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ISSUES TO DEVELOP AT TRIAL

April 2018 - Vol. 3, Issue 3

This issue focuses on recent legislation allowing photo-array identifications into evidence (upending the longstanding common law rule). This legislation became effective July 1, 2017, and, while it puts in place certain requirements before this evidence can be admitted, we can expect that law enforcement will find a way to subvert these requirements, or honor them in the breach.

Below, we outline the new legislation and provide some practice tips.

All of the information and all of the ideas we proffer are thanks to and courtesy of Peter Mitchell (Director of Training) and John Schoeffel (Special Litigation and Training Units) of the Legal Aid Society, who assembled an outstanding CLE on the new legislation, much more comprehensive than our summary below. We thank them for generously permitting us to share their ideas with practitioners statewide who may not have had access to their CLE and the excellent materials they created.

A. The New Legislation

- **C.P.L. § 60.30.** This statute **formerly** allowed into evidence just testimony from the witness about out-of-court identifications of the defendant in person, *i.e.*, in either a lineup or a showup. Before the new legislation, the common law precluded DAs from admitting pre-trial photo IDs into evidence based primarily on the longstanding concern that jurors would assume that the defendant has a criminal record since the police already possessed his photo. See People v. Caserta, 19 N.Y.2d 18 (1966).
- The new statute adds a convoluted provision permitting introduction of a witness's identification from pictures, photos, or other recorded reproductions of the defendant, as long as made pursuant to a "blind" or "blinded" procedure. The new statute does nothing to address the original concern expressed by the Court of Appeals in Caserta about jurors inferring criminality from the defendant's photograph.
- "Blind" and "blinded" are defined terms in the new legislation, see C.P.L. § 60.25(1) (c):
 - *Blind (aka "double blind") = at the time the identification is made from the photo array, the cop doesn't know which person in the array is the suspect.*
 - *"Blinded" = cop doesn't know "where the suspect is in the array viewed by the witness."* How will this work? DCJS protocols (more about them below) suggest that the cop should hand the array to the witness concealed in a folder and try not to be in the witness's line of sight during the viewing. BUT, even assuming good faith efforts to comply, blinded does not prevent the cop (who

actually knows who the suspect is) from subtly reinforcing the witness's identification afterwards.

While there is quite a bit of authority that “blind” procedures produce more reliable identifications, there is virtually no research around the dubious notion that “blinded” procedures reduce misidentifications. The new statute is problematic insofar as it needlessly allows police to use this untested and problematic procedure instead of the preferable blind/double blind. You should expect that the police will use the disfavored blinded procedure.

- Failure to follow a “blind” or “blinded” procedure means only that the photo-array identification is statutorily inadmissible. It does NOT mean that the photo array is constitutionally suggestive.
- Constitutional suggestiveness is evaluated at a Wade hearing (which, of course, you are still absolutely entitled to). And you will still only get an independent source hearing (and the golden opportunity to question the identification witness prior to trial) if an identification is suppressed on constitutional grounds (such as Wade/suggestiveness, search and seizure, or right to counsel violations). Violation of statutory procedures alone will not get you an independent source hearing, it just keeps the photo array identification out (no small thing, but not the whole ball of wax).
- **C.P.L. 710.30 notice:** If the prosecutor intends to introduce the photo-array identification at trial, he/she must provide notice of the identification within 15 days of arraignment, late notice permitted with good cause. Otherwise, preclusion.
 - **WARNING:** If the police think your client is the perpetrator, they can use a non-blind or non-blinded procedure, knowing it won't be admissible, but to obtain an identification. Since they don't plan on introducing it, no 710.30 notice needed. They can follow that with a properly conducted photo array procedure which would be admissible.

YOU MAY NEVER LEARN ABOUT THE PRIOR ID PROCEDURE UNLESS YOU ASK (THE DA, THE COP AT THE WADE). Yet that first procedure may be Brady. Or, the second procedure could have turned a tentative identification into a certain one. At the least, it comprises a “multiple identification” procedure which DCJS-issued protocols, discussed below, deem inadvisable.

B. DCJS “Best Practices” Protocols

- There are now DCJS (Division of Criminal Justice Services)-issued “best practices” protocols with respect to these “blind” and “blinded” procedures. **Make these best practices your new best friend.** They can become fodder for questioning at the Wade and cross-examination at trial. **We've attached the full DCJS protocols to this newsletter and discuss some of the key best practices in Section C., below.**

- The protocols also address best practices for live line-ups, see pp. 8-13, some of which overlap with the photo array protocols.
- The protocols also include model forms for administrators to use for line-up and photo array procedures.

