

NOPD CONSENT DECREE MONITOR
NEW ORLEANS, LOUISIANA



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File Number: 37PA-191555

Deputy Superintendent Danny Murphy
Compliance Bureau, New Orleans Police Department
714 Broad Street
New Orleans, LA 70119

Dear Superintendent Murphy:

This letter constitutes confirmation that the Office of Consent Decree Monitor (“OCDM”) has reviewed and provided comments on the revised Chapter 42.8.1 – Eyewitness Identification – Photographic Line Up. The OCDM has no objection to the policy as revised.

We believe that the revised Chapter 42.8.1 – Eyewitness Identification – Photographic Line Up, incorporates all requirements of the Consent Decree and sets forth clear and appropriate rules to guide officer conduct. We will continue to assess the adequacy of this policy following its implementation. If we identify any concerns following implementation, we will present those concerns to you and the Department of Justice. Additionally, we note that, pursuant to the Consent Decree, NOPD has agreed to review and revise policies and procedures as necessary upon notice of a significant policy deficiency. We also note NOPD’s obligation to review this policy after a year of implementation to ensure it “provides effective direction to NOPD personnel and remains consistent with the Agreement, best practices, and current law.” Consent Decree at ¶ 8.

We appreciate your team’s effort, cooperation, and responsiveness throughout this process.
Very truly

Very truly yours,

David L. Douglass
For SHEPPARD MULLIN RICHTER & HAMPTON LLP*
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CC: HONORABLE SUSIE MORGAN (VIA ELECTRONIC MAIL)
EMILY GUNSTON, DEPARTMENT OF JUSTICE (VIA ELECTRONIC MAIL)



NEW ORLEANS POLICE DEPARTMENT OPERATIONS MANUAL

CHAPTER: 42.8.1

TITLE: EYEWITNESS IDENTIFICATION – PHOTOGRAPHIC LINE-UP

EFFECTIVE:

REVISED:

PURPOSE

1. This Chapter establishes requirements for administering photographic line-up eyewitness identification methods for the purpose of identifying persons responsible for crime and exonerating the innocent.

POLICY STATEMENT

2. This Department will strive to use eyewitness identification techniques, when appropriate, to enhance the investigative process and will emphasize identifying persons responsible for crime and exonerating the innocent. There are several eyewitness identification processes such as, field identification, composite sketch, live lineup, and photographic line-up identification.

DEFINITIONS

Definitions related to this Chapter include:

Confirmation photograph—A single photograph displayed to a witness in an effort to confirm the identity of a suspect. This method is limited to situations in which the suspect is previously known to the witness by name.

“Double-blind” procedure/use of a blind administrator—A “double-blind” lineup is one in which neither the line-up administrator nor the eyewitness knows who the suspect is. This prevents the administrator of the lineup from providing inadvertent or intentional verbal or nonverbal cues to influence the eyewitness to pick the suspect.

Eyewitness identification process—Any field identification, composite sketch, live lineup, or photographic identification.

Fillers—Photographs or images of individuals who are not suspects but resemble the victim’s or witness’ description of the suspect in significant features (i.e. face, weight, build, skin tone).

Photographic line-up—The double-blind, sequential presentation of six individual photographs to a victim or witness of a crime for the purpose of identifying or eliminating an individual as the suspect. For purposes of this Chapter, “photo array” and “six-pack” are synonymous with

photographic line-up.

Photo number—The sequential position within a group indicating the numerical order placement of a particular photograph within a photographic line-up. (For instance, if the photograph is the sixth photo shown to the witness, the photograph's photo number is "6." Photo numbers shall be marked on the lower right hand section on the back of all photographs included in line-ups.

Redact/redaction—The censoring, removing, or obscuring of part of an image or photograph in a manner to make it clear that it has been altered, sometimes referred to "blacking out." The redaction is made to a part of the image or photo to eliminate an element or elements that cause the image to be different from the other images or photos used in the photographic line-up to a degree that might render it too "suggestive" or "different."

GENERAL

3. Due process requires that identifications be conducted in a fair, objective, and non-suggestive manner.
4. Due process is violated when identification procedures arranged and/or conducted by the police are unnecessarily suggestive and conducive to irreparable mistaken identification.
5. Confirmation photographs are not considered photographic line-ups.
6. Prior to conducting an identification procedure, investigators should take a full description of the suspect from the witness and document that description.
7. The officer should record the critical parts of what a witness has said verbatim as to how confident or certain he or she is of the identification made.
8. Officers should avoid any words or actions that suggest to the witness that a positive identification is expected, who they expect the witness to identify, or congratulating the witness on an identification.
9. Every show-up, photo array, line-up or voice identification procedure, whether an identification is made or not, shall be documented in a report (EPR). The report shall include a summary of the procedure, the persons who were present for it, instructions given to the witness by the officer (this is accomplished by submitting the appropriate witness instruction form as part of the report), any statement or reaction by the witness, and any comments made by the witness regarding the identification procedure.

