LINEUPS, SHOWUPS AND PHOTOGRAPHIC SPREADS: LEGAL AND PRACTICAL ASPECTS REGARDING IDENTIFICATION PROCEDURES AND TESTIMONY

These materials were compiled from a variety of sources by John R. Wasberg, former Senior Counsel in the Washington Attorney General's Office, retired. The materials are provided as a research source only, are not intended as legal advice, and should not be relied on without independent research and legal analysis. Any views expressed are those of Mr. Wasberg alone and do not necessarily reflect the opinions of any other person or any agency.

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LINEUPS, SHOWUPS AND PHOTOGRAPHIC SPREADS; PLUS OTHER LEGAL AND PRACTICAL ASPECTS OF IDENTIFICATION PROCEDURES AND TESTIMONY

I. INTRODUCTION AND DEFINITIONS

This article discusses legal and practical matters related to identification of a suspect by means of a lineup, showup or photographic spread. A "lineup" is a physical presentation of a group of people of similar appearance, including the suspect, from which a witness attempts to pick the perpetrator of the crime. A "showup" is a one-on-one confrontation between the suspect and a victim or other witness of a crime. A "photographic spread" (sometimes referred to as a "photo array," "photo montage," or "photographic lineup") is a grouping of photographs of people of similar appearance, including the suspect, from which a witness attempts to pick the perpetrator.

The article provides select citations to Washington Court decisions, as well as citations to the key U.S. Supreme Court decisions. For a relatively thorough and current listing of case law citations nation-wide on the subject of this outline, see the law review article on "Investigations and Police Practices — Identifications," 38 Georgetown Law Journal Annual Review of Criminal Procedure 167 (2009) (note that the articles in the Georgetown Law Journal review continue to be updated annually).

The case law on suggestiveness of eyewitness identification procedures addresses solely *questions of law which judges must determine*, i.e., whether the testimony of a witness should have been admitted and whether a conviction should stand. It is important to remember, however, that matters of suggestiveness and eyewitness reliability also are important to *questions of fact which juries must determine*. Even if the legal standard for admissibility of testimony is met in a given case, one or more jurors may find reasonable doubt based on perceived suggestiveness of an ID procedure or perceived lack of reliability of the testimony of an eyewitness at trial. This article's tips on helping to ensure reliability of eyewitness testimony are given with a goal of helping to understand both:

(a) the case law legal standards for admission of such testimony, and (b) some of the factors that may affect juror consideration of such testimony.

II. GENERALITIES REGARDING EFFECT OF SUGGESTIVENESS OF IDENTIFICATION PROCEDURES ON ADMISSIBILITY OF IDENTIFICATION TESTIMONY

Due process protection under the U.S. Constitution requires that a conviction be set aside if an eyewitness identification at trial follows a pre-trial identification procedure that was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification at trial." *Simmons v. U.S.*, 390 U.S. 377 (1968). If the police have suggested to the witness that the suspect to be observed in an identification procedure committed the crime, then the testimony of the eyewitness in court will be admissible (and will support a conviction) only if the government can overcome the resulting substantial likelihood of irreparable misidentification.

Factors considered in determining whether the pre-trial suggestiveness tainted the identification trial testimony of the eyewitness are as follows: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention at the time of the crime; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the time of the identification procedure; and (5) the lapse of time between the crime and the identification procedure. *State v. Shea*, 85 Wn. App. 56 (Div. II, 1997).

Obtaining and documenting an accurate description from the witness prior to conducting any identification procedure is of critical importance to the overall process. What follows is a non-exhaustive list of suggestions as guides in obtaining an accurate initial description before memorializing it in your report:

1. Always get as detailed a description as possible of the suspect, especially as to distinguishing characteristics, such as scars, tattoos, moles, etc. Encourage the witness to tell you everything.
2. Never lead the witness or say anything about the suspect.
3. After establishing rapport with the witness and inquiring about the condition of the witness, try to get the witness: to relax (to close his or her eyes if it helps) and to visualize the perpetrator's features.
4. To get an accurate height, ask the witness where his or her eyes would hit the suspect's body if he or she looked straight ahead.

5. Ask the witness to hold his or her hand up to approximate the height of the perpetrator.
6. Ask the witness to estimate *your* height and weight.

7. Ask the witness to approximate the distance between him or her and the perpetrator by moving a similar distance away from you.
8. Ask the witness to slowly go through the incident, step-by-step, in his or her mind to try to determine how long he or she was looking at the suspect.
9. Ask the witness if he or she was thinking at the time of the crime about identifying the suspect later.
10. Always go back over the witness's original statement to avoid miscommunication. State exactly what you are going to put in your report and ask the witness if he or she wants to change, add or emphasize anything.
11. Encourage the witness to contact investigators with any additional information.
12. Advise the witness to not discuss the case with other witnesses.

III. SUGGESTIVENESS SHOULD BE AVOIDED AT ALL STAGES OF THE IDENTIFICATION PROCEDURE

After completion of any of the various identification procedures, document the procedure and tell the witness what you are putting in the report regarding the witness's identification or lack thereof.

