

## EYEWITNESS IDENTIFICATION

<p style="text-align: center;">EVERETT POLICE DEPARTMENT POLICY &amp; PROCEDURE NO. <b>1.12</b></p>	<p>ISSUE DATE: 26 May 2011</p>
	<p>EFFECTIVE DATE: 26 May 2011</p>
<p style="text-align: center;">MASSACHUSETTS POLICE ACCREDITATION STANDARDS REFERENCED: <b>none</b></p>	<p>REVISION DATE: _____</p>

### I. GENERAL CONSIDERATIONS AND GUIDELINES

Police identification procedures are an important consideration for establishing the identity of a criminal offender. They are equally significant in clearing an innocent suspect. The police must, therefore, be careful to ensure that their eyewitness identification procedures are not conducted in an unnecessarily or impermissibly suggestive manner and that they do not contribute to mistaken identification.<sup>1</sup>

The identification of criminal offenders must be approached with extreme caution as the court may exclude evidence if it is improperly obtained. If improper identification procedures are used, a court may not only exclude the out-of-court identification, but can also, in certain circumstances, exclude subsequent in-court identification. The court will carefully examine the identification procedure and the manner in which it was conducted to determine whether the police influenced the witness, intentionally or unintentionally.

### II. POLICY

It is the policy of this department that:

- A. Persons subjected to procedures which are intended to lead to the identification of persons who are suspected of or charged with criminal offenses are afforded their Sixth Amendment right to counsel, when required.
- B. The Due Process provisions of the Fifth and Fourteenth Amendments, which require identification procedures utilized by

the police to comply with standards of fairness so as not to be unduly suggestive, are observed.

### **III. DEFINITIONS**

- A. *Show-up*: The presentation of one suspect to an eyewitness in a short time frame following the commission of a crime.
- B. *Photo Array*: The showing of several photographs of different individuals to an eyewitness for the purpose of obtaining identification.
- C. *Lineup*: The presentation of a number of individuals to an eyewitness for the purpose of obtaining identification.
- D. *Voice Lineup*: The presentation of a number of individuals to a witness for the purpose of obtaining an identification of a suspect's voice.

### **IV. PROCEDURES**

#### ***A. Right to Counsel During Identification Procedure***

- 1. There is no requirement for an attorney to be present when identification in the field is made of a suspect who has been apprehended during the period immediately after the commission of a crime. Immediately is generally considered to be within two hours.
- 2. There is no right to counsel under circumstances where identification takes place accidentally, i.e., in a manner that was not contrived, planned, or anticipated by the police.
- 3. There is no right to counsel for identification procedures involving photographs or composite drawings, whether conducted before or after the initiation of adversarial criminal proceedings.
- 4. Right to counsel begins when any "adversarial judicial proceeding" has been initiated "whether commenced by way of formal charge, preliminary hearing, indictment, information, or arraignment." <sup>2</sup>
  - a. Once a suspect has been arraigned or indicted, his/her right to have counsel present at any in-person identification procedure attaches.
  - b. No right to the presence of counsel exists prior, or simply because a complaint has been filed, even if an arrest warrant has issued.
    - 1) If counsel is present or readily available, it may be advisable to have counsel present, unless doing so will seriously delay the police investigation.

- 2) The presence of the suspect's attorney may contribute to a more fair and objective identification proceeding.
- 3) If counsel fails to object to certain aspects of the identification when it is conducted, the suspect may be held to have waived any objection later at a court proceeding.

### ***B. Due Process Considerations***

1. Due process requirements dictate that identifications be conducted in a fair, objective, and non-suggestive manner. Due process considerations are violated when identification procedures arranged and/or conducted by the police are so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny the defendant due process of law.<sup>3</sup>
2. In determining whether a specific identification procedure is unnecessarily suggestive, all of the circumstances surrounding the procedure must be considered.
3. The factors which will influence the court's determination of whether a specific identification procedure was unduly or unnecessarily suggestive include:
  - a. Whether police conduct was reasonable in light of the circumstances, e.g., suspect under arrest or only temporarily detained;
  - b. Amount of time between incident and identification;
  - c. Isolation of the suspect; whether the suspect is singled out in some manner;
  - d. Whether the police communicated to the witness their belief that the suspect committed the crime for which identification is sought to be made;
  - e. Whether the suspect is viewed by two or more witnesses simultaneously;
  - f. Existence of police urging witness to make identification; and
  - g. Existence of any exigency.

