

**REPORT OF THE
VIRGINIA STATE CRIME COMMISSION**

MISTAKEN EYEWITNESS IDENTIFICATION

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



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RICHMOND
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COMMONWEALTH of VIRGINIA

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January 11, 2005

TO: The Honorable Mark Warner, Governor of Virginia
And
Members of the Virginia General Assembly

The 2004 General Assembly, through House Joint Resolution 79, requested the Virginia State Crime Commission study mistaken identification in criminal cases.

Enclosed for your review and consideration is the report which has been prepared in response to this request. The Commission received assistance from all affected agencies and gratefully acknowledges their input into this report.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'D. Albo', written over a horizontal line.

David B. Albo
Chairman

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- Attachment 1: House Joint Resolution 79 (2004)*
Attachment 2: Eyewitness Evidence: A Guide for Law Enforcement
Attachment 3: Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures
Attachment 4: Virginia Department of Criminal Justice Services Training Standard for Photographic Lineups

I. Authority

The *Code of Virginia*, § 30-156, authorizes the Virginia State Crime Commission to study, report and make recommendations on all areas of public safety and protection. Additionally, the Commission is to study matters “including apprehension, trial and punishment of criminal offenders.” Section 30-158(3) provides the Commission the power to “conduct studies and gather information and data in order to accomplish its purposes as set forth in § 30-156. . .and formulate its recommendations to the Governor and the General Assembly.”

Using the statutory authority granted to the Crime Commission, the staff conducted a study of mistaken identification in criminal cases.

II. Executive Summary

During the 2004 Session of the Virginia General Assembly, Delegate Harry R. Purkey introduced House Joint Resolution 79 (HJR 79)¹, directing the Virginia State Crime Commission to study mistaken identification in criminal cases. Specifically, the resolution directs the commission to: (i) review the cases in the United States in which DNA profiling was used to exonerate persons convicted of a crime; (ii) examine the procedures used in traditional police lineups or photographic review; and, (iii) consider the sequential method as a procedure for identifying suspects. As a result of the study effort, the staff made recommendations to improve the procedures for conducting lineups in the Commonwealth of Virginia. These recommendations, as follows, were approved by the Virginia State Crime Commission:

Recommendations:

Recommendation 1: Amend the *Code of Virginia* to require local police and sheriff’s departments to have a written policy for conducting in-person and photographic lineups.

Recommendation 2: Request the Department of Criminal Justice Services (DCJS), in cooperation with the Virginia State Crime Commission, to establish a workgroup to develop a model policy for conducting in-person and photographic lineups.

Recommendation 3: Request DCJS, through regulation, to amend the entry level and in-service training academy requirements regarding lineups to include only use of the sequential method, by October 1, 2005.

Recommendation 4: Request DCJS to work with the Virginia Law Enforcement Professional Standards Commission to include the sequential method for conducting lineups as part of the accreditation process for law

¹ House Joint Resolution 79 (2004). See Attachment 1.

enforcement agencies.

Recommendation 5: Require DCJS, in conjunction with the Crime Commission, work with the Virginia Sheriffs' Association and the Virginia Chiefs of Police Association to assist members in using and understanding the benefits of the sequential method of lineups; presentation to each association's annual meetings will occur.

Recommendation 6: Amend the *Code of Virginia* to designate the Virginia State Police, through their oversight of the Central Criminal Records Exchange, as a repository for all mug shots and queries for photographic lineups.

III. Methodology

The Virginia State Crime Commission utilized three research methodologies to examine HJR 79. First, a literature review of psychology and legal documents regarding mistaken eyewitness identification in criminal cases was conducted. Research from the United States Department of Justice and the National Institute of Justice "Eyewitness Evidence: Guidelines for Law Enforcement" (DOJ Guidelines) was reviewed. Staff also conducted a case law review of instances in which DNA profiling was used to exonerate persons convicted of a crime, as well as those cases involving the constitutionality of identification procedures.

Second, staff thoroughly examined law enforcement training materials, guidelines and policies related to conducting lineups. As part of this examination, federal and other states' policies and guidelines were examined and compared, as well as any national and state law enforcement accreditation requirements. In addition, staff collected Virginia police academy new employment and in-service curricula to determine how law enforcement is currently trained on conducting line-ups.

Third, staff examined the policies and procedures specific to each police department and sheriff's office in Virginia. As part of this examination, staff requested each police and sheriff's department send a copy of its policy or general order related to conducting lineups. Staff then thoroughly reviewed these policies and compared them to federal and other state's policies. Then, staff developed and distributed a survey to each of the police departments and sheriff's offices who had responded to our request for a policy to identify how their line-up policies and procedures are carried out in practice. Finally, staff conducted site visits to police departments and sheriff's offices to examine their in-person and photographic lineup capabilities.

IV. Background

Recent cases in which DNA evidence has been used to exonerate individuals previously convicted of crimes, prompted inquiries into what evidence was used to obtain these wrongful convictions. According to a 1999 National Institute of Justice report, over

75,000 people a year become criminal defendants based on eyewitness identification.² Specifically, there have been 151 DNA exoneration cases, nationally.³ In 61 of the first 70 DNA exoneration cases, mistaken eyewitness identification was a factor leading to the conviction; and, in 45 of the first 82 DNA exoneration cases, a photographic lineup was the type of pre-trial identification procedure used.⁴

A. DNA and Mistaken Eyewitness Identification

In 1989, Virginia became the first state to establish a criminal DNA database. Now, as of October 31, 2004, the Division of Forensic Science (DFS) at the Virginia Department of Criminal Justice Services has 225,318 DNA profiles on file.⁵ As of this date, it has also recorded 2,271 cold hits, where DNA analysis of a crime scene sample with no suspect matches a profile in a database of previously convicted offenders, a database of samples from those individuals arrested for specified crimes, or a database of other crime scene profiles.⁶

There have been eight DNA exoneration cases in Virginia since 1989 when the DNA database was established:

Defendant Name	Date of Conviction	Date of Exoneration
David Vasquez	1985	1989
Walter Snyder	1986	1993
Edward Honaker	1984	1994
Troy Webb	1989	1996
Earl Washington	1984	2000
Marvin Anderson	1982	2001
Julius Ruffin	1981	2003
Arthur Lee Whitfield	1984	2004

Furthermore, since 2001, when the law allowing for post-conviction review of DNA evidence under certain circumstances was enacted, the DFS has received requests for testing in 17 post-conviction cases:

- Three tests excluded the defendant (Arthur Whitfield, Julius Ruffin and Marvin Anderson);
- Seven tests have included the defendant;

² “Mistaken Eyewitness Identification: The Problem.” Available at <http://www.innocenceproject.org/causes/mistakenid.php>.

³ Id.

⁴ Id.

⁵ “DNA Databank Statistics.” Available at <http://www.dcjs.va.gov/forensic/index.cfm>.

⁶ Id.