A. Avoid suggestiveness *before* the identification

Never tell the witness that: (a) you caught (or think you caught) the person who committed the crime; (b) the victim's property was in the suspect's possession; (c) the suspect made admissions; or (d) the person to be observed is a "suspect."

Instead, you should tell the witness that: (a) he or she should keep an open mind; (b) the person who committed the crime may or may not be among those present (or in the case of a showup, is the person present); (c) just because the person is in custody (assuming that custody is obvious) does not mean that he or she committed the crime; (d) the purpose of the procedure is to clear the innocent as well as identify the guilty; and (e) the witness should not confer with other witnesses regarding the identification. Don't allow more than one witness to participate in the procedure at one time.

B. Avoid suggestiveness *during* the identification

Never permit the witness's attention to be drawn to the suspect because of: (a) the way in which you have set up the identification procedure; or (b) remarks you have made during the procedure.[1]

In lineups and photographic spreads, the participants must be similar in appearance, but there is no requirement that the appearances be identical. Obviously, however, if the witness describes a set of particular distinguishing characteristics, all of the other persons in the lineup or photo spread should have these characteristics, if at all possible.[2] In the case of a photo spread, you should make sure that the *style and nature of the pictures themselves* (not just the people in them) are as similar as possible.

To avoid doing anything that might be construed as drawing attention to the suspect, you should say and do as little as possible during the critical time when the witness is making the identification. When more than one witness is to view the lineup or photographic spread, explain to each witness that each must go through the procedure separately. Do not permit the witnesses to hear the comments of one another at the identification procedure, or to compare notes as to their respective descriptions of the perpetrator.

Showups are the most likely of the identification procedures to be found suggestive, because only one suspect is present. Nonetheless, the courts make an exception to the general rule that a suspect deserves a full lineup, because a showup conducted shortly after the crime was committed allows: (a) an innocent suspect to be cut loose immediately, at a time when the witness has a fresh image in mind; and (b) the police to go on with their investigation while the trail is still fresh. As the hours elapse following the commission of the crime, these social policy interests in favor of showups diminish, and the interests favoring a more fair presentation of possible culprits begin to outweigh the former interests.[3]

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[1] In order to reduce the chance that an officer conducting an identification process will unconsciously lead the witness toward the suspect, some agencies have adopted a "double-blind" approach (blind for both the witness and for the officer). In this approach, the officer conducting the lineup or photo array did not pick the fillers and does not know who is the suspect.

[2] A trial court has broad discretion to order that a suspect submit to grooming prior to appearance in a lineup. *State v. Smith*, 90 Wn. App. 857 (Div. I, 1998); *State v. Ammlung & Titcombe*, 31 Wn. App. 696 (Div. II, 1982). Also, case law in California has held that police may modify photographs (such a by adding a mustache), but only to help *confirm* an identification already made on a tentative basis without the modification. *See People v. Hernandez*, 204 Cal. App.3d 639 (Cal. Ct. App. 1988).

[3] Because the determination of suggestiveness of ID procedures, as well as reliability of ID testimony, is always based on the "totality of the circumstances," court

Laundry list of suggestions for conducting physical lineups[4]*:*

1. Include just one suspect and at least four (preferably five) non-suspect participants (the ideal lineup contain six subjects, the suspect and five non-suspect participants); randomly position the suspect unless the suspect or his/her attorney states a preference.
2. Choose participants of the same race and sex and with similar characteristics, particularly the distinguishing characteristics reported by the witness.
3. If the suspect refuses to fully participate or cooperate in the lineup, tell him or her that such resistance may be commented upon in court as an admission of guilt (see generally, 21A Am Jur 2d, *Criminal Law,* §§ 1052-1060).
4. If the suspect wore distinctive clothing, have all participants wear similar distinctive clothing; if the suspect has a unique, readily identifiable characteristic like a scar, facial hair or tattoo, you may need to conceal the feature or try to duplicate it in the other participants.
5. If voice identification is necessary, have all participants say the same words.
6. Document the names of all participants in the lineup and all other persons present.

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decisions in ID procedure cases are extremely fact-intensive. In addition, courts often merge analysis of suggestiveness with analysis of whether the suggestiveness impermissibly tainted the eyewitness testimony such as to make it unreliable. It is therefore difficult to set out black-and-white rules based on the court decisions, whether in relation to elapsed-time restrictions on showups or otherwise. For a partial list of Washington showup ID cases, with elapsed time information included, see Part XIII of this article below.

