
TOPIC: MIRANDA, CONFESSIONS & LINE-UPS

HOURS: 3

DESIRED OUTCOME FOR THIS CLASS

To provide trainees with the basic knowledge to advise a person of his or her rights against self-incrimination.

TRAINING OBJECTIVES:

1. Describe the circumstances when Miranda warnings are/are not required and explain the procedures for advising a suspect of his or her Miranda rights, to include suspect waiver and invocation of his or her rights.
2. Explain the procedures for conducting witness identification of a suspect, to include show-ups, single photo verification and sequential photo or live person line-ups.
3. Properly advise a suspect of his or her rights during end of phase simulated response scenarios.

CRITERIA: The trainee shall be tested on the following:

1. What are Miranda Rights?
2. The four Miranda Warnings.
3. When to provide Miranda Warnings.
4. Definition of custodial interrogation.
5. The totality of circumstances as applied to custodial interrogation
6. Voluntariness of statement
7. Totality of circumstances test to determine whether or not a suspect's will was overborne.
8. Statements not requiring Miranda Warnings
 - a. Spontaneous statements
 - b. Investigative inquiries
 - c. Investigative detentions
 - d. Public safety exception
 - e. Other examples
9. Waiver of rights
10. Invocation of rights
11. Effect of failure to comply with Miranda
12. Definitions of:
 - a. Show-up/Drive-by
 - b. Single photo verification
 - c. Sequential photo and live line-up

13. Consideration to ensure the validity of identification
14. Procedures for show-up/drive-by identifications
15. Procedures for single photo verification
16. General guidelines for line-ups
17. Photo and live line-up guidelines

EVALUATION:

1. Training objectives 1 & 2 will be tested via an end of phase written examination. The minimum passing score for the examination is 70%.
2. Training objective 3 will be evaluated during end-of-phase skill evaluations, as applicable.

I. What are Miranda Rights?

- A. In Miranda v. Arizona, 384, U.S. 436, 86 S.Ct. 1602 (1966), Miranda was arrested and taken into custody. He was identified by a witness and then taken into an interrogation room. He was questioned by two police officers who did not advise him that he had a right to have an attorney present. After interrogating Miranda for two hours, the officers obtained a written confession. At the top of the statement was a typed paragraph stating that the statement was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me."
- B. At Miranda's trial, the written confession was admitted into evidence over the objection of Miranda's attorney. The officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years imprisonment on each count. The Supreme Court of Arizona held that Miranda's constitutional rights **were not violated** in obtaining the confession and affirmed the conviction.
- C. The United States Supreme Court held that as an **absolute** prerequisite to the admissibility of a confession or other incriminating statement, the suspect **must be warned** prior to questioning of his **Fifth Amendment privilege against self-incrimination** and his **Sixth Amendment right to counsel**. The Court set out four warnings that must be given and indicated that it would not be sufficient to only give some of them. *The four warnings are:*
1. **You have the continuing right to remain silent,**
 2. **Anything you say can and will be used against you in a court of law,**
 3. **You have the right to the presence of an attorney,**
 4. **If you cannot afford an attorney one will be appointed to represent you at no expense.**

STUDENT NOTE: MEMORIZE THESE LINES --- EVEN THOUGH YOU HAVE THESE LINES MEMORIZED, ALWAYS OPT FOR THE HABIT OF READING IT OFF OF THE MIRANDA CARD.

The Miranda warnings apply even if the investigator knows that the defendant knows his rights. Under *Miranda*, the duty of warning exists even if the defendant tells you that he knows his rights.

- II. When must Miranda Warnings be given** – the key question for law enforcement officers in light of the Miranda decision is at what stage of the police investigation must Miranda warnings be given?

Miranda warnings are required when law enforcement officers engage in custodial interrogation.

III. What is custodial interrogation

- A. "Custodial interrogation" is defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. This definition has two parts.

1. There must be an interrogation.
 - a. Direct questioning
 - b. Functional equivalent of interrogation, namely words or actions on the part of the police that are likely to elicit an incriminating response
2. The suspect must be in Custody. When deciding whether or not there is custodial interrogation, courts examine a number of factors. They look at:
 - a. probable cause to arrest,
 - b. the subjective intent of the defendant,
 - c. the focus of the investigation,
 - d. the nature of the interrogation,
 - e. the purpose of the investigation.

