# Lineups and Showups

*That man there is the one. He's the one that shot me.*
— Lineup ID, *Colman* v. *Alabama*[1]

That man there is in trouble. Big trouble. Even if he didn't fire the shot, he could easily be found guilty at trial because a witness's positive identification of a suspect at a lineup or showup is, in the words of the California Supreme Court, "frequently determinative of an accused's guilt."[2] Or, as the United States Supreme Court put it, "The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation."[3]

One reason that a pretrial identification carries so much weight is that a witness who has picked out a person at a lineup is "not likely to go back on his word later on."[4] In addition, if the witness appears to be credible to the jury, his identification of the defendant is apt to be convincing because a crime victim or witness will seldom have reason to lie about the identity of the perpetrator. And, as if that weren't enough, prosecutors will usually be permitted to buttress the reliability of the witness's in-court identification of the defendant by presenting testimony that the witness had also identified him at a lineup or showup when, as is usually the case, the perpetrator's features would have been fresh in the witness's memory.[5]

Simply put, the combination of the witness's pretrial identification of the defendant and his positive identification in the courtroom generates such convincing force that, from the defendant's perspective, it is devastating.

This is, of course, a good thing—*if* the defendant was the perpetrator. But what if he wasn't? What if the witness was mistaken? And what if he was mistaken because the lineup or showup was intentionally or inadvertently structured so as to induce or otherwise prompt him to identify the defendant? The Supreme Court had this possibility in mind when it observed that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined."[6]

To help prevent this from happening and also to combat the inherent "vagaries of eyewitness identification,"[7] the courts require that officers employ certain procedures that are designed to minimize suggestiveness and maximize reliability. As we will discuss later, if officers fail to comply with these requirements, a court may find that the resulting ID was unreliable and, therefore, inadmissible.

There is another reason that compliance is important. Assuming the witness's ID of the defendant was not so unreliable as to render it inadmissible in court, its impact on jurors will be severely weakened if they think the lineup or showup was unfair. As the Supreme Court cautioned in *Manson* v. *Brathwaite*, "Suggestive procedures often will vitiate the weight of the evidence at trial and the jury may tend to discount such evidence."[8] For these reasons, it is essential that officers understand exactly what they are required to do, and what they are prohibited from doing, when conducting lineups and showups.

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[1] (1970) 399 U.S. 1, 5.
[2] *Evans* v. *Superior Court* (1974) 11 Cal.3d 617, 623.
[3] *United States* v. *Wade* (1967) 388 U.S. 218, 235.
[4] *United States* v. *Wade* (1967) 388 U.S. 218, 229.
[5] See *Gilbert* v. *California* (1967) 388 U.S. 263, 273 ["[T]he witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury."]; *People* v. *Gould* (1960) 54 Cal.2d 621, 626 ["Evidence of extrajudicial identification is admissible, not only to corroborate an identification made at the trial, but as independent evidence of identity."].
[6] *United States* v. *Wade* (1967) 388 U.S. 218, 229 [quoting from Wall, "Eye-Witness Identification in Criminal Cases"].
[7] *United States* v. *Wade* (1967) 388 U.S. 218, 228.
[8] (1977) 432 U.S. 98, 112, fn.12. Also see *People* v. *Carter* (1975) 46 Cal.App.3d 260, 266 ["[T]he probative value of an identification depends on the circumstances under which it was made."].

In addition to the reliability of the ID, there are several other legal issues that officers and prosecutors commonly confront, and which will also be covered in this article. They include a suspect's right to have counsel at a lineup and the attorney's role, what officers can do when a suspect refuses to stand in a lineup, the issuance of Appearance Orders, and defense motions for lineups. But first, the basics.

## Types of Lineups and Showups

There are four types of lineups and two types of showups. Although they all serve the purpose of identifying the perpetrator of a crime, they are used in different situations and, as we will discuss later, are subject to different requirements.

**LIVE LINEUPS**: In common usage, the term "lineup" means a live or "corporeal" lineup in which the suspect is displayed to the witness in the company of five or more people who ressemble him; i.e., "fillers" or "foils." As the Court of Appeal explained, a lineup is "a relatively formalized procedure wherein a suspect is placed among a group of other persons whose general appearance resembles the suspect."[9]

To say that lineups are "formalized" simply means they usually take place in lineup rooms in police stations and jails where the suspect and fillers stand on a stage. Bright lights directed at the stage prevent the suspect from seeing the witnesses, which gives them a much-needed sense of security.

Because live lineups require the suspect's presence, they are usually used only when the suspect is in custody for the crime under investigation or some other crime. If he is not in custody, the usual procedure is to conduct a photo lineup.

**RECORDED LINEUPS**: In a recorded lineup, officers conduct a live lineup, but without the witness in attendance. Instead, they record the lineup on videotape or digitally, and show it to the witness later. While this procedure is often used when the witness cannot attend a live lineup, it may also be useful if the suspect has a right to have counsel present but an attorney is not available. This is because, as we will discuss later, a suspect does not have a right to counsel when a witness views a recorded lineup.

**PHOTO LINEUPS**: In a photo lineup, the witness is shown photographs of the suspect and the fillers, usually booking or DMV photos. In most cases, officers will utilize this procedure when it is impractical to conduct a live lineup, usually because the suspect had not yet been arrested.[10] A photo lineup may also be necessary if the suspect changed his appearance after the crime occurred, and officers had obtained a photograph of him that better depicted his appearance then.

**PHOTO COLLECTIONS**: If officers have no suspect, but there is reason to believe that the perpetrator belonged to a certain group, they may show the witness photos of members of that group; e.g., gang books, sexual assault registries, school yearbooks.

**VOICE-ONLY LINEUPS**: If the witness heard the perpetrator speak, but did not see him, officers may conduct a voice-only lineup in which the witness listens to the voices of the suspect and fillers, but does not see their faces.[11] In most cases, the suspect and fillers will say something that the perpetrator said. Voice-only lineups may be live or prerecorded.

**FIELD SHOWUPS**: The most common pretrial identification procedure is the field showup in which the suspect is displayed to the witness alone (i.e., without fillers) and the witness is essentially asked, "Is this the perpetrator?" Such a procedure is, of course, highly suggestive, but the courts permit it if there was an overriding reason for not conducting a live or photo lineup.[12]

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[9] *People* v. *Dampier* (1984) 159 Cal.App.3d 709, 712-13. Edited.

[10] **NOTE**: There is no rule requiring that officers conduct live lineups instead of photo lineups. See *People* v. *Brandon* (1995) 32 Cal.App.4th 1033, 1052, fn. 16 ["there is no constitutional requirement that a live lineup be conducted"]; *People* v. *Lawrence* (1971) 4 Cal.3d 273, 277 [although it might have been "better" to conduct a live lineup, "the failure to take such action is not the crucial factor in the determination of the case at bench"]; *People* v. *Whittaker* (1974) 41 Cal.App.3d 303, 309 [no requirement that "once [the defendant] was in custody, officers were limited to use of a corporeal lineup"]; *People* v. *Suttle* (1979) 90 Cal.App.3d 573, 581 ["we will not go farther by holding that a corporeal lineup should have been used since appellant was in custody"].

[11] See *People* v. *Ellis* (1966) 65 Cal.2d 529, 534 ["The speech patterns of individuals are distinctive physical characteristics that serve to identify them just as do other physical characteristics"]; *People* v. *Clark* (1992) 3 Cal.4th 41, 135-37.

[12] See *People* v. *Sandoval* (1977) 70 Cal.App.3d 73, 85 ["Such a procedure should not be used, however, without a compelling reason because of the great danger of suggestion from a one-to-one viewing which requires only the assent of the witness."]; *People* v. *Bisogni* (1971) 4 Cal.3d 582, 587 ["a single person showup is not necessarily unfair"].

In most cases, the overriding reason is that the crime had just occurred, that officers had detained a suspect and they needed to quickly confirm or dispel their suspicion that he was the perpetrator.[13] In these situations a showup is justified because, as the Court of Appeal pointed out, "A prompt on-the-scene confrontation between a suspect and a witness enables the police to exclude from consideration innocent persons so a search for the real perpetrator can continue while it is reasonably likely he is still in the immediate area."[14] Furthermore, the suggestiveness that is inherent in showups will ordinarily be "offset by the likelihood that a prompt identification within a short time after the commission of the crime will be more accurate than a belated identification days or weeks later."[15]

Two other things should be noted about showups. First, there are some procedural restrictions in addition to those relating to suggestiveness. For example, officers must be diligent in conducting showups and they must not transport the suspect to another location for a showup unless he consented or there was good cause. We covered these restrictions in the article "Investigative Detentions" in the Spring 2010 *Point of View*.

Second, the California Legislature is now considering an addition to the Penal Code which would prohibit officers from conducting showups of suspects if they had probable cause to arrest them. We have discussed some of the problems with such a rule in a comment on page 22 entitled "Showups: Should probable cause make them illegal?"

**CONFIRMATORY SHOWUP**: Officers have sometimes attempted to confirm that an arrested suspect was the perpetrator by displaying him without fillers, whether live or by photograph. Such a procedure is, of course, highly suggestive.[16] For example in the case of *People* v. *Sandoval*[17] officers arrested a suspect in a purse snatch that had occurred about 15 minutes earlier. As they drove him to the police station, the victim, who was already seated in a room at the station, was informed by other officers that the suspect "would be brought through the hallway." As he walked by, the victim identified him, but the court ruled the ID should have been suppressed because this procedure "in effect suggested to the victim that defendant was the robber." Also see "Pre-lineup photo display" on pages 12-13.

## Misidentification: The "Primary Evil"

The main legal issue in most ID cases is whether the investigating officers said or did something that was apt to result in misidentification. This, said the U.S. Supreme Court, is the "primary evil to be avoided."[18] As we will now discuss, the courts try to prevent this from happening by prohibiting testimony pertaining to a pretrial ID unless there was sufficient reason to believe it was reliable.

Before going further, it should be noted that there may be some confusion about this issue. In the past, a witness's pretrial identification testimony would be suppressed if officers employed procedures that were unduly "suggestive."[19] But this changed in 1977 when the Supreme Court in *Manson* v. *Brathwaite* pointed out that suggestiveness, while relevant, does not necessarily lead to misidentification; that the admissibility of a pretrial ID should depend simply on whether it was reliable.[20] Said the Court, "Reliability is the linchpin in determining the admissibility of identification testimony." The question, then, is how can the courts determine whether an ID was sufficiently reliable?