[4] The suggestions here address a physical lineup in which all subjects are *simultaneously* displayed. It also permissible to conduct a physical lineup in which the subjects are *sequentially* displayed. This sequential method is becoming more common for lineups conducted by Washington law enforcement agencies, and that change in practice by some agencies may lead to defense attorneys arguing to juries that non-sequential lineup IDs are less reliable than sequential lineups. We recommend prior consultation with a law enforcement agency experienced in this method prior to employment of the sequential method. *Additional* suggestions in relation to sequential physical lineups include informing the witness that: (a) a group of individuals will be presented one at a time; (b) the individuals will be presented in random order; (c) the witness should take as much time as needed in making a decision about each individual before moving on to the next; (d) if the person who committed the crime is present, identify him or her; (e) all individuals will be presented in a predetermined order, even if an identification is made [**or** the procedure will be stopped at the point of an identification, consistent with departmental procedures]; (f) the witness should confirm at the outset that the witness understands the nature of the sequential procedure.

7. Take frontal and profile photographs of the lineup, and preserve the photos for trial.
8. Regardless of whether the witness picks the "right" or "wrong" participant, do not discuss the choice with the witness.
9. Instruct the witness not to discuss the lineup or the case with other witnesses.
10. Encourage the witness to contact you if he or she has additional information.
11. Document in a report who was involved in the procedure.

Laundry list of suggestions for conducting showups:

1. If practicable and safe, try not to present the suspect in a suggestive physical context—in handcuffs, sitting in the back of the patrol car, surrounded by police officers who are holding the victim's personal property or a possible disguise that the suspect had in his or her pocket when stopped, etc.
2. Don't say that you think you caught person that the witness described, and don't refer to the person as a suspect or say that the suspect made any admissions.
3. Tell the witness to keep an open mind, that the person who committed the crime may or may not be the person present, and, if the suspect in obvious custody, not to let this affect the witness's judgment.
4. Don't make the presentation in the presence of any other witnesses.
5. Document in a report who was present at the showup.

Laundry list of suggestions for conducting photographic arrays[5]*:*

Note: If you presently have the suspect in custody, if you can find sufficient persons similar in appearance to the suspect to *lineup* ID procedure conduct a reasonable lineup, and if there are no extenuating

[5] The suggestions here address a photo array in which photos are *simultaneously* displayed. It is also permissible to display photos *sequentially*. This sequential method is becoming more common for photo array ID procedures conducted by Washington law enforcement agencies, and that change in practice by some agencies may lead to defense attorneys arguing to juries that non-sequential photo arrays are less reliable than sequential lineups. We recommend prior consultation with a law enforcement agency experienced in this method prior to employment of the sequential method. *Additional* suggestions in relation to this method include informing the witness that: (a) photographs from a predetermined set will be presented one at a time in a random order previously determined; (b) the witness should take as much time as needed in making a decision on a photo before moving to the next photo; (c) all photos will be shown, even if an identification is made [or the procedure will be stopped at the point of identification, consistent with departmental procedures]; (d) the witness should confirm at the outset that the witness understands the nature of the sequential procedure.

circumstances, then **a lineup ID procedure is favored** over a photo ID procedure. See Part XIII.C. below for a partial list of Washington cases addressing this issue. Check with your local prosecutor for case-by-case guidance.

1. Use the most recent picture you have of the suspect.
2. Use photos of other persons of the same sex and race, and with similar facial characteristics.
3. Include just one suspect plus a minimum of four (preferably five) non-suspect photos (the ideal array includes six subjects—the suspect and five other participants); (this is not an absolute requirement; however, note that the Washington courts have said that use of **just a single photo** is, as a matter of law, impermissibly suggestive. See e.g. *State v. Maupin*, 63 Wn. App. 887 (Div. III, 1992) (but note that the court went on to find the ID testimony reliable based on a review of all of the circumstances of the case).
4. Number each photo on the back.
5. Record separately the names, dates of birth and numbers assigned to each photo.
6. Give each witness directions along these lines prior to showing the array:

> I am going to show you six photographs. Please look at all six photographs before making any comment. The person who committed the crime may or may not be among those shown in the photographs you are about to see. If you recognize any of the persons in the photographs as the person who you believe committed the crime, go back and pick out the person you recognize. If you recognize any of the persons as the suspect, please do not ask me if your choice was "right" or "wrong," as I am prohibited by law from telling you.[6]

7. If the witness picks a photo, ask the witness to initial the back of the photo, and then initial the photo yourself.
8. Regardless of whether the witness picks the "right" or "wrong" photo, do not discuss the choice.
9. Place all photos in an evidence envelope, seal, initial, date, and place the evidence in property storage in accordance with

[6] A similar admonition should be given to a witness prior to a lineup.

departmental policy;[7] document in a report who was involved in the procedure.

C. Avoid suggestiveness *after* the identification

The officer must be very careful to avoid suggestive words or actions after the identification procedure has been conducted. Telling a witness that he or she picked the "right" or "wrong" person out of a lineup or photo spread can jeopardize admissibility of a later in-court identification. See *State v. McDonald*, 40 Wn. App. 743 (Div. I, 1985) (where witness picked one person from lineup and detective told witness immediately afterward that the person arrested was a different person participating in the lineup, this fact, combined with the weakness of the identification on the other identification-reliability factors discussed elsewhere in this article, made the in-court identification of the arrestee/defendant inadmissible). In *State v. Courtney*, 137 Wn. App. 376 (Div. III, 2007) May '07 LED: 08, the Court of Appeals' analysis suggests that undue suggestiveness likely occurred where, after each of the two victims identified the defendant in a photo montage as the person who murdered their friend, officers (1) told each victim that the other victim had picked the same person, and (2) told one of the victims that the person picked was in custody. But the Court of Appeals upheld the identifications, because the trial court had found that each of the victims had a long, clear look at the perpetrator at the time of the crime.

