESTIMONY BY WITNESS, AND POSSIBLY YOU, AT TRIAL 20

X. HYPNOSIS IS NOT AN OPTION FOR WITNESS MEMORY RETRIEVAL.....20

XI. EXPERTS MAY OR MAY NOT BE PERMITTED TO TESTIFY IN YOUR CASE CONCERNING UNRELIABILITY OF EYEWITNESS TESTIMONY 21

XII. JURY INSTRUCTIONS 21

XIII. HARMLESS ERROR RULE APPLIES 22

XIV. ADDITIONAL COURT DECISIONS ON IDENTIFICATION PROCEDURES 22

A. Showup suggestiveness cases where one possible issue was the time lapse between the incident and the showup.....22

B. Live lineup suggestiveness 23

C. Older decisions considering whether physical lineups are favored over photo lineups.....23

D. Photo lineup suggestiveness 23

APPENDIX

Model Policy of Washington Association of Sheriffs and Police Chiefs setting minimum standards for eyewitness identification …….25

TABLE OF AUTHORITIES

Cases

Dunaway v. New York,
442 U.S. 200 (1979)..... 15.16

Gilbert v. California,
388 U.S. 263 (1967)..... 17

In re Armed Robbery,
99 Wn.2d 106 (1983)..... 15

Jordan v. Ducharme,
983 F.2d 933 (9th Cir. 1992)..... 17

Kirby v. Illinois,
406 U.S. 682 (1972)..... 17

Manson v. Brathwaite,
432 U.S. 98 (1977)..... 4

Miranda v. Arizona,
384 U.S. 436 (1966)..... 18

Montejo v. Louisiana,
129 S. Ct. 2079 (2009)..... 19

Neil v. Biggers,
409 U.S. 188 (1972)..... 4, 14

People v. Bustamonte,
30 Cal.3d 88 (1981)..... 19

People v. Cooks,
141 Cal. App.3d 224 (Cal. App. 1983)..... 15

People v. Danpier,
159 Cal. App.3d 709 (1984) 16

People v. Gatch,
56 Cal. App. 3d 505 (Cal. App. 1976) 16

People v. Hall,
95 Cal. App. 3d 299 (Cal. App. 1979) 16

People v. Hernandez,
204 Cal. App.3d 639 (Cal. Ct. App. 1988) 7

People v. Miguel L.,
32 Cal. 3d 100 (1982) 20

People v. Palmer,
491 A.2d 1075 (Conn. 1985) 15

People v. Richard W.,
136 Cal. App. 3d 733 (1982) 20

Perry v. New Hampshire,
132 S.Ct. 716 (2012) 4

Rock v. Arkansas,
107 S.Ct. 2704 (1987) 21

Simmons v. U.S.,
390 U.S. 377 (1968) 4

State v. Alferez,
37 Wn. App. 508 (Div. III, 1984) 22

State v. Allen,
176 Wn.2d 611 (2013) 22

State v. Ammlung & Titcombe,
31 Wn. App. 696 (Div. II, 1982) 6

State v. Bobic,
94 Wn. App. 702 (Div. I, 1999) 24

State v. Burrell,
28 Wn. App. 606 (Div. I, 1981) 23

State v. Cheatam,
150 Wn.2d 626 (2003) 21

State v. Clark,
48 Wn. App. 850 (1987) 16

State v. Coe,
109 Wn.2d 832 (1988) 20, 21

State v. Courtney,
137 Wn. App. 376 (Div. III, 2007) 12

State v. Derri,
199 Wn.2d 658 (June 23, 2022) 1, 2

State v. Doleshall,
53 Wn. App. 69 (Div. I, 1988) 15

State v. Eacret,
94 Wn. App. 282 (Div. I, 1999) 23

State v. Favro,
5 Wn. App. 311 (1971) 16

State v. Fortun-Cebada,
158 Wn. App. 158 (Div. I, 2010) 21

State v. Guzman-Cuellar,
47 Wn. App. 326 (Div. I, 1987) 21

State v. Hanson,
46 Wn. App. 656 (Div. I, 1987) 13

State v. Henderson,
27 A.3d 872 (N.J., 2011) 2

State v. Hendrix,
50 Wn. App. 510 (Div. I, 1988) 19, 22

State v. Hilliard,
89 Wn.2d 430 (1977) 22

State v. Hudspeth,
22 Wn. App. 292 (Div. II, 1978) 11

State v. Jaquez,
105 Wn. App. 699 (Div. II, 2001) 17, 19

State v. Jordan,
39 Wn. App. 530 (Div. I, 1985) 16

State v. Kimball,
14 Wn. App. 951 (Div. I, 1976) 16

State v. Lawson,
291 P.3d 673 (Or. 2012) 2, 16

State v. Maupin,
63 Wn. App. 887 (Div. III, 1992) 9, 23

State v. McDonald,
40 Wn. App. 743 (Div. I, 1985) 11

State v. Nettles,
81 Wn.2d 205 (1972) 22

State v. Rogers,
44 Wn. App. 510 (Div. I, 1986) 21

State v. Royer,
58 Wn. App. 778 (Div. II, 1990) 22

State v. Salinas,
169 Wn. App. 210 (Div. I, 2012) 3

State v. Sanchez,
171 Wn. App. 518 (Div. III, 2012) 3

State v. Shea,
85 Wn. App. 56 (Div. II, 1997) 3

State v. Smith,
90 Wn. App. 857 (Div. I, 1998) 5

State v. Smith,
37 Wn. App. 381 (Div. III, 1984) 22

State v. Springfield,
28 Wn. App. 446 (Div. III, 1981) 13, 21

State v. Stalsbroten,
138 Wn.2d 227 (1999) 19

State v. Thorkelson,
25 Wn. App. 615 (Div. I, 1980) 22

State v. Traweek,
43 Wn. App. 99 (Div. II, 1986) 22

State v. Wheeler,
108 Wn.2d 230 (1987) 14

Stovall v. Denno,
388 U.S. 293 (1967) 16

Terry v. Ohio,
392 U.S. 1 (1968) 14, 17

Torres v. City of Los Angeles,
540 F.3d 1031 (9th Cir. 2008) 15

U.S. v. Ash,
413 U.S. 300 (1973) 15

U.S. v. Johnson,
745 F.3d 227 (7th Cir. 2014) 2

U.S. v. Jones,
907 F.2d 456 (4th Cir. 1990) 16

U.S. v. LaPierre,
998 F.2d 1460 (9th Cir. 1993) 16

U.S. v. Sublet,
644 F.2d 737 (8th Cir. 1981) 18

U.S. v. Wade,
388 U.S. 218 (1967)..... 15

United States Constitutional Provisions

Fourteenth Amendment (Due Process Clause) 2, 3

Fifth Amendment 17, 18

Fourth Amendment 8, 13-15

Sixth Amendment 15-17

Court Rules

CrR 3.1 ..... 16, 17

CrRLJ 3.1 ..... 16, 17

Other Authorities

"Investigations and Police Practices — Identifications," 46 Georgetown Law Journal Annual Review of Criminal Procedure 203-216 (2017) (note that the annotations of federal court decisions in the Georgetown Law Journal reviews are updated annually) 1, 22

21A Am Jur 2d, *Criminal Law,* §§ 1024-32 ("Use of self incriminatory evidence: a. Real, physical and identification evidence; b. Examinations and tests of accused") 8, 20

"Initiation Of Contact Rules Under The Fifth Amendment" accessible via an Internet link on the CJTC LED page [https://www.cjtc.wa.gov/resources/law-enforcement-digest] 19

Note also that footnote 1 at page 2 of this Article references a number of resources on eyewitness identification procedures, including (1) guides

from the United States Department of Justice, and (2) a Model Policy of the Washington Association of Sheriffs and Police Chiefs adopted on May 21, 2015 (a copy of the WASPC Model Policy is set forth in an appendix to this document). The WASPC Model Policy is identical to the Model Policy of the Washington Association of Prosecuting Attorneys adopted by WAPA on April 16, 2015.