C. Practice Tips

- Use the Wade for fact-gathering/discovery: question the cop-witness about the procedures employed to learn about potential non-compliance with “best practices.” The Wade is your chance to set up later arguments to the jury about police “corner cutting” — something that really resonates with jurors at trial — but you want to know what you’re looking at before bringing it before the jury at trial.
- Based on the protocols, you can question the police witness(es) about the following:
 - type of procedure (blind or blinded): per the protocols, blind is “preferable” to blinded, see p. 4 of protocols.
 - choice of fillers: per the protocols, fillers should not only be similar in appearance to the suspect, but the original description of the suspect should be taken into account as well, see p. 2.
 - conduct of procedure - if blinded, how was this logistically accomplished? See pp. 4-5 (describing the “two person shuffle” and the “one person shuffle,” along with other protocols for administering the blinded procedure);
 - number of identification procedures involving the same witness: per the protocols, multiple identification procedures by the witness involving the same suspect are not “advisable,” see p. 5.
 - efforts to record procedure: per the protocols, “where practicable” and with witness’s consent, police should video or audio record ID procedure, see p. 6.
 - what was said to the witness before the procedure: per the protocols, neutral instructions should be given to the witness before the viewing (e.g., perpetrator “may or may not be pictured”; witness should not assume administrator knows who the perpetrator is), see pp. 3-4.
 - witness confidence statement taken? Per the protocols, cop should obtain this after an identification, see pp. 6, 7.

If you or your investigator interviews an ID witness who looked at photos, be sure to ask about the logistics of the procedure; everything the officer said after the ID; and any other facts relating to other Best Practices that the witness would know. This may be your only chance to learn the basis for challenging police non-compliance with the protocols.

- If the hearing judge tries to limit your cross into the protocols because they are not themselves a basis of suppression, you can push back by pointing out that the steps addressed in the protocols are relevant at the Wade since they relate to factors bearing on the constitutional question of unnecessary suggestiveness. The protocol violations if combined with the other flaws could be relevant to that determination.

A good example of how the protocols relate to suggestiveness is the phenomenon of post-procedure reinforcement (a distinct danger with blinded procedures). Police cues to the witness after the selection can (you can argue) be a basis to find undue suggestiveness even if the improper police action didn't "cause" the identification. You can cite Raheem v. Kelly, 257 F.3d 122, 135 (2d Cir. 2001) for support: "The defendant's protection against suggestive identification procedures encompasses not only the right to avoid methods that suggest the initial identification, but as well the right to avoid having suggestive methods transform a selection that was only tentative into one that is positively certain".

- You can also argue that you have the right to cross on all factual matters regarding how the identification procedures occurred, even if the individual question would not directly "require" suppression. See People v. Williamson, 79 N.Y.2d 799 (1991)(broad right to cross at suppression hearings where questions are relevant to a potentially applicable suppression theory). And you have the right to question how the procedure was conducted generally, since if it wasn't blinded or blind, you'd be entitled to preclusion of testimony about the procedure under C.P.L. § 60.25(1)(c).
- Request photo-array specific Rosario for the Wade hearing: written instructions, photo array case information sheet; "showing the photo array" form. As noted above, all of these forms are contained in the attached protocols. There are also similar forms for lineups.
- Depending on the information generated from the Wade, impeach at trial with references to the DCJS:

Consider not referring to the "best practices" document directly at the Wade. Save completing the impeachment with references to the DCJS protocols for trial.

- **PhotoManager/PIMS:** IDs made from the photo display machine would seem to fit within CPL § 60.30 since the police usually do not yet have a target. Thus, such identifications are necessarily blinded or blind. But the police must preserve a record of the screens/photos viewed or a presumption of suggestiveness attaches which the DA must overcome to meet their burden of going forward. See People v. Holley, 26 N.Y.3d 514 (2015).

RECAP: So while police failure to adhere to the DCJS "best practices" protocols will not automatically result in suppression of evidence, such failure could contribute to such a finding and does mean good cross at trials (after first crossing on it at hearings to learn what happened).

Page 71

Identification Procedures: Photo Arrays and Line-ups

Municipal Police Training Council
Model Policy

and

Identification Procedures Protocol and Forms

*Promulgated by the
Division of Criminal Justice Services
Pursuant to Executive Law 837 (21)*

June 2017



**Division of Criminal
Justice Services**

**Municipal Police
Training Council**

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Division of Criminal
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Municipal Police
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**Identification Procedures: Photo Arrays and
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THE 2017 EDITION IS PUBLISHED BY THE:

New York State Division of Criminal Justice Services
Office of Public Safety
80 South Swan Street
Albany, New York 12210

<http://www.criminaljustice.ny.gov>

VERSION June 2017

PRINTED IN THE UNITED STATES OF AMERICA

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

The Identification Procedures: Photo Arrays and Line-ups Model Policy is intended to allow for the individual needs of each of the police departments in New York State regardless of size or resource limitations. This model policy has been promulgated as the protocol and forms by DCJS pursuant to subdivision 21 of section 837 of the Executive Law of New York.