D. Don't ask for "certainty" by the witness unless you know that it is there

It is generally recommended that the officer not ask a witness to state certainty on a scale of 1-10 or as a percentage. The witness will rarely say 100%, and a couple of percentage points might allow a clever defense attorney to convince a naïve juror that the juror has a "reasonable doubt" about the defendant's guilt. If the witness appears to be certain, however, it is ok to ask, "Are you certain?"

E. Recording identification results

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[7] See *State v. Hudspeth*, 22 Wn. App. 292 (Div. II, 1978) regarding the duty to preserve evidence of photo ID procedures. You are required to preserve arrays in which a witness either affirmatively identified defendant or failed to identify defendant in circumstances after defendant had become a suspect and his or her photo had been purposely placed within an array for ID purposes. The fact that defendant's picture may have been a part of arrays or "mugbooks" prior to such time as he or she became a suspect generally does not trigger the preservation requirement.

In addition to other reporting suggestions in this outline, the investigator should: (1) record both identification and non-identification results in writing, including any word from the witness regarding how certain he or she is; and (2) ensure results are signed and dated by the witness.

F. Overcoming suggestiveness at trial by proving reliability of the identification testimony

In a showup (a one-on-one confrontation), in comparison to the other types of identification procedures, the procedure is more likely to be found suggestive simply because there were no other persons for the witness to choose from. In cases of showup "suggestiveness," as with other identification procedures where there is suggestiveness, in order for the witness's later ID testimony to be admissible, that suggestiveness must be offset by the factors which we preliminarily outlined above in the second paragraph in Part II. Thus, the courts look at the following questions:

(1) What was the witness's opportunity to observe the perpetrator at the time of the crime? (Consider length of time, lighting, distance, vision impairment, etc.)

(2) What degree of attention did the witness pay at the time of the crime? (Was the witness trying to memorize the perpetrator's looks, drunk or sober, previously acquainted with the suspect, etc.?)

(3) Was the original description accurate?
(4) Was the witness certain at the time of the identification procedure?

(5) How much time went by between the time of the crime and time of the identification procedure? (Although there is no hard-and-fast rule setting an outside time limit, showups generally should be held within a few hours of the time of the crime;[8] other identification procedures may generally be conducted with much longer time lapses, though the lapse must be taken into account in determining identification-reliability.)

IV. SEARCH AND SEIZURE ISSUES

The United States Surpreme Court has held that any time a person is taken involuntarily to the police station, an "arrest" has occurred, and probable

[8] However, see *State v. Springfield*, 28 Wn. App. 446 (Div. II, 1981), where a showup involving a reserve police officer as victim/witness to an armed robbery was upheld even though the armed robbery had occurred 17 hours earlier. For another case involving an even longer delay between time of crime and showup, see the U.S. Supreme Court decision in *Neil v. Biggers*, 409 U.S. 188 (1972).

cause must be established to justify the arrest. *Dunaway v. New York*, 442 U.S. 200 (1979). The Washington State Supreme Court has interpreted *Dunaway* to mean that a court may not issue a court order compelling a suspect to come to the stationhouse for a lineup in the absence of probable cause. *In re Armed Robbery*, 99 Wn.2d 106 (1983). Thus, a person cannot be forcibly taken into custody and compelled to appear in a lineup, with or without a court order, in the absence of probable cause.

However, nothing in the *Fourth*[9] Amendment precludes an officer from obtaining consent from a suspect to go to the station house for a lineup or to go to another location for a showup. Furthermore, if the person has been lawfully arrested on one crime and remains in lawful custody on that crime, the suspect may be compelled to appear in a lineup on an unrelated matter, even if there is not separate probable cause to arrest on the unrelated matter. *State v. Doleshall*, 53 Wn. App. 69 (Div. I, 1988).

Courts in this country are in disagreement as to whether involuntarily transporting a person away from the scene of a *Terry* stop, *Terry v. Ohio*, 392 U.S. 1 (1968), necessarily transforms a *Terry* stop (requiring only "reasonable suspicion) into an arrest (requiring probable cause). In *State v. Wheeler*, 108 Wn.2d 230 (1987), the Washington State Supreme Court interpreted the Fourth Amendment as allowing the police to transport a burglary suspect from the scene of a *Terry* stop to the scene of the reported crime for a showup identification procedure. Courts in other jurisdictions have made more restrictive readings of the Fourth Amendment, requiring extenuating circumstances for such a transport of a *Terry* detainee, such as the logistical problems of: (A) a frail or partially incapacitated witness who cannot readily be brought to the suspect. for the showup (See *People v. Hall*, 95 Cal. App. 3d 299 (Cal. App. 1979)); or (B) a shortage of officers such that there are not enough officers to secure the scene, chase other suspects, transport the witnesses, etc. (See *People v. Gatch*, 56 Cal. App. 3d 505 (Cal. App. 1976)). The United States Supreme Court has never addressed this question other than in its "bright line" stationhouse-transport rule articulated in *Dunaway* above.