These factors are also known as the totality of the circumstances. Statements taken in violation of an individual's rights cannot be used against him.

IV. Voluntariness

A. Even if *Miranda* does not apply because there was no custodial interrogation, statements given may still be suppressed if they are not voluntary under the totality of the circumstances. It is obvious that if police hold a gun to a person's head and obtain a confession, a court will throw out the confession because it was not voluntarily given. Likewise, they may not allow a statement in if the subject's will was overborne. The factors courts examine in determining whether or not a suspect's will was overborne, under a totality of the circumstances test, include:

1. the age of the accused,
2. level of education,
3. lack of advice as to constitutional rights,
4. length of detention,
5. the repeated and prolonged nature of the questioning,
6. the use of physical punishment, such as deprivation of food or sleep. (See *State v. Darby*, 556 N.W. 2d 331 (S.D. 1996); *State v. Tuttle*, 650 N.W. 2d 20 (S.D. 2002); *Coon v. Weber*, 644 N.W. 2d 638 (S.D. 2002); *State v. Oltmanns*, 519 N.W. 2d 602 (S.D. 1999).
7. whether suspect under influence of alcohol or drugs,
8. whether suspect deceived about evidence against him,
9. whether suspect subjected to implied threat or more serious consequences if he failed to admit guilt
10. suspect's prior experience with law enforcement
11. whether polygraph was administered

In regard to factor 9, police may tell a suspect that cooperation will be passed on and may increase the likelihood of leniency, but threatening to inform the prosecutor or judge of the suspect's refusal to cooperate violates the 5th Amendment.

V. Statements Not Requiring Miranda Warnings

A. As previously discussed, when both custody and interrogation exist, officers must read Miranda warnings to the suspect. However, many times, only one condition or neither condition applies. In these cases, officers need not read Miranda warnings.

B. *Spontaneous Statements.*

- 1, What begins as a general inquiry into an incident can result in incriminating statements. This is especially true when spontaneous, volunteered, or "threshold" confessions are made. If officers responding to a disturbance are greeted at the door by a man who says, "I just stabbed my wife," the

man's statement will be admissible in Court. It was not uttered in response to a police inquiry; therefore it does not require a rights warning. However, if the officers take the man, now a suspect in a crime, into custody and subsequently question him about the alleged stabbing, they must advise the suspect of his rights.

2. When officers encounter a suspect making spontaneous statements, they do not need to stop the suspect from talking and administer Miranda warnings. Even taking the suspect into custody, securing and handcuffing him to ensure safety does not mandate the reading of rights. As long as the suspect is not subjected to interrogation no warning is necessary. If the suspect willingly makes statements about the crime or confesses to it, officers should simply record what he says without interrupting or asking questions. His statements will be admissible in court, even though Miranda warnings were not given and waived, as long as the statements did not result from officers' questions.
3. Eventually the suspect will stop talking. Then officers will have to read the rights warnings and obtain a waiver before questioning takes place.

C. Investigative Inquiries:

1. The issue of timing the Miranda warnings - reading them neither too soon nor too late - is also critical during investigatory situations. Even incidents in which officers' suspicions are aroused but which do not yet indicate probable cause for an arrest do not create the need to give rights warnings.
2. When officers question someone not suspected of committing a crime - a victim, witness, or resident during a neighborhood canvas - sometimes the person may implicate himself in the crime at hand or in an unrelated incident. As long as the officers are trying to gather general investigative information rather than attempting to elicit incriminating statements, then no interrogation is taking place. Additionally, as long as the person being interviewed agreed to cooperate with the investigation and is free to leave, there is no custody issue. Therefore, incriminating statements made during routine fact-finding interviews are admissible in court.

3. Once the questioning shifts from a general, investigative finding of facts to an attempt to elicit incriminating statements, then an interrogation is beginning and officers must advise the suspect of his rights

D. ***Investigative Detention:*** During previous lessons you learned about Reasonable Suspicion Based Stops/Terry Stops, which is referred to as an investigative detention. You learned that an officer who is aware of facts and circumstances that would lead a reasonable police officer to conclude that criminal activity is afoot, may stop a person, using reasonable force short of deadly force, and detain the person for a reasonable amount of time to investigate further. ***With that in mind, is a Miranda warning required when conducting an investigative detention?***