UTILIZING PHOTOGRAPHIC LINE-UPS

10. Members shall employ photographic line-ups in all felony cases when the identity of the suspect is not known and / or when confirmation of the identity of the suspect is desired.
11. At no time prior to, during, or after the presentation of a photographic line-up shall it be suggested to a witness that any person depicted in the line-up is a suspect or was in any way connected to the offense.

CREATING A PHOTOGRAPHIC LINE-UP

12. The investigator should compose the line-up in such a manner that the suspect does not unduly stand out.

13. When creating a photographic line-up, investigators shall use the suspect's photograph and five filler photographs that do not depict the suspect.
14. Each photographic line-up shall include only one suspect in each identification procedure.
15. To create the photographic line-up, investigators may request a line-up from the Louisiana State Police Fusion Center or create a line-up from archival photographs stored in the ThinkStream database or Cop Link.
16. If alternative sources of photographs must be used, such as school identification photographs for a juvenile with no photographs on file, the suspect's and all filler photographs must come from the same source database. If any alternative sources of photographs, other than those commonly used by law enforcement, are used, the investigator compiling the photographic line-up must consult with his/her supervisor and obtain approval of both the source(s) used and the final compilation of the photographic line-up.
17. The filler photos in a line-up must generally fit the witness's description of the perpetrator. If the investigator has more than one photograph of the suspect, he/she should select the photograph that best resembles the suspect's description provided by the victim or witness being shown the photo line-up or appearance at the time of the incident. When there is a limited or inadequate description of the perpetrator provided by the witnesses or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers shall resemble the suspect's photograph in significant features, such as:
 - (a) Hair color, style, and length;
 - (b) Facial hair color, style, and length;
 - (c) Eye color;
 - (d) Facial expressions (for example, some photographs should not include smiling individuals while other photographs in the line-up do not);
 - (e) Markings, piercings, or tattoos that make the individual stand out;
 - (f) Obvious age differences;
 - (g) Obvious differences in skin color; and
 - (h) Distinct accessories such as earrings or head gear.
18. If significant differences between the suspect's photograph and the filler photographs are unavoidable, the officer must redact aspects of all photos to eliminate the significant differences. For example, if one individual is wearing earrings and the others are not, an investigator should place a black dot / square over the bottom of the ears of all individuals depicted in the line-up to eliminate the significant difference in appearance.
19. The investigating officer shall print the photographs to be used in the line-up in high-quality color.
20. Before administering the line-up, the investigating officer shall randomly determine the order in which the photographs will be displayed to the witness. The investigator shall number the back of each photograph in the line-up, documenting the order in which the photos are to be shown (for example, the third photo to be shown shall be marked "3" on the back).
21. The number shall be placed on the lower right hand section on the back of all photographs used in the line-up. The investigator shall document on Form 277b and confirm that the numbers on the photos and those listed on the Form 277b match and

are shown in the order indicated.

22. Only soft-point pens (sharpie type) shall be used to mark the photographs to prevent indentations in the photographs that would be visible on the front side of the photograph.
23. The photo number and identifying information such as SID# (State Identification, or criminal record number assigned to a particular criminal history record) for each photograph included in the line-up shall be documented on the Individual/Photo Sequence Form (Form #277b).
24. Should there be more than one suspect, a separate photographic lineup shall be conducted for each suspect. Separate Individual/Photo Sequence Forms (Form #277b) and Eyewitness Identification Forms (Form 277) shall be completed for each line-up.
25. Should there be more than one suspect and the suspects are similar in general appearance, a separate photographic lineup shall be conducted for each suspect using different filler photographs in each photographic line-up. Separate Individual/Photo Sequence Forms (Form #277b) and Eyewitness Identification Forms (Form 277) shall be completed for each line-up.
26. Should there be more than one witness, the suspect's photo and filler photos shall be placed in a different random order for each witness. Separate Individual/Photo Sequence Forms (Form #277b) and Eyewitness Identification Forms (Form 277) shall be completed for each line-up.

THE PHOTOGRAPHIC LINE-UP ADMINISTRATOR

27. Any members involved in the case / investigation shall not participate in the administration of the photographic line-up.
28. Line-up administrators are selected by the case investigator or the investigator's supervisor.
29. The line-up administrator shall **not**:
 - (a) Be involved in the creation of the line-up;
 - (b) Have any knowledge of the investigation;
 - (c) Have any knowledge as to which photograph depicts the suspect in the investigation; or
 - (d) Have already participated in administering a line-up in the same case.