EYEWITNESS IDENTIFICATION PROCEDURES: LEGAL AND PRACTICAL ASPECTS

I. INTRODUCTION AND DEFINITIONS

This Article focuses on legal and practical matters related to eyewitness identification of a suspect by means of a live lineup, showup or photographic lineup. A "live lineup" (sometimes referred to as a "physical lineup" or simply "lineup") is a physical presentation of a group of people of similar appearance to that described by a witness or witnesses, including the suspect, from which a witness is asked to pick the perpetrator, if the witness determines the perpetrator is present. A "showup" is a one-on-one confrontation between the suspect and witness (often the victim) to a crime. A "photographic lineup" (sometimes referred to as a "photo spread," "photo array," "photo montage," "photographic lineup" or "six pack") is a grouping or showing of photographs of people of similar appearance to that described by a witness or witnesses, including the suspect, from which a witness is asked to pick the perpetrator, if the witness determines the perpetrator is present.

This Article provides select citations to Washington appellate court decisions, as well as key U.S. Supreme Court decisions and decisions from courts in some other jurisdictions. For a relatively thorough, current listing of citations to U.S. Supreme Court and federal court decisions on law enforcement identification procedures, see the several pages of annotations in "Investigations and Police Practices — Identifications," 46 Georgetown Law Journal Annual Review of Criminal Procedure 203-216 (2017) (note that the annotations in the Georgetown Law Journal reviews of various criminal procedure topics are updated annually).

****

Alert: Readers need to be aware of *State v. Derri*, 199 Wn.2d 658 (June 23, 2022). In *Derri*, the Washington Supreme Court was unanimous in ruling, under the totality of the circumstances, that: (1) the photo montage identification procedures that were used by law enforcement in the case were *impermissibly suggestive*, but (2) the suggestive identification procedures did not create a substantial likelihood of *unreliability* and irreparable misidentification in the eyewitness testimony.

The *Derri* Opinion adds a gloss to U.S. Supreme Court Due Process precedents (see discussion below in this article) relating to both the question of suggestiveness of ID procedures and the question of

ultimate reliability of eyewitness testimony in light at any suggestiveness. Thus, under *Derri*, the Washington courts must consider new, relevant, widely accepted scientific research when determining both (1) the suggestiveness of ID procedures and (2) reliability of eyewitness identifications that were impacted by impermissibly suggestive procedures.

The *Derri* Opinion declares that modern, widely accepted scientific research has shown the eyewitness ID procedures are less suggestive if (1) a double-blind process is used to create and administer a photo montage or physical lineup; (2) the suspect's photo is not used in more than one presentation to a witness; and (3) the suspect's photo is not the only photo showed to the witness. The photo ID processes used by the detective with the various witnesses failed in some way to uniformly adhere to these advisable processes, at least in some respect as to each witness. Therefore, the Opinion concludes, the ID processes were impermissibly suggestive.

Next, however, the *Derri* Opinion concludes that the impermissibly suggestive conducting of photo identification did not result in unreliable eyewitness testimony. Important to the favorable outcome for the State in this case was the combined effect of the following facts: (1) each of the teller-witnesses had a much more than momentary opportunity to observe the bank robber; (2) two tellers recalled meeting the defendant on a previous occasion at the bank to discuss a banking question; (3) one of those two tellers remembered that the previous occasion involved an in-depth conversation and writing down of the defendant's name; (4) the other of those two tellers watched and heard the in-depth conversation on that occasion, and that teller remembered the defendant's voice and "stuttering" manner of speaking: (5) all of the tellers described, prior to looking at photos with the detective, the defendant, his appearance, and his demeanor in sufficient detail to establish that they were paying attention to the robber; (6) all of the descriptions were relatively consistent with the defendant's actual appearance; (7) two of the tellers' out-of-court identifications were made within one day of the robberies; and (8) the tellers showed high levels of certainty in their identifications.

****

The case law on suggestiveness of eyewitness identification procedures addresses *questions of law that judges must determine*, i.e., whether the testimony of a witness should have been admitted and whether a

conviction should stand. It is important to remember, however, that matters of suggestiveness and eyewitness reliability also are important to *questions of fact that juries must determine*. Even if the legal standard for admissibility of testimony is met in a given case, one or more jurors may find reasonable doubt based on perceived suggestiveness of an ID procedure or perceived lack of reliability of the testimony of an eyewitness at trial. This Article's tips on helping to ensure reliability of eyewitness testimony are given with a goal of helping to understand both: (a) the case law legal standards for admission of such testimony, and (b) some of the factors that may affect juror consideration of such testimony.

In the years since this Article was first authored in the early 1990s, there has been a strong and steadily growing trend of acknowledgement from leading prosecutor and law enforcement representatives concluding that law enforcement eyewitness identification procedures of the past should be improved to better separate the innocent from the guilty. These conclusions are based on both (1) extensive scientific research and studies by social science experts, and (2) recent advanced-DNA-testing-based innocence determinations in a number of cases involving persons whose previous convictions were based in large part on eyewitness testimony. The author's intent in revisions to this Article over time is to better reflect this trend than previous versions of this Article. The author believes that this Article provides a good overview of its ambitious subject matter, but the Article is not intended to be the last or best word on law enforcement identification procedures. The author recommends that law enforcement readers consult other resources on the subject, as well as their own agency legal advisors and/or local prosecutors.[1]

---

[1] The author recommends comprehensive guides from the U.S. Department of Justice (DOJ): "Eyewitness Evidence, A Guide For Law Enforcement" (October 1999) and "Eyewitness Evidence: A Trainer's Manual For Law Enforcement" (September 2003) on DOJ's website for Office of Justice Programs, National Institute of Justice, which has a search engine. **Included is some discussion of simultaneous and sequential approaches, as well as the double-blind method for live lineups and photographic lineups.** The National Institute of Justice also aided a Police Executive Research Forum survey of law enforcement identification procedures issued in 2013. Washington state officers should be aware that (1) the Washington Association of Sheriffs and Police Chiefs (WASPC) and (2) the Washington Association of Prosecuting Attorneys (WAPA) have each adopted an identical model policy on eyewitness identifications. The WASPC Model Policy is set forth in the appendix to this document. Note also that the Commission On Accreditation For Law Enforcement Agencies, Inc. has adopted standards addressing ID procedures (the author has not reviewed those standards). The International Association of Chiefs of Police has also addressed such procedures in Training Keys and model policies (the author has not reviewed IACP's materials). Also note that several states (not Washington) have adopted legislation addressing law enforcement eyewitness ID procedures. Finally, note (1) the discussion by the New Jersey Supreme Court in *State v. Henderson*, 27 A.3d 872 (N.J. 2011)

II. GENERALITIES REGARDING EFFECT OF SUGGESTIVENESS OF EYEWITNESS IDENTIFICATION PROCEDURES ON ADMISSIBILITY OF ID TESTIMONY

Due process protection under the U.S. Constitution requires that a conviction be set aside if an eyewitness identification at trial follows a pre-trial identification procedure conducted by the government that was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification at trial." *Simmons v. U.S.*, 390 U.S. 377 (1968); *see also Neil v. Biggers*, 409 U.S. 188 (1972); *Manson v. Brathwaite*, 432 U.S. 98 (1977). Under *Manson v. Brathwaite*, courts use a two-step review process. If the identification procedure by law enforcement is determined in Step One to have been unnecessarily suggestive, then the testimony of the eyewitness in court will be admissible only if, in Step Two, the government can overcome the suggestiveness determination by establishing that the identification is nonetheless reliable.[2]

Key factors considered in the Step Two determination of whether the pre-trial suggestiveness tainted the identification trial testimony of the eyewitness such as to make the ID testimony unreliable are as follows: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention at the time of the crime; (3) the accuracy of the witness's prior description of the criminal; (4) the level of

---

regarding a New Jersey Supreme Court-appointed special master's survey of social science research on law enforcement eyewitness identification procedures; (2) the Oregon State Supreme Court's discussion of this research in *State v. Lawson*, 291 P.3d 673 (Or. 2012); and (3) the discussion in *United States v. Johnson*, 745 F.3d 227 (7th Cir., Feb. 6, 2014) of research (David G. Dobolyi & Chad S. Dodson, *Eyewitness Confidence in Simultaneous and Sequential Lineups: A Criterion Shift Account for Sequential Mistaken Identification Overconfidence*, 19 J. Experimental Psychology: Applied 345 (2013)) that suggests that the simultaneous approach is at least as accurate as the sequential approach that most other researchers have favored.