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[13] See *Stovall* v. *Denno* (1967) 388 U.S. 293, 302; *People* v. *Martinez* (1989) 207 Cal.App.3d 1204, 1219.
[14] *People* v. *Cowger* (1988) 202 Cal.App.3d 1066, 1072.
[15] *People* v. *Odom* (1980) 108 Cal.App.3d 100, 110.
[16] See *People* v. *Bisogni* (1971) 4 Cal.3d 582, 586-87 [witnesses "were asked to look through a hole in a door or wall [at the police station] where they observed [the suspect] alone in a room"; a "highly suggestive" procedure]; *People* v. *Contreras* (1993) 17 Cal.App.4th 813, 820 ["After Lopez failed to identify appellant from the photo lineup, the deputy district attorney showed him a single photo of Contreras two days before the preliminary hearing and asked if Lopez could identify him as his assailant"].
[17] (1977) 70 Cal.App.3d 73.
[18] *Neil* v. *Biggers* (1972) 409 U.S. 188, 198.
[19] See *Neil* v. *Biggers* (1972) 409 U.S. 188, 198.
[20] (1977) 432 U.S. 98, 114.

## The test for admissibility

To determine whether a witness's identification of a defendant at a lineup was sufficiently reliable to be admitted into evidence at trial, the courts employ a two-part test. First, they look to see whether the officers utilized a procedure that was unduly suggestive. If it wasn't, the ID will be admissible.[21] If it was, they will determine whether, despite such suggestiveness, the witness's identification of the defendant was sufficiently trustworthy; i.e., whether, despite such suggestiveness, there was no "substantial likelihood of misidentification."[22] And if the identification was sufficiently reliable, the ID will be admissible; if not, it will be suppressed. (We will discuss how the courts calculate the trustworthiness of an identification later in this article.)

To recap, the test for determining the admissibility of a lineup identification is as follows:

(1) SUGGESTIVE? Was the lineup unduly suggestive?
    No: The ID testimony will be admissible.
    Yes: Proceed to part (2).

(2) TRUSTWORTHY? Despite such suggestiveness, was the witness's identification of the defendant trustworthy?
    No: The lineup results will be suppressed.
    Yes: The lineup results will be admissible.

Note that if the lineup ID is suppressed, the witness will not be given an opportunity to identify the defendant in court unless prosecutors can prove "by clear and convincing evidence that the in-court identification is based upon observations of the suspect other than the lineup identification."[23]

## What is suggestiveness?

A lineup or showup will be deemed "suggestive" if it was conducted in a manner that would have communicated to the witness that the suspect was, in fact, the perpetrator. As the Court of Appeal explained, a lineup is suggestive "if it suggests in advance of a witness's identification the identity of the person suspected by the police."[24] Or, in the words of the California Supreme Court, to warrant the suppression of a witness's identification of a defendant, "the state must, at the threshold, improperly suggest something to the witness; i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure."[25]

**"UNDULY" SUGGESTIVE**: As noted, a witness's identification resulting from a suggestive lineup or showup may be suppressed only if the suggestiveness was "undue" or excessive.[26] The reason that suggestiveness, in and of itself, will not result in suppression is that, as the Court of Appeal observed in *People* v. *Perkins*, "No identification can be completely insulated from risk from suggestion."[27] For example, field showups are inherently suggestive because the witness views only a single person. And lineups are suggestive because the number of fillers is, by necessity, relatively small; plus it is often difficult to locate fillers who closely resemble the suspect.

**MERE SUGGESTIVENESS GOES TO WEIGHT**: Any suggestiveness that does not rise to the level of "undue" goes to the weight of the identification, not its admissibility.[28]

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[21] See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 114; *People* v. *Virgil* (2011) 51 Cal.4th 1210, 1256 ["If the answer to the first question is 'no,' because we find that the challenged procedure was not unduly suggestive, our inquiry into the due process claim ends."]; *People* v. *Avila* (2009) 46 Cal.4th 680, 699 ["Because we have concluded the lineup was not unduly suggestive, we need not consider whether it was reliable"].

[22] *Neil* v. *Biggers* (1972) 409 U.S. 199, 198.

[23] *People* v. *Bisogni* (1971) 4 Cal.3d 582, 587. Also see *United States* v. *Crews* (1980) 445 U.S. 463, 473.

[24] *People* v. *Brandon* (1995) 32 Cal.App.4th 1033, 1052. Also see *Foster* v. *California* (1969) 394 U.S. 440, 443.

[25] *People* v. *Ochoa* (1998) 19 Cal.4th 353, 413.

[26] See *Neil* v. *Biggers* (1972) 409 U.S. 199, 198-99; *People* v. *Kennedy* (2006) 36 Cal.4th 595, 610.

[27] (1986) 184 Cal.App.3d 583, 590.

[28] See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 116 ["We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill."]; *Foster* v. *California* (1969) 394 U.S. 440, 442, fn.2 ["The reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury."]; *People* v. *Perkins* (1986) 184 Cal.App.3d 583, 591 ["Here, Perkins's counsel was able to effectively develop and cross-examine witnesses about the facts of Maria's identification. No more was required."]; *People* v. *DeVaney* (1973) 33 Cal.App.3d 630, 636 ["[I]t was for the jury to determine whether Pendleton's in-court identification was believable."]; *U.S.* v. *Williams* (7th Cir. 2008) 522 F.3d 809, 811 ["The normal way of dealing with [errors] is to expose the problem at trial so that a discount may be applied to the testimony, rather than to exclude relevant evidence."].

**UNINTENTIONAL SUGGESTIVENESS**: If the actions of the officers rendered the lineup or showup unduly suggestive, it is immaterial that they did not intend to do so.[29]

**BURDEN OF PROOF**: The defense has the initial burden of proving that the lineup or showup was unduly suggestive.[30] Furthermore, it must prove such suggestiveness "as a demonstrable reality, not just speculation."[31] If the defense sustains its burden, the prosecution must prove—by clear and convincing evidence—that the identification was nevertheless trustworthy.[32]

## Suggestiveness: Relevant Circumstances

In determining whether a lineup or showup was unduly suggestive, the courts examine the overall procedure—the totality of circumstances.[33] As a practical matter, however, the circumstances we discuss next are almost always decisive.

But first it should be noted that, while we included most of these circumstances because of their long-standing influence on the courts, some were added as the result of a report by the California Commission on the Fair Administration of Justice (CCFAJ) entitled "Report and Recommendations Regarding Eyewitness Identification Procedures." In its report, the CCFAJ suggested that the reliability of lineups and showups would be improved if law enforcement agencies made certain changes in their procedures. Although these suggestions are not mandated by the courts, we have incorporated them in the following discussion, but with notations that they are CCFAJ recommendations. The California Legislature is, however, considering a bill that would require that "law enforcement study and consider adopting" these procedures.[34]

### Similarity between suspect and fillers

While the suspect and the fillers should be similar in age and general appearance, "there is no requirement that [the suspect] be surrounded by people nearly identical in appearance."[35] As the California Supreme Court pointed out, "Because human beings do not look exactly alike, differences are inevitable."[36] Still, officers should attempt to locate fillers who were sufficiently similar in appearance to the suspect so as to enhance the reliability and significance of the witness's identification. The following comments by the courts illustrate what they look for in evaluating the composition of lineups:

**LIVE LINEUPS**

- "The five men were of substantially equivalent race, height, and weight."[37]
- "The participants all appeared to be of comparable age and of similar build."[38]
- "All six participants were bearded and wore identical clothing . . . with one exception, the others resembled defendant very much."[39]
- "[T]he men in the lineup were dressed in street clothes consisting of sport shirts and slacks of varying designs and colors. All were black men of similar height and physical build."[40]

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[29] See *People* v. *Rodriguez* (1977) 68 Cal.App.3d 874, 881 ["it matters not" whether suggestiveness "was caused by inadvertence"].
[30] See *People* v. *Avila* (2009) 46 Cal.4th 680, 700 ["Defendant does bear the burden of demonstrating the identification procedure was unduly suggestive."]; *People* v. *Cunningham* (2001) 25 Cal.4th 926, 989 ["The defendant bears the burden of demonstrating the existence of an unreliable identification procedure."]; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 ["The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted"].
[31] *People* v. *DeSantis* (1992) 2 Cal.4th 1198, 1222; *People* v. *Perkins* (1986) 184 Cal.App.3d 583, 589.
[32] See *People* v. *Cooks* (1983) 141 Cal.App,3d 224, 306; *People* v. *Rodriguez* (1977) 68 Cal.App.3d 874, 881; *People* v. *Ratliff* (1986) 41 Cal.3d 675, 689.
[33] See *People* v. *Ware* (1978) 78 Cal.App.3d 822, 839; *People* v. *Blum* (1973) 35 Cal.App.3d 515, 520 ["The fairness of a lineup is to be assessed in the light of the totality of the circumstances."].
[34] Assembly Bill 308 — 2011-2012 Regular Session.
[35] *People* v. *Wimberly* (1992) 5 Cal.App.4th 773, 790. Also see *People* v. *Brandon* (1995) 32 Cal.App.4th 1033, 1052 ["[T]here is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance."].
[36] *People* v. *Carpenter* (1997) 15 Cal.4th 312, 367.
[37] *People* v. *Mosher* (1969) 1 Cal.3d 379, 396.
[38] *People* v. *Lawrence* (1971) 4 Cal.3d 273, 280.
[39] *People* v. *Carpenter* (1997) 15 Cal.4th 312, 367.
[40] *People* v. *O'Roy* (1972) 29 Cal.App.3d 656, 662.

- Defendant and one of the fillers "had braids or dreadlocks in their hair, while two others appear to have similar type of hair."[41]
- "All of the men have a mustache and some have other facial hair. Several have a hairstyle similar to that of defendant."[42]
- "[A]ll the participants had different types of facial hair, some with mustaches, some with beards, goatees, etc."[43]

**PHOTO LINEUPS**

- The men depicted in the photographs "are all Caucasian, of a reasonably similar build and within the same age group."[44]
- "All of the men depicted in the photographs are White; all have long hair in various shades from blond to brown; and all have beards."[45]
- "All of the photographs were of Black males, generally of the same age, complexion, and build, and generally resembling each other.... Minor differences in facial hair among the participants did not make the lineup suggestive."[46]
- "Each lineup consists of five identically sized photographs of Caucasian males of apparently similar age and with similar facial features. Four of the men . . . appear to have similarly colored light red hair.... The color photographs show the subjects against identical blue backgrounds."[47]
- "[A]ll six of the pictures are of Caucasian males in the same age range, with similar skin, eye, and hair coloring. Each photo depicts a subject wearing distinctive glasses. Four of the six photos show men with similar length hair, with two having somewhat shorter hair. All except for one are clean-shaven."[48]
- "All [of the five Caucasian women in the photo lineup] are of medium build. The four at the left appear to be of the same general age, that is, between 40 and 50, the tall woman at the extreme right being somewhat younger. None bears a facial resemblance to any of the others. None has extremely distinctive features. The facial idiosyncrasies among the five women are no more marked than those which normally distinguish one person from another."[49]

**VOICE-ONLY LINEUPS**: The participants' voices should be "similar in tone, pitch, volume and accent."[50] Thus, in rejecting an argument that a voice-only lineup was suggestive, the court in *People* v. *Vallez* said, "While none of the five imitators was especially talented in impersonating the defendant's voice, the differences between the voices was not so great as to be unfair or impermissibly suggestive."[51]