### ***C. Show-up Identification***

1. PROMPTNESS
  - a. Show-up identification procedures are a common police tool and should be used:
    - 1) Promptly after a crime has been committed where it is essential to an on-going police investigation; or
    - 2) Under exigent circumstances, such as the near death of the only available witness.

- b. Show-ups allow a witness to view a suspect while the memory is fresh.
- c. A show-up may be as likely to clear an innocent person as it is to identify a guilty one.

## 2. FAIRNESS

- a. Every field show-up or other one-on-one confrontation between a suspect and a witness that is arranged by the police must be as fair and non-suggestive as possible.<sup>4</sup>
- b. There is no requirement that an attorney be present.<sup>5</sup>

## 3. DETAINING THE SUSPECT

- a. A suspect may consent to a show-up.
- b. A person may be stopped and detained pursuant to a valid threshold inquiry. See department policy on **1.07 Stop, Frisk and Threshold Inquiries**.
- c. A suspect may be brought back to the scene of a crime or detained while a witness is brought to the suspect for the purpose of a show-up.<sup>6</sup>

## 4. LOCATION OF THE SHOW-UP

- 1) Bringing the Suspect to the Victim
  - 2) The suspect may be transported to the victim's location.<sup>7</sup>
  - 3) Although more intrusive than bringing the witness to the suspect, it is permissible if reasonable for the circumstances.
    - a) It is recommended that the suspect not be brought back to a crime scene. The crime scene may be contaminated by the suspect's presence.
    - b) DNA, hairs, or other trace evidence may be left at the scene by the suspect being brought there by police.
  - 4) A suspect should not be brought to the residence of a victim or witness.
- b. Bringing the Witness to the Suspect
    - 1) Transporting the witness to the suspect's location is the preferred method.
    - 2) Detention for a threshold inquiry is less intrusive and suggestive than detention and transportation.
  - c. Field Views: 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.<sup>8</sup>

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- d. Emergencies: When a show-up identification is arranged in an emergency situation, where a witness or a victim is in imminent danger of death or in critical condition in a hospital, and the circumstances are such that an immediate confrontation is imperative, the emergency identification procedure shall be conducted in an appropriate manner consistent with the following:
    - 1) Seek the permission of the hospital authorities or the patient's own physician to conduct the identification.
    - 2) Emergency identifications are subject to the fundamental requirements of fairness and must not be tainted by any suggestive remarks or gestures by the police.

## 5. SHOW-UP

### a. Police Actions

- 1) Police officers must not do or say anything that might convey to the witnesses that:
  - a) The suspect has admitted guilt;
  - b) Stolen property has been recovered;
  - c) Physical evidence has been seized; or
  - d) Officers believe that the suspect is guilty.
- 2) Officers should caution the witness that the subject may not be the offender.

### b. Viewing the Suspect

- 1) The suspect should be viewed by one witness at a time and out of the presence or hearing of other witnesses.
  - a) Witnesses who have viewed the suspect should not be permitted to communicate with those who have not.
  - b) The same suspect should not be presented to any witness more than once.
- 2) Where multiple witnesses are available to identify the subject, officers should permit the subject to be identified by only one or two witnesses. Once one or two witnesses have identified the subject, further identifications should be attempted by means of a photo array or lineup. The multiple methods of identification will provide corroboration.

- c. Caution: Clothing or articles found at the crime scene should not be placed on or in contact with a suspect.