[2] Note that where the government is not responsible for the suggestiveness of circumstances surrounding an identification, the constitution does not preclude submission of the identification evidence to the jury, and it is up to the jury to determine what weight to give the identification. *See Perry v. New Hampshire*, ___ U.S. ___, 132 S. Ct. 716 (Jan. 11, 2012) March 2012 LED:02 (U.S. Supreme Court holds that where officers did not purposely stage what inadvertently turned out to be a "showup" ID of the suspect, constitutional due process protections against suggestive ID procedures were not triggered.); *see also State v. Sanchez*, 171 Wn. App. 518 (Div. III, 2012) Jan 2013 LED:21 (any possible influence on witness of media accounts is for jury to assess); *State v. Salinas*, 169 Wn. App. 210 (Div. I, 2012) Oct. 2012 LED:17 (failure of witness to ID suspect in photo lineup by police shortly after crime occurred does not bar her from making an in-court ID if no police suggestiveness in the ID procedure is involved).

certainty demonstrated by the witness at the time of the identification procedure; and (5) the lapse of time between the crime and the identification procedure. *State v. Shea*, 85 Wn. App. 56 (Div. II, 1997).

Obtaining and documenting an accurate description from the witness prior to conducting any identification procedure is of critical importance to the overall process. What follows is a non-exhaustive list of suggestions as guides in obtaining an accurate initial description before memorializing it in your report:

1. Always get as detailed a description as possible of the suspect, especially as to distinguishing characteristics, such as scars, tattoos, moles, etc. Encourage the witness to tell you everything the witness thinks is relevant in describing the suspect.
2. Ask open-ended questions and avoid leading the witness when asking about the suspect.
3. After establishing rapport with the witness and inquiring about the physical and emotional condition of the witness, try to get the witness: to relax (to close his or her eyes if it helps) and to visualize the perpetrator's features.
4. To get an accurate height, ask the witness where his or her eyes would hit the suspect's body if he or she looked straight ahead.
5. Ask the witness to hold his or her hand up to approximate the height of the perpetrator.
6. Ask the witness to estimate *your* height and weight.
7. Ask the witness to approximate the distance between him or her and the perpetrator by moving a similar distance away from you.
8. Ask the witness to slowly go through the incident, step-by-step, in his or her mind to try to determine how long he or she was looking at the suspect.
9. Ask the witness if he or she was thinking at the time of the crime about identifying the suspect later.
10. Always go back over your detailed report of the witness's original statement to avoid miscommunication. Tell the witness exactly what you are going to put in your report, and ask the witness if he or she wants to change, add or emphasize anything.
11. Encourage the witness to contact investigators with any additional information.
12. Advise the witness to not discuss the case with other witnesses, and encourage the witness to avoid the media and media accounts.

III. SUGGESTIVENESS SHOULD BE AVOIDED AT ALL STAGES OF ALL THREE TYPES OF ID PROCEDURES

A. Avoid suggestiveness *before* the identification

Prior to conducting an identification procedure, do not tell the witness that: (a) you caught (or think you caught) the person who committed the crime; (b) the victim's property was in the suspect's possession; (c) the suspect made admissions; or (d) the person to be observed is a "suspect."

Instead, tell the witness certain things tailored to the type of procedure (see "laundry list" of suggestions below in this section) to help avoid suggestiveness and to help achieve reliability.

B. Avoid suggestiveness *during* the identification

Don't allow more than one witness to participate in the procedure at one time. Generally try to limit any given witness/victim to just one identification procedure for any given suspect in the case.

Never permit the witness's attention to be drawn to the suspect because of: (a) the way in which you have set up the identification procedure; or (b) remarks or nonverbal cues by you during the procedure.[3]

In lineups and photographic spreads, the participants must be similar in appearance, but there is no requirement that the appearances be identical. Obviously, however, if the witness describes a set of particular distinguishing characteristics, all of the other persons in the lineup or photo spread should have these characteristics, if at all possible.[4] In the

---

[3] **In order to reduce the chance that an officer conducting a live lineup or photo lineup will unconsciously provide non-verbal cues that will lead the witness toward picking out the suspect, the identical model policies of WAPA and WASPC require either a "double-blind" approach or "[partially] blinded" approach. In the "double blind" approach the officer administering the live lineup or photo lineup does not pick the fillers and does not know which person is the suspect. An alternative procedure by some agencies for sequential photo lineups that see the double-blind approach as impractical uses a partially blinded approach in which the administrator picks the fillers and knows which is the photo of the suspect, but does not know which photo lineup participant is being viewed at any time. One such approach is a "folders" approach in which individual photos are placed by the administrator in folders, the folders and a few empty folders are then shuffled, and the photo lineup administrator conducts a sequential lineup procedure in such a way that the administrator does not know which photo the witness is viewing during the process. The law governing Washington criminal cases does not mandate the double-blind or partially blinded approach. However, defense attorneys may make some headway with jurors on reasonable doubt in some cases where on of those approaches were not used in an eyewitness identification procedure.**

[4] A trial court has broad discretion to order that a suspect submit to grooming prior to appearance in a lineup. *State v. Smith*, 90 Wn. App. 857 (Div. I, 1998); *State v.*

case of a photo spread, you should make sure that the *style and nature of the pictures themselves* (not just the people in them) are as similar as possible.

To avoid doing anything that might be construed as drawing attention to the suspect, you should say and do as little as possible during the critical time when the witness is making the identification. When more than one witness is to view the lineup or photographic spread, explain to each witness that each must go through the procedure separately. Do not permit the witnesses to hear the comments of one another at the identification procedure, or to compare notes as to their respective descriptions of the perpetrator.

Showups are the most likely of the identification procedures to be found suggestive, because only one suspect is present. Nonetheless, the courts make an exception to the general rule that a suspect deserves a full lineup, because a showup conducted shortly after the crime was committed allows: (a) an innocent suspect to be cut loose immediately, at a time when the witness has a fresh image in mind; and (b) the police to go on with their investigation while the trail is still fresh. As the hours elapse following the commission of the crime, these social policy interests in favor of showups diminish, and the interests favoring a more fair presentation of possible culprits begin to outweigh the former interests.[5]

Laundry list of suggestions for conducting physical lineups[6]*:*

Ammlung & Titcombe, 31 Wn. App. 696 (Div. II, 1982). Also, case law in California has held that police may modify photographs (such as by adding a mustache), but only to help *confirm* an identification already made on a tentative basis without the modification. *See People v. Hernandez*, 204 Cal. App.3d 639 (Cal. Ct. App. 1988).

[5] Because the determination of suggestiveness of ID procedures, as well as reliability of ID testimony, is always based on the "totality of the circumstances," court decisions in ID procedure cases are usually quite fact-intensive. In addition, courts sometimes mistakenly merge analysis of *suggestiveness* with analysis of whether the suggestiveness impermissibly tainted the eyewitness testimony such as to make it *unreliable*. This makes it more difficult to set out black-and-white rules based on the court decisions, whether in relation to elapsed-time restrictions on showups or otherwise. For a partial list of Washington showup ID cases, with elapsed time information included, see Part XIV of this article below.