- Six tests were inconclusive; and,
- One test is pending.⁷

Mirroring the national trend, in each of the three excluded cases, mistaken eyewitness identification was a factor leading to the conviction, with a lineup procedure being used in two of these cases. Specifically, in the case of Julius Ruffin, who was spent 21 years in prison for rape and sodomy he did not commit, mistaken eyewitness identification led to the conviction. In this case, the victim did not identify Ruffin in a lineup, but saw him on an elevator at the Eastern Virginia Medical School where she was nursing student and he was a maintenance worker. After she exited the elevator, she called the police and identified Ruffin as her assailant. During the trials, the victim testified that she was 100% certain Ruffin was the man who committed the crimes against her.⁸ Two juries could not reach a unanimous verdict, but the third jury found Ruffin guilty.⁹

In the case of Marvin Anderson, who spent 15 years in prison on the identification of an Ashland rape victim, it was a color photograph that tainted the identification procedures. Because no mugshot was available for Anderson, a color photo of Anderson was used in the identification amongst numerous black and white photos. The victim chose the color photograph of Anderson, and then subsequently identified him in the lineup, and again at trial. The victim was confident in her identification, but she was mistaken and Marvin Anderson was wrongly convicted.¹⁰

Similarly, in the most recent case of Arthur Lee Whitfield who was charged with the rape of two women, it was a lineup procedure and mistaken identification that led to his being convicted of one of the crimes and pleading guilty to the second. The first victim picked out seven photographs, one of which was Whitfield, in a simultaneous lineup procedure at the police station. The witness then later identified Whitfield in a live simultaneous lineup. During trial, the defense argued unsuccessfully that Whitfield had been misidentified, but Whitfield was subsequently convicted based on the mistaken identification and served 22 years for crimes he did not commit.

Throughout the United States, in the 90% of convictions involving mistaken eyewitness accounts that were later cleared through DNA evidence, “witness reliability and identification were challenged but upheld by the courts.”¹¹ Although extremely significant, DNA is only one safeguard for the wrongfully convicted. DNA cannot exonerate those persons wrongfully convicted on the basis of eyewitness testimony where no DNA evidence exists. The fact that DNA evidence only exonerates those convicted individuals who leave trace evidence and that the vast majority of these convictions

⁷Phone interview with Dr. Paul Ferrara, Director, Division of Forensic Science, Virginia Department of Criminal Justice Services. (September 9, 2004).

⁸Tim McGlone. “Special Report: Earl Ruffin, the Wrong Man.” *The Virginian-Pilot*. (February 8, 2004).

⁹Id.

¹⁰Frank Green. “Eyes don’t always have it: Eyewitnesses can be sure but still be wrong on ID.” *Richmond Times-Dispatch*. (January 28, 2002).

¹¹Myers, Linda. “Innocence Project co-director sees eyewitness error,” available at www.news.cornell.edu/Chronicle/oo/10.5.00/Neufeld.html. (October 5, 2000).

resulted from eyewitness identification highlights the need for a change in eyewitness identification procedures in the Commonwealth.

B. Mistaken Eyewitness Identification Procedures

Psychological factors are at play with any eyewitness identification. Beginning in the late 1970s, modern psychologists noted that psychology could play a significant role in preventing the occurrence of eyewitness errors in the first place rather than postdicting errors after the fact.¹² This new movement argued that some variables affect the accuracy of eyewitness accounts over which the justice system actually has control.¹³ The structure of a lineup, for example, is one such variable because the system controls how lineups are structured.¹⁴ In a police lineup, a suspect is embedded among several known-innocent people, or fillers, and the eyewitness is asked if he/she can identify the perpetrator. A lineup contains only one suspect.

There is a large body of psychological evidence pointing to the fact that people, under certain conditions, will misidentify someone from a live or photo lineup.¹⁵ Researchers and psychologists have determined system variables that can create an environment susceptible to misidentification. These variables include: similarity of fillers; instructions prior to viewing lineup; presentation of the lineup procedure; and, law enforcement feedback.

Turning to the first variable, similarity of fillers, researchers and psychologists have noted that the fillers used in a lineup must be similar in order to prevent the lineup from being biased against an innocent suspect.¹⁶ A suspect positioned among fillers with mainly dissimilar characteristics increases the likelihood that the eyewitness will focus his/her attention on the suspect, giving an unreliable identification. Additionally, too much similarity can confuse witnesses and reduce accurate identifications.¹⁷

The nature of the instructions given to the eyewitness prior to his viewing the lineup is another important system variable.¹⁸ Eyewitnesses need to be instructed that the actual perpetrator might not be present in the lineup. If an eyewitness assumes that the perpetrator is in the lineup, the eyewitness will likely pick the person who most closely resembles the perpetrator.¹⁹ Informing the eyewitness of the possibility that the suspect is not present in the lineup helps to prevent witnesses from forcing an identification.²⁰

Along those same lines, the processes of relative and absolute judgment are factors in the structure of a lineup procedure. Specifically, relative judgment is the ability

¹² Gary L. Wells, et al. "From the Lab to the Police Station: A Successful Application of Eyewitness Research." *American Psychologist*, p. 582. (June 2000).

¹³ Id.

¹⁴ Id.

¹⁵ Wells, p. 584.

¹⁶ Id.

¹⁷ Id.

¹⁸ Wells, p. 585

¹⁹ Id.

²⁰ Id.

to detect a difference between two or more stimuli; and, absolute judgment is the ability to accurately judge the level of a stimulus without comparison stimulus. Relative judgment is at play with a simultaneous lineup. A simultaneous lineup procedure allows a witness to look at a group of photographs displayed side-by-side, usually in a 6-to-a-page manila folder. With this method, a witness often uses relative judgment and makes an identification by comparing and combining various characteristics of the individuals displayed. As a result, the witness often identifies the individual that most looks like the person he/she remembers as compared to the other persons in the lineup. The witness tends to compare one member of a lineup to another, making relative judgments about which individual looks most like the perpetrator.

In the alternative, sequential lineups make use of absolute judgment. In a sequential lineup procedure, the eyewitness is presented with one lineup member at a time, and it allows the witness to make an identification based on each person's appearance before viewing another photo or lineup member. This procedure discourages the eyewitness from making relative judgments about who looks most like the perpetrator. Although one subject might look more like the perpetrator than the last, the eyewitness cannot be sure that the next subject is not the perpetrator.

Another important system variable is law enforcement feedback and its impact on confidence malleability.²¹ People often believe that confidence relates to accuracy, that a witness that is confident in his/her identification is more than likely to also be accurate.²² However, research indicates that feedback influences eyewitness confidence and is independent of accuracy. Feedback can come in the form of instructing eyewitnesses that a co-witness identified the same person or confirming, outright or through inadvertent verbal and body cues, that the person identified is the actual suspect. This feedback can induce false confidence in witnesses. When law enforcement use precautions to avoid confirming a witness's choice and encourage a witness to focus on his/her own thought processes, the problem of confidence inflation is lessened.²³ However, even when utilizing precautions to avoid any advertent body signals or cues to witnesses, inadvertent body signals or cues to witnesses do occur when the identity of the actual suspect is known to the individual conducting the identification procedure. Ensuring that the individual conducting the lineup does not know the identity of the actual suspect eliminates unintentional verbal and body cues, which may adversely impact a witness' ability to make a reliable identification.