- d. Instructions to Witness before viewing: In accordance with guidance from the Middlesex County District Attorney's Office the following instructions will be given to witnesses. (see **EPD Form 1.12A Show-Up ID Instructions**)

## 6. REPORTS

- a. A report of every attempted show-up, whether identification is made or not, shall be submitted.
- b. Officers shall make written notes of any identification and any statements made by witnesses at the time of show-up with the suspect. Officers should be particularly alert to note any spontaneous exclamations.
- c. Once a witness has indicated his/her opinion regarding the identity of the subject, the officer should ask the witness how certain [s]he is of the identification.
  - 1) Officers should not ask the witness to use a numerical scale, but rather encourage him/her to indicate certainty in his/her own words.
  - 2) All statements by the witnesses should be incorporated into the officer's report.
- d. All significant circumstances should be reported, including the time, place, and all persons present at the scene of the show-up.

### ***D. Photographic Identification***

#### 1. GENERALLY

- a. The use of photographs to establish or verify the identity of a criminal offender is a valuable investigative procedure. Although there is no right to an attorney during a photographic identification procedure, the same due process considerations requiring the procedure to be fair, objective, and non-suggestive apply.<sup>9</sup>
- b. Photographs for identification purposes should be displayed to witnesses as soon as possible after the commission of a crime. This is when their memory is still fresh and the opportunity for a positive identification is at its greatest.

#### 2. CREATING A PHOTO ARRAY

- a. Place the suspect's photograph in a group of at least six other similar type photographs of individuals (commonly referred to as "fillers").
  - 1) Fillers should be reasonably similar in age, weight, and general appearance.

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- 2) The goal in building the array is not to select filler photographs that look like the suspect, but rather ones that fit the description given by witnesses.
  - 3) Avoid using fillers that so closely match the suspect that a person familiar with the suspect would have difficulty distinguishing the fillers.
  - 4) If the subject has an unusual feature, such as a facial scar or disfiguration, attempt to select some fillers with the same type of feature, or artificially add or conceal the feature.
  - 5) Do not include more than one photograph of the same person.
- b. Try to use photographs of the same size and basic composition.
    - 1) It is preferable to avoid mixing color and black and white photographs.
    - 2) Avoid mixing mug shots with other images.
3. INSTRUCTIONS TO VICTIM/WITNESS
- a. The officer should carefully instruct the witness prior to showing him/her the array.
  - b. Preferably, the instructions should be read from a departmental form (**EPD Form 1.12B – Photo Array Instruction**), and the witness should be asked to sign the form indicating that [s]he understands the instructions.
  - c. The officer should also sign and date the form.
4. SHOWING A PHOTO ARRAY
- a. If possible, another officer should actually show the photographs.
  - b. If possible, the officer should be unaware of which photograph depicts the suspect.
    - 1) This technique, called blind administration, has been recommended by the National Institute for Justice, and is intended to ensure that the witness does not interpret a gesture or facial expression by the officer as an indication as to the identity of the suspect.
    - 2) The technique also allows the prosecution to demonstrate to the judge or jury at trial that it was impossible for the officer showing the photographs to indicate to the witness, intentionally or unintentionally, which photograph [s]he should select.

- 3) The investigating officer should either leave the room while the array is being shown by the second officer, or should stand back where the witness will not see him/her.
  - 4) If an investigating officer is present when a second officer is showing an array, [s]he must remain completely silent.
- c. When showing photographs to a witness:
- 1) The officer should show them one at a time to the witness.
  - 2) The officer should ask the witness simply whether or not [s]he recognizes the person, and tell the witness to take his/her time.
  - 3) When the witness signals for the next photograph, the officer should move the first photograph so that it is out of sight and ask the witness whether [s]he recognizes the next photograph.
  - 4) The procedure should be repeated until the witness has viewed each photograph, or until the witness identifies a subject.
  - 5) If the witness identifies a subject before all the photographs have been viewed, the officer should ask the witness whether [s]he wishes to view more photographs.
- d. If a witness asks to view the array a second time, the officer administering the identification should ask the witness if [s]he was able to make an identification from the original viewing.
- 1) 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 photographs a second time.
    - a) In such a case, the photographs should be shown to the witness in a different order.
- e. Once a witness has identified a suspect, the officer should ask the witness how certain [s]he is of the identification.
- 1) Officers should not ask the witness to use a numerical scale, but rather encourage him/her to indicate certainty in his/her own words.
  - 2) All statements by the witnesses should be incorporated into the officer's report.
  - 3) The witness should be asked to initial and date the back of the photograph selected.