To be on the safe side, officers conducting a showup should follow the general rule that the witness should be brought to the suspect unless there is no reasonable alternative to transporting the suspect to the witness. While you await the arrival of the witness you may take whatever safety steps (handcuffs, placement in the patrol car, etc.) are reasonable. Safety first. Remember, however, that the less indicia of seizure the better for purposes of the suggestiveness determination. Thus, if it is safe to do so,

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[9] See, however, the *Sixth* Amendment discussion below in Part V.

it is better to have the suspect outside the vehicle, not in handcuffs, not surrounded by officers, not holding a purse-snatching victim's purse, etc., at the time that the suspect is presented to the witness.

Finally, civil liability for an unsupportable arrest can hinge at least in part on deficiencies in identification procedures. Where officers relied on the identification to establish probable cause for the arrest, a faulty procedure may mean that a court will find there was not probable cause to support an arrest. *See Torres v. City of Los Angeles*, 540 F.3d 1031 (9th Cir. 2008) October 2008 LED:12.

V. RIGHT TO AN ATTORNEY—SIXTH AMENDMENT AND CRIMINAL RULE 3.1

A. There is no right to counsel in 1) a pre-arrest showup or 2) photographic array ID procedures whenever conducted.

Because a showup will necessarily have occurred before any arrest has been made and before any charges have been filed, there is no right to an attorney during a lawful *pre-arrest showup* procedure. *Kirby v. Illinois*, 406 U.S. 682 (1972); *People v. Danpier*, 159 Cal. App.3d 709 (1984). Nor is there any right to an attorney during a *photographic array*, regardless of when the pictures are shown to the witness (before or after arrest, before or after charges are filed, etc.). See *U.S. v. Ash*, 413 U.S. 300 (1973); *State v. Clark*, 48 Wn. App. 850 (1987).

B. There is a right to an attorney in some lineup circumstances.

1. Basic rights under the federal constitution

The United States Supreme Court has held that a suspect has a charge-specific right to the presence of counsel at a physical lineup only if the lineup occurs *after* the commencement of criminal judicial proceedings on the particular charged crime—in a state such as Washington where the process starts with an information, that means after the information has been filed. See *Kirby v. Illinois*, cited above; *U.S. v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S. 293 (1967). In *Wade, Gilbert,* and *Stovall*, the U.S. Supreme Court held that a post-charging lineup was a "critical stage" in a criminal proceeding that required assistance of counsel, but the Court did not expressly define counsel's role or what constitutes the "lineup." However, it appears that the right clearly includes the right to have counsel view not only the people in the lineup itself, but also what the witnesses say and do in the observation room during the lineup. *U.S. v. LaPierre*, 998 F.2d 1460

(9th Cir. 1993). Case law is mixed as to whether, after defense counsel has arrived and the lineup participants have been assembled, a witness-preparation session is permitted, and whether, after the lineup has been shown to the witness, a post-lineup witness-debriefing session, outside the presence of counsel, immediately afterwards, violates the right.[10] Whatever you do will be scrutinized under cross examination in a suppression hearing, and, if the suppression judge permits the ID testimony, again at trial (where the defense attorney is trying to establish "reasonable doubt"). Ideally, once the lineup participants have been assembled and counsel is present, you should let the defendant's attorney come into the observation room at the same time that you enter with the witness, and you should let the defense attorney: 1) hear your preliminary instructions to the witness, 2) observe the presentation and 3) hear the selection, or lack thereof, by the witness.

2. Possible enhancement of counsel-rights under Washington court rules CrR 3.1/CrRLJ 3.1

To date, the Washington constitutional counterpart to the Federal constitution's Sixth Amendment has not been interpreted by the Washington courts to provide greater protection than the Federal constitution in this context. However, under Washington's Court Rules for both superior courts and courts of limited jurisdiction, a limited right to an attorney attaches sooner (i.e., post-arrest, pre-charging) than under the constitution. Under the most cautious reading of the rules (which are not worded identically), the qualified right to an attorney under the rules