[6] The suggestions here address a physical lineup in which all subjects are *simultaneously* displayed. It is also permissible, if not preferable, to conduct a physical lineup in which the subjects are *sequentially* displayed. See footnote 1 above for some resources describing this approach and reasons for its adoption. The purpose of using a sequential approach is to make it less likely that the witness will feel, despite advice to the contrary, that he or she is expected to pick someone even if it is a relative-choice guess based on who looks most like the person who committed the crime. This sequential method is followed by some Washington law enforcement agencies, and that change in practice by some agencies may lead to defense attorneys arguing to juries that

1. Include just one suspect and at least five non-suspect participants; randomly position the suspect unless the suspect or his/her attorney states a preference.
2. Choose participants of the same race and sex and with similar significant characteristics, particularly distinguishing characteristics reported by the witness.
3. If the suspect refuses to fully participate or cooperate in the lineup, tell him or her that such resistance may be commented upon in court as an admission of guilt. *See generally*, 21A Am Jur 2d, *Criminal Law,* §§ 1024-1032 ("Use of self incriminatory evidence: a. Real, physical and identification evidence; b. Examinations and tests of accused").
4. If the suspect wore distinctive clothing, have all participants wear similar distinctive clothing; if the suspect has a unique, readily identifiable characteristic like a scar, facial hair or tattoo, you may need to conceal the feature or try to duplicate it in the other participants.
5. Avoid doing a second lineup that includes the same suspect with the same witness.
6. Introduce the lineup procedure with directions along the following lines (and have the witness sign an acknowledgement of having received such directions):

> I am going to have you look at six people. Please take your time and look at all six people before making any comment. It is as important to clear the innocent as to identify guilty persons. The persons in the lineup may not look exactly the same as on the date of the incident because

---

non-sequential lineup IDs are less reliable than sequential lineups. We recommend prior consultation with a law enforcement agency experienced in this method prior to employment of the sequential method. *Additional* suggestions in relation to sequential physical lineups include informing the witness that: (a) a group of individuals will be presented one at a time; (b) the individuals will be presented in random order; (c) the witness should take as much time as needed in making a decision about each individual before moving on to the next; (d) if the person who committed the crime is present, identify him or her; (e) all individuals will be presented in a predetermined order, even if an identification is made [**or** the procedure will be stopped at the point of an identification, consistent with departmental procedures]; (f) the witness should confirm at the outset that the witness understands the nature of the sequential procedure. The author believes that as of the date of the most recent update of this Article, while the general consensus nationally of leading prosecutor and law enforcement representatives favors the sequential approach, research and studies have not conclusively established that the sequential approach, considered in isolation, is generally significantly more reliable than the simultaneous approach if the latter method is properly done. The law governing Washington criminal cases does not mandate the sequential method. However, defense attorneys may make some headway with jurors on reasonable doubt in some cases where the sequential method was not used in an eyewitness identification procedure.

> features such as head and facial hair can be changed. The person who committed the crime may or may not be in the lineup. If you recognize any of the persons in the lineup as the person you believe committed the crime, pick out the person you recognize, and please let me know in your own words how sure you are of your identification. Regardless of whether you make an identification, we will continue our investigation. If you identify anyone as the suspect, please do not ask me if your choice was "right" or "wrong," because I am not permitted to tell you.

7. If voice identification is necessary, have all participants say the same words.
8. Document the names of all participants in the lineup and all other persons present.
9. Videotape or take frontal and profile photographs of the lineup, and preserve the photos for trial.
10. Regardless of whether the witness picks the "right" or "wrong" participant, do not discuss "correctness" of the choice with the witness.
11. Instruct the witness not to discuss the lineup or the case with other witnesses, and encourage the witness to avoid the media and media accounts.
12. Encourage the witness to contact you if he or she has additional information.
13. Document all relevant details in a report.

Laundry list of suggestions for conducting showups:[7]

1. If practicable and safe, try <u>not</u> to present the suspect in a suggestive physical context—i.e., don't present the suspect in handcuffs, sitting in the back of the patrol car, surrounded by police officers who are holding the victim's personal property or a possible disguise that the suspect had in his or her pocket when stopped, etc.
2. Don't say that you think you caught person that the witness described, and don't refer to the person as a suspect or say that the suspect made any admissions.
3. Tell the witness to please take your time, keep an open mind, understand that the person who committed the crime may or may not be the person present and that it is as important to clear the innocent as to identify guilty persons. If the suspect is in obvious custody, advise

[7] See also the discussion in Part V below of whether the Fourth Amendment is implicated if the suspect is transported to the location of the witness, as opposed to transporting the witness to the location of the suspect.

the witness not to let this affect the witness's judgment. Advise the witness that if he or she makes an identification, to let you know in the witness's own words how sure the witness is of the identification.
4. Don't make the presentation in the presence of any other witnesses.
5. Instruct the witness not to discuss the showup or the case with other witnesses, and encourage the witness to avoid the media and media accounts.
6. Encourage the witness to contact you if he or she has additional information.
7. Document all relevant details in a report, including who was present at the showup.

Laundry list of suggestions for conducting photographic lineups [8]*:*

Note: If you presently have the suspect in custody, if you can find sufficient persons similar in appearance to the suspect to *lineup* ID procedure conduct a reasonable lineup, and if there are no extenuating circumstances, then you may wish to do a lineup ID procedure over a photo ID procedure. Check with your local prosecutor for guidance.

[8] The suggestions here address a photo lineup in which photos are *simultaneously* displayed. It is also permissible, if not preferable, to display photos *sequentially*. This sequential method is becoming more common for photo lineup ID procedures conducted by Washington law enforcement agencies, and that change in practice by some agencies may lead to defense attorneys arguing to juries that non-sequential photo lineups are less reliable than sequential lineups. See footnote 1 above for some resources describing this approach. The purpose of using a sequential approach is to make it less likely that the witness will feel, despite advice to the contrary, that he or she is expected to pick someone even if it is a guess. We recommend prior consultation with a law enforcement agency experienced in this method prior to employment of the sequential method. *Additional* suggestions in relation to this sequential method include informing the witness that: (a) photographs from a predetermined set will be presented one at a time in a random order previously determined; (b) the witness should take as much time as needed in making a decision on a photo before moving to the next photo; (c) all photos will be shown, even if an identification is made [or the procedure will be stopped at the point of identification, consistent with departmental procedures]; (d) the witness should confirm at the outset that the witness understands the nature of the sequential procedure. The author believes that as of the date of the most recent update of this Article, while the general consensus nationally of leading prosecutor and law enforcement representatives favors the sequential approach, research and studies have not conclusively established that the sequential approach, considered in isolation, is generally significantly more reliable than the simultaneous approach if the latter method is properly done. The law governing Washington criminal cases does not mandate the sequential method. However, defense attorneys may make some headway with jurors on reasonable doubt in some cases where the sequential method was not used in an eyewitness identification procedure.

1. Use a photo of the suspect that best reflects in significant features the description by the witness.
2. Select filler (non-suspect) photos that generally fit the witness's description of the perpetrator. When there is a limited/inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.
3. Include just one suspect plus a minimum of five non-suspect photos; (this is not an absolute requirement; however, note that the Washington courts have said that use of *just a single photo* is, as a matter of law, impermissibly suggestive. See e.g. *State v. Maupin*, 63 Wn. App. 887 (Div. III, 1992) (but note that the court went on to find the ID testimony reliable based on a review of all of the circumstances of the case).
4. Avoid doing a second photo lineup or other identification procedure that includes the same suspect with the same witness.
5. Number each photo on the back.
6. Record separately the names, dates of birth and numbers assigned to each photo.
7. Give each witness directions along these lines prior to showing the photo lineup (and have the witness sign an acknowledgement of having received such directions):

> I am going to show you six photographs. Please take your time and look at all six photographs before making any comment. It is as important to clear the innocent as to identify guilty persons. The persons in the photos may not look exactly the same as on the date of the incident because features such as head and facial hair can be changed. The person who committed the crime may or may not be among those shown in the photographs. If you recognize any of the persons in the photographs as the person who you believe committed the crime, go back and pick out the person you recognize, and please let me know in your own words how sure you are of your identification. Regardless of whether you make an identification, we will continue our investigation. If you identify any of the persons as the suspect, please do not ask me if your choice was "right" or "wrong," because I am not permitted to tell you.

7. If the witness picks a photo, ask the witness to initial the back of the photo, and then initial the photo yourself.

8. Regardless of whether the witness picks the "right" or "wrong" photo, do not discuss the "correctness" of the choice.
9. Instruct the witness not to discuss the procedure or the case with other witnesses, and encourage the witness to avoid the media and media accounts.
10. Encourage the witness to contact you if he or she has additional information.
11. Place all photos in an evidence envelope noting how they were displayed in the lineup, and then seal, initial, date, and place the evidence in property storage in accordance with departmental policy;[9] document in a report who was involved in the procedure.

