

ATTORNEY GENERAL GUIDELINES FOR PREPARING AND CONDUCTING OUT-OF-COURT EYEWITNESS IDENTIFICATIONS¹

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PREAMBLE

These Guidelines supersede the *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*, issued April 8, 2001, as they clarify the recordation and preservation requirements for all out-of-court eyewitness-identification procedures, including such procedures for composing, conducting, and recording identifications by way of mug books.²

In response to recent case law dealing with identification procedures in New Jersey, and the New Jersey Supreme Court's adoption of new changes to Rule 3:11, the Attorney General's Office has promulgated these new Guidelines for Preparing and Conducting Out-of-Court Eyewitness Identifications ("Identification Guidelines"). On March 13, 2019, the New Jersey Supreme Court issued its decision in *State v. Anthony*, 273 N.J. 213 (2019), which clarified that law enforcement must record identification procedures electronically, preferably by video and audio, if feasible, and, if that is not feasible, a contemporaneous written account must be made. If either of those options is not feasible, the administrator must provide a detailed summary of the identification procedure. If either the electronic recording or contemporaneous record is not feasible, the reasons must be documented.

On July 23, 2019, the New Jersey Supreme Court issued a second opinion on identification in *State v. Green*, 239 N.J. 88 (2019), which imposed new obligations on the State when officers use either an old-fashioned hard-copy mug book, or a digital database of mugshots, to search for an unknown suspect based on a witness's physical description of the suspect. Law enforcement must now preserve certain photos the witness views when making an identification and/or suggesting that a particular image looks like the suspect. Specifically, to allow for appropriate review, administrators should preserve: (1) the photo of the suspect the witness selected, along with all other photos on the screen or page; and (2) any photo that a witness says depicts a person who looks similar to the suspect, along with all other photos on that screen or page. When relevant, the State will also have the burden of showing that a witness was not exposed to multiple photos or viewings of the same suspect.

The underlying concern is the risk of "mugshot exposure," which may occur when an eyewitness sees more than one photo of the same potential suspect. It can affect the reliability of any resulting identification because of the possibility that the witness will make an identification

¹ This document is not intended to create, does not create, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nothing in these procedures implies that an identification not done in accordance with them is unreliable or inadmissible in court.

² Mug books are collections of photographs of previously arrested persons. They may be used in cases in which a suspect has not yet been determined and other reliable sources have been exhausted.

based on a memory of the earlier photo and not the original event. To guard against misidentification, administrators must take active measures to ensure that an eyewitness is not exposed to multiple photos or viewings of the same suspect. In addition, administrators should take measures to prevent witnesses from gaining access to extraneous, possibly prejudicial information about a person.

I. COMPOSING THE IDENTIFICATION PROCEDURE

A. Photo Arrays and Live Lineups

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.

1. ***Double-Blind Administration.*** In order to ensure that inadvertent verbal cues or body language do not impact a witness, whenever practical, the person conducting the photo or live lineup identification procedure should be someone other than the primary investigator assigned to the case. 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, they should be careful to avoid inadvertent signaling to the witness of the “correct” response.
2. ***Instructions.*** 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.
3. ***Sequence.*** 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.
4. ***Uniformity.*** 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.
5. ***Additional Composition Recommendations Specific to Photo Arrays.*** In composing a photo array, the administrator or investigator should:
 - a. Include only one suspect in each identification procedure.
 - b. Select “fillers” (a filler is someone who is not a suspect) who generally fit the witness’s 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, such as gender, race, skin color, facial hair, age, and distinctive physical characteristics.