## Did the suspect "stand out?"

If the suspect and fillers were similar in appearance, it is ordinarily immaterial that there was something about the suspect that caused him to stand out. This is because there is usually something about everyone in a lineup that is arguably distinctive; e.g., the tallest, heaviest, best dressed, most uncouth. Consequently, so long as the suspect was not "marked for identification" (discussed later), the fact that there was something distinctive about him will seldom affect the validity of the lineup. As the California Supreme Court explained, the issue is not whether the defendant stood out, but whether he stood out "in a way that would suggest the witnesses should select him."[52] For example, in rejecting arguments that the defendant stood out in this manner, the courts have noted the following:

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[41] *People* v. *Johnson* (2010) 183 Cal.App.4th 253, 272.
[42] *People* v. *Cunningham* (2001) 25 Cal.4th 926, 990.
[43] *People* v. *Adams* (1982) 137 Cal.App.3d 346, 353.
[44] *People* v. *Holt* (1972) 28 Cal.App.3d 343, 350.
[45] *People* v. *Wash* (1993) 6 Cal.4th 215, 245, fn.11.
[46] *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1217.
[47] *People* v. *Yeoman* (2003) 31 Cal.4th 93, 124-25, fn.6.
[48] *U.S.* v. *Beck* (9th Cir. 2005) 418 F.3d 1008, 1012.
[49] *People* v. *Malich* (1971) 15 Cal.App.3d 253, 260.
[50] *People* v. *Vallez* (1978) 80 Cal.App.3d 46, 55.
[51] (1978) 80 Cal.App.3d 46, 54.
[52] *People* v. *Carpenter* (1997) 15 Cal.4th 312, 367. Also see *People* v. *Faulkner* (1972) 28 Cal.App.3d 384, 391 ["[T]he crucial issue is whether appellant has been singled out and his identification made a foregone conclusion"].

- While the defendant was the shortest person in the lineup, he was not "significantly" shorter than the others.[53]
- "[A]lthough defendant was the tallest, all the others were tall as well."[54]
- "Although the other men may have been darker in complexion and not as thin, the men in the lineup were sufficiently similar in appearance"[55]
- "[A]ppellant notes that he was wearing a bright white sweatshirt or sweater. However, so long as the defendant is not alone dressed in a striking manner, there is no need for the police to match outfits of everyone in the lineup anymore than the police are required to match the physical proportions of the other men with scientific exactitude."[56]
- "While defendant's profile is facing the opposite direction from the other five pictures, the point of concern to the witness is the person's features, not the direction he is facing."[57]
- "[A]ny discoloration in defendant's photograph would not suggest it should be selected."[58]
- "[T]he fact defendant's face has a 'yellow cast' is unimpressive as photograph number six has a distinctly 'red cast,' number four has an 'orange cast,' and others have differing color characteristics."[59]
- Although the defendant was the only person in the photo lineup wearing a gold shirt and gold sweater, this clothing "was not similar to that described to the police by [the witness]."[60]
- "[D]efendant's tattoo did not make the live lineup impermissibly suggestive. None of the witnesses observed a tattoo on the gunman's head."[61]

In contrast, the court in *People* v. *Carlos*[62] ruled that a photo lineup was suggestive because the suspect's name and ID number were printed below his photo, while none of the other photos were similarly marked. Said the court, "Although the name placement is not quite an arrow pointing to Carlos, it is plainly suggestive."

**LINEUP POSITION**: The suspect's position in the lineup is irrelevant. As the California Supreme Court noted, "[N]o matter where in the array a defendant's photograph is placed, he can argue that its position is suggestive."[63]

**NUMBER OF FILLERS**: The number of fillers is sometimes noted, but it is seldom a significant circumstance because it is common practice to include at least five. An especially large number of fillers will, of course, reduce any suggestiveness; e.g., witness looked for the perpetrator in gang books, mug books, sexual assault registries, school yearbooks.[64]

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[53] *People* v. *Cook* (2007) 40 Cal.4th 1334, 1355. Also see *People* v. *Mosher* (1969) 1 Cal.3d 379, 396 ["While it has been suggested that a lineup with a tall defendant among short men could be unfair, the California cases have held that the height disparity in a lineup is not per se suggestive."]; *People* v. *Rist* (1976) 16 Cal.3d 211, 218 ["Aside from the fact that defendant may have been the shortest member of the lineup there is no evidence that he differed in appearance from the other members."]; *People* v. *Blair* (1979) 25 Cal.3d 640, 661["[D]efendant does not appear to be significantly taller, heavier, or older than the other participants."].

[54] *People* v. *Gordon* (1990) 50 Cal.3d 1223, 1243. Also see *People* v. *Davis* (1969) 2 Cal.App.3d 230, 237 [suspect was the tallest].

[55] *People* v. *Floyd* (1970) 1 Cal.3d 694, 712. Also see *People* v. *Guillebeau* (1980) 107 Cal.App.3d 531, 557 ["While in the six-picture color photo lineup appellant was darker complected than the other Negroes, this does not by itself render the identification unduly suggestive."].

[56] *People* v. *Wimberly* (1992) 5 Cal.App.4th 773, 790.

[57] *People* v. *West* (1984) 154 Cal.App.3d 100, 105.

[58] *People* v. *Gonzalez* (2006) 38 Cal.4th 932, 943. Also see *People* v. *Hicks* (1971) 4 Cal.3d 757, 764 [court rejects the argument that a photo lineup was unreliable because his photo "had a gray background while the others had a white background"]

[59] *People* v. *West* (1984) 154 Cal.App.3d 100, 105.

[60] *People* v. *Lawrence* (1971) 4 Cal.3d 273, 280.

[61] *People* v. *Gonzalez* (2006) 38 Cal.4th 932, 944.

[62] (2006) 138 Cal.App.4th 907, 912.

[63] *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1217. Also see *People* v. *De Angelis* (1979) 97 Cal.App.3d 837, 841 ["[T]he contention of 'strategically' placing defendant's photo toward the center of the display fails of merit. No matter where placed, a like complaint could be made."]; *People* v. *Davis* (1969) 2 Cal.App.3d 230, 237-38 [immaterial that defendant was at the end of the line]; *People* v. *Faulkner* (1972) 28 Cal.App.3d 384, 392 ["the positions of the lineup participants were allotted by chance drawing"].

[64] See *In re Cindy E.* (1978) 83 Cal.App.3d 393, 402 [school yearbook]; *People* v. *Pervoe* (1984) 161 Cal.App.3d 342, 357 [scrapbook]; *People* v. *Posten* (1980) 108 Cal.App.3d 633, 647 ["mug" book]; *People* v. *Wells* (1971) 14 Cal.App.3d 348, 355 [book of parolees]; *People* v. *Phan* (1993) 14 Cal.App.4th 1453, 1462 ["All together well over 20 person are depicted"].

**MULTIPLE LINEUP APPEARANCES**: A suspect in a lineup may stand out because the witness had seen him in a previous showup or photo lineup. But, so long as there was a legitimate need for multiple lineup appearances, this circumstance will not render an identification unduly suggestive.[65]

**SUSPECT DIRECTS ATTENTION TO HIMSELF**: While a suspect will certainly "stand out" if he said or did something that drew attention to himself, the courts will disregard this circumstance in determining whether a lineup or showup was suggestive. As the California Supreme Court observed, the rule prohibiting suggestive lineups and showups "speaks only to suggestive identification procedures employed by the People."[66]

For example, in *People* v. *Boyd*[67] the defendant claimed that his lineup was unduly suggestive because he "hung his head, moved it back and forth and continued to look at the floor for some seconds." In rejecting the argument, the Court of Appeal ruled that "a defendant may not base his claim of deprivation of due process in a lineup on his own behavior." Similarly, in *People* v. *Wimberly*,[68] a robbery case, the suspect and the fillers in a live lineup were asked to say certain words that the robber had said. Because Wimberly spoke too softly to be heard clearly, an officer asked him to repeat the words. On appeal, Wimberly contended that the officer's request rendered the subsequent ID suggestive, but the court, citing *Boyd*, ruled that a suspect may not challenge a lineup "when his own conduct has caused the procedure to be suggestive."

**COVERING UP A DISTINCTIVE FEATURE**: In some cases it may be possible to reduce or eliminate any suggestiveness resulting from a single feature by covering it up. For example, in *People* v. *De Santis*,[69] where the suspect was much shorter than the fillers in a live lineup, officers eliminated the problem by having the suspect stand on some books that were concealed from the witnesses. And in *People* v. *Adams*,[70] where officers were concerned that the photo of the suspect stood out because of a bandage on his forehead, they covered it up with a piece of paper—then covered all the other photos in the same way. Finally, in *People* v. *De Angelis*,[71] where the photos of comparable fillers were in black and white, but the only photo of the suspect was in color, the officers reproduced it in black and white.

### Was the suspect "marked for identification"?

The most obvious example of a suggestive lineup is one in which the suspect was "marked for identification," which occurs if both of the following circumstances existed: (1) the witness provided officers with a particular description of the perpetrator or his clothing, or reported that he had a distinctive feature; and (2) the suspect was the only person in the lineup who matched that description or possessed that feature. As the Second Circuit put it, "A lineup is unduly suggestive as to a given defendant if he meets the description of the perpetrator previously given by the witness and the other lineup participants obviously do not."[72]

For example, in *People* v. *Caruso*[73] two robbery victims described the driver of the getaway car as "big, with dark wavy hair and a dark complexion." Caruso was arrested and placed in a lineup with four other men. But while he was big, dark, "of Italian descent" with "dark wavy hair," the other four "were not his size, not one had his dark complexion, and none had dark wavy hair." In ruling that the lineup was unduly suggestive, the court said, "During the robbery [the witnesses] noted the driver's large size and dark complexion, and if they were to choose anyone in the lineup, defendant was singularly marked for identification."

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[65] See *People* v. *Johnson* (2010) 183 Cal.App.4th 253, 272; *People* v. *Cook* (2007) 40 Cal.4th 1334, 1355.
[66] *People* v. *Yeoman* (2003) 31 Cal.4th 93, 125.
[67] (1990) 222 Cal.App.3d 541.
[68] (1992) 5 Cal.App.4th 773. Also see *U.S.* v. *Jones* (4th Cir. 1990) 907 F.2d 456, 459-60 ["Johnson may have been asked to repeat 'Hit the floor!' but only because he had spoken softly the first time."].
[69] (1992) 2 Cal.4th 1198.
[70] (1982) 137 Cal.App.3d 346.
[71] (1979) 97 Cal.App.3d 837.
[72] *Raheem* v. *Kelly* (2nd Cir. 2001) 257 F.3d 122, 134.
[73] (1968) 68 Cal.2d 183. COMPARE *People* v. *Lawrence* (1971) 4 Cal.3d 273, 280; *People* v. *Thomas* (1970) 5 Cal.App.3d 889, 900.

Similarly, in *Torres* v. *City of Los Angeles*[74] the court ruled that a suspect was marked for identification in a photo lineup because "only one other photo in the six-pack besides the photo of [the suspect] was of a visibly overweight individual and thus of a person who fit [the victim's] description."