C. Court Safeguards to Mistaken Eyewitness Identifications

The court system does have certain safeguards in place to prevent mistaken eyewitness identifications from leading to a wrongful conviction. Prior to 1972, the United States Supreme Court (Court) indicated that unnecessarily suggestive eyewitness identification procedures should result in exclusion of the identification evidence. Notably, in Stovall v. Denno,²⁴ the Court "held that the defendant could claim that 'the

²¹ Wells, p. 586.

²² Id.

²³ Id.

²⁴ Stovall v. Denno, S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

confrontation conducted ... was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.”²⁵ This case went further to hold that denial of due process based on the suggestiveness of an identification procedure must be determined on the totality of the circumstances.²⁶ Subsequently, in the 1972 case of Neil v. Biggers, the Court held that eyewitness identification evidence will be excluded only if the unnecessarily suggestive procedure created a substantial risk of mistaken identification.²⁷ The Court laid out factors to be considered in evaluating the likelihood of misidentification. These factors include:

- The opportunity of the witness to view the criminal at the time of the crime;
- The witness’ degree of attention;
- The accuracy of the witness’ prior description of the criminal;
- The level of certainty demonstrated by the witness at the confrontation; and,
- The length of time between the crime and the confrontation.²⁸

Finally, in Manson v. Brathwaite,²⁹ the Court held that “reliability is the linchpin in determining the admissibility of identification testimony.”³⁰ The Court established a two-prong test for the exclusion of eyewitness identification evidence. In the first prong, the suggestiveness of the identification procedure must be shown. In the second prong, it must be established that the suggestive identification procedure resulted in unreliable eyewitness evidence.³¹ The Court stated that the factors for assessing reliability are those established in Neil v. Biggers.³² These factors are then to be weighed against the suggestive identification itself to determine if the suspect’s due process rights were violated and therefore have the eyewitness evidence excluded.³³

Although these cases indicate that the legal system has tools in place to prevent wrongful convictions based on mistaken eyewitness identifications, they are solutions to a problem that has already occurred, i.e. the suggestive identification procedure. If the suggestive procedures were avoided in the first place, then prevention of wrongful convictions based on mistaken eyewitness identifications would not rest solely on court safeguards.

D. Department of Justice, National Institute of Health Guidelines

The possibility that procedures within the criminal justice system could allow for repeated mistakes led the United States Department of Justice, National Institute of

²⁵ Stovall v. Denno, cited in Neil v. Biggers, 409 U.S. 188 (1972).

²⁶ *Id.*

²⁷ Neil v. Biggers, 409 U.S. 188 (1972).

²⁸ *Id.*

²⁹ Manson v. Brathwaite, 432 U.S. 98 (1977).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

Justice to form the Technical Working Group for Eyewitness Evidence (TWGEYEE) to specifically address these concerns and suggest solutions. The group consisted of 34 members from the fields of law enforcement, the legal system, and research professions, from both urban and rural jurisdictions in the United States and Canada. TWGEYEE met over a year long period with the goal of developing improved protocols for collecting and preserving eyewitness evidence so that the most accurate and reliable evidence could be presented in court.³⁴ The product of this collaboration was the handbook, *Eyewitness Evidence: A Guide for Law Enforcement*, which incorporates their years of scientific research on memory and interview techniques into investigative practices that can be used by various jurisdictions to ensure that the criminal justice system will fairly and effectively elicit accurate and reliable eyewitness evidence.³⁵

The purpose of the guidelines is to prevent eyewitness error rather than correcting errors after they have occurred. The guidelines take the basic elements of police investigations and suggest workable changes in order to achieve more consistent eyewitness results. For example, standard police questioning practices originally were designed to elicit information from uncooperative suspects rather than to foster reliable information for cooperative witnesses.³⁶ The guidelines focus on increasing the amount of information gathered in eyewitness interviews and ensuring that only the eyewitness supplies the information.³⁷ Specifically, the guidelines look to establish criteria for photo-identifications and lineups and address the many opportunities these situations afford for a biased result.

The guidelines suggest:

- Showing only one suspect per identification;
- Selecting photos of “fillers”, or nonsuspects, that match the eyewitness’s description of the criminal rather than the person the investigators suspect of the crime. The original process of choosing persons who match the description of the suspect narrows the universe of options for the witness and risks creating a subtle suggestion to the witness about what the police think the suspect looks like;³⁸
- Avoiding the use of nonsuspects who so closely resemble the suspect that a person familiar with the suspect might have difficulty distinguishing between the nonsuspect and the suspect;
- Placing a suspect in different positions in each photo array when dealing with more than one eyewitness in a given case;

³⁴ Doyle, Larson, and DiTraglia, “The Eyes Have It – Or Do They? New Guides for Better Eyewitness Evidence Procedures.” *Criminal Justice, American Bar Association’s Section of Criminal Justice* (Fall 2001).

³⁵ See attachment 2.

³⁶ Doyle, Larson, and DiTraglia, “The Eyes Have It – Or Do They? New Guides for Better Eyewitness Evidence Procedures.” *Criminal Justice, American Bar Association’s Section of Criminal Justice* (Fall 2001).

³⁷ Id.

³⁸ Doyle, Larson, and DiTraglia, “The Eyes Have It – Or Do They? New Guides for Better Eyewitness Evidence Procedures.” *Criminal Justice, American Bar Association’s Section of Criminal Justice* (Fall 2001).

- Properly instruct the witness that the actual suspect might not be present in the lineup; and,
- Display suspects sequentially, or one at a time, rather than simultaneously.³⁹

E. Other State's Policies and Procedures

In April 2001, the New Jersey Attorney General, who has the power to dictate law enforcement policy, issued the *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*.⁴⁰ With these Guidelines, New Jersey became the first state to officially adopt the recommendations issued by the United States Department of Justice in its *Eyewitness Evidence Guidelines*. The implementation of these guidelines required appropriate training. To allow for this training, the Attorney General delayed the effective date 180 days, and requested that each county prosecutor designate key law enforcement personnel and police training coordinators to work with the Division of Criminal Justice to train its staff as well as the local law enforcement agencies within each jurisdiction.

The New Jersey Attorney General's Office, Division of Criminal Justice, Prosecutors & Police Bureau oversees the implementation of the Guidelines.⁴¹ There are 21 County Prosecutors who report directly to the Attorney General. Furthermore, every county consists of county and municipal police departments who report to the County Prosecutor. In total, there are approximately 700 of these county and municipal police departments. Therefore, in order to consolidate training efforts, the New Jersey Attorney General's Office conducted one statewide-training, requesting all the local trainers to attend. Then, each trainer left with a CD-rom and a training manual to allow them to train their officers locally.