The Municipal Police Training Council (MPTC) approved the model policy in June 2017.

Acknowledgements

The District Attorney's Association of the State of New York "Photo Identification Guidelines", the District Attorney's Association of the State of New York "Line-up Procedure Guidelines", the International Association of Chiefs of Police "Eyewitness Identifications Model Policy", the National Academy of Sciences report titled: "Identifying the Culprit: Assessing Eyewitness Identification", and the recommendations made by the New York State Justice Task Force in their document titled: "Recommendations for Improving Eyewitness Identifications" served as a basis for this model policy.

The New York State Division of Criminal Justice Services (DCJS) acknowledges the extensive work done by the following associations and agencies:

District Attorney's Association of the State of New York

New York State Association of Chiefs of Police

New York State Police

New York City Police Department

New York State Sheriff's Association

New York State Office of Victim Services

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

I Purpose

Executive Law §837 subdivision 21 directs the Division to establish a standardized protocol and forms for the administration of photo array and live lineup identification procedures, and this document was developed to meet that requirement. This protocol is grounded in evidence-based principles and is intended to meet the needs of all police departments in New York State regardless of size or resource limitations.

In 2017 New York State's Criminal Procedure Law (CPL) was amended to permit the admissibility of photo array evidence where the procedures were conducted with safeguards to ensure accuracy. As a result of these changes, the prosecution is permitted to introduce testimony in a direct case by the person who made a photo identification – **so long as the procedure is conducted in a blind or blinded manner.** The protocols outlined here were developed to further structure the administration in a method and manner designed to ensure fair and reliable eyewitness identification procedures.

The Municipal Police Training Council has not only endorsed this protocol and forms, but also has implemented an online training program for all current and new police officers pursuant to subdivision 4 of section 840 of the Executive Law. All police agencies should have written policies that guide the administration of eyewitness identification procedures that comply with the CPL sections discussed herein. Policies based on these protocols will meet this requirement.

II Definitions

- A. **Photo array:** A collection of photographs that are shown to a witness to determine if the witness can recognize a person involved with the crime.
- B. **Line-up:** A collection of individuals, organized in a row, who are shown to a witness to determine if the witness can recognize a person involved with the crime.
- C. **Suspect:** Person the police believe has committed the crime.
- D. **Filler:** A person, other than the suspect, who is used in either a live line-up or a photo array.
- E. **Administrator:** The person who is conducting the identification procedure.
- F. **Blind Procedure:** An identification procedure where the administrator does not know the identity of the suspect.
- G. **Blinded Procedure:** An identification procedure where the administrator may know who the suspect is, but by virtue of the procedure's administration, the administrator does not know where the suspect is in the array viewed by the

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

witness. This procedure is designed to prevent the administrator from being able to inadvertently provide cues to the witness.

- H. **Confidence Statement:** A statement from an eyewitness immediately following their identification regarding their confidence or certainty about their identification. The witness should be asked to provide their level of certainty in their own words as opposed to using a numerical scale.

III Photo Arrays

A. Selection of fillers

1. Fillers should be similar in appearance to the suspect in the array.
2. While ensuring that the array is not unduly suggestive, the original description of the suspect should be taken into account when selecting fillers to be used.
3. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features, or other distinctive characteristics.
4. An administrator should not use a filler if the administrator is aware that the filler is known to the witness.
5. There should be at least five fillers, in addition to the suspect.
6. Only one suspect should be in each array.
7. If there is more than one suspect, then different fillers should be used in separate arrays for each suspect.
8. Photo quality, color and size should be consistent. Administrators should ensure that the photos do not contain any stray markings or information about the subject. Color and black and white photos should not be mixed.
9. Any identifying information contained on any of the photos should be covered and those areas of the other photos used should be similarly covered.

B. Inviting the witness to view the array

1. When a suspect is known and the investigator calls a witness to arrange for the viewing of a photo array, the investigator should simply advise the witness that he/she intends to conduct an identification procedure and should not say anything about the suspect. For example, the investigator should say to the witness: "We'd like you to come in to view a photo array in connection with the crime committed on *(date and location)*."

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

2. The investigator should avoid addressing whether or not a person is in custody.
3. Investigators should give no opinion on their perception of the witness's ability to make an identification.
4. Investigators should not inform the witness about any supporting evidence such as confessions, other identifications, or physical evidence that may have been obtained.
5. Witnesses should be prevented from speaking to the victim and any other witnesses about the identification procedure when they arrive to view the array.

