



# POLICE / PROSECUTOR UPDATE

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As it has been quite a while since the subject has been discussed, we will examine the law regarding pretrial identification procedures: lineup, showup (one-on-one confrontation), and photographic array.

**Lineups** - Generally, the participants in a lineup should be selected so that the suspect does not stand out so strikingly in his characteristics that he is virtually alone with respect to identifying characteristics. However, the police are not required to perform the impossible task of finding four or five other people who are virtual twins to the suspect. *Number of Participants* - Our Supreme Court has stated that a lineup should consist of at least five or six individuals, although a lesser number might be permissible depending on the circumstances. *Physical Characteristics of Participants* - A marked difference in the style or color of a suspect's hair as compared to the other participants should be avoided. The same is true of skin color and complexion. *Physical Build* - The participants should have similar physical builds; there should be no extreme discrepancy in height and weight. *Age* - It is necessary only that the ages of the participants be in the same general range as the suspect. Finally, police should avoid informing a lineup observer that a suspect, or words conveying a similar meaning, is in the lineup.

Prior to the filing of an indictment or information, an accused is not entitled to the presence of counsel at a lineup. However, an accused is entitled to the presence of counsel after the initiation of formal criminal proceedings. The fact a defendant is formally charged with one offense does not entitle him to presence of counsel for a lineup on an unrelated and uncharged crime. Note - when a lineup is preserved on videotape, the presence of counsel is not necessary, even after filing of formal charges.

**Showups** - Generally, it is permissible for a police officer to present a suspect for identification within a short time of the commission of an offense. The major justification for the use of showups is the enhanced accuracy of identification due to the relative immediacy of the witness' observation of the suspect. Therefore, the briefer the lapse of time, the better. The greatest lapse of time approved by our courts is 2 1/2 hours.

Showups have been approved where the suspect was returned to the crime scene, or at the location where the suspect was apprehended, or even in jail. Also, showups have been approved where the suspect was handcuffed and/or in a police car when observed by the witness. Finally, one situation of which our courts seem especially solicitous of showups is when the victim of the crime, or the suspect, is hospitalized.

**Photographic Arrays** - A properly constituted and conducted photographic array identification is reliable. There is no requirement that police conduct a corporeal lineup instead of a photographic identification. For example, our courts have held that if a defendant has been positively identified from a photo array, he has no right to also appear in a lineup.

Although mug shots cannot generally be shown to a jury, a photo array consisting of such photographs is proper. *Number of Photographs* - The number of photographs in an array should ordinarily be five or six. *Makeup of Photographic Array* - Our Supreme Court has stated, "Several photographs, preferably not mug-shot types, should be displayed to the victim with a request that he pick out his assailant. The pictures themselves should not indicate which among them, if any, the police believe the criminal to be, and the officer displaying the photographs should endeavor to do so in an impartial manner." Obviously, while photographs in an array should be reasonably similar to one another, they need not be of individuals identical in appearance. For example, an array is not unduly suggestive when it included bearded subjects while the defendant was clean-shaven, so long as more than one person in the display was clean-shaven. On the other hand, an array consisting of a color photo of the defendant and five other black and white mug shots was impermissibly suggestive.

**Conduct of Police During Procedure** - Courts have condemned comment by officers conducting the photographic lineup which accompany or precede the witness' selection, such as the suspect's photograph is in the array. On the other hand, it is not improper to tell a witness that he picked the defendant's picture after the identification had been made. *Group Identifications* - When two or more witnesses are participating in a photographic identification, it is important that precautions be taken to assure that the witnesses' identifications are not the result of collaborative effort. Our Supreme Court has approved a procedure where the witnesses were kept in separate rooms and the photo array was rearranged before its showing to each witness.

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