The Guidelines apply to all law enforcement, including sheriffs. However, in New Jersey, campus police do not rise to the same level, and therefore receive assistance from the county police departments.⁴² The Guidelines are used in all cases, including juvenile cases. Anytime an identification procedure is used, the officers must adhere to the Guidelines. New Jersey has no indication that the Guidelines are not being followed but insist that the greatest assurance that the Guidelines will be followed is a defense attorney arguing lack of adherence to the Guidelines on cross-examination.⁴³

As far as the costs of implementing the Guidelines in New Jersey, the biggest cost comes from the elimination of the 6-pack folders previously used for photo-identification. One county had an innovative solution to this cost in that they hired a carpenter to build a sequential photo box from the original 6-pack folder.⁴⁴ So, law enforcement is free to

³⁹ Doyle, Larson, and DiTraglia, "The Eyes Have It – Or Do They? New Guides for Better Eyewitness Evidence Procedures." *Criminal Justice*, *American Bar Association's Section of Criminal Justice* (Fall 2001).

⁴⁰ See attachment 3.

⁴¹ Lori Linskey, Prosecutor, New Jersey Attorney General's Office.

⁴² *Id.*

⁴³ Lori Linskey, Prosecutor, New Jersey Attorney General's Office.

⁴⁴ *Id.*

determine their own ways to implement the Guidelines. Another cost associated with the implementation is staffing concerns for small localities that do not have a trained independent officer to conduct the identification procedures, and they cannot afford to train additional staff. As a solution to this problem, local departments are banding together and forming task forces, with officers on call to help out in the procedures wherever they are needed. Additionally, the County Prosecutor provides assistance.

The overall response to the adoption of the DOJ Guidelines in New Jersey has been positive, both within the state and throughout the country. The Attorney General's Office reports that the state's law enforcement has been innovative and dedicated to the process.⁴⁵ Although, they remain the only jurisdiction that has implemented these procedures statewide, other jurisdictions and/or local police and sheriff's departments throughout the United States have adopted these guidelines on their own accord. The New Jersey Attorney General's Office has received inquiries from almost every other jurisdiction, including Ohio, Connecticut, Rhode Island, Hawaii, and Missouri. They also recently confirmed that the Syracuse, New York District Attorney's Office has implemented the Guidelines.⁴⁶

V. Virginia Policies and Procedures for the Identification of Suspects

Currently, in Virginia, the Virginia Department of Criminal Justice Service, Standards and Training Section is responsible for the implementation of regulations promulgated by the Criminal Justice Services Board pertaining to minimum and in-service training requirements for police and sheriff's departments. The current training curriculum is taught to the newly employed law enforcement officers within 12 months of employment. It is this curriculum that contains the training standard related to photographic line-ups.⁴⁷ The in-service training occurs every other year, and that curriculum changes in order to provide an opportunity for growth and advancement. Thirty police academies in Virginia conduct the training. A curriculum review committee meets periodically to suggest changes to the curriculum. This committee makes recommendations and has a public hearing before the Criminal Justice Services Board which establishes the minimum training requirements.

A. Current Training Related to Lineups

DCJS requires the basic academies to train and test new officers on the following criteria related to in-person and photographic lineups:

- Use of the same sex;
- Use of similar size, build, color, race, ethnic background;
- Use of either black/white photos in a group or color photos in a group (do not mix the group);
- Use of descriptors that the victim or witnesses provide; and,
- Do not use photos that reflect bias toward one person, i.e.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ See attachment 4.

mug shots for some and not all.

DCJS provides a sample lesson plan to the academies and requires these factors to be included in the curriculum for the newly employed. DCJS allows for both the simultaneous and/or the sequential method to be taught at the training academies.

B. Accreditation Requirements

The Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) was established as an independent national accrediting authority for law enforcement agencies in 1979 by the four major law enforcement membership associations: International Association of Chiefs of Police (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and, Police Executive Research Forum (PERF). The Executive Directors of these four associations appoint members to the Commission annually. The commission has 21 members and derives its general authority from the four major law enforcement membership associations and derives its accreditation authority from those agencies that voluntarily participate in the accreditation program. The mission of the Commission's accreditation program is to improve delivery of law enforcement service by offering a body of standards, developed by law enforcement practitioners, covering a wide range of up-to-date law enforcement topics. A decision to participate in the accreditation program is entirely voluntary in order to insure that law enforcement agencies are committed to addressing and complying with applicable standards.⁴⁸ Accredited agencies benefit from CALEA accreditation by obtaining recognition, controlling liability insurance costs, and increased governmental and community support.⁴⁹ Currently, CALEA does not require law enforcement to use the sequential method or to conduct double blind lineups in order to receive accreditation. Twenty-two Virginia law enforcement agencies currently have CALEA accreditation, as well as one training academy.⁵⁰

Law enforcement accreditation at the state level requires an adherence to the Virginia Law Enforcement Professional Standards Commission (VLEPSC). The Virginia Sheriffs' Association, the Virginia Association of Chiefs of Police and DCJS comprise the VLEPSC. Executive board members consisting of active Sheriffs and Chiefs of Police establish professional standards and administer the accreditation process by which Virginia agencies can be systematically measured, evaluated, and updated. The mission of VLEPSC is to increase the effectiveness and efficiency of law enforcement agencies in the Commonwealth; to promote cooperation among all components in the criminal justice system; to insure the appropriate level of training for law enforcement personnel; and to promote public confidence in law enforcement.⁵¹ As with CALEA, accreditation with VLEPSC is voluntary and use of the sequential method or the requirement of double blind lineups is also not required for accreditation in Virginia. Forty-nine Virginia law enforcement agencies currently have VLEPSC accreditation.

⁴⁸ Available at <http://www.calea.org/newweb/AboutUs/Aboutus.htm>.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Available at <http://www.dcjs.virginia.gov/accred/overview.cfm?menuLevel=5&mID=11>.

C. Local Department Findings

Currently, there is no statutory or regulatory rule requiring Virginia police and sheriffs' departments to have a policy related to conducting lineups. To determine if any law enforcement departments had voluntarily adopted a written policy for conducting lineups, staff surveyed all of Virginia's law enforcement. Seventy-three percent (259 of 356) of local law enforcement departments responded to the survey regarding photographic identifications and lineups. Specifically, 144 police departments and 115 sheriffs' departments responded. The majority of the non-respondents were very small town police departments or sheriffs' departments without law enforcement responsibilities.

Thirty-seven percent (96 of 259) of the responding departments had a written policy concerning the procedures for lineups in their department:

- 49 Police Departments, and,
- 47 Sheriffs' Offices.

Sixty-three percent (163 of 259) of the responding departments did not have a written policy concerning lineups:

- 95 Police Departments, and,
- 68 Sheriffs' Offices.