C. Instructions to witness

1. Consideration should be given to providing written instructions to the witness. The instructions should be communicated in various languages when appropriate. The instructions should be read to the witness and signed by the witness after being read.
2. Before the procedure begins, the administrator should tell the witness what questions will be asked during the identification procedure.
3. The investigator should tell the witness that as part of the ongoing investigation into a crime that occurred on *(date)* at *(location)* the witness is being asked to view the photo array to see if the witness recognizes anyone involved with the crime.
4. These instructions let the witness know that they should not seek assistance from the administrator in either making a selection or confirming an identification. They also address the possibility of a witness feeling any self-imposed or undue pressure to make an identification. The instructions are as follows:
 - a. The perpetrator may or may not be pictured.
 - b. Do not assume I know who the perpetrator is.
 - c. I want you to focus on the photo array and not to ask me or anyone else in the room for guidance about making an identification during the procedure.
5. Instructions to the witness about the quality of the photographs.

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

- a. Individuals presented in the photo array may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
 - b. Photographs may not always depict the true complexion of a person; it may be lighter or darker than shown in the photo.
 - c. Pay no attention to any markings that may appear on the photos, or any other differences in the type or style of the photographs.
6. The witness should be informed that if they make an identification at the conclusion of the procedure they will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind. Inform the witness that this question is not intended to suggest how certain or uncertain he/she might be about an identification. Every witness who makes an identification is asked this question.
 7. The witness should be advised that the investigation will continue regardless of whether or not they make an identification.
 8. Where the procedure is to be recorded by the use of audio or video, the witness should be informed prior to the start of the procedure, and their consent should be requested prior to the recording.
 - a. The witness should sign the form indicating their consent or lack of consent.
 - b. If the witness does not consent, the officer should not record the procedure.
- D. Administering the procedure
1. Photo arrays must always be conducted using either a "blind procedure" or "blinded procedure". A "blind" procedure is preferable, where circumstances allow and it is practicable.
 2. If the procedure is blinded, the administrator should handle and display the array so that the administrator does not know suspect's position in the array until the procedure has completed.
 3. Two methods that can be used to successfully accomplish a blinded procedure are:

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

- a. “Two person shuffle” – the array is assembled by someone other than the administrator and then it is placed into an unmarked folder for the administrator.
 - b. “One person shuffle” – multiple arrays are created by the administrator and the suspect’s position is different in each. Three sealed envelopes containing the arrays are provided to the witness who selects one to use. The envelopes should be identical and free of any markings. The witness should sign and date the two unused envelopes across the seal. These envelopes should also be preserved.
4. Regardless of the method of administration that is to be used, the administrator should be positioned in such a way so that they are not in the witness’ line of sight during the viewing of the array. Where practicable, the administrator should still be able to view the witness and hear what they say.
 5. If there are multiple witnesses viewing the array, they should be prevented from speaking to each other about the identification procedure before, during, and after the process.
 6. The witnesses must view the array separately. Multiple copies of the same array may be used for the same suspect for each new witness viewing the array.
 7. To protect the integrity of the identification procedure, the administrator must remain neutral so as not to, even inadvertently, suggest a particular photograph to the witness.
 8. Attention should be given to the location of the procedure so that the witness is not influenced by items in the room such as wanted posters or BOLO (be on the lookout) information.
 9. Generally, it is not advisable for a witness to be involved in multiple procedures involving the same suspect.
- E. Post viewing questions
1. After viewing the array ask the witness the following questions:
 - a. Do you recognize anyone?
 - b. If so, what number photograph do you recognize?
 - c. From where do you recognize the person?

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

2. If the witness' answers are vague or unclear, the administrator will ask the witness what he or she meant by the answer.
3. Confidence Statement
 - a. Ask the witness to describe his/her certainty about any identification that is made.
 - b. Ask the witness to use his/her own words without using a numerical scale. For example, say, "Without using numbers, how sure are you?"

F. Documentation

1. Document any changes made to any of the photographs used.
2. Document where the procedure took place, who was present, the date and time it was administered.
3. Preserve the photo array in the original form that was shown to each witness.
4. Each witness should complete a standardized form after viewing the array and the actual array used should be signed and dated by each witness.
5. Recording the Procedure
 - a. The entire identification procedure should be memorialized and documented. Where practicable and where the witness' consent has been gained the procedure should be memorialized using audio or video recording.
 - b. Where the procedure is to be recorded by the use of audio or video, the witness' consent should be obtained and documented on a form prior to recording. If the witness does not consent to the recording, the officer should not record the identification procedure and should request that the witness sign a form saying he/she refused to be recorded.
 - c. Audio or video recording may not always be possible or practicable. Some reasons that may prevent the identification procedure from being recorded include, but are not limited to:
 - (i) If it is law enforcement's belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant;