C. Avoid suggestiveness *after* the identification

The officer must be very careful to avoid suggestive words or actions after the identification procedure has been conducted. Telling a witness that he or she picked the "right" or "wrong" person out of a live lineup or photo lineup can jeopardize admissibility of a later in-court identification. See *State v. McDonald*, 40 Wn. App. 743 (Div. I, 1985) (where witness picked one person from live lineup and detective told witness immediately afterward that the person arrested was a different person participating in the lineup, this fact, combined with the weakness of the identification on the other identification-reliability factors discussed elsewhere in this article, made the in-court identification of the arrestee/defendant inadmissible). In *State v. Courtney*, 137 Wn. App. 376 (Div. III, 2007) May 2007 LED:08, the Court of Appeals' analysis suggests that undue suggestiveness likely occurred where, after each of the two victims identified the defendant in a photo lineup as the person who murdered their friend, officers (1) told each victim that the other victim had picked the same person, and (2) told one of the victims that the person picked was in custody. But the Court of Appeals upheld the identifications as being nonetheless sufficiently reliable, because the trial court had found that each of the victims had a long, clear look at the perpetrator at the time of the crime.

[9] See *State v. Hudspeth*, 22 Wn. App. 292 (Div. II, 1978) regarding the duty to preserve evidence of photo ID procedures. You are required to preserve photos from photo lineups in which a witness either affirmatively identified defendant or failed to identify defendant in circumstances after defendant had become a suspect and his or her photo had been purposely placed within a lineup for ID purposes. The fact that defendant's picture may have been a part of photo lineups or "mugbooks" prior to such time as he or she became a suspect generally does not trigger the preservation requirement.

D. Assess and report the level of certainty

Extensive scientific/psychology studies have led to a broadly accepted view that, while as a general proposition "certainty" varies from individual to individual, it is important to the reliability determination to assess, as of the time of the identification procedure, how sure the eyewitness is regarding an identification. The reason this is important is that studies have shown that witnesses tend to become significantly more certain of their identification once they learn that the person they picked is the person suspected by police and/or charged by the State.

Therefore, if the witness volunteers a statement as to his or her level of certainty in a live lineup, photo lineup or showup procedure, the officer should record the exact words used by the witness. If the witness does not make a statement as to level of certainty, the officer, without suggesting or implying that the person chosen is the person suspected by the police, should ask the witness to state in his or her own words the level of certainty as to an identification (or the officer may choose to first ask the witness "How do you know this person?" to try to explore the level of certainty, and then, if that does not produce a response reflecting level of certainty, the officer can more directly ask for an expression as to level of certainty.) It is not necessary to ask a witness to state certainty on a scale of 1-10 or as a percentage, which measures can be confusing to witnesses. But the bottom line is that a confidence statement should be obtained.

E. Recording identification results

Video recordings of identification procedures are the ideal and next best are audio recordings. If neither video nor audio recordings are used, officers should produce a detailed written report of the identification procedure immediately following completion of the procedure.

F. Overcoming suggestiveness at trial by proving reliability of the identification testimony

In a showup (a one-on-one confrontation), in comparison to the other types of identification procedures, the procedure is more likely to be found suggestive simply because there were no other persons for the witness to choose from. In cases of showup "suggestiveness," as with other identification procedures where there is suggestiveness, in order for the witness's later ID testimony to be admissible, that suggestiveness must be offset by the reliability factors that we preliminarily outlined above in the second paragraph in Part II. Thus, for all three types of identification procedures, the courts look at the following key questions:

(1) What was the witness's opportunity to observe the perpetrator at the time of the crime? (Consider length of time, lighting, distance, vision impairment, etc.)

(2) What degree of attention did the witness pay at the time of the crime? (Was the witness trying to memorize the perpetrator's looks, drunk or sober, previously acquainted with the suspect, etc.?)

(3) Was the original description a close description of the suspect?

(4) Was the witness certain at the time of the identification procedure?

(5) How much time went by between the time of the crime and time of the identification procedure? (Although there is no hard-and-fast rule setting an outside time limit, showups generally should be held within a few hours of the time of the crime;[10] other identification procedures may generally be conducted with much longer time lapses, though the lapse must be taken into account in determining identification-reliability.)

IV. MUG BOOKS AND COMPOSITE SKETCHES

"Mug books" are collections of photos of previously arrested persons. Non-suggestive mug books have historically been used in cases in which a suspect had not yet been determined and other reliable sources had essentially been exhausted. No photo should unduly stand out. Only one photo of each individual should be presented. Pre-showing instructions to the witness should be along the lines of the instructions given an eyewitness in a photo lineup procedure. Assessment and recording of the level of certainty of any identification should be made, and the entire procedure should be reported in detail.

A composite sketch is a likeness prepared by a police artist or other trained person working with a witness. As with other identification procedures, those conducting the procedure should be careful not to influence the witness's memory. *See State v. Hanson*, 46 Wn. App. 656 (Div. I, 1987).

[10] However, see *State v. Springfield*, 28 Wn. App. 446 (Div. III, 1981), where a showup involving a reserve police officer as victim/witness to an armed robbery was upheld even though the armed robbery had occurred 17 hours earlier. For another case involving an even longer delay between time of crime and showup, see the U.S. Supreme Court decision in *Neil v. Biggers*, 409 U.S. 188 (1972).

Depending on the level of detail provided by the witness, a composite sketch prepared by a competent sketch artist may provide sufficient reasonable suspicion to stop a suspect.

Whether the sketch will also be admissible at trial will depend on the experience and expertise of the sketch artist, the validity of the techniques used, and the overall foundation for the sketch submitted by the prosecution. *See e.g., People v. Palmer*, 491 A.2d 1075 (Conn. 1985); *People v. Cooks*, 141 Cal. App.3d 224 (Cal. App. 1983). There are no Washington appellate court decisions on this final point.

V. SEARCH AND SEIZURE ISSUES

The United States Supreme Court has held that any time a person is taken involuntarily to the police station, an "arrest" has occurred, and probable cause must be established to justify the arrest. *Dunaway v. New York*, 442 U.S. 200 (1979). The Washington State Supreme Court has interpreted *Dunaway* to mean that a court may not issue a court order compelling a suspect to come to the stationhouse for a lineup in the absence of probable cause. *In re Armed Robbery*, 99 Wn.2d 106 (1983). Thus, a person cannot be forcibly taken into custody and compelled to appear in a live lineup, with or without a court order, in the absence of probable cause.

However, nothing in the *Fourth Amendment*[11] of the federal constitution or article I, section 7 of the Washington constitution precludes an officer from obtaining consent from a suspect to go to the station house for a live lineup or to go to another location for a showup. Furthermore, if the person has been lawfully arrested on one crime and remains in lawful custody on that crime, the suspect may be compelled to appear in a live lineup on an unrelated matter, even if there is not separate probable cause to arrest on the unrelated matter. *State v. Doleshall*, 53 Wn. App. 69 (Div. I, 1988).

Courts in this country are in disagreement as to whether involuntarily transporting a person away from the scene of a *Terry* stop, *Terry v. Ohio*, 392 U.S. 1 (1968), necessarily transforms a *Terry* stop (requiring only "reasonable suspicion) into an arrest (requiring probable cause). In *State v. Wheeler*, 108 Wn.2d 230 (1987), the Washington State Supreme Court interpreted the Fourth Amendment as allowing the police to transport a burglary suspect from the scene of a *Terry* stop to the scene of the reported crime for a showup identification procedure. Courts in other jurisdictions have made more restrictive readings of the Fourth Amendment, requiring

[11] See, however, the *Sixth* Amendment discussion below in Part VI.

extenuating circumstances for such a transport of a *Terry* detainee, such as the logistical problems of: (A) a frail or partially incapacitated witness who cannot readily be brought to the suspect for the showup (See *People v. Hall*, 95 Cal. App. 3d 299 (Cal. App. 1979)); or (B) a shortage of officers such that there are not enough officers to secure the scene, chase other suspects, transport the witnesses, etc. (See *People v. Gatch*, 56 Cal. App. 3d 505 (Cal. App. 1976)). The United States Supreme Court has never addressed this question other than in its "bright line" stationhouse-transport rule articulated in *Dunaway v. New York*, as noted above in this section.

To be on the safe side, officers conducting a showup should follow the general rule that the witness should be brought to the suspect unless there is no reasonable alternative to transporting the suspect to the witness. While you await the arrival of the witness you may take whatever safety steps (handcuffs, placement in the patrol car, etc.) are reasonable. Safety first. Remember, however, that the less indicia of seizure the better for purposes of the suggestiveness determination. Thus, if it is safe to do so, it is better to have the suspect outside the vehicle, not in handcuffs, not surrounded by officers, etc., at the point in time that the suspect is presented to the witness.