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[10] But see the Washington Court of Appeals decisions in: (i) *State v. Favro*, 5 Wn. App. 311 (1971) (Washington court rejected California case law authority to hold that there was no Sixth Amendment violation in officers waiting until 15 minutes after the lineup to have the officer-witness to make his identification by filling out an identification sheet); (ii) *State v. Kimball*, 14 Wn. App. 951 (Div. I, 1976) (witness met with police on several occasions over a 7-week period following a lineup at which he had failed to identify the defendant, there was no violation of the Sixth Amendment right in failing to have counsel present at these follow-up meetings, after which defendant eventually concluded that he could identify defendant from the lineup); and (iii) *State v. Jordan,* 39 Wn. App. 530 (Div. I, 1985) (Washington court held that detective's use of a 10-minute "witness preparation" session in the observation room, outside the presence of counsel, did not violate the defendant's Sixth Amendment rights; note, however, that the Ninth Circuit of the U.S. Court of Appeals, though ultimately finding the in-court identification testimony to be reliable, criticized this approach and suggested in habeas corpus review of the same case that it would be better to have an attorney present "during all stages of the identification, including the preliminary instructions." *Jordan v. Ducharme*, 983 F.2d 933, 938 (9th Cir. 1992)). And see also *U.S. v. Jones*, 907 F.2d 456 (4th Cir. 1990) (inability of defense counsel to hear everything police said to witness during lineup did not rise to level of Sixth Amendment violation). Remember that you will always be subject to cross examination as to your tactical decisions.

attaches immediately after a person is arrested. See CrR 3.1; CrRLJ 3.1. Because forcibly taking a person into custody to compel him or her to appear in a lineup is an "arrest," a person taken into pre-charging custody for this purpose should either be advised of his or her *Miranda* rights, *Miranda v. Arizona*, 384 U.S. 436 (1966) (with no need for a waiver if no questioning is intended) or be given a limited warning along the following lines: "*You have the right at this time to an attorney. If you are unable to afford an attorney, you are entitled to have one provided without charge.*" The arresting officer does not need an affirmative waiver of the right to counsel in this pre-charge circumstance, but if the person requests an attorney, the officer must make a phone available and reasonably attempt to accommodate the request for an attorney-consult before proceeding with the lineup. If, following the consult, the arrestee requests the presence of the attorney, you should take reasonable steps to allow the attorney to come to the stationhouse and observe the lineup procedure.[11]

3. Defense counsel role at the lineup.

The suspect's attorney has the right to be present only as an *observer.* Defense counsel cannot rearrange the personnel, cross-examine, or ask those in the lineup to say or do anything. Counsel may not even insist that law enforcement officials listen to his or her objections to procedures employed. "At most, defense counsel is merely present at the lineup to silently observe and to later recall his observations for purposes of cross-examination or to act in the capacity of a witness." *People v. Bustamonte*, 30 Cal.3d 88 (1981). However, it may be helpful in defending against a later claim of suggestiveness if you ask defense counsel if he or she has any suggestions (e.g., problems with the arrangement of the lineup participants), and if the suggestions are easily implemented, you should incorporate them.

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[11] Also note regarding CrR 3.1 the case of *State v. Jaquez*, 105 Wn. App. 699 (Div. II, 2001) Aug. 2001 LED:18. *Jaquez* involved the unusual circumstance of a showup participant who, at the time of the showup, was both (1) the subject of a *Terry* stop on reasonable suspicion as to a robbery just committed, and (2) the subject of an arrest on a warrant discovered shortly after the *Terry* seizure was made. The Court found to be significant the unusual (for showup situations) circumstance that the detainee was actually under arrest, not merely detained on reasonable suspicion. The *Jaquez* Court rejected the defendant's Sixth Amendment right to counsel argument, but qualifiedly stated that the defendant, who had asked for an attorney upon receiving *Miranda* warnings, should have been afforded immediate telephonic consultation with counsel before being required to submit to a showup identification procedure. The *Jaquez* Court ultimately ruled that any error was not prejudicial, and that any trial court error under CrR 3.1(c)(2) was harmless.

Be sure to document what everyone says, including the defense attorney. Ideally, you will be able to have a prosecutor present to observe and advise.

4. Waiver of the counsel right requirement.

A suspect may waive his or her right to have an attorney present at a lineup, just as he or she may waive the right to have an attorney present during questioning. *See, e.g., U.S. v. Sublet*, 644 F.2d 737 (8th Cir. 1981). Even in a post-charge circumstance where a person has already made a court appearance on a charge, an officer may initiate contact with the defendant to request that he or she appear in a lineup in relation to a charged matter. This is because in 2009, the U.S. Supreme Court revised its interpretation of the Sixth Amendment, concluding that the Sixth Amendment does not bar initiation of contact with a defendant on a pending charged matter to get a waiver of Sixth Amendment rights in relation to the charged matter. *Montejo v. Louisiana*, 129 S.Ct. 2079 (2009) July 2009 LED:15. See our article on "Initiation of Contact" accessible via an Internet link on the CJTC LED page [https://fortress.wa.gov/cjtc/www/led/ledpage.html].

VI. NO SELF INCRIMINATION ISSUES ARE PRESENTED IN ID PROCEDURE CASES

The constitutional privilege against self incrimination under the Fifth Amendment of the federal constitution is not implicated where a person is compelled to provide only physical evidence. To compel a person to appear in a lineup or showup, or to assume a particular stance or repeat certain phrases in the context of such identification procedures does not trigger or implicate any Fifth Amendment protection. See generally, 21A Am Jur 2d, *Criminal Law* §§ 1052-1060; *see also State v. Jaquez*, 105 Wn. App. 699 (2001) Aug. 2001 LED:18; *State v. Stalsbroten*, 138 Wn.2d 227 (1999) August 1999 LED:20.