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

- (ii) recording equipment malfunctions;
 - (iii) recording equipment is not available because it was otherwise being used;
 - (iv) the identification procedure is conducted at a location not equipped with recording devices and the reasons for using that location are not to subvert the intent of this policy;
 - (v) inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel; or
 - (vi) a lack of consent from the witness.
6. Any physical or verbal reaction to the array should be memorialized in a standardized manner. If this is done in writing, anything said by the witness should be verbatim.
7. The confidence statement should be documented verbatim.
8. Where an identification is made, complete a CPL 710.30 Notice. Note: Failure to provide this notice could prevent its use in court.
- G. Speaking with the witness after the procedure
- 1. The administrator, or other appropriate person, should document the statements, comments or gestures of the witness regarding the identification procedure before talking with the witness about next steps.
 - 2. Once the identification procedure is concluded and documented, the administrator can talk to the witness about how the case will proceed or what the next steps in the case may be.
 - 3. The administrator should not comment or make gestures on the identification itself by saying things such as: "Great job" or "We knew you would recognize him" or even nodding his/her head in agreement.
 - 4. The witness should be told not to discuss what was said, seen, or done during the identification procedure with other witnesses, nor should the investigator discuss any other identification procedures with the witness.
- H. All members who will be involved in the administration of a photo array shall receive training on how to properly administer photo arrays.

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

IV Live Line-ups

A. Selection of fillers

1. Fillers should be similar in appearance to the suspect in the line-up.
2. While ensuring that the array is not unduly suggestive, the original description of the suspect should be taken into account when selecting fillers to be used.
3. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features, or other distinctive characteristics.
4. An administrator should not use a filler if the administrator is aware that the filler is known to the witness.
5. Where practicable there should be five fillers, in addition to the suspect, but in no case, should there be less than four fillers used.
6. Only one suspect should appear per line-up.
7. If necessary, all members of the line-up should be seated to minimize any differences in height.
8. If there is more than one suspect, then different fillers should be used in separate line-ups for each suspect.
9. The suspect should be allowed to pick his position within the line-up. If a prior identification was made using a photo array that number should be avoided unless insisted upon by the suspect.
10. The fillers must be instructed not to speak with each other or make unnecessary gestures. All members of the line-up should be instructed to remain still, hold the placard, and look forward unless instructed otherwise by the security officer.

B. Inviting the witness to view the line-up

1. When an investigator calls a witness to arrange for the witness to view a line-up, the investigator should simply ask the witness to come in for the identification procedure and should not say anything about the suspect. For example, the investigator should say to the witness: "We'd like you to come in to view a line-up in connection with the crime you witnessed on (*date and location*)."
2. Investigators should give no opinion on their perception of the witness' ability to make an identification.

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

3. The investigator should avoid addressing whether or not a person is in custody.
4. Investigators should not inform the witness about any supporting evidence such as confessions, other IDs, or physical evidence that may have been obtained.
5. Witnesses should be prevented from speaking to the victim or any other witnesses about the identification procedure when they arrive to view the line-up.

C. Instructions to witness

1. Consideration should be given to providing written instructions to the witness. The instructions should be communicated in various languages when appropriate. The instructions should be read to the witness and signed by the witness after being read.
2. Before the procedure begins, the administrator should tell the witness what questions will be asked during the identification procedure.
3. The investigator should tell the witness that as part of the ongoing investigation into a crime that occurred on *(date)* at *(location)* the witness is being asked to view the line-up to see if the witness recognizes anyone involved with that crime
4. These instructions let the witness know that they should not seek assistance from the administrator in either making a selection or confirming an identification. They also address the possibility of a witness feeling any self-imposed or undue pressure to make an identification. The instructions are as follows:
 - a. The perpetrator may or may not be present.
 - b. Do not assume I know who the perpetrator is.
 - c. I want you to focus on the line-up and not to ask me or anyone else in the room for guidance about making an identification during the procedure.
 - d. Individuals presented in the line-up may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

5. Instructions to the witness about line-up members moving, speaking, or changing clothing:
 - a. Consideration should be given to telling the witness that the line-up members can be asked to speak, move or change clothing, if requested.
 - b. If one line-up member is asked to speak, move, or change clothing then all the line-up members will be asked to do the same.
 6. The witness should be informed that if they make an identification at the conclusion of the procedure they will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind. Inform the witness that this question is not intended to suggest how certain or uncertain he/she might be about an identification. Every witness who makes an identification is asked this question.
 7. The witness should be advised that the investigation will continue regardless of whether or not they make an identification.
 8. Where the procedure is to be recorded by the use of audio or video, the witness should be informed prior to the start of the procedure, and their consent should be requested prior to the recording.
 - a. The witness should sign the form indicating their consent or lack of consent.
 - b. If the witness does not consent, the officer should not record the procedure.
- D. Administering the procedure
1. Where practicable, taking into account resource limitations, a blind procedure should be used to conduct and administer a line-up, but is not required.
 2. After the instructions are given, the administrator – whether the procedure is to be conducted blind or not – should stand away from the witness during the line-up, in a neutral manner, while still being in a position to observe the witness. The key is for the administrator to stand outside the witness' line of sight while the witness is viewing the line-up. This will reduce any inclination by the witness to look at the administrator for guidance.
 3. Generally, it is not advisable for a witness to be involved in multiple procedures involving the same suspect.