The same principle applies to clothing worn by the perpetrator. For example, in *Foster* v. *California*[75] the Supreme Court invalidated a lineup because "petitioner stood out from the other two men . . . by the fact that he was wearing a leather jacket similar to that worn by the robber." And in *People* v. *Ware*[76] the court ruled that a photo lineup was suggestive because the defendant was "the only person in the photos wearing a blue denim jacket of the type [that the victim] reported her assailant was wearing."

On the other hand, if the feature was not particularly distinctive, or if it was shared by other fillers, the courts will usually admit the ID and let the jury decide its weight. Thus, in ruling that the defendant was not marked for identification, the courts have noted the following:

- "While it is true that defendant's photograph has the mustache with the most pronounced gap in the center [the perpetrator had a gapped mustache], others of the photographs have mustaches with at least slight gaps."[77]
- "The mere fact that defendant was wearing the same color pants worn by the robber did not make the lineup unfair."[78]
- Although the perpetrator wore a bandana, and although the defendant was the only person in the photo lineup who wore a bandana, "two of the other photos showed persons with different headgear."[79]
- While the man who robbed a liquor store was wearing a blue jacket, and although the defendant was wearing a blue jacket at the lineup, all of the eight men in the lineup were wearing similar blue jackets.[80]

## Pre-lineup communications

A lineup or showup that was otherwise fair may be deemed suggestive if officers said or did something beforehand that would have prompted the witness to select the suspect. As the United States Supreme Court observed, "Persons who conduct the identification procedure may suggest, intentionally or unintentionally, that they suspect the witness to identify the accused. Such a suggestion, coming from a police officer or prosecutor, can lead a witness to make a mistaken identification."[81]

**PROVIDING SUGGESTIVE INFORMATION**: Officers must, of course, say nothing to the witness that could be reasonably interpreted as directing attention to the suspect.[82] Thus, the Court of Appeal warned against "[s]uggestive comments or conduct that single out certain suspects or otherwise focus a witness's attention on a certain person in a lineup."[83] For example, in *Torres* v. *City of Los Angeles*[84] the court ruled it was

[74] (9th Cir. 2008) 548 F.3d 1197, 1208.
[75] (1969) 394 U.S. 440, 442-43.
[76] (1978) 78 Cal.App.3d 822, 839.
[77] *People* v. *Dontanville* (1970) 10 Cal.App.3d 783, 792. Also see *People* v. *DeSantis* (1992) 2 Cal.4th 1198, 1222 ["This hardly uncommon apparel cannot be termed a badge of identity here"]; *People* v. *McDaniels* (1972) 25 Cal.App.3d 708, 711 [blue shirt]; *People* v. *Cunningham* (2001) 25 Cal.4th 926, 990 ["at least one of the other men is dressed in a three-piece suit, and another is wearing a suit jacket"]; *People* v. *Arias* (1996) 13 Cal.4th 92, 169-70 [the witness's "recollection and use of a distinct aspect of the robber's appearance [i.e., 'a bad case of acne'] enhances, rather than undermines, the inference that his photo identification was accurate"].
[78] *People* v. *Harris* (1971) 18 Cal.App.3d 1, 6.
[79] *In re Charles B.* (1980) 104 Cal.App.3d 541, 544-45.
[80] *People* v. *Davis* (1969) 2 Cal.App.3d 230, 237.
[81] *Moore* v. *Illinois* (1977) 434 U.S. 220, 224-25. Also see *Simmons* v. *United States* (1968) 390 U.S. 377, 383 ["The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime."].
[82] See *Moore* v. *Illinois* (1977) 434 U.S. 220, 230, fn.4 [as the defendant was led into the lineup, a prosecutor identified him as the suspect and told her that evidence pertaining to the crime had been found in his apartment]; *People* v. *Arias* (1996) 13 Cal.4th 92, 167 [DA's process server told witness that the suspect "had already been convicted of murder and rape"]. COMPARE *Simmons* v. *United States* (1968) 390 U.S. 377, 385 ["There is no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that the FBI agents in any other way suggested which persons in the pictures were under suspicion."].
[83] *People* v. *Perkins* (1986) 184 Cal.App.3d 583, 588.
[84] (9th Cir. 2008) 548 F.3d 1197, 1208.

suggestive to tell the witness that officers had "possibly identified the 15 to 16 year-old chubby boy" who was involved in a drive-by murder, and there were only two overweight boys in the lineup, one of whom was the defendant.

**IMPLYING A SUSPECT OR PERPETRATOR IS IN LINEUP**: It has been argued that officers must not even inform a witness that they have arrested someone, or that one of the people in the lineup is a "suspect." While officers should avoid suggesting that the perpetrator is in the lineup ("Which one of these guys did it?"[85]), the courts have consistently rejected arguments that it was unduly suggestive to inform a witness that someone in the lineup was a suspect. This is because witnesses who are asked to view a lineup will naturally assume that officers did not grab six people off the street at random in hopes that one of them might have been the perpetrator.[86] Still, when suggestiveness is an issue, the courts often note, at least in passing, whether the officers did or did not tell the witness that they had a "suspect" or that a "suspect" was in the lineup.[87]

**"ANOTHER WITNESS MADE AN ID"**: If another witness had previously identified someone in a lineup, officers should keep this confidential as it may be viewed as pressuring the witness to make an identification.[88]

**CAUTIONARY INSTRUCTIONS**: It is considered standard procedure for officers to help reduce any inherent suggestiveness by giving the witness certain information and instructions.[89] The following are fairly common:

LINEUPS

- The perpetrator may or may not be in the lineup. (Or, do not assume that we have identified the perpetrator merely because we are asking you to attend a lineup.)
- You are not obligated to identify anyone.
- Do not discuss your case with other witnesses or anyone else in the room.
- Do not call out a person's number or do anything that might indicate to others that you have identified someone.
- If you want to have a certain person say or do something, make your request to the officer conducting the lineup. All people in the line will then be asked to say or do the same thing.
- Our investigation in this case will continue regardless of whether you identify or do not identify anyone. (CCFAJ recommendation)

SHOWUPS

- Do not assume that the person you will be seeing is the perpetrator merely because we are asking you to look at him [or because he is handcuffed] [or because he is sitting in a patrol car].
- Do not speak with the other witnesses who will be going with us.
- When we arrive, do not say anything in the presence of other witnesses that would indicate you did or did not recognize someone. You will be questioned separately.
- Our investigation in this case will continue regardless of whether you identify or do not identify anyone. (CCFAJ recommendation)

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[85] See *People* v. *Vanbuskirk* (1976) 61 Cal.App.3d 395, 400 ["Which man is the man that came in the store that night?"].

[86] See *People* v. *Carpenter* (1997) 15 Cal.4th 312, 368 ["Anyone asked to view a lineup would naturally assume the police had a suspect."]; *People* v. *Contreras* (1993) 17 Cal.App.4th 813, 820 ["Telling a witness suspects are in custody … is not impermissible."]; *People* v. *Ballard* (1969) 1 Cal.App.3d 602, 605 [not suggestive to inform witnesses that "the police had two suspects who fit the description that she had given them"]; *People* v. *Dominick* (1986) 182 Cal.App.3d 1174, 1196 [not suggestive to tell the witness "that one or more of the suspects 'might' be in the lineup"]; *People* v. *Nguyen* (1994) 23 Cal.App.4th 32, 39 [not suggestive for an officer to tell the witness, prior to a showup, "that he had been able to catch a few people but that he needed a witness to identify them."]; *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1218.

[87] See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386; *People* v. *Johnson* (1989) 210 Cal.App.3d 316, 323.

[88] See *People* v. *Vanbuskirk* (1976) 61 Cal.App.3d 395, 402, fn.4.

[89] See, for example, *People* v. *Avila* (2009) 46 Cal.4th 680, 698; *People* v. *Yeoman* (2003) 31 Cal.4th 92, 124 ["Before each lineup, Trimble admonished Ford that the suspect's photograph might or might not be included and that she should not feel obligated to choose one."]; *People* v. *Arias* (1996) 13 Cal.4th 92, 169 [the officer told the witness that "the suspect might be in here, he might not"]; *People* v. *Sequeira* (1981) 126 Cal.App.3d 1, 16 ["The witnesses were separated, told not to talk with each other, and to designate their identifications by writing the suspect's number on a car provided them."]; *People* v. *Cunningham* (2001) 25 Cal.4th 926, 990 [the witness "was instructed that he was not to assume the person who committed the crime was pictured therein, that it was equally important to exonerate the innocent, and that he had no obligation to identify anyone."].

## Post-lineup communications

After a live or photo lineup, officers will ordinarily want to talk to the witness about his identification of the suspect or his failure to make an identification. As we will now discuss, such communications are ordinarily appropriate and will not affect the admissibility of subsequent identifications.

**HOW CONFIDENT?** If the witness identified someone, the CCFAJ recommends that officers inquire as to his degree of confidence that he picked the perpetrator; and that his responses be recorded or included in the lineup report. The Seventh Circuit also addressed this issue in *United States* v. *Williams* when it said, "Obtaining immediate estimates of confidence also reduced the chance of error. People often profess greater confidence after the fact; their memories realign to their earlier statements, so that trial testimony may reflect more confidence than is warranted."[90]

**"ANYONE CLOSELY RESEMBLE?"** If the witness did not identify anyone, or if he made only a tentative ID, it is not suggestive to ask whether anyone in the lineup closely resembled the perpetrator. In fact, the court in *People* v. *Perkins*[91] pointed out that such a question was "a logical one" after the officer's chief witness failed to identify a suspect. Said the court, "In order to continue the investigation and make certain he was on the right track, [the officer] needed to explore [the witness's] recollection and description of the robber."

**WITNESS REACTS TO SEEING SOMEONE**: If the witness did not make an ID, but said or did something that indicated he recognized someone in the lineup, it is appropriate to question him about this. Said the Court of Appeal, "It is not impermissible or unduly suggestive for a police officer to question witnesses further if the officer believes the witnesses may actually recognize someone in the lineup."[92]

**WITNESS REQUESTS INFORMATION**: Officers at a lineup may provide information about the suspect to a witness if (1) the witness made a positive or tentative identification of a suspect, and (2) the witness requested the information. For example, in *People* v. *Ochoa*[93] a rape victim picked the defendant's photo but added that, to be sure, she would need to see a profile photo; so the officer showed her one. In rejecting the argument that the officer's act of providing this information rendered the procedure suggestive, the California Supreme Court said, "Due process does not forbid the state to provide useful further information in response to a witness's request, for the state is not suggesting anything."

Similarly, in *People* v. *Perkins*[94] the victim of a robbery noticed that one of the robbers had a tattoo of a lightning bolt on his neck. During the lineup, the victim recognized Perkins as the robber but said she "could not be sure" until she knew whether he had such a tattoo; the officer then confirmed that he did. On appeal, the court ruled that the officer's confirmation did not render the lineup unduly suggestive because the victim had recognized Perkins as the robber before she learned about the tattoo, and that the purpose of her question was only to confirm a "key detail."