D. Survey Results

Staff developed and distributed a second survey to the 259 Virginia police departments and sheriffs' offices who responded to the first survey. The second survey was designed to determine the actual procedures used by each department.

Ten law enforcement departments reported conducting a total of 32 live lineups during Fiscal Year 2004 (FY 04). The Henry County Sheriff's Office reported the most usage of live lineups with eight during FY 04. One hundred eight law enforcement departments reported conducting a total of 5,298 photographic lineups during FY 04. The number of photographic lineups by agency ranged from a low of one at Christopher Newport University to a high of 800 at Roanoke City Police Department.

As to the type of photographic lineups reported used by departments with a lineup during FY 04:

- 58 respondents reported using all color photographs;
- 2 respondents reported using all black and white photographs;
- 47 reported using either all color photographs or all black and white photographs, depending on case specifics; and,
- 1 did not respond.

The overwhelming majority of departments reported using at least six photographs per

lineup. The numbers of photographs reported used by departments with a lineup in FY 04 were:

- 96 (89%) used at least 6 photos;
- 9 (8%) used at least 8 photos;
- 1 (1%) used at least 7 photos;
- 1 (1%) used at least 9 photos; and,
- 1 (1%) used at least 10 photos.

Sixty-five percent of the departments reported using multiple sources for acquisition of photographic lineups. Local law enforcement departments reported the following as their source of photos for lineups:

- Computer-generated only: 24 (22%)
- DMV only: 1 (1%)
- Mug books only: 13 (12%)
- Polaroid/arrest photos only: 1 (1%)
- Photo ID's only: 1 (1%)
- Jail photos only: 3 (3%)
- Combination of the above: 65 (60%)

Smaller law enforcement agencies reported having difficulty acquiring and conducting photographic lineups due to a lack of available photographs. Fifty-four of the 108 responding agencies reported having to go outside of their department for mugshots to use in lineups. In fact, outside resources were used to conduct 194 lineups in FY 03. In each of these cases, the wait for receiving the requested mugshot and lineup was 6-8 weeks.

Forty-six representatives from the responding departments reported solely using the simultaneous photo method to conduct photographic lineups; whereas five of the survey respondents interviewed reported solely using the sequential method to conduct photographic lineups in FY 04 (Goochland County Sheriff's Office, New Kent County Sheriff's Office, Tappahannock Police Department, Tazewell Sheriff's Office, and Virginia Beach Police Department). Furthermore, six of the survey respondents interviewed reported using either the simultaneous or the sequential method to conduct photographic lineups, depending upon the officer (Smyth County Sheriff's Office, Virginia Tech Police Department, Charlottesville Police Department, Herndon Police Department, Metro Transit Police Department, and South Boston Police Department). Waynesboro Police Department indicated they were changing policy to move toward the use of the sequential method.

E. Site Visits

Staff conducted four site visits to local law enforcement departments to examine their computer-generated systems for conducting photographic lineups. The Goochland Sheriff's Office:

- Uses the sequential method;

- Has a small database of pictures, and often must rely on other entities to obtain photographic lineups; and,
- Has a computerized, searchable database.

The Henrico County Police Department uses the six-to-a-page photographic lineups (pictures are placed in a manila folder and the witness views the photographs simultaneously) and, has a computerized, searchable database of approximately 5,000 arrest photos taken from the jail population. The Chesterfield County Police Department also uses the six-to-a-page photographic lineups and has a computerized, searchable database of approximately 5,200 arrest photos.

The Virginia Beach Police Department uses the sequential method and has a computerized, searchable database of approximately 10,000 arrest photos. However, Virginia Beach has a database that allows them to share information and photographs with 11 other law enforcement agencies in the Tidewater area CRIMES network. Virginia Beach also conducts mandatory training twice a year on the use of the sequential method of photographic identification.

As a policy, Virginia Beach does not use lineups as the only evidence for a prosecution, but are only used as a tool to aide an investigator in an investigation. To successfully prosecute a case, Virginia Beach advocates that there must be additional evidence to support a positive result in a lineup identification. Without supplemental evidence the chances of a wrongful prosecution of an innocent individual is greatly increased.

The Virginia Beach Police Department modeled its eyewitness identification procedures after the DOJ Guidelines. Representatives from the department reported that use of their procedures minimizes the risk of misidentification and the identification has a stronger evidentiary value than one obtained without these procedures.

VI. Conclusion and Recommendations

In summary, there is overwhelming psychological evidence supporting the need for changes in the current procedures Virginia law enforcement is required and trained to use in conducting in-person and photographic lineups. Virginia law enforcement is trained on both the simultaneous and sequential method and is not mandated to use the sequential method. There is no requirement that law enforcement even have a policy on the proper procedures and practices for conducting more reliable lineups. Additionally, smaller departments lack the resources necessary for producing a lineup and need access to up-to-date photographs of suspects and fillers.

Based on the study analysis, the Virginia State Crime Commission made the following recommendations to improve the procedures for conducting lineups in the Commonwealth of Virginia.

Recommendation 1: Amend the *Code of Virginia* to require local police and sheriff's departments to have a written policy for conducting in-person and photographic lineups.

Recommendation 2: Request the Department of Criminal Justice Services (DCJS), in cooperation with the Virginia State Crime Commission, to establish a workgroup to develop a model policy for conducting in-person and photographic lineups.

Recommendation 3: Request DCJS, through regulation, to amend the entry level and in-service training academy requirements regarding lineups to include only use of the sequential method, by October 1, 2005.

Recommendation 4: Request DCJS to work with the Virginia Law Enforcement Professional Standards Commission to include the sequential method for conducting lineups as part of the accreditation process for law enforcement agencies.

Recommendation 5: Require DCJS, in conjunction with the Crime Commission, work with the Virginia Sheriffs' Association and the Virginia Chiefs of Police Association to assist members in using and understanding the benefits of the sequential method of lineups; presentation to each association's annual meetings will occur.

Recommendation 6: Amend the *Code of Virginia* to designate the Virginia State Police, through their oversight of the Central Criminal Records Exchange, as a repository for all mug shots and queries for photographic lineups.

VII. Acknowledgements

The Virginia State Crime Commission extends its appreciation to the following agencies and individuals for their assistance and cooperation on this study:

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Virginia Department of Criminal Justice Services

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Judy Kirkendall, Job Task Analysis Administrator, Standards and Training Division

Virginia Department of Motor Vehicles

Karen Chappell, Deputy Commissioner

Ed Ryder

Virginia Sheriffs' Association

John Jones, Executive Director

Virginia Beach Police Department

Detective Rick Deems

Deputy Chief Gregory Mullen

Sergeant Bruce Razey

Virginia State Police

Mary Crawford, AFIS Manager

Lt. Tom Turner

Elaine Shepherd

Attachment 1:
House Joint Resolution 79 (2004)

HOUSE JOINT RESOLUTION NO. 79

Directing the Virginia State Crime Commission to study mistaken identification in criminal cases. Report.