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

4. Witnesses must view the line-up separately.
5. If there are multiple witnesses viewing the line-up, they should be prevented from speaking to each other about the identification procedure before, during, and after the process.
6. The position of the suspect should be moved each time the line-up is shown to a different witness, assuming the suspect and/or defense counsel agree.
7. Attention should be given to the selection of a neutral location for the procedure so that the witness is not influenced by items in the room such as wanted posters or BOLO (be on the lookout) information.
8. The security officer who is monitoring the suspect and fillers in the line-up room should remain out of view of the witness. This will eliminate the potential for any claims of inadvertent suggestions by the security officer and it also removes the potential for distracting the witness as the line-up is being viewed.

E. Post-viewing questions

1. After viewing the line-up the witness should be asked:
 - a. Do you recognize anyone?
 - b. If so, what is the number of the person that you recognize?
 - c. From where do you recognize the person?
2. If the witness' answers are vague or unclear, the administrator will ask the witness what he or she meant by the answer.
3. Confidence statement
 - a. Ask the witness to describe his/her certainty about any identification that is made.
 - b. Ask the witness to use his/her own words without using a numerical scale. For example, say, "Without using numbers, how sure are you?"

F. Documenting the procedure

1. Recording the Procedure

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

- a. The entire identification procedure should be memorialized and documented. Where practicable and where the witness' consent has been gained the procedure should be memorialized using audio or video recording.
 - b. Where the procedure is to be recorded by the use of audio or video, the witness' consent should be obtained and documented by the use of a form prior to recording. If the witness does not consent to the recording, the officer should not record the identification procedure and should request that the witness sign a form saying he/she refused to be recorded.
 - c. Audio or video recording may not always be possible or practicable. Some reasons that may prevent the identification procedure from being recorded include, but are not limited to:
 - (i) If it is law enforcement's belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant;
 - (ii) recording equipment malfunctions;
 - (iii) recording equipment is not available because it was otherwise being used;
 - (iv) the identification procedure is conducted at a location not equipped with recording devices and the reasons for using that location are not to subvert the intent of this policy.
 - (v) inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel; or
 - (vi) a lack of consent from the witness.
 - d. The line-up should be preserved by photograph. The witness should sign the photograph to verify that it is the line-up that he or she viewed.
2. Any physical or verbal reaction to the line-up should be memorialized in a standardized manner. If this is done in writing, anything said by the witness should be verbatim.
 3. The confidence statement should be documented verbatim.
 4. Document where the procedure took place, who was present, the date and time it was administered.

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

5. Anything the line-up members are asked to do (e.g., speak, move, or change clothing) must be documented.
 6. Document all people in the viewing room with the witness and the line-up room with the suspect.
 7. Document the officer or person who escorts the witnesses to and from the line-up room.
 8. Document requests made by the defense counsel and whether they were granted, and if not, why not. Reasonable requests from defense counsel should be honored and documented. Any defense request for a change in the line-up that is not, or cannot be, honored must also be documented.
 9. Where an identification is made, complete a CPL 710.30 Notice. Note: Failure to provide notice of the identification could prevent its use in court.
- G. Defendant's right to counsel
1. There are circumstances where during a line-up a suspect may have a defense attorney present.
 2. Investigators should consult with their District Attorney's Office for guidance regarding a defendant's right to counsel.
 3. When in attendance, the defense attorney must be instructed not to speak in the viewing room when the witness is present.
- H. Speaking with the witness after the procedure
1. The administrator, or other appropriate person, should document the statements, comments or gestures of the witness regarding the identification procedure before talking with the witness about next steps.
 2. Once the identification procedure is concluded and documented, the administrator can talk to the witness about how the case will proceed or what the next steps in the case may be.
 3. The administrator should not comment or make gestures on the identification itself by saying things such as: "Great job" or "We knew you would recognize him" or even nodding their head in agreement.
 4. The witness should be told not to discuss what was said, seen, or done during the identification procedure with other witnesses, nor should the investigator discuss any other identification procedures with the witness.