1. Although detainees are not free to leave, a *Miranda* waiver is not ordinarily required because the circumstances surrounding most detentions do not generate the degree of compulsion to speak that the *Miranda* procedure is designed to alleviate. [*U.S. v. Booth*, 669 F.2d 1231, 1237 (9th Cir. 1981)]. “The comparatively nonthreatening character of detentions of this sort,” said the U.S. Supreme Court, “explains the absence of any suggestion in our opinions that [detentions] are subject to the dictates of *Miranda*.” *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984).
2. A *Miranda* waiver is, however, required if the questioning “cease[s] to be brief and casual” and becomes sustained and coercive, or if there are other circumstances that would cause a reasonable person in the suspect’s position to believe that he or she is under arrest. As the Court pointed out in *Berkemer v. McCarty*:

If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him “in custody” for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda.

3. The question arises: Is a waiver required if the detainee is in handcuffs? In most cases, the answer is yes because handcuffing is much more closely associated with an arrest than a detention. But because the issue is whether a reasonable person would conclude that the handcuffing is tantamount to a formal arrest, it is arguable that a handcuffed detainee is not “in custody” if ...
 - a. it is reasonably necessary to restrain him or her,

- b. officers disclose that he or she is not under arrest and that the handcuffing is merely a temporary safety measure, and
 - c. there are no other circumstances that reasonably indicate he or she is under arrest.
4. A further question: Is a suspect “in custody” for *Miranda* purposes if he or she is initially detained at gunpoint? It appears not if ...
- a. the precaution is warranted,
 - b. the weapon is reholstered before the detainee is questioned, and
 - c. there are no other circumstances that indicate the detention has become an arrest.

E. Public Safety Exception.

- 1. The Supreme Court has ruled that even in cases when the suspect is in custody, some questioning, which might be considered interrogation, is permissible and admissible without *Miranda* warnings if the questioning is devoted to locating a suspect’s deadly weapon out of concern for public safety.
- 2. In *New York v. Quarles*, 467 U.S. 649 (1984), the Court established a “public safety” exception to interrogation situations.
- 3. The Court held that this exception provides that it is unnecessary that a suspect be immediately advised of his rights if he has information that would help eliminate a potential threat to the public.

F. Other Examples:

- 1. A judicial officer may require the accused to speak for identification by witnesses to an offense, *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926 (1967) and pose for photographs not involving reenactment of a scene; try on articles of clothing; permit the taking of specimens of material under his fingernails, permit the taking of samples of his hair and other materials of his body which involve no unreasonable intrusion thereof.
- 2. An accused may be compelled to model certain clothing. This does not violate his privilege against self-incrimination. However, compelling an accused to wear clothing or other

items that make him unduly conspicuous in a lineup may, when considered together with other improprieties, be a factor in the court's conclusion that the lineup as conducted constituted a violation of due process. This will be examined further in the section on lineups.

3. A suspect may be required to demonstrate his voice for identification purposes. The suspect may not refuse on the ground that his privilege against self-incrimination would be violated. By giving such a demonstration, the suspect is not being required to give testimonial evidence against himself, but only to give physical evidence. Accordingly, it has been held that compelling an accused to speak within hearing distance of the witnesses at a police lineup, even to utter words purportedly uttered by the person committing the crime, is not compulsion to utter statements of a "testimonial" nature, since in such a case the accused is required to use his voice as an identifying physical characteristics, not to speak his guilt. *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764 (1973).
4. The taking of handwriting samples is not a "critical" stage of the criminal proceedings entitling the accused to the assistance of counsel. In addition, the taking of such samples does not constitute a violation of the accused's privilege against self-incrimination, since such privilege reaches only compulsion of an accused's communications, whatever form they might take *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951 (1967).
5. Field sobriety tests are not testimonial in nature and therefore not subject to the Fifth Amendment. *State v. Meek*, 444 N.W. 2d 48 (S.D. 1989).
6. Statements to a penitentiary counselor are not subject to Miranda. *State v. Olson*, 449 N.W. 2d 251 (S.D. 1989).
7. Requiring a person to turn over records to a Grand Jury is not testimonial in nature and therefore not subject to the Fifth Amendment. However, in certain circumstances, the act of production might be testimonial, even though the records themselves are not.

