



## RISK MANAGEMENT INFORMATION

# FIELD IDENTIFICATION PROCEDURES: THE SHOW-UP

*\*This information was originally developed in conjunction with the League of Minnesota Cities Insurance Trust's PATROL program (Police Accredited TRaining OnLine). For information on PATROL, contact Laura Honeck at patrol@lmc.org or 651-281-1280. For questions about the material in this memo, contact Ann Gergen at agergen@lmc.org or 651-281-1291.*

### Introduction:

The legal community is continuing to debate the accuracy of eyewitness testimony and identifications.<sup>1</sup> This criticism includes show-ups, which is an identification procedure conducted in the field.

Although show-ups have been criticized as being too suggestive, courts continue to allow them because they serve two important purposes. First, they enable law enforcement officers to quickly release a suspect if he turns out not to be involved.<sup>2</sup> Second, if officers have captured the wrong person, finding out immediately allows them to refocus their investigation and continue to pursue the responsible suspect.<sup>3</sup> If conducting a show-up doesn't serve one or both of these purposes, it may be a hint that conducting one is not be the best tool for obtaining identification evidence under the circumstances.

### Legal Standard:

Courts use a two-part test to determine whether identification evidence from show-ups will be admissible. Part 1 of the test looks at whether the show-up was unnecessarily suggestive.<sup>4</sup> Courts have held that having the suspect in a squad car, in handcuffs, and flanked by officers at the time of identification is suggestive.<sup>5</sup> Additionally, words spoken by officers in conjunction with the show-up can tip the scales to make the identification evidence unreliable. Statements like: "We caught the guy you identified" or the suspect is "currently being detained" can be fatal to the state's case.<sup>6</sup>

Part 2 of the test focuses on the reliability of the identification evidence.<sup>7</sup> The central question is whether the witness had a sufficient and convincing basis for knowing that the subject of the show-up committed the crime in question without any suggestiveness on the part of the police or other factors in the show-up

<sup>1</sup> See *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1261 (Mass. 1995).

<sup>2</sup> *State v. Taylor*, 594 N.W.2d 158, 162 (Minn. 1999); *State v. Carey*, 207 N.W.2d 529, 532 (Minn. 1973).

<sup>3</sup> See *Carey*, 207 N.W.2d at 532.

<sup>4</sup> *Taylor*, 594 N.W.2d at 161.

<sup>5</sup> *State v. Anderson*, 657 N.W.2d 846, 851 (Minn. Ct. App. 2002).

<sup>6</sup> *State v. Sundberg*, No. A07-108, 2007 WL 4239205 (Minn. Ct. App. Dec. 4, 2007).

<sup>7</sup> *Manson v. Brathwaite*, 432 U.S. 98, 104 (1977); *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995); *State v. Bellecourt*, 312 Minn. 263, 251 N.W.2d 631, 633 (1977).

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procedure.<sup>8</sup> In other words, courts require the witness to pick a suspect of their own volition – not with the help of the police. Courts look at five factors to answer this question:

1. The opportunity the witness had to view the suspect at the time of the crime.
2. How much attention the witness was paying to the crime and the suspect.
3. The accuracy of the description that the witness gave to the police before the show-up.
4. The level of certainty the witness stated or demonstrated when identifying the suspect.
5. The amount of time that passed between the crime and the identification.<sup>9</sup>

Courts then weigh these five factors under the totality of the circumstances test. If they find that the “witness’ identification had independent origin” the show-up is considered reliable and is admissible in court.<sup>10</sup>

### **Photo Show-up:**

While well-conducted one-person show-ups are admissible in court, the same is not always true for a one-person photo show-up.<sup>11</sup> Even though technology now makes it possible to rapidly access driver’s license photos, presenting only one photo to a witness is a practice that’s subject to challenge in the courts.<sup>12</sup> Courts allow show-ups in part because the police can quickly release a suspect that turns out not to be involved. Conducting a one-person photo show-up does not serve this purpose because there is no one to let go. Therefore, courts are more likely to scrutinize them.

### **Ethical Considerations:**

Officers should also think in ethical terms about show-ups. The fact is that show-ups and other eyewitnesses identifications can and do end up sending the wrong person to prison.<sup>13</sup> Therefore, when doing show-ups, it is extremely important that officers follow the rules and conduct the show-ups professionally. Doing so ensures accurate identifications, good convictions, and reflects well on law enforcement.

### **Practice Pointers:**

To maximize the accuracy and admissibility of identification evidence from show-ups, officers should consider the following tips:

1. Conduct the show-up close to the crime scene. All things being equal, it’s probably better to bring the witness to the suspect rather than bringing the suspect to the witness. Moving the witness helps minimize the length and scope of the detention for the suspect.

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<sup>8</sup> See generally, *State v. Ostrem*, 535 N.W.2d 916 (Minn. 1995).

<sup>9</sup> *Bellecourt*, 251 N.W.2d at 633 (adopting the five-part test from *Neil v. Biggers*, 409 U.S. 188, 199 (1972)).

<sup>10</sup> *Ostrem*, 535 N.W.2d at 921.

<sup>11</sup> *Id.* (“[s]ingle photo line-up identification procedures have been widely condemned as unnecessarily suggestive”); see also *Simmons v. U.S.*, 390 U.S. 377, 383 (1968).

<sup>12</sup> See *State v. Lushenko*, 714 N.W.2d 729, 732 (Minn. Ct. App. 2006).

<sup>13</sup> See *Commonwealth v. Johnson*, 650 N.E.2d 1257, 261 (Mass. 1995).

2. Before conducting the show-up, get and *document* as complete a description of the suspect as possible. An officer's notes and the description that is broadcast can be vital evidence. Both should be preserved.
3. If possible, go beyond the height, weight, race, hair color and clothing. Other features such as posture, gait, tattoos, haircut, hairline, skin texture, complexion, moles, scars, etc. can be very useful in establishing identity. Ask detailed questions and document the answers in your notes.
4. Do not have the suspect hold physical items or disguises that were associated with the crime.
5. Choose words carefully at the moment of identification. Tell the witness to keep an open mind because the person they're about to look at may or may not be the perpetrator. Tell the witness they should not feel compelled to make a positive identification. Tell the witness the investigation will continue whether or not they positively identify the suspect.
6. Don't confirm a witness' positive identification.
7. Document the witness' identification and degree of certainty. If the witness doesn't voluntarily get into the zone of discussing their degree of certainty, you can ask the question, "How certain are you?" Try to quote the witness' statements about these issues.

### **Conclusion:**

The debate on the accuracy of eyewitness testimony and identifications, including show-ups, continues. Although show-ups have been labeled as suggestive by the courts, they continue to be admissible if conducted properly. Officers should know the law in this area and follow the practice pointers in this lesson to ensure that their show-ups are admissible in court.

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