Finally, civil liability for an unsupportable arrest can hinge at least in part on deficiencies in identification procedures. Where officers relied on the identification to establish probable cause for the arrest, a seriously faulty law enforcement ID procedure may mean that a court will find there was not probable cause to support an arrest, and civil liability is possible. *See Torres v. City of Los Angeles*, 540 F.3d 1031 (9th Cir. 2008) October 2008 LED:12.

VI. RIGHT TO AN ATTORNEY—SIXTH AMENDMENT AND WASHINGTON COURT RULES

A. There is no Sixth Amendment right to counsel in 1) a pre-arrest showup or 2) photographic lineup whenever conducted

Because a showup will necessarily have occurred before any arrest has been made and before any charges have been filed, there is no right to an attorney during a lawful *pre-arrest showup* procedure. *Kirby v. Illinois*, 406 U.S. 682 (1972); *People v. Danpier*, 159 Cal. App.3d 709 (1984). Nor is there any right to an attorney during a *photographic lineup*, regardless of when the pictures are shown to the witness (before or after arrest, before or after charges are filed, etc.). *See U.S. v. Ash*, 413 U.S. 300 (1973); *State v. Clark*, 48 Wn. App. 850 (1987).

B. There is a Sixth Amendment right to an attorney in some live lineup circumstances

1. Basic rights under the federal constitution

The United States Supreme Court has held that a suspect has a charge-specific right to the presence of counsel at a physical lineup only if the lineup occurs *after* the commencement of criminal judicial proceedings on the particular charged crime—in a state such as Washington where the process starts with an information, that means after the information has been filed. See *Kirby v. Illinois*, cited above; *U.S. v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967). In *Wade, Gilbert,* and *Stovall*, the U.S. Supreme Court held that a post-charging live lineup was a "critical stage" in a criminal proceeding that required assistance of counsel, but the Court did not expressly define counsel's role or what constitutes the "lineup." However, it appears that the right clearly includes the right to have counsel view not only the people in the lineup itself, but also what the witnesses say and do in the observation room during the lineup. *U.S. v. LaPierre*, 998 F.2d 1460 (9th Cir. 1993). Case law is mixed as to whether, after defense counsel has arrived and the live lineup participants have been assembled, a witness-preparation session is permitted, and whether, after the lineup has been shown to the witness, a post-lineup witness-debriefing session, outside the presence of counsel, immediately afterwards, violates the right.[12]

[12] But see the Washington Court of Appeals decisions in: (i) *State v. Favro*, 5 Wn. App. 311 (1971) (Washington court rejected California case law authority to hold that there was no Sixth Amendment violation in officers waiting until 15 minutes after the lineup to have the officer-witness make his identification by filling out an identification sheet); (ii) *State v. Kimball*, 14 Wn. App. 951 (Div. I, 1976) (witness met with police on several occasions over a 7-week period following a lineup at which he had failed to identify the defendant, and court held that there was no violation of the Sixth Amendment right in failing to have counsel present at these follow-up meetings, after which defendant eventually concluded that he could identify defendant from the lineup); and (iii) *State v. Jordan,* 39 Wn. App. 530 (Div. I, 1985) (Washington court held that detective's use of a 10-minute "witness preparation" session in the observation room, outside the presence of counsel, did not violate the defendant's Sixth Amendment rights; note, however, that the Ninth Circuit of the U.S. Court of Appeals, though ultimately finding the in-court identification testimony to be reliable, criticized this approach and suggested in habeas corpus review of the same case that it would be better to have an attorney present "during all stages of the identification, including the preliminary instructions." *Jordan v. Ducharme*, 983 F.2d 933, 938 (9th Cir. 1992)). And see also *U.S. v. Jones*, 907 F.2d 456 (4th Cir. 1990) (inability of defense counsel to hear everything police said to witness during lineup did not rise to level of Sixth Amendment violation). Remember that you will always be subject to cross examination as to your tactical decisions.

Whatever you do will be scrutinized under cross examination in a suppression hearing, and, if the suppression judge permits the ID testimony, again at trial (where the defense attorney is trying to establish "reasonable doubt"). Ideally, once the lineup participants have been assembled and counsel is present, you should let the defendant's attorney come into the observation room at the same time that you enter with the witness, and you should let the defense attorney: 1) hear your preliminary instructions to the witness, 2) observe the presentation and 3) hear the selection, or lack thereof, by the witness.

2. Possible enhancement of counsel-rights under Washington court rules CrR 3.1/CrRLJ 3.1

To date, the Washington constitutional counterpart to the Federal constitution's Sixth Amendment has not been interpreted by the Washington courts to provide greater protection than the Federal constitution in this context. However, under Washington's Court Rules for both superior courts and courts of limited jurisdiction, a limited right to an attorney attaches sooner (i.e., post-arrest, pre-charging) than under the constitution. Under the most cautious reading of the rules (which are not worded identically but have been given the same meaning by Washington appellate courts on the attorney right issues discussed here), the qualified right to an attorney under the rules attaches immediately after a person is arrested. See CrR 3.1; CrRLJ 3.1. Because forcibly taking a person into custody to compel him or her to appear in a lineup is an "arrest," a person taken into pre-charging custody for this purpose should either be advised of his or her *Miranda* rights, *Miranda v. Arizona*, 384 U.S. 436 (1966) (with no need for a waiver if no questioning is intended) or be given a limited warning along the following lines: "*You have the right at this time to an attorney. If you are unable to afford an attorney, you are entitled to have one provided without charge*." The arresting officer does not need an affirmative waiver of the right to counsel in this pre-charge circumstance, but if the person requests an attorney, the officer must make a phone available and reasonably attempt to accommodate the request for an attorney-consult before proceeding with the lineup. If, following the consult, the arrestee requests the presence of the attorney, you should take reasonable steps to allow the attorney to come to the stationhouse and observe the lineup procedure.[13]

[13] Also note regarding CrR 3.1/CrRLJ 3.1 the case of *State v. Jaquez*, 105 Wn. App. 699 (Div. II, 2001) Aug. 2001 LED:18. *Jaquez* involved the unusual circumstance of a showup participant who, at the time of the showup, was both (1) the subject of a *Terry* stop on reasonable suspicion as to a robbery just committed, and (2) the subject of an arrest on a warrant discovered shortly after the *Terry* seizure was made. The Court found to be significant the unusual (for showup situations) circumstance that the detainee

3. Defense counsel's role at the live lineup is observer

The suspect's attorney has the right to be present only as an *observer.* Defense counsel cannot rearrange the personnel, cross-examine, or ask those in the lineup to say or do anything. Counsel may not even insist that law enforcement officials listen to his or her objections to procedures employed. "At most, defense counsel is merely present at the lineup to silently observe and to later recall his observations for purposes of cross-examination or to act in the capacity of a witness." *People v. Bustamonte*, 30 Cal.3d 88 (1981). However, it may be helpful in defending against a later claim of suggestiveness if you ask defense counsel if he or she has any suggestions (e.g., problems with the arrangement of the live lineup participants), and if the suggestions are easily implemented, you should incorporate them.

Be sure to document what everyone says, including the defense attorney. Ideally, you will be able to have a deputy prosecutor present to observe and advise.

4. Waiver of counsel right

A suspect may waive his or her right to have an attorney present at a live lineup, just as he or she may waive the right to have an attorney present during questioning. *See, e.g., U.S. v. Sublet*, 644 F.2d 737 (8th Cir. 1981). Even in a post-charge circumstance where a person has already made a court appearance on a charge, an officer may initiate contact with the defendant to request that he or she appear in a live lineup in relation to a charged matter. This is because in 2009 the U.S. Supreme Court revised its interpretation of the Sixth Amendment, concluding that the Sixth Amendment does not bar initiation of contact with a defendant on a pending charged matter to get a waiver of Sixth Amendment rights in relation to the charged matter. *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009) July 2009 LED:15. See our article on "Initiation Of Contact Rules Under The Fifth Amendment" accessible via an Internet link on the CJTC LED page [https://www.cjtc.wa.gov/resources/law-enforcement-digest].