- c. 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.
 - d. Include a **minimum** of five fillers per identification procedure.
 - e. When there is more than one witness, consider placing the suspect in different positions in each lineup.
 - f. When showing a new suspect to the same witness, avoid reusing fillers in lineups.
 - g. Ensure that no writings or information concerning previous arrest(s) will be visible to the witness.
 - h. View the array, once completed, to ensure that the suspect does not stand out.
 - i. Preserve the presentation order of the photo lineup.
 - j. Preserve all photos in their original condition.
6. *Additional Composition Recommendations Specific to Live Lineups.* In composing a live lineup, the lineup administrator or investigator should:
- a. Include only one suspect in each identification procedure.
 - b. Select fillers who generally fit the witness's 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, such as gender, race, skin color, facial hair, age, and distinctive physical characteristics.
 - c. When there is more than one witness, consider placing the suspect in different positions in each lineup.
 - d. Include a **minimum** of four fillers per identification procedure.
 - e. When showing a new suspect to the same witness, avoid reusing fillers in lineup.

B. Physical and Digital Mug Books

The following procedures will result in the composition of a physical or digital mug book. An identification obtained in this manner should minimize any risk of misidentification and have stronger evidentiary value than one obtained without these procedures.

1. **Duplicates.** Preparers should ensure that only one photo of each individual is in the mug book.
2. **Double-Blind Administration.** In order to ensure that inadvertent verbal cues or body language do not have an impact on a witness, whenever practical, the person conducting the mugshot-identification procedure should be someone other than the primary investigator assigned to the case. 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 identification procedure, they should be careful to avoid inadvertent signaling to the witness of any “correct” response.
3. **Instructions.** The witness should be instructed prior to the identification procedure that the perpetrator may not be among those in the mugshots they will view and, therefore, they should not feel compelled to make an identification.
4. **Sequence.** If feasible, mugshot-identification procedures should be conducted sequentially, i.e., showing one photo or one person at a time to the witness, rather than simultaneously. See Section I.A.3.
5. **Extraneous Information.** Ensure that no writings or information concerning previous arrest(s) will be visible to the witness.

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’s identification. These steps are designed to ensure the accuracy of identification or nonidentification decisions.

A. Sequential and Simultaneous Photo Arrays & Mug Book Identifications

When presenting photos, the administrator or investigator should follow the below procedures:

1. Electronically record, preferably in video-audio format, the identification procedure. If an electronic recording is not feasible, the administrator must contemporaneously record the identification procedure in writing, and document why an electronic recording was not feasible. If a contemporaneous written recording is not feasible, the administrator must prepare a detailed written summary of the identification procedure as soon as practicable and without

undue delay, and explain in writing why an electronic recording and a written contemporaneous account were not feasible.

2. Provide viewing instructions to the witness as outlined in subsection I.A.2, above.
 - a. For sequential photo arrays, provide the following additional viewing instructions to the witness:
 - i. Individual photographs will be viewed one at a time³;
 - ii. The photos are in random order;
 - iii. Take as much time as needed in making a decision about each photo before moving to the next one; and
 - iv. 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/departmental procedures).
3. Confirm that the witness understands the nature of the procedure.
4. Avoid saying anything to the witness that may influence the witness's selection.
5. Present each photo to the witness separately, in a previously determined order, removing those previously shown.
6. If an identification is made, avoid reporting to the witness any information regarding the individual the witness has selected prior to obtaining the witness's statement of certainty.
7. Record any identification results and witness's statement of certainty as outlined in subsection III, "Recording Identification Results."
8. Document in writing the 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.

³ See Section I.A.3.

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.

B. Simultaneous and Sequential Live Lineup

When presenting a live lineup, the lineup administrator or investigator should follow the below procedures:

1. Provide viewing instructions to the witness as outlined in subsection I. B, above.
2. For sequential live lineups, 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 that person.
 - 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. Instruct all those present at the lineup not to suggest in any way the position or identity of the suspect in the lineup.
4. Ensure that any identification actions (*e.g.*, speaking, moving, etc.) are performed by all members of the lineup.
5. Avoid saying anything to the witness that may influence the witness's selection.
6. If an identification is made, avoid reporting to the witness any information regarding the individual selected prior to obtaining the witness's statement of certainty.
7. Record any identification results and witness's statement of certainty as outlined in subsection III, "Recording Identification Results."
8. 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.
9. 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.
10. 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.
11. Instruct all those present at the lineup not to suggest in any way the position or identity of the suspect in the lineup.
12. Present each individual to the witness separately, in a previously determined order, removing those previously shown.