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- f. In order to ensure the fairness of the procedure and to enhance the reliability of in-court identification, the photo array should be preserved in the same configuration as when the identification was made, together with full information about the identification process.

## 5. REPORTING

- a. A report of every photo array, whether an identification is made or not, shall be submitted. The report shall include:
  - 1) A summary of the procedure;
  - 2) The persons who were present;
  - 3) Instructions given to the witness by the officer (this should be accomplished by attaching the Photo Array Instruction Form to the report);
  - 4) Any statement or reaction by the witness; and
  - 5) Any comments made by the witness regarding the identification procedure.
- b. When an investigation has failed to identify a suspect, it may be advisable to have those eyewitnesses who had a good opportunity to clearly observe the criminal offender come to the police station to look through photographic files. However, officers should not resort to this procedure until other investigative avenues have been exhausted.
  - 1) Remove or hide any information on the photographs that might in any way influence the witness.
  - 2) Ensure that the files contain only one photograph of each individual and that the photographs are reasonably current.
  - 3) Do not refer to the photographs as “mug shots.”
  - 4) If photographs of various formats are used, ensure that several of each format are used.
  - 5) Permit the witness to look at a number of photographs before making his/her selection.
  - 6) Do not call to the attention of the witness any particular photograph.
  - 7) A report shall be filed following the procedure, regardless of whether identification is made. The report should describe the photographs viewed by the witness(es).
  - 8) Officers should be extremely cautious before charging a subject based on this type of identification alone.

## ***E. Lineup Identification***

### 1. GENERALLY

- a. All police lineups for possible eyewitness identification shall be conducted under the direction of **Commander Criminal Investigation Unit or his/her designee**, and, when feasible, after consultation with the District Attorney's office.
- b. A suspect cannot be detained and compelled to participate in a lineup without probable cause to arrest.<sup>10</sup>

### 2. SUSPECT RIGHTS

- a. Before any suspect who has been arraigned or indicted is shown to eyewitnesses in a lineup, the suspect must be specifically informed of:
  - 1) His/her right to have an attorney present at the lineup; and
  - 2) His/her right to be provided with an attorney without cost if [s]he is unable to afford such legal counsel.
- b. 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.<sup>11</sup>
- c. A suspect has no right to have counsel present at a lineup if [s]he has not been arraigned or indicted.
- d. If the suspect has a right to have an attorney present, permit him/her to call for his/her own attorney or take him/her to court so that an attorney may be appointed.
- e. If an attorney has been retained by the suspect or appointed by the court, such attorney shall be notified of the time and place of the identification procedure and the circumstances relating to the offense charged.
- f. If the suspect knowingly and voluntarily waives his/her right to have an attorney present (preferably in writing), the lineup may then be held with every effort to ensure that the suspect is protected from any prejudicial procedures.

### 3. REFUSAL TO PARTICIPATE IN A LINEUP

- a. After a person has been arrested, [s]he may be required to participate in a lineup regarding the crime for which [s]he was arrested.<sup>12</sup>
- b. A suspect may lawfully refuse to participate in a lineup only if [s]he has a right to have counsel present (post arraignment/indictment) and the counsel is absent through no fault of the suspect or his/her attorney.
  - 1) If the suspect refuses to participate:

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- a) [S]he should be informed that [s]he has no legal right to do so and that his/her refusal can be used as evidence against him/her in court.
  - b) If the suspect refuses to participate in the lineup, arrangements may be made for an alternative identification procedure.
  - c) In serious criminal cases, the District Attorney's office may be asked to apply for a court order to compel the suspect to participate in a lineup.