ADMINISTERING A PHOTOGRAPHIC LINE-UP

30. The line-up administrator shall audio and/or video record the administration of the entire photographic line-up. The recording shall be retained according to current evidence procedures for video / audio recordings.
31. Absent extenuating circumstances, which must be articulated in the investigative / case report, all photographic line-ups shall be conducted in the investigating officer's Division Interview / Interrogation (L3) Room. If the investigating officer's Interview / Interrogation Room is not available, another Division's may be used.
32. The line-up administrator shall read aloud to the witness the top section of the Eyewitness Identification Form (Form 277), which is preceded by "*Read the following section aloud to the witness.*" This section includes an admonishment to the witness

that the witness is not required to make a selection and the perpetrator may not be included in the line-up.

33. The line-up administrator shall present the photographs one at a time, in the order documented on Form 277b and which match the numbers on the photographs.
34. Officers **shall not** indicate in any way to the witness whether a photo presented in a line-up is connected to the case. Officers shall avoid mentioning that:
 - (a) The individual was apprehended near the crime scene;
 - (b) The evidence points to the individual as the suspect; or
 - (c) Other witnesses have identified, or failed to identify, the individual as the suspect.
35. In order to avoid undue influence, witnesses should view a lineup individually and outside the presence of other witnesses. Witnesses shall be instructed to avoid discussing details of the incident or of the identification process with other witnesses.
36. If the witness identifies a photograph as that of the suspect, the line-up administrator shall continue with the photographic line-up and display any remaining photographs in the line-up.
37. If the witness identifies a photograph as that of the suspect, the witness shall sign and date the back side of the photograph of the identified individual.
38. The witness shall initial and date the back side of all photographs which are not identified as that of the suspect.
39. All photographs in a photographic line-up shall be marked by the witness, either with a signature and date for an identified photograph or initials and date for photographs not resulting in an identification.
40. Witnesses should use soft-point (Sharpie type) pens to mark the photographs to prevent indentations in the photographs that would be clearly visible on the front side of the photograph.
41. During the course of the photographic line-up, the line-up administrator shall complete Form 277 as detailed in **Documenting a Photographic Line-Up (below)**.

ADMINSTERING A PHOTOGRAPHIC LINE-UP WITH AN OUT-OF-TOWN WITNESS

42. If the victim/witness is not available to participate in a photographic line-up conducted by the NOPD investigator and he/she does not live within Orleans or a contiguous parish, the investigator's supervisor shall determine if NOPD officers will travel to the witness to perform the photographic line-up or if the following method for out-of-town line-ups shall be used.
43. If the decision is to utilize the procedure for out-of-town line-ups, the investigator will:
 - (a) Contact the victim/witness by phone and confirm their willingness to participate in the photographic line-up after advising them of the procedure to be used.
 - (b) Obtain a mailing address from which the victim/witness can receive the photographs/images and forms and instruct the victim/witness to contact the investigator by phone (provide the contact number) when they receive the line-up in the mail but not to open the envelope until instructed.
 - (c) Compile the photographs to be used in the same manner that would be used for a local photographic line-up. Ensure that the images or photographs do not indicate or identify the subjects or suspect in any way.

- (d) The packet mailed to the victim/witness shall include the required forms (Form 277 and Form 277b), along with a pre-addressed, postage paid, Certified Mail return envelope addressed to the investigator at his/her NOPD address.
- (e) Send the photographic line-up and forms to the previously identified address.
- (f) Confirm a date, time and contact phone number to conduct the line-up with the victim/witness.
- (g) Choose a line-up administrator to conduct the line-up by phone.
- (h) The entire process from this point forward shall be audio or video recorded in the same manner as a local photographic line-up. The L3 Room can be utilized for this process.
- (i) Call the phone number provided by the victim/witness and introduce the person who will be the line-up administrator. The line-up administrator will then provide instructions on the procedure to be utilized.
- (j) The photographic line-up administrator will provide step-by-step instructions to the victim/witness on conducting the line-up, including reading the required forms while the victim/witness views them.
- (k) At the appropriate time in the process, the administrator will instruct the victim/witness to view the images/photos in the order indicated.
- (l) The results of the line-up shall be documented in the same manner as a local photographic line-up.
- (m) The victim/witness shall complete, initial, sign and date the forms and the photographs as instructed by the photographic line-up administrator and mail all photographs and the completed documents to the NOPD in the return envelope provided (Certified Mail only).
- (n) The NOPD investigator and his/her supervisor will review ALL materials and recordings to ensure that NOPD procedures were followed and the conduct of the administration of the photographic line-up was legal and chain-of-evidence was and is maintained.
- (o) When the photographic line-up and documents are received by the investigator, they will be opened in the presence of the investigator, line-up administrator and supervisor and verified. Any forms requiring completion and/or signatures shall be completed by the appropriate party at that time and in the presence of the other two.
- (p) The returned photographic line-up and recording shall be copied for the case file. The originals shall be placed in Central Evidence and Property within 24 hours of receipt by the NOPD investigator.
- (q) A copy of CE&P receipt, all documentation and memorialization of the process as outlined above shall be included in a supplemental report and in the case file. Any concerns, issues or relevant observations concerning the out-of-town photographic line-up shall be noted in the report.