VI. Invocation and waiver of Miranda Rights

A. Waiver of rights

1. A suspect may waive his 5th Amendment and 6th Amendment rights outlined in Miranda. To do so, the waiver must be made **voluntarily, knowingly and intelligently**. A valid waiver of Miranda can only be made after the warnings are given. The State has the burden of proving such a waiver, and the level of the State's burden is by a preponderance of the evidence. *State v. Tuttle*, 650 N.W. 2d 20 (S.D. 2002).
2. In order for a defendant to invoke the affirmative right to remain silent, **he must do so unambiguously**. If a defendant makes an ambiguous statement about his rights, the officers are not required to either end the interview or clarify his ambiguous statement. *Berghuis v. Thompkins, United States Supreme Court, June 1, 2010*
3. **This the same rule utilized when a defendant invokes his right to counsel.** Courts have held that a waiver of Miranda rights need not be expressly given. If it is shown that a *Miranda* warning is given and that the defendant understands those rights, his course of conduct showing a desire to give up those rights is enough to show an implied waiver. *Berghuis v. Thompkins, United States Supreme Court, June 1, 2010. State v. Ralios, 2010 SD 43*
4. After giving a Miranda warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights. Officers do not need to obtain a waiver before proceeding with the interrogation. *Berghuis v. Thompkins, United States Supreme Court, June 1, 2010*

B. Invocation

1. A suspect must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. An ambiguous request for counsel is not an invocation of an accused's right to counsel under the Sixth Amendment. If a suspect says "I think I better talk to a lawyer first," police are not required to clarify if the suspect is requesting counsel before the interrogation can proceed. It is better police practice to clarify ambiguous or equivocal references to counsel by a suspect, but that is not constitutionally required. *Davis v. United States*, 114 S. Ct. 2350 (1994),
2. If a defendant invokes his rights while undergoing custodial interrogation, all questioning must cease until counsel has been made available to the defendant unless he initiates

further communication, exchanges or conversation with the police. ***Edwards v. Arizona***, 451 U.S. 477, 101 S.Ct. 1880 (1981).

3. If an accused has invoked his right to counsel on one charge, he cannot be questioned by police during the investigation of a second, unrelated offense. *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093 (1988).
 - a. This rule will likely apply even if you don't know that the suspect has invoked on the first charge. **NOTE:** *If you are interviewing someone who is in custody, you need to be sure to ask the other officers whether he has invoked his rights.*
 - b. If the suspect has been released from custody for a period of 14 days *Edwards* presumption of involuntariness no longer applies. *Maryland v. Shatzer*, United States Supreme Court, February 24, 2010.
4. The suspect himself must specifically request legal counsel. If he does not say something to the effect of, "I want to speak to my lawyer," or "Give me a public defender," then the suspect has not invoked his right to counsel. More particularly, the suspect alone can invoke this right; an attorney cannot appear at the police facility and request to see a client unless the suspect has asked to see the attorney. The police are not required to tell the suspect that an attorney has requested to see him unless he has asked for legal counsel.

VII. Effect of failure to comply with Miranda

- A. Failure to comply with Miranda requirements makes a statement obtained by the police during in-custody interrogation inadmissible.
- B. The admission at the criminal trial of a statement made by the defendant which is inadmissible under *Miranda* may lead to the reversal of a conviction obtained at a trial.
- C. The United States Supreme Court has created a "harmless error" exception even when the confession was said to be involuntary. In *State v. Blue Thunder*, 466 N.W. 2d 613 (S.D. 1991) the South Dakota Supreme Court adopted the "harmless error" rule for the use of statements which were obtained in violation of Miranda.

However, this exception should never be relied upon when obtaining statements from suspects. Courts typically find that statements admitted into evidence which violate Miranda are "harmless" when the evidence is so overwhelming that a conviction would have occurred even if the statements had been properly excluded.

- D. One situation exists when a statement taken in violation of *Miranda*, which later is suppressed, CAN be used in court. Evidence inadmissible under *Miranda* in the prosecution's case-in-chief is allowed when introduced solely for the purpose of impeaching a defendant's trial testimony on the ground of its inconsistency with prior statements made by him, providing that the trustworthiness of the evidence satisfies legal standards. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643 (1971).
- E. Statements involuntarily obtained cannot be used even for impeachment. *State v. Tapio*, 459 N. W. 2d 406 (S.D. 1990).