#### 4. PREPARING THE LINEUP

- a. Select a group of at least five or six other persons who fit the description of the subject as provided by the witness(es).
  - 1) The goal in building the lineup is not to select fillers that look like the suspect, but rather ones that fit the description given by witnesses.
  - 2) Avoid using fillers that so closely match the suspect that a person familiar with the suspect would have difficulty distinguishing the fillers.
  - 3) If the subject has an unusual feature such as a facial scar or disfiguration, attempt to select some fillers with the same type of feature, or artificially add or conceal the feature.
- b. Do not display a suspect in any lineup that is not suitable and properly composed.
- c. Advise the accused that [s]he may take any position in the lineup that [s]he prefers and may change positions prior to being viewed by each new witness.
- d. If there are two or more suspects of a particular crime, present each suspect to witnesses in separate lineups. Different fillers should be used to compose each lineup.
- e. The witness shall view the suspect and fillers one at a time. The line-up shall be set up in such a way so that the participants who are not being viewed by the witness are out of sight.
- f. All persons in the lineup must be numbered consecutively and be referred to only by number.
- g. A complete written record of the lineup proceedings shall be made and retained, including the name of each lineup participant.
- h. The entire lineup procedure shall be recorded, photographed, or videotaped for possible future court presentation.

## 5. SUSPECT'S ATTORNEY

- a. When an attorney for the suspect is present, the attorney should be permitted to make reasonable suggestions regarding the composition of the lineup 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 lineup report.
- b. Allow counsel representing the accused sufficient time to confer with his/her client prior to the lineup.
- c. Once the lineup is commenced, the suspect's attorney should function primarily as an observer and [s]he should not be permitted to converse with the lineup participants, or with the witnesses, while the lineup is underway.
- d. The suspect's attorney at a lineup is not entitled to hear any discussions between a witness and the police.
- e. The suspect's attorney is not legally entitled to the names or addresses of the witnesses attending a lineup if the suspect has not yet been arraigned or indicted.<sup>13</sup> If an attorney in such a situation insists on having information about lineup witnesses, advise him/her to direct his/her request to the District Attorney's office.

## 6. INSTRUCTIONS FOR THE WITNESS

- a. The officer should carefully instruct the witness prior to showing him/her the lineup.
- b. Preferably, the instructions should be read from a departmental form (**EPD Form 1.12C - Lineup Instruction**), and the witness should be asked to sign the form indicating that [s]he understands the instructions.
- c. The officer should also sign and date the form.

## 7. CONDUCTING THE LINEUP

- a. Ensure that witnesses are not permitted to see the accused or shown any photographs of the accused immediately prior to the lineup.
- b. Ensure that only one witness views the lineup at a time and that witnesses are not permitted to speak with one another during the proceedings.
- c. Scrupulously avoid using statements, clues, casual comments, or providing unnecessary or irrelevant information that in any manner may influence the witness' decision-making process or perception.
- d. If possible, the officer should be unaware of which person in the lineup is the suspect.

- 1) This technique, called blind administration, has been recommended by the National Institute for Justice, and is intended to ensure that the witness does not interpret a gesture or facial expression by the officer as an indication as to the identity of the suspect.
- 2) The technique also allows the prosecution to demonstrate to the judge or jury at trial that it was impossible for the officer showing the lineup to indicate to the witness, intentionally or unintentionally, which person [s]he should select.
  - a) The investigating officers may be present during the line-up, but must position themselves in such a way that they cannot be seen by the witness(es).
  - b) If an investigating officer is present, [s]he must remain completely silent while the witness is viewing the lineup.
- e. The witness shall view the suspect and fillers one at a time. The participants who are not being viewed by the witness should be out of sight.
- f. Make a written notation of any identification made (or any failure to make an identification), including any spontaneous exclamation or reaction by a witness, and any comments made by the witness regarding the identification procedure.
  - 1) Once a witness has indicated his/her opinion regarding the identity of the subject, the officer should ask the witness how certain [s]he is of the identification.
  - 2) Officers should not ask the witness to use a numerical scale, but rather encourage him/her to indicate certainty in his/her own words.
  - 3) All statements by the witnesses should be incorporated into the officer's report.
- g. During a lineup, 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.<sup>14</sup>
  - 1) 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.
  - 2) All lineup participants shall be asked to perform the same actions.
  - 3) Each lineup participant may also be directed to speak for voice identification purposes. See **Voice Identification** in this policy.