III. 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.

A. All Out-Of-Court Identifications

When conducting an identification procedure (photo array, lineup, or mug book), the administrator or investigator should:

1. Record both identification and nonidentification results in writing, *including the witness's own words*.
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. If the witness writes on or marks any materials, ensure that the marked copy of those materials are not used in other identification procedures.

B. Additional Recording Requirements Specific to Mug Book Identifications

1. For all mug book identification procedures, the administrator or investigator should record the page on which the relevant photos were displayed, in addition to the above requirements outlined in Section III.A.

2. ***Positive Identifications.*** If the witness makes a positive identification, the investigator or administrator must preserve the following:
 - a. The photo a witness identifies as the assailant or suspect; **and**
 - b. All other photos on that page of the physical mug book or digital screen.
3. ***Similar Individuals.*** If the witness suggests that any photo looks similar to or resembles the perpetrator, the investigator or administrator must also preserve the following:
 - a. Any photo a witness says depicts a person who looks similar to the suspect; **and**
 - b. All other photos on the page of the physical mug book or digital screen with the “similar” suspect.
4. **Additional Requirements Based on Specific Mug Book Systems or Databases**
 - a. **Physical Mug Books:**
 - i. The administrator must preserve the photos identified in subsections III.B.2 and III.B.3 by maintaining each hard-copy mugshot. The photos themselves should be presented in their original condition.
 - b. **High Intensity Drug Trafficking Area (HIDTA) PhotoManager System:**
 - i. The administrator should create a session in “witness mode” to enter a witness’s physical description of the perpetrator.
 - ii. Allow the witness to examine the images.
 - iii. If the witness identifies a suspect, the session is considered complete. At that time, all photos on the screen must be preserved, the search should be saved (if possible), and a report should be generated.⁴
 - iv. If the witness instead identifies a photo that looks *similar* to the suspect, the administrator must preserve all of the photos on the screen and save the search (if possible). The administrator should also generate a report, and do the following:

⁴ “*Witness mode*” should be used because at the end of a session, a report can be generated of the photos displayed, how long each was displayed, and whether the witness marked a photo as either “yes,” “no,” or “possible.” The report generates a log of numbers, each of which links to a single photo. Individual photos can also be printed.

- close out the session, switch back to “*investigative mode*,” and – using the “similar” function – narrow the field further to search for additional similar photos.⁵
 - switch back to “*witness mode*” to allow the witness to examine the more limited group of photos as part of a new session.
 - preserve the photos identified in subsections III.B.2 and III.B.3 by downloading (if possible) and printing the photos.
- v. If possible, the administrator should generate a report at the end of any “*witness mode*” session where a witness identifies either a suspect or someone who looks similar to the suspect.
- vi. When the witness identifies either a suspect or someone who looks similar to the suspect, the administrator must record the page on which the relevant photos were displayed.
- c. Other Digital Systems:
- i. Preserve the photos identified in subsections III.B.2 and III.B.3 by downloading (if possible) and printing the photos.
 - ii. Generate a report if the system has the capability to generate a report of the photos that were viewed.
 - iii. Record the page on which the relevant photos were displayed.

⁵ “*Investigative mode*” should only be used as described above because a simple mouse-click on a photo in “*investigative mode*” will reveal a host of information about the person – including their name, and the date and time of arrest – that a witness should not be exposed. In addition, individual photos can be printed, but – unlike “*witness mode*” – no report of the session can be created. Finally, “*investigative mode*” is problematic for this type of procedure because it repeats individual photos when the “similar” function is used or an array is created.