VII. THE SUPPRESSION HEARING

If identification is at issue (for instance in a stranger robbery or rape case), the defense attorney may bring a motion to suppress the identification. The likely basis of the motion will be that the identification procedure was unduly suggestive. In most such cases, both you and the witness will be called to testify. If the witness's testimony regarding the identification procedure differs significantly from yours, the identification may be suppressed. That is an important reason that you tell the witness along the way exactly what you are going to put in your reports, first as to the

witness's original description, and second, as to the witness's words at the identification procedure.

VIII. IDENTIFICATION TESTIMONY BY WITNESS, AND POSSIBLY YOU, AT TRIAL

Sometimes, by the time of trial, the witness can no longer identify the defendant due to forgetfulness or other reasons. Although it is not always permitted, you may be able to make the case by testifying about the witness's earlier identification, including the exact words used by the witness at that time. See *People v. Miguel L.*, 32 Cal. 3d 100 (1982); *People v. Richard W.*, 136 Cal. App. 3d 733 (1982); *State v. Hendrix*, 50 Wn. App. 510 (Div. I, 1988).

IX. COMPOSITE SKETCHES

A composite sketch is a likeness prepared by a police artist from a witness's account. As with other identification procedures, officers should be careful not to influence the witness's memory. Depending on the level of detail provided by the witness, a composite sketch prepared by a competent sketch artist may provide sufficient reasonable suspicion to stop a suspect. Whether the sketch may also be admissible at trial will depend on the experience and expertise of the sketch artist, the validity of the techniques used, and the overall foundation for the sketch submitted by the prosecution. *See e.g., People v. Palmer*, 491 A.2d 1075 (Conn. 1985); *People v. Cooks*, 141 Cal. App.3d 224 (Cal. App. 1983).

X. HYPNOSIS IS NOT AN OPTION FOR WITNESS MEMORY RETRIEVAL

In *State v. Coe*, 109 Wn.2d 832 (1988), the Washington Supreme Court established a "bright line" rule barring identification testimony from a witness who has been hypnotized in relation to the identification. The *Coe* Court held that, even though some of the sexual assault complainants had made detailed descriptions of the assailant prior to hypnosis, all post-hypnotic testimony from these witnesses was *per se* tainted by the hypnosis, and therefore inadmissible. The *Coe* Court distinguished the U.S. Supreme Court decision in *Rock v. Arkansas*, 107 S.Ct. 2704 (1987), where the U.S. Supreme Court held that a criminal defendant's federal constitutional right to testify in his or her own behalf mandates that a *criminal defendant* generally may testify in his or her own behalf following hypnosis.

XI. EXPERTS MAY OR MAY NOT BE PERMITTED TO TESTIFY IN YOUR CASE CONCERNING UNRELIABILITY OF EYEWITNESS TESTIMONY

Several Washington appellate cases have addressed the question of admissibility of expert testimony concerning the possible unreliability of eyewitness accounts. While there is some possible conflict in the case law, it appears that the trial court has very broad discretion to determine whether an expert witness should be allowed to testify regarding the possibility of unreliable eyewitness account due to psychological and biological factors. *See, e.g., State v. Coe*, 109 Wn.2d 832 (1988); *State v. Moon*, 45 Wn. App. 692 (Div. I, 1986); *State v. Hernandez*, 58 Wn. App. 793 (Div. II, 1990). A trial court is most likely to determine that such expert testimony will be helpful to the jury where: (1) the identification of the defendant is the principal issue at trial; (2) the defendant presents an alibi defense; (3) there is little or no other evidence linking the defendant to the crime; and (4) there are serious problems with the eyewitness testimony (such as discrepancies among several witnesses's descriptions, or discrepancies between a single witness's description and the defendant's actual appearance, and/or indicators of possible cross-racial misidentification). The trial court's decision whether to permit expert testimony is reviewed for abuse of discretion. *See, e.g., State v. C.G.*, 150 Wn.2d 604 (2003).

XII. HARMLESS ERROR RULE APPLIES

As with other constitutional law areas, where the other admissible trial evidence of a defendant's guilt is overwhelming, an error in admitting unreliable eyewitness testimony will be found to be "harmless error." *State v. Alferez*, 37 Wn. App. 508 (Div. III, 1984); see also cases cited at "Investigations and Police Practices — Identifications," 38 Georgetown Law Journal Annual Review of Criminal Procedure 167 (2009) (note that articles in the Law Journal review continue to be updated annually).