Identification Procedures: Photo Arrays and Line-ups Model Policy

Identification Procedures Protocol and Forms [EXC §837 (21)]

- I. All members who will be involved in the administration of a live line-up shall receive training on how to properly administer line-ups.

LINE-UP FORM

WITNESS INSTRUCTIONS

READ THE FOLLOWING TO THE WITNESS PRIOR TO SHOWING THE LINE-UP

- With your consent, the procedure may be recorded using video or audio.
- Do you consent to recording? Video and Audio Audio Only No Initial: _____
- As part of our on-going investigation into a crime that occurred at (*location*) on (*date*) you are about to view a line-up. (*Use similarly neutral language to invite witness to the identification procedure.*)
- You will look through a one-way mirror and see six people in the line-up. They will not be able to see you.
- There will be a number associated with each person on the other side of the mirror.
- Take whatever time you want to view the line-up.
- The perpetrator may or may not be present.
- Do not assume I know who the perpetrator is.
- I want you to focus on the lineup and not look to me or anyone else in the room for guidance about making an identification during the procedure.
- Individuals presented in the line-up may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.
- Members of the line-up can be requested to speak, move, or change clothing.
- If one line-up member is asked to speak, move, or change clothing, then all the line-up members will be asked to do the same.
- If you do make an identification I will ask you to describe your level of confidence about that identification using your own words, without the use of numbers. This question is not intended to suggest how certain or uncertain you might be about an identification. Every witness who makes an identification is asked this question.
- After you have had an opportunity to view the line-up I will ask you the following questions:
 1. Do you recognize anyone?
 2. If you do, what is the number of the person you recognize?
 3. From where do you recognize the person?
 4. **ONLY IF AN ID IS MADE:** Without using numbers, how sure are you?
- I may ask follow up questions.
- The investigation will continue regardless of whether or not you make an identification.
- DO NOT discuss with other witnesses what you see, say or do during this procedure.**

WITNESS MUST SIGN

The above instructions have been read to me. _____ Date: _____

THIS PAGE OF THE FORM **MUST NOT** BE SHOWN TO THE WITNESS

LINE-UP CASE INFORMATION SHEET

Complaint or Case Report #: _____ Crime Date & Location: _____

Line-up Date: _____ Time: _____ Location: _____

Crime Committed: _____ Witness' Name: _____

Was Witness Transported? Yes No

Transporting Officer: _____

Rank: _____ Command: _____ ID #: _____

Line-up Administrator: _____

Rank: _____ Command: _____ ID #: _____

Investigating Officer: _____

Rank: _____ Command: _____ ID #: _____

Security Officer: _____

Rank: _____ Command: _____ ID #: _____

Asst. District Attorney Present? Yes No

Name of ADA: _____ Phone #: _____

Interpreter Present? Yes No Name: _____

Was the procedure video recorded? Video Only Audio & Video Audio Only No

Line-up photograph taken? Yes No Witness initialed? Yes No

Position	Name	Number Held	Age	Height	Weight
1					
2					
3					
4					
5					
6					

Suspect's name: _____ D.O.B. _____ Position: _____

Comments: _____

Signature of Administrator: _____ Date: _____

LINE-UP FORM

RUNNING THE LINE-UP AND RESULTS

Witness: _____ Administrator: _____

Instructions to the administrator conducting the line-up:

- Remain neutral. Do not comment on the identification before, during or after the identification procedure. When inviting the witness, avoid addressing whether or not a person is in custody.
- After instructing the witness, stand away and out of the witness' line of sight, while still being able to observe and hear the witness.
- Where practicable and where consent has been given, video or audio record the entire procedure.
- If video or audio recording obtain consent from the witness.
- A photo should be taken of the line-up and the witness should sign the photo to attest that it represents the line-up that they viewed.
- Introduce by name all individuals present in the viewing room to the witness.
- Tell the witness when the identification procedure will begin, (e.g. "You will now look through the one way mirror.")
- If there is a need to have a line-up member speak, move, change clothing, or some other activity, then all the line-up members must do the same activity.
- Complete the entire CASE INFORMATION SHEET that accompanies this form.

AFTER THE WITNESS HAS VIEWED THE LINE-UP, ASK THE FOLLOWING QUESTIONS

- Did you recognize anyone in the line-up? _____
- If the answer to the preceding question is negative, STOP and go to the signature line.
 - If the answer is positive, proceed to the next question:
- If so, what is the number of the person that you recognize? _____
- From where do you recognize that person? _____

Record the words and gestures of the witness: _____

CONFIDENCE STATEMENT

Without using numbers, how sure are you? _____

Date: _____ Time: _____ Witness Signature: _____

LINE-UP FORM

SUSPECT'S COUNSEL SHEET

Suspect's attorney present? Yes No

Suspect's attorney: _____ Telephone: _____

The suspect's attorney was instructed *not* to speak while in the viewing room with the witness.