**"YOU PICKED THE RIGHT ONE"**: Officers should not inform a witness that he picked the "right" person in a lineup or otherwise confirm that he selected the suspect because it may have a "corrupting effect" on his subsequent identifications.[95] This is especially true if the witness made only a tentative ID. For example, in *People* v. *Gordon*[96] police arrested Gordon for the robbery-murder of an armored car guard. At a live lineup, a witness told officers that Gordon "looks familiar, but I'm not certain." Later that day, an officer phoned the witness to inquire about her comment. According to the court, in the course of the conversation the officer essentially told her that she had "picked the right person." As the result, all subsequent identifications of Gordon by the witness were suppressed.

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[90] (7th Cir. 2008) 522 F.3d 809, 812.
[91] (1986) 184 Cal.App.3d 583, 590. Also see *People* v. *Nation* (1980) 26 Cal.3d 169, 180.
[92] *People* v. *Perkins* (1986) 184 Cal.App.3d 583, 590. Also see *People* v. *Contreras* (1993) 17 Cal.App.4th 813, 820 ["questioning a witness further if the officer believes the witness actually recognized someone in the lineup is not impermissible"].
[93] (1998) 19 Cal.4th 353.
[94] (1986) 184 Cal.App.3d 583.
[95] *People* v. *Gordon* (1990) 50 Cal.3d 1223, 1242.
[96] (1990) 50 Cal.3d 1223.

Even if the witness positively identified the suspect, officers should not inform him that there was additional evidence of his guilt. For example, in *People* v. *Slutts*[97] two witnesses to an indecent exposure tentatively identified Slutts, after which an officer told them that Slutts "had committed a prior similar offense" and needed psychiatric help. The court observed that this statement "was made apparently to persuade the girls to hold to their identification of defendant." And although this did not result in the suppression of the ID (because the ID occurred beforehand), it was a legitimate issue on appeal.

## Other relevant circumstances

**WERE THE WITNESSES SEPARATED?** Whenever two or more witnesses will be viewing a lineup or showup, it would be inherently suggestive if one of them were to hear another witness identify the suspect. As the court explained in *People* v. *Ingle*,[98] "It has been recognized that permitting one eyewitness to a crime the opportunity to observe another eyewitness make a photo lineup identification before he himself is asked to make his own identification is unnecessarily suggestive and fraught with the potential for irreparable misidentification." It has also been noted that a witness who identifies a suspect after hearing another witness identify him may subconsciously become unduly confident of his identification due to "mutual reinforcement."[99]

For this reason, it has become standard procedure to segregate the witnesses before the viewing occurs, and question them separately.[100] For example, in *People* v. *Sequeira*[101] the court ruled that one of the circumstances that rendered a lineup "eminently fair" was that the witnesses "were separated, told not to talk with each other, and to designate their identifications by writing the suspect's number on a card provided them."

**DOUBLE-BLIND LINEUPS**: To help prevent suggestiveness, the CCFAJ has recommended that live and photo lineups be "double-blind," meaning that the officers who conduct the lineup do not know the identity of the suspect. The advantage of this procedure is that the officers cannot possibly say or do anything—whether intentionally or inadvertently—that would have called attention to the suspect.[102] (By the way, it is called a *double* blind lineup because neither the officers nor the witnesses are informed beforehand of the suspect's identity.)

**SEQUENTIAL LINEUPS**: When officers are conducting double-blind live or photo lineups, the CCFAJ recommends that they display the suspect and the fillers to the witness one at a time. These are known as "sequential" lineups, as opposed to simultaneous live lineups in which the suspect and the fillers appear on stage at the same time, and simultaneous photo lineups in which the photographs are displayed all at once.

According to some psychologists, witnesses who view simultaneous lineups may tend to compare the people in the lineup with one another instead of comparing each one with their mental picture of the perpetrator. And this tendency, they contend, may result in misidentifications because, if the perpetrator was not in the lineup, the witness may identify the person who most resembles him. To date, only one California court has discussed the subject of sequential lineups, and its conclusion was positive. The case was *People* v. *Brandon* and the court said, "The circumstances surrounding the photographs being shown to [the witness] (loose, in a stack and shown one at a time) reflect she was not influenced by any so-called 'filler' photographs."[103]

**PRE-LINEUP PHOTO DISPLAY**: Just before conducting a lineup, officers have sometimes shown surveillance photos of the perpetrator to the witness. Such a

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[97] (1968) 259 Cal.App.2d 886.
[98] (1986) 178 Cal.App.3d 505, 513.
[99] See *People* v. *Nation* (1980) 26 Cal.3d 169, 180.
[100] See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 116 ["And since Glover examined the photograph alone, there was no coercive pressure to make an identification arising from the presence of another."]; *People* v. *Dontanville* (1970) 10 Cal.App.3d 783, 793 ["Each child was called in separately to view the photographs and admonished not to discuss what transpired with the others."].
[101] (1981) 126 Cal.App.3d 1, 16.
[102] See *U.S.* v. *Williams* (7th Cir. 2008) 522 F.3d 809, 811 [suggestiveness may be reduced if "the officer conducting [the lineup is] ignorant of the suspect's identity"].
[103] (1995) 32 Cal.App.4th 1033, 1052.

procedure is, to put it mildly, "arguably suggestive."[104] Nevertheless, the courts have not strictly prohibited it when there was good reason to believe the ID was reliable; e.g., the witness got a good look at the perpetrator.[105] It is also probably because the perpetrator's ID is not apt to be a significant issue at trial if prosecutors have photographs of him committing the crime. But if ID will be a contested issue, this procedure should be avoided because, even if the identification is ruled admissible, it is apt to have little weight with the jury.[106]

**RECORDING LINEUPS; RETAINING PHOTOS**: To prove that live lineups were fair, the CCFAJ recommends that they be recorded. As for photo lineups, it is already standard practice to retain the photos.[107]

## Identification Trustworthiness

As noted, even if a lineup or showup was unduly suggestive, the resulting identification will not be suppressed if it was nevertheless trustworthy. While the courts will consider the totality of circumstances in determining whether an identification was trustworthy,[108] the following circumstances are usually key:

**OPPORTUNITY TO OBSERVE PERPETRATOR**: The courts almost always note the extent to which the witness had an opportunity to see the perpetrator before, during, or after the crime. This is because the danger of misidentification is particularly grave "when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest."[109] Of particular importance are the length of time the witness saw the perpetrator, the distance between them, whether the witness's view of the perpetrator was obstructed, and the lighting conditions. For example, in ruling that witnesses had a good opportunity to see the perpetrator, the courts have noted the following:

- "two to three minutes . . . within two feet . . . natural light"[110]
- "up to half an hour . . . under adequate artificial light in her house and under a full moon outdoors"[111]
- "The robbery took place in the afternoon in a well-lighted bank. The robbers wore no masks. Five bank employees had been able to see the robber for periods ranging up to five minutes."[112]
- "close range for at least three minutes"[113]
- a "clear and unobstructed view [for 15-20 minutes] . . . well-lighted conditions"[114]
- the victim had an "unobstructed view . . . for at least three minutes"[115]
- "well-lit bedroom for a couple of minutes"[116]
- "20-to-30 second opportunity . . . with lighting provided by the headlights of both cars and a streetlight"[117]
- "Her view of his face with the nylon covering (which did not distort his features) from a foot away lasted about a minute and a half."[118]

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[104] *U.S.* v. *Lawson* (D.C. Cir. 2005) 410 F.3d 735, 740 [it was "arguably suggestive" to show witnesses surveillance photos of the bank robbers]; *U.S.* v. *Sanders* (8th Cir. 1980) 626 F.2d 1388, 1389.
[105] See, for example, *People* v. *Kennedy* (2005) 36 Cal.4th 595, 611; *People* v. *Ingle* (1986) 178 Cal.App.3d 505, 513; *People* v. *Johnson* (2010) 183 Cal.App.4th 253, 273; *People* v. *Alexander* (2010) 49 Cal.4th 846, 903; *U.S.* v. *Beck* (9th Cir. 2005) 418 F.3d 1008, 1013.
[106] See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 116.
[107] See *People* v. *Bethea* (1971) 18 Cal.App.3d 930, 938 [it may be difficult to prove the fairness of a photo lineup without the photos].
[108] See *Neil* v. *Biggers* (1972) 409 U.S. 188, 199; *People* v. *Kennedy* (2006) 36 Cal.4th 595, 610; *People* v. *Cook* (2007) 40 Cal.4th 1334, 1354 ["The cases hold that despite an unduly suggestive identification procedure, we may deem the identification reliable under the totality of the circumstances"].
[109] *United States* v. *Wade* (1967) 388 U.S. 218, 229. Also see *People* v. *Cook* (2007) 40 Cal.4th 1334, 1354 ["we consider such factors as the witness's opportunity to view the suspect at the time of the offense"].
[110] *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 114.
[111] *Neil* v. *Biggers* (1972) 409 U.S. 188, 200.
[112] *Simmons* v. *United States* (1968) 390 U.S. 377, 385.
[113] *People* v. *York* (1980) 108 Cal.App.3d 779, 786.
[114] *People* v. *Ware* (1978) 78 Cal.App.3d 822, 839, fn.11.
[115] *People* v. *Rist* (1976) 16 Cal.3d 211, 216.
[116] *People* v. *Fortier* (1970) 10 Cal.App.3d 760, 764.
[117] *People* v. *Martinez* (1989) 207 Cal.App.3d 1204, 1220.
[118] *People* v. *Edwards* (1981) 126 Cal.App.3d 447, 454.

**ATTENTION DIRECTED AT PERPETRATOR**: A witness's identification is especially likely to be deemed trustworthy if his attention had been directed at the perpetrator.[119] For example, in *People* v. *Gomez*[120] the court ruled that a robbery victim's ID of the defendant was trustworthy because, among other things, she "kept reminding herself to study the face of the robber because she knew she would be called upon later to identify him." And in *People* v. *Sanders*[121] the court noted that a man who survived an attack in which his friend was killed testified that he "focused on his attackers' faces in order to identify them if he survived the attack."

Conversely, the trustworthiness of an identification may become an issue if the witness had only a glance at the suspect, or if he was just a casual or passing observer.[122]

**SOMETHING DISTINCTIVE**: In some cases, a witness's attention may be directed to the perpetrator because there was something distinctive or unusual about him.[123] For example, in *People* v. *Cunningham*[124] the witnesses to a robbery-murder testified that their attention was initially drawn to the perpetrator because of his unusual appearance which included a "burgundy three-piece pinstripe polyester suit and tie," "thick glasses with dark rims," "a mustache that connected with a goatee-like beard," and his "hair in back was shoulder-length in the middle."