---

was actually under arrest, not merely detained on reasonable suspicion. The *Jaquez* Court rejected the defendant's Sixth Amendment right-to-counsel argument, but qualifiedly stated that the defendant, who had asked for an attorney upon receiving *Miranda* warnings, should have been afforded immediate telephonic consultation with counsel before being required to submit to a showup identification procedure. The *Jaquez* Court ultimately ruled that any error was not prejudicial, and that any trial court error under CrR 3.1(c)(2) was harmless.

VII. NO SELF INCRIMINATION ISSUES ARE PRESENTED IN EYEWITNESS IDENTIFICATION PROCEDURE CASES

The constitutional privilege against self incrimination under the Fifth Amendment of the federal constitution is not implicated where a person is compelled to provide only physical evidence. To compel a person to appear in a live lineup or showup, or to assume a particular stance or repeat certain phrases in the context of such identification procedures does not trigger or implicate any Fifth Amendment protection. See generally, 21A Am Jur 2d, *Criminal Law* §§ 1024-1032 ("Use of self incriminatory evidence: a. Real, physical and identification evidence; b. Examinations and tests of accused"); *see also State v. Jaquez*, 105 Wn. App. 699 (2001) Aug. 2001 LED:18; *State v. Stalsbroten*, 138 Wn.2d 227 (1999) August 1999 LED:20.

VIII. THE SUPPRESSION HEARING

If identification is at issue (for instance in a stranger-robbery case or stranger-rape case), the defense attorney may bring a motion to suppress the identification. The likely basis of the motion will be that the identification procedure was unduly suggestive. In most such cases, both you and the witness will be called to testify. If the witness's testimony regarding the identification procedure differs significantly from yours, the identification is more likely to be suppressed. That is an important reason that you tell the witness along the way exactly what you are going to put in your reports, first as to the witness's original description, and second, as to the witness's words at the identification procedure.

IX. IDENTIFICATION TESTIMONY BY WITNESS, AND POSSIBLY YOU, AT TRIAL

Sometimes, by the time of trial, the witness can no longer identify the defendant due to forgetfulness or other reasons. Although it is not always permitted, you may be able to make the case by testifying about the witness's earlier identification, including the exact words used by the witness at that time. See *People v. Miguel L.*, 32 Cal. 3d 100 (1982); *People v. Richard W.*, 136 Cal. App. 3d 733 (1982); *State v. Hendrix*, 50 Wn. App. 510 (Div. I, 1988).

X. HYPNOSIS IS NOT AN OPTION FOR WITNESS MEMORY RETRIEVAL

In *State v. Coe*, 109 Wn.2d 832 (1988), the Washington Supreme Court established a "bright line" rule barring identification testimony from a

witness who has been hypnotized in relation to the identification. The *Coe* Court held that, even though some of the sexual assault complainants had made detailed descriptions of the assailant prior to hypnosis, all post-hypnotic testimony from these witnesses was *per se* tainted by the hypnosis, and therefore inadmissible. The *Coe* Court distinguished the U.S. Supreme Court decision in *Rock v. Arkansas*, 107 S.Ct. 2704 (1987), where the U.S. Supreme Court held that a criminal defendant's federal constitutional right to testify in his or her own behalf mandates that a *criminal defendant* generally may testify in his or her own behalf following hypnosis.

XI. EXPERTS MAY OR MAY NOT BE PERMITTED TO TESTIFY IN YOUR CASE CONCERNING UNRELIABILITY OF EYEWITNESS TESTIMONY

The trial court has broad discretion to determine whether an expert witness should be allowed to testify regarding the possibility of unreliable eyewitness account due to psychological and biological factors. *State v. Cheatam*, 150 Wn.2d 626, 644-52 (2003) Feb. 2004 LED:05. Where eyewitness identification of the defendant is a key element in a case, the trial judge is required, however, to carefully consider whether expert testimony would help the jury. The jury may need help assessing the eyewitness testimony because, under the special circumstances of the particular case, the assessment is outside the ordinary experience of most jurors. Some key factors for the trial court to consider in making its discretionary determination of whether such expert testimony should be presented to the jury include: (1) whether the defendant and witness are of different races; (2) whether the defendant displayed a weapon; and (3) whether the incident created significant stress for the witness. *See Cheatam*.

XII. JURY INSTRUCTIONS

Because of the restriction in the Washington constitution on judges commenting on the evidence in jury trials, the Washington appellate courts have not followed the practice of a number of other jurisdictions in the United States, which allow or require jury instructions advising juries to view eyewitness identification with caution in certain circumstances, such as in cases involving cross-racial identifications. Most recently, the Washington Supreme Court rejected an argument for automatically requiring such an instruction in all cases involving cross-racial identification; the Washington Supreme Court ruling generally does, however, leave to the discretion of the trial court whether to give such an

instruction regarding this concern. *State v. Allen*, 176 Wn.2d 611 (2013) March 13 LED:12.

XIII. HARMLESS ERROR RULE APPLIES

As with other constitutional law areas, where the other admissible trial evidence of a defendant's guilt is overwhelming, an error in admitting unreliable eyewitness testimony will be found to be "harmless error." *State v. Alferez*, 37 Wn. App. 508 (Div. III, 1984); see also the federal court decisions cited in the annotations at "Investigations and Police Practices — Identifications," 46 Georgetown Law Journal Annual Review of Criminal Procedure 203-216 (2017) (note that the annotations in the Law Journal are updated annually).

XIV. ADDITIONAL COURT DECISIONS ON IDENTIFICATION PROCEDURES

A. Showup suggestiveness cases where one possible issue is the time lapse between the incident and the showup

State v. Guzman-Cuellar, 47 Wn. App. 326 (Div. I, 1987) (showup ID not unnecessarily suggestive where defendant was in custody and in handcuffs when presented to an eyewitness to a murder-by-gun approximately *one hour* after the shooting)

State v. Rogers, 44 Wn. App. 510 (Div. I, 1986) (showup ID not unnecessarily suggestive where victim/eyewitness to an armed robbery was taken to see suspect coming out of his apartment approximately *six hours* after the robbery)

State v. Alferez, 37 Wn. App. 508 (Div. III, 1984) (showup ID not unnecessarily suggestive where eyewitness made identification approximately *five hours* after she observed suspect commit assault with a deadly weapon)

State v. Springfield, 28 Wn. App. 446 (Div. III, 1981) (showup ID not unlawfully suggestive: (a) where the victim of an armed robbery and assault was an undercover police reserve officer who was involved in a face-to-face confrontation with his assailant for a total of about six minutes; (b) where, prior to the showup at defendant's home, the reserve officer/victim had identified defendant in a non-suggestive photo lineup; and (c) where there was at most *17 hours'* delay between the incident and the identification)

State v. Fortun-Cebada, 158 Wn. App. 158 (Div. I, 2010) January 2011 LED:15 (showup ID not unlawfully suggestive where police observed Mr. Walker apparently making a crack cocaine buy from defendant Fortun-Cebada on the street, the officers arrested Walker, seized the purchased crack cocaine from him, put him in handcuffs, and brought Walker and Fortun-Cebada together on the street for a show-up identification *"within minutes"* of Fortun-Cebada's sale of the drugs to Mr. Walker)

B. Live lineup suggestiveness

State v. Traweek, 43 Wn. App. 99 (Div. II, 1986) (Where witness had identified robber as a blond man, and defendant was the only blond in the lineup, the procedure was suggestive; however, the prosecutor was able to overcome the suggestiveness evidence to establish reliability by showing the strength of the original eyewitness identification. See discussion at Part III. F. above.)