## 8. REPORTING

- a. A report of every lineup, whether an identification is made or not, shall be submitted.
- b. The report shall include a summary of the procedure, the persons who were present for it, instructions given to the witness by the officer (this should be accomplished by attaching the Lineup Instruction Form to the report), any statement or reaction by the witness, and any comments made by the witness regarding the identification procedure.

## ***F. Voice Identification***

### 1. GENERALLY

- a. Although considerably less common than visual identifications, voice identification lineups may be helpful to criminal investigations where the victim or other witness was blind, the crime took place in the dark, the subject was masked, the witness' eyes were covered by the perpetrator, or the witness was never in the same room with the perpetrator but did hear his/her voice.
- b. If officers wish to conduct a voice identification lineup procedure with a witness who also saw the subject, the officer must first consult with the District Attorney's Office.

### 2. SUSPECT RIGHTS: As with any in-person identification or confrontation, if the suspect has been arraigned or indicted, [s]he has a right to the presence of counsel at the voice identification procedure.

### 3. PREPARATIONS

- a. Where a voice identification is attempted, the following procedures should be employed to the fullest extent possible:<sup>15</sup>
  - 1) At least six persons whose voices will be listened to by the witness should participate in the voice identification lineup. One-on-one confrontations should be avoided.
  - 2) The suspect and other participants shall not be visible to the witness. This may be accomplished by using a partition, or similar means.
  - 3) All participants, including the suspect, shall be instructed to speak the same words in the same order.
  - 4) If the victim or witness recalls hearing the perpetrator use specific words, those words shall not be ones the suspect and other participants are instructed to speak; the lineup participants should speak neutral words in a normal tone of voice.<sup>16</sup>

- 5) When both a visual and voice lineup are done, the lineup participants shall be called in a different order and by different numbers.<sup>17</sup>
- 6) If there are two or more suspects of a particular crime, present each suspect to witnesses in separate lineups. Different fillers should be used to compose each lineup.

#### 4. CONDUCTING THE VOICE IDENTIFICATION LINEUP

- a. If possible, the officer should be unaware of which person in the lineup is the suspect.
  - 1) This technique, called blind administration, has been recommended by the National Institute for Justice, and is intended to ensure that the witness does not interpret a gesture or facial expression by the officer as an indication as to the identity of the suspect.
  - 2) The technique also allows the prosecution to demonstrate to the judge or jury at trial that it was impossible for the officer showing the lineup to indicate to the witness, intentionally or unintentionally, which person [s]he should select.
    - a) The investigating officers may be present during the line-up, but must position themselves in such a way that they cannot be seen by the witness(es).
    - b) If an investigating officer is present, [s]he must remain completely silent while the witness is viewing the lineup.
- b. Officers should avoid any words or actions that suggest to the voice witness that a positive identification is expected or whom they expect the witness to identify.

#### 5. INSTRUCTIONS TO THE WITNESS

- a. The officer should carefully instruct the witness prior to conducting the voice identification lineup.
- b. Preferably, the instructions should be read from a departmental form (**EPD Form 1.12D Voice Identification Instruction**), and the witness should be asked to sign the form indicating that [s]he understands the instructions.
- c. The officer should also sign and date the form.

#### 6. REPORTING

- a. The result of any voice identification lineup procedure shall be detailed in the officer's report.
- b. The report shall include a summary of the procedure, the persons who were present for it, instructions given to the

witness by the officer, any statement or reaction by the witness, and any comments made by the witness regarding the identification procedure.