**DETAILED DESCRIPTION**: The courts often consider whether the witness had initially provided officers with a detailed description of the perpetrator, or whether the description was vague or general. For example, in ruling that a witness's description appeared to be trustworthy, the courts have noted the following:

- The description included "the assailant's approximate age, height, weight, complexion, skin texture, build, and voice."[125]
- The description included the perpetrator's "race, his height, his build, the color and style of his hair, and the high cheekbone facial feature. It also included clothing [he] wore."[126]
- The witness "described his age, facial appearance and his wearing apparel in some detail."[127]
- The witness described his "clothing, hair, complexion, facial hair, height, weight, and condition of intoxication."[128]

**ACCURACY OF INITIAL DESCRIPTION**: A strong indication of trustworthiness is the accuracy of the witness's initial description of the perpetrator; i.e., the number

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[119] See *Neil* v. *Biggers* (1972) 409 U.S. 188, 200 ["She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes."]; *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 115 ["Glover was not a casual or passing observer, as is so often the case with eyewitness identification."]; *People* v. *Bauer* (1969) 1 Cal.3d 368, 374 ["This was not a case of a hurried look in circumstances where there was no reason to observe with particularity."]; *People* v. *Phan* (1993) 14 Cal.App.4th 1453, 1462 ["[The witness] 'looked straight in his face,' and made a conscious effort to 'stare at him.' Her degree of attention could hardly have been higher: appellant Phan was a threat not only to her but to her children."]; *People* v. *Kilpatrick* (1980) 105 Cal.App.3d 401, 412 ["[T]he victim took time while in the motel room to get a clear view, under daylight, of her assailant."]; *In re Cindy E.* (1978) 83 Cal.App.3d 393, 402 ["their degree of attention [during a 'tense conversation'] can hardly be passed off as that of casual observers"]; *People* v. *Cowger* (1988) 202 Cal.App.3d 1066, 1072 ["Her degree of attention was high: she kept fighting off defendant, who was trying to remove her clothes."]; *People* v. *Nguyen* (1994) 23 Cal.App.4th 32, 39 ["[The victim's] degree of attention was high since there were no other customers in the store, and appellant's companion [had] asked for [the victim's] assistance."].

[120] (1976) 63 Cal.App.3d 328.

[121] (1990) 51 Cal.3d 471.

[122] See *Moore* v. *Illinois* (1977) 434 U.S. 220, 229 ["only 10 to 15 seconds" after awakening from a nap]; *People* v. *Bisogni* (1971) 4 Cal.3d 582, 587 [only "two short looks" and "a glance"]; *People* v. *Caruso* (1968) 68 Cal.2d 183, 188 ["fleeting glance"]; *People* v. *Nation* (1980) 26 Cal.3d 169, 181 [a "glance"].

[123] See *People* v. *LeBlanc* (1972) 23 Cal.App.3d 902, 906 [the "oddity" of the perpetrator's hair styling caused the victim to notice him]; *People* v. *Arias* (1996) 13 Cal.4th 92, 169-70 [the witness recalled "a distinct aspect of the robber's appearance"]; *People* v. *Malich* (1971) 15 Cal.App.3d 253, 261-62 ["small wire on her upper right teeth"]; *People* v. *Harpool* (1984) 155 Cal.App.3d 877, 886 ["very distinct dental features"]; *People* v. *Faulkner* (1972) 28 Cal.App.3d 384, 392 ["unusual high forehead" and "chuke"].

[124] (2001) 25 Cal.4th 926, 958, 990.

[125] *Neil* v. *Biggers* (1972) 409 U.S. 188, 200. Also see *People* v. *Blum* (1973) 35 Cal.App.3d 515, 519 ["a detailed description"].

[126] *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 115.

[127] *People* v. *Rodriguez* (1970) 10 Cal.App.3d 18, 32.

[128] *People* v. *Martinez* (1989) 207 Cal.App.3d 1204, 1220.

of descriptive details that matched.[129] For example, in *People* v. *Guillebeau*[130] the court explained that one of the reasons a rape victim's identification of the defendant was reliable was that she was able to help make a composite picture of her assailant "which strongly resembled appellant." While inaccuracies are also relevant,[131] the courts understand that witnesses are often unable to provide detailed descriptions, and that discrepancies are inevitable. Consequently, a somewhat inaccurate description may be offset by other circumstances that tend to show the ID was reliable.[132]

**INCONSISTENCIES**: If an identification was otherwise reliable, some inconsistencies in the witness's description of the perpetrator will go to the weight of the ID, not its admissibility.[133]

**ID BASED ON MULTIPLE FACTORS**: For the same reason that the specificity of a witness's initial description is a sign of trustworthiness, the courts also consider whether the witness's subsequent identification of the defendant was based on several characteristics or just one.[134] For example, although a witness in *People* v. *Flint*[135] "had difficulty" identifying a burglar by his facial features, the Court of Appeal ruled the identification was sufficiently trustworthy because it was also based on "his clothing, posture, build, hairstyle, and race."

**WITNESS TRAINED TO PAY ATTENTION**: The trustworthiness of an identification may be bolstered by the fact that the witness had been trained to pay special attention to people he thinks he might need to identify later; e.g., bank tellers, police officers.[136] As the United States Supreme Court observed in *Manson* v. *Brathwaite,* "[A]s a specially trained, assigned, and experienced officer, [the witness] could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest his [drug] vendor. In addition, he knew that his claimed observations would be subject later to close scrutiny and examination at any trial."[137]

**WITNESS HAD SEEN PERPETRATOR BEFORE**: An ID is naturally likely to be more trustworthy if the witness was acquainted with the perpetrator or had seen him before.[138] For example, in ruling that a rape victim's identification of her attacker was reliable, the court in *People* v. *Nash* noted that she "had seen appellant

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[129] See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 ["generally accurate description"]; *People* v. *Sanchez* (1982) 131 Cal.App.3d 718, 731 ["substantial congruity"]; *People* v. *Johnson* (1989) 210 Cal.App.3d 316, 323 ["[H]is description of the perpetrator matched Johnson precisely."]; *People* v. *Kilpatrick* (1980) 105 Cal.App.3d 401, 412 ["Her descriptions of defendant's vehicle and personal appearance as well as her clothing . . . were all accurate."].

[130] (1980) 107 Cal.App.3d 531, 557.

[131] See *United States* v. *Wade* (1967) 388 U.S. 218, 241 [it is relevant whether there was "any discrepancy between any pre-lineup description and the defendant's actual description"].

[132] See *In re Carlos M.* (1990) 220 Cal.App.3d 372, 387 ["The accuracy of her description of appellant, while inaccurate as to the type of pants he was wearing, was an otherwise generally accurate description."]; *People* v. *Arias* (1996) 13 Cal.4th 92, 169 ["These estimates are not so disparate as to cast particular suspicion on Lam's reliability at trial."]; *People* v. *Blair* (1979) 25 Cal.3d 640, 662 ["In spite of these discrepancies, there are significant factors pointing in the direction of reliability."]. ALSO SEE *People* v. *Smith* (1970) 4 Cal.App.3d 41, 48 ["Crime victims often have limited opportunity for observation; their reports may be hurried, perhaps garbled by fright or shock."].

[133] See *People* v. *Virgil* (2011) 51Cal.4th 1210, 1256 ["Inconsistencies in her descriptions of the man she saw, and in her accounts of her activities on the day of the murder, are matters affecting the weight of her eyewitness testimony, not its admissibility."].

[134] See *Neil* v. *Biggers* (1972) 409 U.S. 188, 200 [witness's description "included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice"]; *People* v. *Lewis* (1966) 240 Cal.App.2d 546, 548 [ID based on defendant's "build, walk, and mannerisms"].

[135] (1986) 180 Cal.App.3d 13, 18.

[136] See *People* v. *Fortier* (1970) 10 Cal.App.3d 760, 765 [officers are "trained to notice a suspect's physical characteristics"]; *U.S.* v. *Duran-Orozco* (9th Cir. 1999) 192 F.3d 1277, 1282 ["[H]e gave them the attention an alert police officer would give to possible suspects"]; *U.S.* v. *Gallo-Moreno* (6th Cir. 2009) 584 F.3d 751, 758 ["Tovar's status as a DEA agent bolsters our conclusion about his degree of attention"]; *People* v. *Bethea* (1971) 18 Cal.App.3d 930, 934 [liquor store manager "had been the victim of three robberies"]; *U.S.* v. *Sanders* (8th Cir. 1980) 626 F2 1388, 1389 ["the witness' degree of attention was enhanced by special training for bank personnel"].

[137] (1977) 432 U.S. 98, 114.

[138] See *People* v. *LeBlanc* (1972) 23 Cal.App.3d 902, 906 ["defendant had been a customer of the store before on several occasions"]; *People* v. *Phan* (1993) 14 Cal.App.4th 1453, 1462 [the witness "had seen him before, four days earlier when he had attempted to open her garage"]; *People* v. *Rodriguez* (1977) 68 Cal.App.3d 874, 882 [the witness "had seen [the pepetrator] on *two* separate occasions *before* she saw the photograph of him"].

around the neighborhood on one or two occasions prior to this event."[139]

**ACCURACY IN EARLIER LINEUPS**: It may be logical to infer that the witness's identification was accurate if he previously failed to identify anyone in a lineup in which the defendant was not present.[140] Thus, in *Neil* v. *Biggers* the Supreme Court pointed out that "the victim made no previous identification at any of the showups, lineups, or photographic showups. Her record for reliability was thus a good one."[141] On the other hand, there may be problems if the witness identified a filler, especially if he did not resemble the defendant.[142]

**LEVEL OF CERTAINTY**: The courts frequently note whether, and to what extent, the witness had expressed certainty that the person he picked was the perpetrator.[143] A lack of certainty will not, however, render an ID untrustworthy. As the Court of Appeal explained in *People* v. *Lewis*, "Lack of positiveness in identification does not destroy the value of the identification but goes onto to its weight."[144] (For additional cases that are related to this subject, see "Mere suggestiveness goes to weight" on page 4.)

**IMMEDIATE ID**: Although it is relevant that the witness immediately identified the defendant,[145] it is seldom a significant circumstance because the courts know that witnesses often take their time in making such an important decision. Furthermore, officers often instruct the witnesses to take their time.[146]

**TIME LAPSE BETWEEN CRIME AND LINEUP**: Because memories fade, the length of time between the crime and the lineup or showup is relevant.[147]

**INDEPENDENT EVIDENCE OF GUILT**: It is logical to infer that a witness's ID of the defendant was trustworthy if there was additional independent evidence of his guilt; e.g., the defendant confessed to the crime, his fingerprints were found at the crime scene, he was identified by other witnesses.[148]

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[139] (1982) 129 Cal.App.3d 513, 515.

[140] See *People* v. *Alexander* (2010) 49 Cal.4th 846, 902-903 ["Bulman's history as a witness showed he was not susceptible to making a false identification"]; *People* v. *Wells* (1971) 14 Cal.App.3d 348, 355 [witness ID'd the defendant "following her examination of hundreds of photographs of various parolees in the area"]; *People* v. *Ware* (1978) 78 Cal.App.3d 822, 839 ["Shortly after the incident she was shown a mug book of some 200 photos and positively stated that none of the pictures was that of her assailant."]; *People* v. *Nash* (1982) 129 Cal.App.3d 513, 518 ["the victim was shown but did not identify many men before she saw appellant"] *People* v. *Bauer* (1969) 1 Cal.3d 368, 374 ["Each of the witnesses rejected a number of mug shots"]; *People* v. *Sanchez* (1982) 131 Cal.App.3d 718, 731 [witness "declined to identify anyone out of a photo lineup that did *not* contain a photograph of appellant"]; *People* v. *Spencer* (1972) 22 Cal.App.3d 786, 796 ["Miss Lawson did not identify anyone in the first lineup, from which appellant was absent"].