C. Older decisions considering whether live lineups are favored over photo lineups

In *State v. Thorkelson*, 25 Wn. App. 615, 619 (Div. I, 1980) based on language in State Supreme Court decisions in *State v. Hilliard*, 89 Wn.2d 430 (1977) and *State v. Nettles*, 81 Wn.2d 205 (1972), Division One of the Court of Appeals stated that "absent extenuating circumstances, photographic identification procedures of an in-custody defendant should not be used." However, since that time, Division One has declared that "insofar as *Thorkelson* may suggest a per se rule of exclusion [for photo ID's of in-custody suspects] we modify its holding." *State v. Burrell*, 28 Wn. App. 606 (Div. I, 1981). *Thorkelson's* suggestion of a per se rule of exclusion in this context has not been addressed by the State Supreme Court, but the *Thorkelson* suggestion of such a per se rule has been rejected by the other two divisions of the Court of Appeals. See *State v. Royer*, 58 Wn. App. 778 (Div. II, 1990) and *State v. Smith*, 37 Wn. App. 381 (Div. III, 1984), two photo lineup cases that expressly reject the *Thorkelson* suggestion of a strict rule against using photo lineups while a suspect is in custody. Officers should check with their local prosecutors on this issue, as well as other issues addressed in this Article.

D. Photo lineup suggestiveness

State v. Hendrix, 50 Wn. App. 510 (Div. I, 1988) (Absence from defendant's ID photo of a "very small, little, tiny number" in the upper left hand corner, and presence of such number on all other photos in the photo lineup, was not suggestive, even though identifying witness noted

discrepancy and was troubled by it. The *Hendrix* Court cites other cases where there were minor discrepancies in the photos where other Washington courts have held that such minor discrepancies present fact questions for the jury, not grounds for suppression. At trial in this indecent exposure case, the eyewitness was unable to identify the defendant, and the conviction was upheld based solely on the officer's testimony that the witness had "immediately picked" defendant's picture because it "jumped off the page."

State v. Maupin, 63 Wn. App. 887 (Div. III, 1992) (Where an investigating officer showed a witness a photo of only the defendant, this was per se suggestive; however, the prosecutor was able to establish reliability by showing the strength of the original eyewitness identification. See discussion at III. F. above.)

State v. Bobic, 94 Wn. App. 702 (Div. I, 1999) (Detective investigating stolen car ring used two photo lineups. One set of photos consisted only of six photos: one photo of defendant plus photos of each of his five alleged co-conspirators. The other set of photos included defendant's photo with those of two co-conspirators, along with three other individuals. The Court of Appeals assumes this was impermissibly suggestive, but then goes on to find the eyewitness ID to be reliable enough in other respects to overcome the potential for misidentification.)

State v. Eacret, 94 Wn. App. 282 (Div. I, 1999) (Court declares that placing photos of three suspected assailants in one array of photos, along with photos of five non-suspects, was not impermissibly suggestive, because it did not increase chance the any one suspect would be picked out.) [Caution: The author questions the wisdom of putting more than one suspect in any given photo lineup. Even if this is not deemed to be impermissibly suggestive, a defense attorney may argue to the jury that this circumstance increased the probability that the witness merely made a lucky guess, and thus the defense attorney may thus convince jurors of "reasonable doubt."]

APPENDIX

Model Policy of Washington Association of Sheriffs and Police Chiefs

Eyewitness Identification: Minimum Standards

Adopted May 21, 2015

PURPOSE

The purpose of this policy is to provide law enforcement with minimum standards for the collection of eyewitness evidence in order to increase the probative value of the evidence collected from eyewitnesses and reduce false identifications.

POLICY

This agency will conduct eyewitness identification procedures in a manner consistent with these minimum standards in order to standardize the identification procedures employed by law enforcement and maximize the reliability of the eyewitness evidence collected.

DEFINITIONS

Administrator – The individual conducting an identification procedure with a victim/witness.
Blind Presentation – An identification procedure in which the administrator does not know which physical lineup/photo array member is the suspect. Also known as double-blind presentation.
Blinded Presentation – An alternative to blind presentation in which the administrator knows which physical lineup/photo array member is the suspect. In this presentation, specific procedures are employed to prevent the administrator from knowing which physical lineup/photo array member is being viewed by the victim/witness at any time.

Confidence Statement – A statement in the victim/witness's own words, articulating his/her level of confidence in the identification taken immediately after the identification has been made.
Field Showup – An identification procedure in which a single suspect is presented in order to determine whether the victim/witness recognizes a person involved with the crime. Typically includes the in-person presentation of a suspect in the field and occurs close in time and proximity to the incident under investigation.
Fillers – Non-suspect photographs or physical lineup members included with the suspect's photograph or suspect in an identification procedure.
Identification Procedure – Any procedure that includes the suspect and tests the witness's memory of a person involved with the crime, including a field showup, photo array, physical lineup, mug-book search, and the production of a composite sketch.
Photo Array – An identification procedure in which a series of photographs of persons, including a suspect, is displayed in order to determine whether the victim/witness recognizes a person involved with the crime.

Physical Lineup – An identification procedure in which a group of persons, including a suspect, is displayed in order to determine whether the victim/witness recogn2izes a person involved with the crime.

MINIMUM STANDARDS

Identification procedures should be conducted in a manner consistent with the minimum standards outlined below.

A. Selecting the appropriate identification procedure

1. **When** an identification procedure is conducted should be determined by the investigator after taking into account the following important considerations:

   a. Only **one** identification procedure should be conducted with each victim/witness for each suspect.

   b. Since only one identification procedure should be conducted, **when** the procedure is conducted is crucial and needs to be considered carefully. A rushed, poor procedure cannot be corrected with a later, better procedure.

2. **Which** identification procedure is conducted should be determined by the investigator after taking into account the circumstances of the investigation at hand, and the following considerations:

   a. *Field Showup* - A field showup should be performed only when circumstances require the immediate display of a suspect to a victim or witness. When circumstances allow for construction and administration of a photo array or physical lineup in accordance with this policy, a field showup should be avoided.

   b. *Photo Array* - When constructed and administered in accordance with this policy, a photo array is a reliable test of a victim/witness's memory.

   c. *Physical Lineup* - Lineups can be effective, but are frequently less than optimum due to the difficulty of finding appropriate fillers, the challenges of managing the interaction between various witnesses, victims, and lineup administrators, and the amount of time and resources required to appropriately construct and administer a lineup.

B. Selecting fillers for photo arrays and physical lineups

1. All photo arrays and physical lineups should contain *only* one suspect.
2. In cases in which there are multiple suspects, separate photo arrays/physical lineups with unique fillers should be created for each suspect. No fillers should be used in more than one photo array/physical lineup with the same victim/witness.
3. Fillers should generally fit the victim/witness's description of the suspect. When there is a limited description or when the description differs from the suspect in significant features, the fillers should resemble the suspect's appearance.
4. All photo arrays and physical lineups should contain a minimum of 5 fillers.

C. Minimizing suggestiveness and perceived suggestiveness

1. All photo arrays and physical lineups should be conducted using blind presentation.
2. When blind presentation is not practicable, blinded presentation should be used.

D. Instructing victims and witnesses

1. Administrators should avoid saying anything to a victim/witness that would suggest that there is a specific suspect of interest for the crime at any time prior to an identification procedure**.**
2. Administrators should provide these *minimum* instructions to a victim/witness immediately before conducting an identification procedure:
    - **i.** Keep in mind that the person who committed the crime may or may not be included in the showup/photo array/lineup.
    - **ii.** You should not feel that you have to make an identification. It is just as important to clear innocent persons from suspicion as it is to identify guilty parties.
    - **iii.** The investigation will continue whether or not you make an identification.

E. Witness contamination

1. Victims/witnesses should be separated immediately after the criminal event and should be discouraged from speaking with one another about what they saw (including discussion of the crime on social media).
2. All interviews and identification procedures should be conducted with each victim/witness separately. Steps should be taken to ensure that victims/witnesses do not become aware of the statements and/or identification decisions of other victims/witnesses.
3. Administrators should not provide any feedback to a victim/witness regarding their decision in an identification procedure.

4. Administrators should instruct victims/witnesses that they should not discuss identification decisions with each other and explain to victims/witnesses that doing so could be harmful to the investigation.

F. Documenting the procedure

1. All interviews and identification procedures conducted with any victim/witness should be fully documented. Video-recordings should be used when practicable. Audio-recording is the preferred alternative. If neither video- nor audio-recording is possible, administrators should produce a detailed written report of the interview or identification procedure immediately following completion of the procedure.
2. A confidence statement should be obtained immediately after the victim/witness makes a decision. The exact words used by the victim/witness in expressing his/her degree of confidence should be documented.

Note: The Washington Association of Prosecuting Attorneys adopted an identical Model Policy on April 16, 2015.