Agreed to by the House of Delegates, February 17, 2004
Agreed to by the Senate, March 9, 2004

WHEREAS, of the first 40 cases in the United States in which DNA profiling was used to exonerate persons convicted of a crime, 90 percent involved mistaken identification by one or more eyewitnesses; and

WHEREAS, traditional police lineups or photographic review may create a situation where eyewitnesses identify the person in the lineup or in the photograph who looks most like the suspect relative to the others in the lineup or photo array; and

WHEREAS, in a study by Iowa State University, of 63 wrongful convictions, 53 were based on eyewitness identification; and

WHEREAS, in virtually all of these cases, the actual criminal did not appear in the lineups; and

WHEREAS, the United States Justice Department now recommends the Iowa State-developed sequential method as being less error prone when one person, or photo, at a time is brought before an eyewitness rather than a half dozen or so individuals at the same time; and

WHEREAS, New Jersey became the first state to adopt this sequential method as standard procedure and other states are now examining the use of a similar process; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Virginia State Crime Commission be directed to study mistaken identification in criminal cases. In conducting its study, the Commission shall (i) review the cases in the United States in which DNA profiling was used to exonerate persons convicted of a crime; (ii) examine the procedures used in traditional police lineups or photographic review; and (iii) consider the sequential method as a procedure for identifying suspects.

Technical assistance shall be provided to the Commission by the Department of Criminal Justice Services' Division of Forensic Science. All agencies of the Commonwealth shall provide assistance to the Commission for this study, upon request.

The Virginia State Crime Commission shall complete its meetings by November 30, 2004, and the Chairman of the Commission shall submit to the Division of Legislative Automated Systems an executive summary of its findings and recommendations no later than the first day of the 2005 Regular Session of the General Assembly. The executive summary shall state whether the Commission intends to submit to the General Assembly and the Governor a report of its findings and recommendations for publication as a

document. The executive summary and report shall be submitted as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website.

Attachment 2: Eyewitness Evidence: A Guide for Law Enforcement*

*This attachment summarizes the relevant portions of the United States Department of Justice "Eyewitness Evidence: A Guide for Law Enforcement," dealing with lineup procedures. To access the full document, please contact the Virginia State Crime Commission at (804) 225-4534.

Section V. Procedures for Eyewitness Identification of Suspects

A. Composing Lineups

Principle: Fair composition of a lineup enables the witness to provide a more accurate identification or nonidentification.

Policy: The investigator shall compose the lineup in such a manner that the suspect does not unduly stand out.

Procedure:

Photo Lineup: In composing a photo lineup, the investigator should:

1. Include only one suspect in each identification procedure.
2. Select fillers who generally fit the witness' 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. If multiple photos of the suspect are reasonably available to the investigator, select a photo that resembles the suspect description or appearance at the time of the incident.
4. Include a minimum of five fillers (nonsuspects) per identification procedure.
5. Consider that complete uniformity of features is not required. Avoid using fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.
6. Create a consistent appearance between the suspect and fillers with respect to any unique or unusual feature (e.g., scars, tattoos) used to describe the perpetrator by artificially adding or concealing that feature.
7. Consider placing suspects in different positions in each lineup, both across cases and with multiple witnesses in the same case.

- Position the suspect randomly in the lineup.
8. When showing a new suspect, avoid reusing fillers in lineups shown to the same witness.
 9. Ensure that no writings or information concerning previous arrest(s) will be visible to the witness.
 10. View the spread, once completed, to ensure that the suspect does not unduly stand out.
 11. Preserve the presentation order of the photo lineup. In addition, the photos themselves should be preserved in their original condition.

Live Lineup: In composing a live lineup, the investigator should:

1. Include only one suspect in each identification procedure.
2. Select fillers who generally fit the witness' 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. Consider placing suspects in different positions in each lineup, both across cases and with multiple witnesses in the same case.
Position the suspect randomly unless, where local practice allows, the suspect or the suspect's attorney requests a particular position.
4. Include a minimum of four fillers (nonsuspects) per identification procedure.

5. When showing a new suspect, avoid reusing fillers in lineups shown to the same witness.
6. Consider that complete uniformity of features is not required. Avoid using fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.
7. Create a consistent appearance between the suspect and fillers with respect to any unique or unusual feature (e.g., scars, tattoos) used to describe the perpetrator by artificially adding or concealing that feature.

Summary: The above procedures will result in a photo or live lineup in which the suspect does not unduly stand out. An identification obtained through a lineup composed in this manner may have stronger evidentiary value than one obtained without these procedures.

B. Instructing the Witness Prior to Viewing a Lineup

Principle: Instructions given to the witness prior to viewing a lineup can facilitate an identification or nonidentification based on his/her own memory.

Policy: Prior to presenting a lineup, the investigator shall provide instructions to the witness to ensure the witness understands that the purpose of the identification procedure is to exculpate the innocent as well as to identify the actual perpetrator.

Procedure:

Photo Lineup: Prior to presenting a photo lineup, the investigator should:

1. Instruct the witness that he/she will be asked to view a set of photographs.
2. Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.

3. Instruct the witness that individuals depicted in lineup photos 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.
4. Instruct the witness that the person who committed the crime may or may not be in the set of photographs being presented.
5. Assure the witness that regardless of whether an identification is made, the police will continue to investigate the incident.
6. Instruct the witness that the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification.

Live Lineup: Prior to presenting a live lineup, the investigator should:

1. Instruct the witness that he/she will be asked to view a group of individuals.
2. Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
3. Instruct the witness that individuals present in the lineup 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.
4. Instruct the witness that the person who committed the crime may or may not be present in the group of individuals.
5. Assure the witness that regardless of whether an identification is made, the police will continue to investigate the incident.

6. Instruct the witness that the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification.

Summary: Instructions provided to the witness prior to presentation of a lineup will likely improve the accuracy and reliability of any identification obtained from the witness and can facilitate the elimination of innocent parties from the investigation.

C. Conducting the Identification Procedure

Principle: The identification procedure should be conducted in a manner that promotes the reliability, fairness, and objectivity of the witness' identification.

Policy: The investigator shall conduct the lineup in a manner conducive to obtaining accurate identification or nonidentification decisions.

Procedure:

Simultaneous

Photo Lineup: When presenting a simultaneous photo lineup, the investigator should:

1. Provide viewing instructions to the witness as outlined in subsection B, "Instructing the Witness Prior to Viewing a Lineup."
2. Confirm that the witness understands the nature of the lineup procedure.
3. Avoid saying anything to the witness that may influence the witness' selection.
4. If an identification is made, avoid reporting to the witness any information regarding the individual he/she has selected prior to obtaining the witness' statement of certainty.