[141] (1972) 409 U.S. 188, 201.

[142] See *United States* v. *Wade* (1967) 388 U.S. 218, 241; *People* v. *West* (1984) 154 Cal.App.3d 100, 105; *People* v. *Dominick* (1986) 182 Cal.App.3d 1174, 1197.

[143] See *Manson* v. *Brathwaite* (1977) 432 U.S. 98, 115 ["no question whatsoever"]; *Neil* v. *Biggers* (1972) 409 U.S. 188, 200-1 ["no doubt"]; *Simmons* v. *United States* (1968) 390 U.S. 377, 385 ["none of the witnesses displayed any doubt"]; *People* v. *Kennedy* (2005) 36 Cal.4th 595, 611 ["Oh, my God, that's him"]; *People* v. *Greene* (1973) 34 Cal.App.3d 622, 641 ["My God, that's him"]; *People* v. *Jardine* (1981) 116 Cal.App.3d 907, 915 ["That's the two guys right there."]; *People* v. *Wash* (1993) 6 Cal.4th 215, 245 ["no uncertainty"]; *People* v. *Clark* (1992) 3 Cal.4th 41, 137 [ID was "positive and unshaken"]. Also see *People* v. *Brown* (1969) 273 Cal.App.2d 109, 112 [Robbery victim: "I just know that I would always know him if I ever saw him again."]; *People* v. *Guillebeau* (1980) 107 Cal.App.3d 531, 557 [the witness "emphasized that she would never forget appellant's face"].

[144] (1966) 240 Cal.App.2d 546, 548. Also see *People* v. *Rist* (1976) 16 Cal.3d 211, 216 ["Confusion, or lack of clarity and positiveness in a witness' identification testimony goes to the weight, not the admissibility of the testimony."]; *People* v. *Prado* (1982) 130 Cal.App.3d 669, 674 ["Hansen's failure to make a positive identification of appellant based on photographic displays merely goes to the weight of the evidence, not its sufficiency."].

[145] See *People* v. *Wells* (1971) 14 Cal.App.3d 348, 355 ["instantaneous" ID]; *People* v. *Harris* (1971) 18 Cal.App.3d 1, 6 ["immediately"]; *People* v. *Hawkins* (1970) 7 Cal.App.3d 117, 123 ["unhesitatingly"]; *People* v. *LeBlanc* (1972) 23 Cal.App.3d 902, 906 ["unhesitantly"]; *People* v. *Dontanville* (1970) 10 Cal.App.3d 783, 793 ["immediately"]; *People* v. *Cowger* (1988) 202 Cal.App.3d 1066, 1072 ["instantaneously"]; *People* v. *Brandon* (1995) 32 Cal.App.4th 1033, 1052 ["immediately"].

[146] Also see *People* v. *Arias* (1996) 13 Cal.4th 92, 169 [veteran officer testified "a witness typically selects a photo, if at all, within five minutes or so," but that taking 15 to 20 minutes would indicate indecision which he would include in his report].

[147] See *People* v. *Clark* (1992) 3 Cal.4th 41, 137 ["the ability to remember a perceptive experience diminishes over time"].

[148] See *People* v. *Farham* (2002) 28 Cal.4th 107, 184 ["Significantly, defendant had given a detailed confession to the police"]; *In re Richard W.* (1979) 91 Cal.App.3d 960, 971 [the other incriminating evidence was "strong and persuasive"]; *People* v. *Nguyen* (1994) 23 Cal.App.4th 32, 39 ["appellant's fingerprint was found at the crime scene"]; *People* v. *Anthony* (1970) 7 Cal.App.3d 751, 765 ["overwhelming" circumstantial evidence]; *People* v. *Bauer* (1969) 1 Cal.3d 368, 374 ["substantial corroborating evidence"].

## Right to Counsel

Under certain circumstances, a suspect has a right to have counsel present for the purpose of observing the manner in which the lineup was conducted. As we will now discuss, there are essentially three legal issues pertaining to this right: (1) When does a suspect have a right to counsel? (2) What is the attorney permitted to do? (3) How can officers obtain a waiver of the right?

### When the right attaches

Under the Sixth Amendment, a suspect acquires a right to have counsel present at a lineup or showup if all of the following circumstances exist: (1) the suspect was charged with a crime and had been arraigned on that charge, (2) the lineup or showup pertained to the charged crime, and (3) the suspect appeared in person at the lineup or showup.

**ARRAIGNMENT**: In 2008, the United States Supreme Court ruled that, for Sixth Amendment purposes, a suspect becomes "charged" with a crime at the point he makes his first court appearance pertaining to that crime. Said the Court, "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[149]

**IN-PERSON IDENTIFICATION**: Even if the suspect had been arraigned on the crime under investigation, he does not have a right to have counsel to observe the lineup procedure unless the witness will be viewing him in person or, in the case of a voice-only lineup, listening to him in person. Consequently, a suspect will not have a right to counsel when the witness views his photograph in a photo lineup, views a videotape of a live lineup, or listens to a tape recording of a voice-only lineup.[150]

The reason the right to counsel does not attach in these situations is that the defendant's trial attorney will be able to explore the possibility of suggestiveness by looking at the photos or videotape, or listening to the audio tape. Note, however, that a violation of the right to counsel might occur if officers are unable to provide the defense with copies of the photographs or recordings.[151]

**SUPPRESSION OF EVIDENCE**: If a court rules that officers conducted a lineup in violation of the defendant's right to counsel, the prosecution will be prohibited from introducing testimony that the witness had identified the defendant at the lineup.[152] The witness will also be prohibited from identifying the defendant at trial unless prosecutors can prove, by clear and convincing evidence, that the in-court identification was independent of the unlawful lineup identification.[153]

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[149] *Rothgery* v. *Gillespie County* (2008) 554 U.S. 191, 213. Also see *U.S.* v. *States* (7th Cir. 2011) __ F.3d __ [2011 WL 2857263] ["the initial appearance marks the point at which interrogations . . . begin to be governed by the Sixth Amendment"].

[150] See *United States* v. *Ash* (1973) 413 U.S. 300, 321 ["the Sixth Amendment does not grant the right to counsel at photographic displays"]; *United States* v. *Wade* (1967) 388 U.S. 218, 237; *Gilbert* v. *California* (1967) 388 U.S. 263; *People* v. *Virgil* (2011) 51 Cal.4th 1210, 1256 ["the Sixth Amendment does not guarantee a criminal defendant the right to counsel at a photographic lineup"]; *People* v. *Rist* (1976) 16 Cal.3d 211, 216 ["We have consistently rejected the contention that the constitutional right to counsel extends to photographic identification procedures."]; *People* v. *Dominick* (1986) 182 Cal.App.3d 1174, 1197, fn. 15 ["there is no right to counsel at a photographic identification procedure"]; *People* v. *Rhinehart* (1973) 9 Cal.3d 139, 153 ["There is no right to counsel at a photographic identification"]; *People* v. *Hawkins* (1970) 7 Cal.App.3d 117, 121 ["Any suggestive influences present at a photo-identification in large measure are preserved by the photographic evidence, or readily detectable by cross-examination of the participants."]; *U.S.* v. *Gallo-Moreno* (7th Cir. 2009) 584 F.3d 751, 762 ["When a witness makes an identification based on hearing a defendant's recorded voice on tape and that tape is preserved in the record, the defendant can adequately challenge the witness's voice identification at trial through effective cross-examination."]; *U.S.* v. *Gallo-Moreno* (6th Cir. 2009) 584 F.3d 751, 760 [no Sixth Amendment right to counsel unless the suspect was "present in a trial-like confrontation"].

[151] See *People* v. *Lawrence* (1971) 4 Cal.3d 273, 278 ["As long as the photographs from which the witness made his identification are preserved and available at trial, counsel for the accused . . . an easily reveal the possibility of prejudice"]; *People* v. *Dontanville* (1970) 10 Cal.App.3d 783, 791 ["the chief difference between a photographic line-up and [the live lineup] is the ability to reproduce much of what transpired by the production of the photographs themselves"].

[152] See *Gilbert* v. *California* (1967) 388 U.S. 263, 272-73; *Moore* v. *Illinois* (1977) 434 U.S. 220, 231; *United States* v. *Wade* (1967) 388 U.S. 218, 239-41.

[153] See *United States* v. *Wade* (1967) 388 U.S. 218, 242; *Gilbert* v. *California* (1967) 388 U.S. 263, 272; *People* v. *George* (1972) 23 Cal.App.3d 767, 774 [the prosecution "must show that there was a sufficient independent source for the in-court identification"]; *People* v. *Diggs* (1980) 112 Cal.App.3d 522, 528; *People* v. *Malich* (1971) 15 Cal.App.3d 253, 261; *People* v. *LeBlanc* (1972) 23 Cal.App.3d 902, 906.

### What the attorney is permitted to do

The attorney's role at a lineup is limited to that of a silent observer, taking note of any suggestiveness in the procedure so that he can later assist trial counsel in challenging the lineup.[154] A good explanation of the attorney's function was provided by Justice Mosk in *People* v. *Williams*:

> [D]efense counsel has no affirmative right to be active during the course of the lineup. He cannot rearrange the personnel, cross-examine, ask those in the lineup to say anything or to don any particular clothing or to make any specific gestures. Counsel may not insist law enforcement officials hear his objection to procedures employed, nor may he compel them to adjust their lineup to his views of what is appropriate. ¶ At most, defense counsel is merely present at the lineup to silently observe and to later recall his observations for purposes of cross-examination . . . [155]

**RIGHT TO BE PRESENT WHEN ID IS MADE:** Because the attorney serves as an observer of the identification process, he has a right to be present when the witness is asked if anyone in the lineup was the perpetrator.[156] This is because any suggestiveness at that point is just as likely to result in misidentification as suggestivess that occurs during the viewing.

For example, in *People* v. *Williams,* discussed above, the defendant's attorney was present when a witness viewed the lineup, but then the officers took the witness into another room "for the purpose of making his identification." The attorney asked to observe but his request was denied on grounds that it was against departmental policy. On appeal, the California Supreme Court ruled that such a departmental policy violated Williams' right to counsel because, said the court, "It is not the moment of viewing alone, but rather the whole procedure by which a suspect is identified that counsel must be able to effectively reconstruct at trial."