### ***G. Drawings and Identi-Kit Composites***

1. An artist's sketch, computerized drawing, composite, or other depiction should be considered in a major crime investigation when a witness displays a good recollection of the physical appearance and features of the criminal offender but has not been able to identify a suspect from available photographs.
2. Due process principles applicable to all identification procedures apply to artist's sketches, computerized drawings and composites.
3. Two or more witnesses may collaborate in preparing the drawing or sketch, provided that officers do not use procedures that are unnecessarily or unduly suggestive.
4. Prior to doing so, officers should first separate the witnesses and take a detailed statement and description from each one.

### ***H. Police Station and Courtroom Identification***

1. Prior to conducting any courthouse identification procedure, police may consult the District Attorney's office.
  - a. The same right to an attorney and the same due process suggestiveness considerations that apply to all other identification procedures also apply to station house and courtroom identifications.
  - b. If the suspect has been arraigned or indicted, [s]he has a right to have counsel present at any in-person identification/confrontation.
  - c. Prior to arraignment or indictment, no right to counsel exists.<sup>18</sup>
2. Live confrontations and informal viewings of the suspects by witnesses must be done in such a manner as to minimize any undue suggestiveness.
  - a. Officers shall not state or suggest that the suspect has been arrested or booked or that [s]he has made any confession or incriminating statement or that any incriminating evidence has been uncovered.
  - b. The witness' identification, particularly if it takes place in a police station or courtroom, must be a result of his/her recollection of the appearance of the perpetrator and must not be unduly influenced by information or suggestions originating from the police.



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## ***I. Hypnotically Aided Identification***

1. Hypnotically aided testimony is not admissible at trial. Memory recalled prior to hypnosis which was the subject of a hypnotic session may be excluded as hypnotically aided.<sup>19</sup>
2. In light of the serious consequences which could result from asking or permitting a witness to undergo a hypnotic session, such a procedure shall not be undertaken until the entire matter has been reviewed by the Chief of Police, the District Attorney's office, and appropriate hypnosis experts.

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<sup>1</sup> *Com. v. Hill*, 64 Mass. App. Ct. 131, 831 N.E.2d 923 (2005).

<sup>2</sup> *Com. v. Lopes*, 362 Mass. 448, 287 N.E.2d 118 (1972).

<sup>3</sup> *Com. v. Ellis*, 432 Mass. 746 (2000); *Com. v. Odware*, 429 Mass. 231, 235 (1999).

<sup>4</sup> *Com. v. Storey*, 391 N.E.2d 898, 378 Mass. 312 (1979).

<sup>5</sup> *Com. v. Bumpus*, 238 N.E.2d 343, 354 Mass. 494 (1968).

<sup>6</sup> *Com. v. Crowley*, 29 Mass. App. Ct. 1, 566 N.E. 2d 1043.

<sup>7</sup> *Com. v. Crowley*, 29 Mass. App. Ct. 1, 566 N.E. 2d 1043.

<sup>8</sup> *Com. v. Walker*, 14 Mass. App. Ct. 544, 441 N.E. 2d 261 (1982).

<sup>9</sup> *U.S. v. Ash*, 413 U.S. 300 (1973).

<sup>10</sup> *Com. v. Bumpus*, 209 N.E.2d 167, 362 Mass. 672 (1972).

<sup>11</sup> *Com. v. Torres*, 442 Mass. 554 (2004).

<sup>12</sup> *U.S. v. Wade*, 388 U.S. 218 (1967).

<sup>13</sup> *U.S. v. Wade*, 388 U.S. 218 (1967).

<sup>14</sup> *U.S. v. Wade*, 388 U.S. 218 (1967).

<sup>15</sup> *Com. v. Marini*, 378 N.E.2d 51, 375 Mass. 510 (1978).

<sup>16</sup> *U.S. v. Wade*, 388 U.S. 218 (1967).

<sup>17</sup> *Com. v. Demaria*, 703 N.E.2d 1203, 46 Mass. App. Ct. 114 (1999).

<sup>18</sup> *Com. v. Key*, 19 Mass. App. Ct. 234, 472 N.E. 2d, 1381 (1985).

<sup>19</sup> *Com. v. Kater*, 447 N.E.2d 1190, 388 Mass. 519 (1983).