5. Record any identification results and witness' statement of certainty as outlined in subsection D, "Recording Identification Results."
6. Document in writing the photo lineup procedures, including:
 - a. Identification information and sources of all photos used.
 - b. Names of all persons present at the photo lineup.
 - c. Date and time of the identification procedure.
7. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

Sequential

Photo Lineup: When presenting a sequential photo lineup, the investigator should:

1. Provide viewing instructions to the witness as outlined in subsection B, "Instructing the Witness Prior to Viewing a Lineup."
2. Provide the following *additional* viewing instructions to the witness:
 - a. Individual photographs will be viewed one at a time.
 - b. The photos are in random order.
 - c. Take as much time as needed in making a decision about each photo before moving to the next one.
 - d. All photos will be shown, even if an identification is made; or the procedure will be stopped at the point of an identification (consistent with jurisdictional/departmental procedures).
3. Confirm that the witness understands the nature of the sequential procedure.
4. Present each photo to the witness separately, in a previously determined order, removing those previously shown.
5. Avoid saying anything to the witness that may influence the witness' selection.

6. If an identification is made, avoid reporting to the witness any information regarding the individual he/she has selected prior to obtaining the witness' statement of certainty.
7. Record any identification results and witness' statement of certainty as outlined in subsection D, "Recording Identification Results."
8. Document in writing the photo lineup procedures, including:
 - a. Identification information and sources of all photos used.
 - b. Names of all persons present at the photo lineup.
 - c. Date and time of the identification procedure.
9. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

Simultaneous

Live Lineup: When presenting a simultaneous live lineup, the investigator/lineup administrator should:

1. Provide viewing instructions to the witness as outlined in subsection B, "Instructing the Witness Prior to Viewing a Lineup."
2. Instruct all those present at the lineup not to suggest in any way the position or identity of the suspect in the lineup.
3. Ensure that any identification actions (e.g., speaking, moving) are performed by all members of the lineup.
4. Avoid saying anything to the witness that may influence the witness' selection.
5. If an identification is made, avoid reporting to the witness any information regarding the individual he/she has selected prior to obtaining the witness' statement of certainty.
6. Record any identification results and witness' statement of certainty as outlined in subsection D, "Recording Identification Results."

7. Document the lineup in writing, including:
 - a. Identification information of lineup participants.
 - b. Names of all persons present at the lineup.
 - c. Date and time the identification procedure was conducted.

8. Document the lineup by photo or video. This documentation should be of a quality that represents the lineup clearly and fairly.

9. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

Sequential

Live Lineup: When presenting a sequential live lineup, the lineup administrator/investigator should:

1. Provide viewing instructions to the witness as outlined in subsection B, “Instructing the Witness Prior to Viewing a Lineup.”

2. Provide the following additional viewing instructions to the witness:
 - a. Individuals will be viewed one at a time.
 - b. The individuals will be presented in random order.
 - c. Take as much time as needed in making a decision about each individual before moving to the next one.
 - d. If the person who committed the crime is present, identify him/her.
 - e. All individuals will be presented, even if an identification is made; or the procedure will be stopped at the point of an identification (consistent with jurisdictional/departmental procedures).

3. Begin with all lineup participants out of the view of the witness.

4. Instruct all those present at the lineup not to suggest in any way the position or identity of the suspect in the lineup.

5. Present each individual to the witness separately, in a previously determined order, removing those previously shown.

6. Ensure that any identification actions (e.g., speaking, moving) are performed by all members of the lineup.
7. Avoid saying anything to the witness that may influence the witness' selection.
8. If an identification is made, avoid reporting to the witness any information regarding the individual he/she has selected prior to obtaining the witness' statement of certainty.
9. Record any identification results and witness' statement of certainty as outlined in subsection D, "Recording Identification Results."
10. Document the lineup procedures and content in writing, including:
 - a. Identification information of lineup participants.
 - b. Names of all persons present at the lineup.
 - c. Date and time the identification procedure was conducted.
11. Document the lineup by photo or video. This documentation should be of a quality that represents the lineup clearly and fairly. Photo documentation can be of either the group or each individual.
12. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

Summary: The manner in which an identification procedure is conducted can affect the reliability, fairness, and objectivity of the identification. Use of the above procedures can minimize the effect of external influences on a witness' memory.

D. Recording Identification Results

Principle: The record of the outcome of the identification procedure accurately and completely reflects the identification results obtained from the witness.

Policy: When conducting an identification procedure, the investigator shall preserve the outcome of the procedure by documenting any identification or nonidentification results obtained from the witness.

Procedure: When conducting an identification procedure, the investigator should:

1. Record both identification and nonidentification results in writing, including the witness' own words regarding how sure he/she is.
2. Ensure results are signed and dated by the witness.
3. Ensure that no materials indicating previous identification results are visible to the witness.
4. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures.

Summary: Preparing a complete and accurate record of the outcome of the identification procedure improves the strength and credibility of the identification or nonidentification results obtained from the witness. This record can be a critical document in the investigation and any subsequent court proceedings.

Attachment 3:
Attorney General Guidelines for Preparing and Conducting
Photo and Live Lineup Identification Procedures

ATTORNEY GENERAL GUIDELINES FOR PREPARING
AND CONDUCTING PHOTO AND LIVE LINEUP
IDENTIFICATION PROCEDURES

PREAMBLE

While it is clear that current eyewitness identification procedures fully comport with federal and state constitutional requirements, that does not mean that these procedures cannot be improved upon. Both case law and recent studies have called into question the accuracy of some eyewitness identifications. The Attorney General, recognizing that his primary duty is to ensure that justice is done and the criminal justice system is fairly administered, is therefore promulgating these guidelines as “best practices” to ensure that identification procedures in this state minimize the chance of misidentification of a suspect.

I. COMPOSING THE PHOTO OR LIVE LINEUP

The following procedures will result in the composition of a photo or live lineup in which a suspect does not unduly stand out. An identification obtained through a lineup composed in this manner should minimize any risk of misidentification and have stronger evidentiary value than one obtained without these procedures.

A. In order to ensure that inadvertent verbal cues or body language do not impact on a witness, whenever practical, considering the time of day, day of the week, and other personnel conditions within the agency or department, the person conducting the photo or live lineup identification procedure should be someone other than the primary investigator assigned to the case. The Attorney General recognizes that in many departments, depending upon the size and other assignments of personnel, this may be impossible in a given case. In those cases where the primary investigating officer conducts the photo or live lineup identification procedure, he or she should be careful to avoid inadvertent signaling to the witness of the “correct” response.

B. The witness should be instructed prior to the photo or live lineup identification procedure that the perpetrator may not be among those in the photo array or live lineup and, therefore, they should not feel compelled to make an identification.

C. When possible, photo or live lineup identification procedures should be conducted sequentially, i.e., showing one photo or one person at a time to the witness, rather than simultaneously.

D. In composing a photo or live lineup, the person administering the identification procedure should ensure that the lineup is comprised in such a manner that the suspect does not unduly stand out. However, complete uniformity of features is not required.