**PRE- AND POST-LINEUP INTERVIEWS:** The suspect's attorney does not have a right to be present when officers interview a witness before the lineup begins or after it was completed.[157] For example, in *People* v. *Perkins*[158] the defendant's attorney left the lineup after the witness failed to identify Perkins as the man who robbed her. A few minutes later, an officer asked the witness if there was anyone in the lineup who resembled the robber. She replied that one of the men was, in fact, the robber—it was Perkins. On appeal, Perkins, contended that the post-ID interview violated his right to counsel, but the court disagreed, saying, "[S]ince the identification process had been completed, Perkins' counsel had no more right to be present at the interview than he would at any nonconfrontational identification by a victim. No defendant has the right to demand representation by counsel at every interview between the prosecution and its witnesses."

Similarly, in *People* v. *Mitcham*[159] a robbery victim who was viewing a live lineup at Oakland police headquarters placed a question mark on the lineup card next to Mitcham's number. The robbery investigator did not immediately ask her to explain the question mark because it was "standard practice in his office not to discuss lineup details in the presence of defense counsel." One week later, he met with the victim and asked her about the question mark, and she said she was "95% sure" that Mitcham was the robber. On appeal, Mitcham contended that the

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[154] See *People* v. *Carpenter* (1999) 21 Cal.4th 1016, 1046 ["defense counsel must not be allowed to interfere with a police investigation"]; *People* v. *Bustamante* (1981) 30 Cal.3d 88, 99 ["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. *Williams* (1971) 3 Cal.3d 853, 856 [the right to counsel was adopted "to enable an accused to detect any unfairness in his confrontation with the witness, and to insure that he will be aware of any suggestion by law enforcement officers, intentional or unintentional, at the time the witness makes his identification."].

[155] (1971) 3 Cal.3d 853, 860 (dis. opn. of Mosk, J.).

[156] See *People* v. *Malich* (1971) 15 Cal.App.3d 253, 261 ["[T]he attorney's exclusion from the actual identification after the lineup emasculates the lineup and vitiates an in-court identification based upon it."].

[157] See *People* v. *Carpenter* (1997) 15 Cal.4th 312, 369 ["The right to counsel extends only to the actual identification, not to postidentification interviews."]; *People* v. *Carpenter* (1999) 21 Cal.4th 1016, 1046 ["defense counsel must not be allowed to interfere with a police investigation"].

[158] (1986) 184 Cal.App.3d 583.

[159] (1992) 1 Cal.4th 1027, 1067.

victim's identification of him should have been suppressed, urging the California Supreme Court to rule that a lineup is not "over" until the post-lineup interview is completed. But the court refused, ruling instead that the lineup was complete when the victim "filled out and signed the identification card, indicating her identification of defendant, qualified by a question mark."

### Waiver of right to counsel

A suspect may waive the right to counsel, even if he has an attorney.[160] To obtain a waiver, officers must begin by advising him of the following rights:

(1) You have a right to have counsel present at the lineup.

(2) You are not required to participate in the lineup without counsel.

(3) If you want an attorney but cannot afford one, the court will appoint one for you at no charge.[161]

Officers must then ask the suspect if, having these rights in mind, he is willing to waive the right to counsel. Furthermore, like any other waiver, the waiver of the right to counsel must be made freely, meaning that officers must not pressure the suspect to waive. Note that because there are significant differences between the right to counsel at a lineup and the *Miranda* right to counsel during interrogation, a *Miranda* waiver does not constitute a waiver of counsel's presence at a lineup.[162]

### Attorney not available or won't participate

If the suspect requests a certain attorney who cannot attend the lineup or refuses to do so, officers may proceed with the lineup if they obtain "substitute counsel."[163] If the suspect's attorney appears at the lineup but, for whatever reason, refuses to observe the procedure, officers may proceed with the lineup without him. For example, in *People* v. *Hart* the public defender, "[u]pon seeing the composition of the lineup," objected that it was unfair and immediately "departed." On appeal, the California Supreme Court rejected the defendant's argument that the lineup violated his Sixth Amendment right to counsel because, said the court, "the public defender's *refusal* to attend the lineup cannot be equated with a *denial* of defendant's right to counsel."[164] In such a situation, however, officers should photograph or videotape the lineup so that prosecutors can prove the lineup was not suggestive.

There is one other option when counsel cannot or will not participate in a lineup: Photograph or record the lineup without the witness being present, then show the witness the photos or the recording of the lineup. As noted earlier, such a procedure does not violate the suspect's right to counsel because a suspect does not have a right to counsel unless the witness is viewing a live lineup.

## Other Lineup Issues

**REFUSAL TO STAND IN A LINEUP**: A suspect does not have a right to refuse to participate in a lineup, refuse to speak during a voice lineup, or refuse to wear clothing for identification purposes.[165] And if he refuses, prosecutors may be permitted to disclose it to the jury at trial as evidence of his consciousness of guilt.[166]

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[160] See *Montejo* v. *Louisiana* (2009) __ U.S. __ [129 S.Ct. 2079].

[161] See *People* v. *Wells* (1971) 14 Cal.App.3d 348, 354 [an "effective waiver" resulted when the suspect "was advised also of his right to counsel at the lineup and waived, in writing, his right to such counsel"]; *People* v. *Banks* (1970) 2 Cal.3d 127, 134 [waiver invalid because officer neglected to tell the defendant that an attorney would be appointed if he wished]; *People* v. *Thomas* (1970) 5 Cal.App.3d 889, 897 [defendant was informed "that he did not have to go through the lineup without counsel unless he wanted to; that an attorney would be provided him if he so desired"].

[162] See *People* v. *Banks* (1970) 2 Cal.3d 127, 134-36; *People* v. *Schafer* (1970) 4 Cal.App.3d 554, 560.

[163] See *People* v. *Wimberly* (1992) 5 Cal.App.4th 773, 784-86 [court rejects argument that a suspect has a right to counsel "of his choice"]; *People* v. *Nichols* (1969) 272 Cal.App.2d 59, 64 [appointment of substitute counsel].

[164] (1999) 20 Cal.4th 546, 625.

[165] See *Goodwin* v. *Superior Court* (2001) 90 Cal.App.4th 215, 221; *People* v. *Huston* (1989) 210 Cal.App.3d 192, 216; *People* v. *Ellis* (1966) 65 Cal.2d 529, 533.

[166] See *People* v. *Alexander* (2010) 49 Cal.4th 846, 905 ["The jury reasonably might question why, if he were not involved in the shooting, defendant would not want to appear in the lineup to clear his name despite his attorney's advice."]; *People* v. *Smith* (1970) 13 Cal.App.3d 897, 910; *People* v. *Ellis* (1966) 65 Cal.2d 529, 537 [refusal constituted "circumstantial evidence of consciousness of guilt"]. **NOTE**: Disclosure to jury of refusal to participate was admissible even if the defendant refused to appear on the advice of counsel. See *People* v. *Alexander* (2010) 49 Cal.4th 846, 905-906.

To help ensure the admissibility of this evidence at trial, officers should notify the suspect that his refusal to participate may be used against him in court as evidence that he knew he would be identified as the perpetrator.[167] The following is an example of such an admonition:

> You do not have a right to refuse to participate in a lineup. But if you refuse, your decision to do so may be used in court as proof that you are, in fact, guilty of the crime for which you have been arrested, and that you knew the witness[es] at the lineup would positively identify you as the perpetrator. Having these consequences in mind, do you still refuse to participate in the lineup?

Note that if the suspect refuses to speak at a lineup, and if he was previously *Mirandized*, officers must notify him that the *Miranda* right to remain silent does not give him a right to refuse to participate in a voice test.[168]

**COMPELLING A SUSPECT TO STAND IN LINEUP**: If a suspect refuses to participate in a live lineup, officers may seek a court order that would compel him to do so. Such an order may also authorize officers to use reasonable force if, after being served with a copy of the order, he still refuses to comply.[169] As the Seventh Circuit observed in *In re Maguire*, "While it may not enhance the image of justice to force a [suspect] kicking and screaming into a lineup, the choice has been made by the [suspect], not the court."[170]

In terms of form and procedure, it appears that such an order would be virtually the same as a search warrant. First, an officer would submit to the judge an affidavit containing the following: (1) the name of arrestee and any identifying number, (2) the name of the jail in which the arrestee is currently being held, (3) the crime for which the arrestee was arrested, and (4) the names of the affiant and his agency. The affidavit must then demonstrate probable cause to believe (1) that the arrestee committed the crime under investigation, (2) that the results of the lineup would be relevant to the issue of his guilt,[171] and (3) that the arrestee notified officers that he would not voluntarily appear in a lineup.

A sample court order is shown on the next page. To obtain a copy via email in Microsoft Word format, send a request from a departmental email address to POV@acgov.org.

**APPEARANCE ORDERS**: If the suspect is in custody in another county in California, officers may seek an "Appearance Order" authorizing them to transport the suspect to the county in which the lineup will be held. Such an order may be issued upon an *ex parte* declaration that establishes "sufficient cause" to believe that the suspect committed the crime under investigation, and that a live lineup was reasonably necessary.[172] If the suspect is out of custody, there is currently no procedure for compelling him to appear in a live lineup.[173]

**DEFENDANT'S MOTION FOR LINEUP**: A defendant may file a motion for a court order requiring that officers place him in a live lineup. But such a motion may be granted only if it establishes the following: (1) the perpetrator's identity will be a material issue in the case, (2) there is a reasonable likelihood of a mistaken identification which a lineup would tend to alleviate, and (3) the motion was made in a timely manner.[174]

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[167] See *People* v. *Huston* (1989) 210 Cal.App.3d 192, 217.
[168] See *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1223, fn.9; *People* v. *Ellis* (1966) 65 Cal.2d 529, 539.
[169] See *Schmerber* v. *California* (1966) 384 U.S. 757, 770-71 [Court notes that a search warrant may authorize the use of force to obtain a blood sample]; *U.S.* v. *Pipito* (7th Cir. 1987) 861 F.2d 1006, 1010 [court may authorize the use of force to obtain palm prints]. Also see *United States* v. *Wade* (1967) 388 U.S. 218, 222 ["We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance."].
[170] *In re Maguire* (1st Cir. 1978) 571 F.2d 675, 677.
[171] See Pen. Code § 1524(a)(4).
[172] See *People* v. *Sequeira* (1981) 126 Cal.App.3d 1, 13-15; Pen. Code § 4004.
[173] See *Goodwin* v. *Superior Court* (2001) 90 Cal.App.4th 215, 226 ["There is wisdom in a procedure authorizing an ex parte order compelling a suspect who is out of custody to attend a lineup. [But] that procedure does not currently exist in California law." Edited].
[174] See *Evans* v. *Superior Court* (1974) 11 Cal.3d 617, 625. COMPARE *People* v. *Redd* (2010) 48 Cal.4th 691, 725 [no reasonable likelihood of misidentification]; *People* v. *Sullivan* (2007) 151 Cal.App.4th 524, 560 ["[Defendant] failed to make the prima facie showing required by *Evans*."]; *People* v. *Farnam* (2002) 28 Cal.4th 107, 183-84. ALSO SEE *People* v. *Vallez* (1978) 80 Cal.App.3d 46, 56 ["Motions made shortly before trial will generally be denied unless good cause is shown for the delay."].