ADMINISTERING A PHOTOGRAPHIC LINE-UP FOR ANOTHER LAW ENFORCEMENT AGENCY

- 45. If requested by another law enforcement agency, NOPD investigators may conduct a photographic line-up for that agency once the request is approved by his/her NOPD supervisor.
- 46. NOPD investigators performing photographic line-ups for another law enforcement agency shall follow the guidelines and instructions provided by that agency to conduct of the photographic line-up unless they believe the line-up violates due process. (Due process requires that identifications be conducted in a fair, objective, and non-suggestive manner.)
- 47. NOPD investigators performing photographic line-ups for another law enforcement

agency shall advise his/her supervisor of any concerns raised by the photographs used or the guidelines to be followed prior to the commencement of the line-up.

48. If no guidelines are provided by the requesting investigator or agency, the provisions of this Chapter shall be followed.

DOCUMENTING A PHOTOGRAPHIC LINE-UP

49. The investigating officer shall enter all required information into the Photographic Line-Up Log immediately after the administration of the line-up for each photographic line-up and receiving the evidence from the line-up administrator.
50. The photographic line-up administrator shall document the administration and results of the photographic line-up on the Eyewitness Identification Form (Form 277). The administering officer shall complete all sections of Form 277, documenting the following:
- (a) The item number for the investigation;
 - (b) The date, time, and location of the photographic line-up;
 - (c) The name of the officer administering the identification procedure;
 - (d) The name of the witness (i.e., viewing person);
 - (e) Whether or not the witness identified a photograph as the perpetrator and, if there was an identification, the photo number of the selected photograph;
 - (f) Record the critical parts of what the witness said verbatim;
 - (g) The names of all of the individuals present during the line-up or an indication that no witnesses were present;
 - (h) A signature from the administering officer to confirm that the photographic line-up was conducted according to this Chapter and the process outlined on Form 277;
 - (i) A signature from the witness acknowledging that he/she understood the identification procedures and instructions; and
 - (j) A signature from the reviewing supervisor, confirming that the line-up was conducted according to this Chapter and the process outlined on Form 277.
51. The investigating officer shall complete all sections of Form 277b, documenting the following:
- (a) The numbers on the photos and those listed on the Form 277b match and are shown in the order indicated. The number shall be placed on the lower right hand section on the back of all photographs used in the line-up.
 - (b) The photo number and identifying information such as SID# (State Identification, or criminal record number assigned to a particular criminal history record) for each photograph included in the line-up shall be documented on the Individual/Photo Sequence Form (Form #277b).
53. The scanned (electronic) file of the photographic line-up shall be labeled:
- (a) "Item # - Photo Line-Up" (example: "A-12345-16 Photo Line-Up");
 - (b) If you have a second photo line-up use a sequential number (example: "A-12345-16 Photo Line-Up #2").
 - (c) The file should be saved in the investigator's electronic case file, in a backed-up drive, labeled under the item number.
54. If the witness identifies the suspect, the investigating officer shall file the photographs used in the line-up, Form 277, and Form 277b into evidence at Central Evidence & Property until the final disposition of the case, at which time it shall become a part of the permanent case file.
52. The investigating officer shall document the photographic line-up results in the investigative report.

WITNESSES WITH LIMITED ENGLISH PROFICIENCY, HEARING IMPAIRMENT OR DEAFNESS

55. If a witness in a criminal case / investigation does not speak English as his/her primary language (LEP) and has a limited ability to read, write, speak, or understand English or otherwise has difficulty communicating (e.g. hearing impaired), officers shall arrange for a qualified interpreter or transliterator, such as one available through ELSA, NOT an NOPD authorized interpreter (NOPDAI), before proceeding with the photographic line-up (see: **Chapter 55.5 – Communications with the Hearing Impaired, Deaf, or Persons with Disabilities** or **Chapter 55.4 - Limited English Proficiency Services**).
56. Before the interpreter is permitted to discuss any matter with the witness, the investigating officer shall explain the identification process to the interpreter. Once it is determined that the interpreter comprehends the process and can explain it to the witness, the photographic line-up process may proceed as provided for by this Chapter.