XIII. ADDITIONAL COURT DECISIONS ON IDENTIFICATION PROCEDURES

A. Showup suggestiveness cases where one possible issue was the time lapse between the incident and the showup

State v. Guzman-Cuellar, 47 Wn. App. 326 (Div. I, 1987) (showup ID not unnecessarily suggestive where defendant was in custody and in handcuffs when presented to an eyewitness to a murder-by-gun approximately **one hour** after the shooting)

State v. Rogers, 44 Wn. App. 510 (Div. I, 1986) (showup ID not unnecessarily suggestive where victim/eyewitness to an armed robbery was taken to see suspect coming out of his apartment approximately **six hours** after the robbery)

State v. Alferez, 37 Wn. App. 508 (Div. III, 1984) (showup ID not unnecessarily suggestive where eyewitness made identification approximately **five hours** after she observed suspect commit assault with a deadly weapon)

State v. Springfield, 28 Wn. App. 446 (Div. III, 1981) (showup ID not unlawfully suggestive: (a) where the victim of an armed robbery and assault was an undercover police reserve officer who was involved in a face-to-face confrontation with his assailant for a total of about six minutes; (b) where, prior to the showup at defendant's home, the reserve officer/victim had identified defendant in a non-suggestive photo array; and (c) where there was at most only **17 hours'** delay between the incident and the identification)

State v. Fortun-Cebada, 158 Wn. App. 158 (Div. I, 2010) January 2011 LED:15 (showup ID not unlawfully suggestive where police observed Mr. Walker apparently making a crack cocaine buy from defendant Fortun-Cebada on the street, and shortly afterwards, the officers arrested Walker, seized the purchased crack cocaine from him, put him in handcuffs, and brought Walker and Fortun-Cebada together on the street for a show-up identification)

B. Lineup suggestiveness

State v. Traweek, 43 Wn. App. 99 (Div. II, 1986) (Where witness had identified robber as a blond man, and defendant was the only blond in the lineup, the procedure was suggestive; however, the prosecutor was able to overcome the suggestiveness evidence to establish reliability by showing the strength of the original eyewitness identification. See discussion at Part III. F. above.)

C. Cases discussing extent to which physical lineups are favored over photo ID procedures

In *State v. Thorkelson*, 25 Wn. App. 615, 619 (Div. I, 1980) based on language in State Supreme Court decisions in *State v. Hilliard*, 89 Wn.2d 430 (1977) and *State v. Nettles*, 81 Wn.2d 205 (1972), Division One of the Court of Appeals stated that "absent extenuating circumstances,

photographic identification procedures of an in-custody defendant should not be used." However, since that time, Division One has declared that "insofar as *Thorkelson* may suggest a per se rule of exclusion [for photo ID's of in-custody suspects] we modify its holding." *State v. Burrell*, 28 Wn. App. 606 (Div. I, 1981). *Thorkelson's* suggestion of a per se rule of exclusion in this context has not been addressed by the State Supreme Court, but the *Thorkelson* suggestion has been rejected by the other two divisions of the Court of Appeals. See *State v. Royer*, 58 Wn. App. 778 (Div. II, 1990) and *State v. Smith*, 37 Wn. App. 381 (Div. III, 1984), two photo array cases which expressly reject the *Thorkelson* suggestion of a strict rule against using photo arrays while a suspect is in custody.

D. Photo array suggestiveness

State v. Hendrix, 50 Wn. App. 510 (Div. I, 1988) (Absence from defendant's ID photo of a "very small, little, tiny number" in the upper left hand corner, and presence of such number on all other photos in the array, was not suggestive, even though identifying witness noted discrepancy and was troubled by it. The *Hendrix* Court cites other cases where there were minor discrepancies in the photos where other Washington courts have held that such minor discrepancies present fact questions for the jury, not grounds for suppression. At trial in this indecent exposure case, the eyewitness was unable to identify the defendant, and the conviction was upheld based solely on the officer's testimony that the witness had "immediately picked" defendant's picture because it "jumped off the page."

State v. Maupin, 63 Wn. App. 887 (Div. III, 1992) (Where an investigating officer showed a witness a photo of only the defendant, this was per se suggestive; however, the prosecutor was able to establish reliability by showing the strength of the original eyewitness identification. See discussion at III. F. above.)

State v. Bobic, 94 Wn. App. 702 (Div. I, 1999) (Detective investigating stolen car ring used two photo montages. One montage consisted only of six photos: one photo of defendant plus photos of each of his five alleged co-conspirators. The other montage included defendant's photo with those of two co-conspirators, along with three other individuals. Court assumes this was impermissibly suggestive, but then goes on to find the eyewitness ID to be reliable enough in other respects to overcome the potential for misidentification.)

State v. Eacret, 94 Wn. App. 282 (Div. I, 1999) (Court declares that placing photos of three suspected assailants in one photo montage, along

with photos of five non-suspects, was not impermissibly suggestive, because it did not increase chance the any one suspect would be picked out.) [**CAUTION**: THE AUTHOR QUESTIONS PUTTING MORE THAN ONE SUSPECT IN ANY GIVEN PHOTO MONTAGE OR LINEUP. DEFENSE ATTORNEYS MAY BE ABLE TO AT LEAST MAKE INSINUATIONS AS THEY STRUGGLE TO CONVINCE JURORS OF "REASONABLE DOUBT."]