VII. Show-Ups & Line-Ups

- A. Definitions:
 - 1. *Show-Up/Drive-by*: The process by which a complainant or witness is driven to a suspect who has been stopped in the area of the crime for purposes of excluding or verifying the suspect as the person responsible for the crime through recognition by the complainant or the witness.
 - 2. *Single Photo Verification*: The process by which a complainant or witness is shown a single photograph due to the fact that they have thorough familiarity with the person who is suspected in the criminal activity and law enforcement is simply verifying that the suspect identified by the law enforcement is the same subject known to the witness.
 - 3. *Sequential Photo and Live Line-up*: The process by which a complainant or witness is allowed to view one photo or one person at a time in a sequential manner for purposes of excluding or verifying the suspect as the person responsible for the crime through recognition by the complainant or the witness.
- B. Procedure: In all identification procedures, officers should take steps to ensure that the procedure is not suggestive by the manner in which it is carried out. Thus, officers/deputies should use caution as to the manner in which suspects are presented such

that a suspect may later claim that the officer/deputy influenced the witness' identification of the suspect.

1. The Validity of identification procedures rests on the following considerations:
 - a. Witness' opportunity to view suspect at the time of the crime.
 - b. Witness' focus of attention at time of crime.
 - c. Accuracy of witness' description of suspect prior to identification procedure.
 - d. Level of certainty exhibited by the witness in making the identification.
 - e. The length of time that has passed between the crime and the identification.
 - f. Note-Deputies/Officers should document the existence/lack of existence of these points when compiling reports on identification procedures.
2. Show-Up/Drive-by identification- Although the United States Supreme Court has not affixed a duration of time within which these procedures are to be conducted, generally this type of identification occurs within a short period of the crime and within a reasonable proximity (geographically) from the crime.
 - a. Unless an extreme emergency exists, the complainant or witness shall be taken to the location where the suspect has been stopped. The movement of the suspect to the witness' location may constitute an arrest for which probable cause is required. To the extent that probable cause is lacking without identification, movement may be determined to have been an unlawful arrest.
 - b. To the extent that an officer may safely do so, the officer should take steps to minimize the suggestiveness of the identification. The following should be considered:
 - (1) Have suspect standing outside of any law enforcement vehicle rather than in the vehicle.

- (2) Have the suspect standing without handcuffs or with handcuffs not visible to the witness.
- (3) Any steps taken which give the appearance that the suspect is free to leave will undercut suggestiveness.
- (4) If items taken or used in the crime have been recovered, do not allow the witness to view or become aware of the recovery until after the identification proceeding is complete.
- (5) The witness' failure to recognize the subject stopped must be documented and included in any materials forwarded to the prosecutor who ultimately handles the case. Such evidence may be exculpatory to the suspect who is charged with the crime. As such, it must be forwarded to the prosecutor. Additionally, if the witness identifies a suspect in the future, this failure to identify the first subject presented to them may add credibility to their identification.

3. Single-Photo Verification: This process shall only be used where the witness is thoroughly familiar with the suspect and the officer/deputy is merely attempting to ensure that the witness and the officer/deputy are both referring to the same person.

4. General Guidelines for Line-Ups

- a. A line-up must be conducted with at least six persons and include at least some persons who are similar in appearance to the suspect i.e. facial hair, glasses, general age etc.
- b. All persons in the line-up must be of the same race and sex of the suspect.
- c. During the process officers/deputies in any way, shall not, prompt the witness toward a particular subject in the line-up.
- d. Although suspects do not have a right to refuse to stand in a line-up, a line-up should not be conducted where the suspect's resistant conduct will set him or her apart from the other participants in the line-up.

- e. Suspects may be required to speak during a line-up for comparison purposes only. If officers/deputies are going to require a suspect to speak, they must require all persons participating to speak the same words in turn.
- f. Suspects may be required to put on clothing recovered from the crime for identification purposes. If officers/deputies are going to require the suspect to put on the recovered clothing, they must require all persons participating in the line-up to put on the clothing in turn.
- h. Attorneys:
 - (1) A suspect does not have a right to counsel at a line-up, which is conducted before the suspect has reached a “critical stage” in the justice process. A critical stage is reached when the suspect is arraigned, indicted, or otherwise formally charged with a crime.
 - (2) A suspect has the right to counsel at a line-up if the suspect has reached a critical stage in the justice process.
 - (3) If the suspect has an attorney but has not yet reached a critical stage, officers/deputies should consider allowing the attorney’s presence at the identification proceeding. The presence of an attorney undercuts later claims that the process was somehow suggestive with respect to the suspect.
 - (4) In any case, where an attorney is present they serve only as a witness to ensure the fairness of the procedure.