E. Photo Lineup. In composing a photo lineup, the lineup administrator or investigator should:

1. Include only one suspect in each identification procedure.
2. Select fillers (nonsuspects) who generally fit the witness’ description of the perpetrator. When there is a limited or 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. Select a photo that resembles the suspect's description or appearance at the time of the incident if multiple photos of the suspect are reasonably available to the investigator.
4. Include a minimum of five fillers (nonsuspects) per identification procedure.
5. Consider placing the suspect in different positions in each lineup when conducting more than one lineup for a case due to multiple witnesses.
6. Avoid reusing fillers in lineups shown to the same witness when showing a new suspect.
7. Ensure that no writings or information concerning previous arrest(s) will be visible to the witness.
8. View the array, once completed, to ensure that the suspect does not unduly stand out.
9. Preserve the presentation order of the photo lineup. In addition, the photos themselves should be preserved in their original condition.

F. Live Lineups. In composing a live lineup, the lineup administrator or investigator should:

1. Include only one suspect in each identification procedure.
2. Select fillers (nonsuspects) who generally fit the witness' description of the perpetrator. When there is a limited or 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. Consider placing the suspect in different positions in each lineup when conducting more than one lineup for a case due to multiple witnesses.
4. Include a minimum of four fillers (nonsuspects) per identification procedure.
5. Avoid reusing fillers in lineups shown to the same witness when showing a new suspect.

II CONDUCTING THE IDENTIFICATION PROCEDURE

The identification procedure should be conducted in a manner that promotes the accuracy, reliability, fairness and objectivity of the witness' identification. These steps are designed to ensure the accuracy of identification or nonidentification decisions.

A. Simultaneous Photo Lineup: When presenting a simultaneous photo lineup, the lineup administrator or investigator should:

1. Provide viewing instructions to the witness as outlined in subsection I B, above.
2. Confirm that the witness understands the nature of the lineup procedure.
3. Avoid saying anything to the witness that may influence the witness' selection.
4. If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty.
5. Record any identification results and witness' statement of certainty as outlined in subsection II E, "Recording Identification Results."
6. Document in writing the lineup procedure, including:
 - a. Identification information and sources of all photos used.
 - b. Names of all persons present at the photo lineup.
 - c. Date and time of the identification procedure.

7. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

B. Sequential Photo Lineup: When presenting a sequential photo lineup, the lineup administrator or investigator should:

1. Provide viewing instructions to the witness as outlined in subsection I B, above.
2. Provide the following additional viewing instructions to the witness:
 - a. Individual photographs will be viewed one at a time.
 - b. The photos are in random order.
 - c. Take as much time as needed in making a decision about each photo before moving to the next one.
 - d. All photos will be shown, even if an identification is made prior to viewing all photos; or the procedure will be stopped at the point of an identification (consistent with jurisdictional/departamental procedures).
3. Confirm that the witness understands the nature of the sequential procedure.
4. Present each photo to the witness separately, in a previously determined order, removing those previously shown.
5. Avoid saying anything to the witness that may influence the witness' selection.
6. If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty.
7. Record any identification results and witness' statement of certainty as outlined in subsection II E, "Recording Identification Results."
8. Document in writing the lineup procedure, including:
 - a. Identification information and sources of all photos used.
 - b. Names of all persons present at the photo lineup.
 - c. Date and time of the identification procedure.
9. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

C. Simultaneous Live Lineup: When presenting a simultaneous live lineup, the lineup administrator or investigator should:

1. Provide viewing instructions to the witness as outlined in subsection I B, above.
2. Instruct all those present at the lineup not to suggest in any way the position or identity of the suspect in the lineup.
3. Ensure that any identification actions (e.g., speaking, moving, etc.) are performed by all members of the lineup.
4. Avoid saying anything to the witness that may influence the witness' selection.
5. If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty.
6. Record any identification results and witness' statement of certainty as outlined in subsection II E, "Recording Identification Results."
7. Document in writing the lineup procedure, including:
 - a. Identification information of lineup participants.
 - b. Names of all persons present at the lineup.
 - c. Date and time of the identification procedure.
8. Document the lineup by photo or video. This documentation should be of a quality

that represents the lineup clearly and fairly.

9. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

D. Sequential Live Lineup: When presenting a sequential live lineup, the lineup administrator or investigator should:

1. Provide viewing instructions to the witness as outlined in subsection I B, above.
2. Provide the following additional viewing instructions to the witness:
 - a. Individuals will be viewed one at a time.
 - b. The individuals will be presented in random order.
 - c. Take as much time as needed in making a decision about each individual before moving to the next one.
 - d. If the person who committed the crime is present, identify him or her.
 - e. All individuals will be presented, even if an identification is made prior to viewing all the individuals; or the procedure will be stopped at the point of an identification (consistent with jurisdictional/departmental procedures).
3. Begin with all lineup participants out of the view of the witness.
4. Instruct all those present at the lineup not to suggest in any way the position or identity of the suspect in the lineup.
5. Present each individual to the witness separately, in a previously determined order, removing those previously shown.
6. Ensure that any identification action (e.g., speaking, moving, etc.) are performed by all members of the lineup.
7. Avoid saying anything to the witness that may influence the witness' selection.
8. If an identification is made, avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness' statement of certainty.
9. Record any identification results and witness' statement of certainty as outlined in subsection II E, "Recording Identification Results."
10. Document in writing the lineup procedure, including:
 - a. Identification information of lineup participants.
 - b. Names of all persons present at the lineup.
 - c. Date and time the identification procedure was conducted.
11. Document the lineup by photo or video. This documentation should be of a quality that represents the lineup clearly and fairly. Photo documentation can either depict the group or each individual.
12. Instruct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and discourage contact with the media.

E. Recording Identification Results

When conducting an identification procedure, the lineup administrator or investigator shall preserve the outcome of the procedure by documenting any identification or nonidentification results obtained from the witness. Preparing a complete and accurate record of the outcome of the identification procedure is crucial. This record can be a critical document in the investigation and any subsequent court proceedings. When conducting an identification procedure, the lineup administrator or investigator should:

1. Record both identification and nonidentification results in writing, including the

witness' own words regarding how sure he or she is.

2. Ensure that the results are signed and dated by the witness.
3. Ensure that no materials indicating previous identification results are visible to the witness.
4. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures.

Attachment 4:
Virginia Department of Criminal Justice Services Training
Standard Related to Photographic Lineups

Performance Outcome 4. 1.

Conduct photographic line-up to identify arrestee/suspects.

Training Objective Related to 4. 1.

A. Given a written exercise, list factors to consider when doing a photographic line- up.

Criteria: The trainee will be tested on the following:

- 4.1.1. Same sex
- 4.1.2. Similar size, build, color, race, ethnic background
- 4.1.3. Similar background in photo
- 4.1.4. Black/white photos in group or color photos in group (do not mix the groups)
- 4.1.5. Descriptors that victim or witnesses provide (instructor to provide for class)
- 4.1.6. Do not use photos that reflect bias toward one person, i.e. mug shots for some and not all.