Yes No

If suspect's attorney makes requests about the line-up, record the request and whether the request was agreed to or refused:

1. Request: _____

Agreed Refused

Reason for refusal? _____

2. Request: _____

Agreed Refused

Reason for refusal? _____

3. Request: _____

Agreed Refused

Reason for refusal? _____

PHOTO ARRAY FORM

WITNESS INSTRUCTIONS

READ THE FOLLOWING TO THE WITNESS PRIOR TO SHOWING THE PHOTO ARRAY

- With your consent, the procedure may be recorded using video or audio.
- Do you consent to recording? Video and Audio Audio Only No Initial: _____
- As part of the ongoing investigation into a crime that occurred on (*date*) at (*location*) you will view a photo array. (*Use similarly neutral language to invite witness to the identification procedure.*)
- It consists of six photographs of individuals. Each photograph has a number underneath the photograph.
- Take whatever time you want to view the photo array.
- The perpetrator may or may not be pictured.
- Do not assume that I know who the perpetrator is.
- I want you to focus on the photo array and not look to me or anyone else in the room for guidance about making an identification during the procedure.
- Individuals presented in the photo array may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.
- Photographs may not always depict the true complexion of a person; it may be lighter or darker than shown in the photo.
- Pay no attention to any markings that may appear on the photos, or any other difference in the type or style of the photographs.
- If you do make an identification I will ask you to describe your level of confidence about that identification using your own words. This question is not intended to suggest how certain or uncertain you might be about an identification. Every witness who makes an identification is asked this question.
- After you have had an opportunity to view the photo array I will ask you the following questions:
 1. Do you recognize anyone?
 2. If you do, what is the number of the photograph you recognize?
 3. From where do you recognize the person?
 4. **ONLY IF AN ID IS MADE:** Without using numbers, how sure are you?
- I may ask follow up questions.
- The investigation will continue regardless of whether or not you make an identification.
- DO NOT discuss with other witnesses what you see, say or do during this procedure.**

WITNESS MUST SIGN

The above instructions have been read to me. _____ Date: _____

THIS PAGE OF THE FORM **MUST NOT** BE SHOWN TO THE WITNESS

PHOTO ARRAY CASE INFORMATION SHEET

Complaint or Case Report #: _____ Crime Date & Location: _____

Photo Array Date: _____ Time: _____ Location: _____

Crime Committed: _____ Witness' Name: _____

Was Witness Transported? Yes No

Transporting Officer: _____

Rank: _____ Command: _____ ID #: _____

Photo Array Administrator: _____

Rank: _____ Command: _____ ID #: _____

Investigating Officer: _____

Rank: _____ Command: _____ ID #: _____

Interpreter Present? Yes No Name: _____

Was the procedure video recorded? Video Only Audio & Video Audio Only No

**The original photo array MUST be preserved.
Attach a copy of the photo array to this form and provide the information below, if available.**

Position	Name	NYSID (where applicable)	Date of Photo
1			
2			
3			
4			
5			
6			

Suspect's name: _____ D.O.B. _____ Position: _____

Was any photo altered? Yes No

If yes, which? _____

Describe the alteration: _____

Comments: _____

Signature of Administrator: _____ Date: _____

PHOTO ARRAY FORM

SHOWING THE PHOTO ARRAY

Witness: _____ Administrator: _____

Procedure conducted: blind blinded

If blinded, indicate method: One-person shuffle Two-person shuffle Other: _____

Instructions to the administrator showing the photo array:

- Remain neutral. Do not comment on the identification before, during or after the identification procedure. When inviting the witness, avoid addressing whether or not a person is in custody.
- Provide the photo array(s) in an envelope or folder (or in three sealed envelopes if using the "one person shuffle" method) when handing it to the witness.
- Stand out of the witness' line of sight, where practical, but still observe the witness as the witness views the photo array.
- Where practicable and where consent has been given, video or audio record the entire procedure.
- If video or audio recording, obtain consent from the witness.
- Complete the entire CASE INFORMATION SHEET that accompanies this form.

AFTER THE WITNESS HAS VIEWED THE ARRAY, ASK THE FOLLOWING QUESTIONS

- Did you recognize anyone in the photo array? _____
- If the answer to the preceding question is negative, **STOP** and go to the signature line.
 - If the answer is positive, proceed to the next question:
- If so, what is the number of the photograph that you recognize? _____
- From where do you recognize that person? _____

Record the words and gestures of the witness: _____

CONFIDENCE STATEMENT

Without using numbers, how sure are you? _____

Date: _____ Time: _____ Witness Signature: _____