STUDENT NOTE: The following section on Photo and Live Line-Up guidelines is adopted from SD Division of Criminal Investigations’ best practice policy.

4. Photo and Live Line-Up Guidelines

As a general introduction, there has been lots of discussion, research, and literature generated concerning the topic of valid eye-witness identifications in various professional

circles. The most significant points of consideration focus on the use of a sequential photo line-up versus simultaneous photo line-up procedures. (The difference being a sequential photo line-up is showing one picture at a time with the simultaneous line-up being the typical “six-pack” of photos.) While the majority of the research has indicated that there are no major differences in the accuracy rate of witnesses able to correctly identify the proper suspect in these two line-up processes, there does appear to be a significant difference in the lower rate of false-positive or misidentification of suspects when utilizing a sequential photo line-up.

Items of consideration presented in this guideline have been largely derived from the Santa Clara County Police Chief's Association protocol.

a. EYEWITNESS IDENTIFICATION PROTOCOL

First, ideally, the agent/officer conducting any photo or live line-up should not know the identity of the suspect; the agent/officer who doesn't know the suspect from the fillers cannot influence the process. It is recognized that in some cases this may not be possible as no other agent/officer is available. In these cases, the investigating agent should conduct the line-up using extreme care not to communicate the identification of the suspect in any way. Even a most experienced agent can inadvertently give subconscious hints to the witness to identify the suspect.

Second, line-ups should be conducted sequentially and not simultaneously. There is permissive language in this statement and the decision to deviate from the suggested guideline may be considered based upon the circumstances of the investigation. When utilizing a sequential line-up procedure, the agent will show the witness only one photo or one person at a time.

b. HOW TO CONDUCT A SEQUENTIAL LINE-UP

First, assemble the suspect or suspect's photo and at least five fillers in the normal manner. If it is a live line-up then secure the suspect and at least five fillers in the normal manner. Make sure the witness cannot see either the suspect or the fillers. Arrange the six in random order. Record this order.

Second, admonish the witness that:

- (1) He/she will be asked to view a set of individual photographs.
- (2) It is just as important to clear innocent persons from suspicion as it is to identify guilty parties.
- (3) Individuals may not appear exactly as they did on the date of the incident as head and facial hair are subject to change.
- (4) The person who committed the crime may or may not be shown.
- (5) Assure the witness that regardless of whether an identification is made, the police will continue to investigate the incident.
- (6) The procedure requires that the investigator ask the witness to state, in his or her own words, how certain he or she is of any identification.

In addition, instruct the witness that:

- (7) Photos/persons will be viewed one at a time.
- (8) Photos/persons will be presented in random order.
- (9) The witness may take as much time as needed in making a decision about each person before moving on to the next one.
- (10) The witness should identify the person who committed the crime, if present
- (11) All persons will be presented, even if an identification is made.
- (12) If the witness wishes to view the photos/persons again, he or she may do so.

Third, conduct the sequential line-up as follows:

- (13) Confirm that the witness understands the nature of the sequential procedure.
- (14) Present each photo/person to the witness separately in a previously determined and random order.
- (15) Remove each photo/person before presenting the next one.
- (16) Record both positive identification and non-identification results in writing, including the witness' own words regarding how sure he/she is.
- (17) Ask the witness to initial and date back of identified photograph.
- (18) Document, in writing, the lineup procedure, including:
 - (a) Identification information and source of all photos/persons used;
 - (b) Names of all persons present at the lineup;
 - (c) Date and time of procedure.

Sample narrative paragraph:

I (Agent Brown) met with Witness A on 7-21-09 at the DCI Building in Pierre, SD at noon by myself. I was assisting Agent Smith in the display of a photo line-up to Witness A as I was not involved with this case previously. The photographs supplied by Agent Smith were all booking photos that had the biographical and jail information removed. I advised Witness A that the photos would be placed individually on the table and the fact that these photos may not contain the suspect in the case. Witness A was shown a sequential line-up of six photos. When Witness A was shown photograph #4, Witness A picked Suspect B as the individual who assaulted her on July 19th, 2009 stating, "That's the guy, I'll remember that face the rest of my life." I continued to show the remaining photographs and Witness A again confirmed photograph #4 was the individual that assaulted her. I had Witness A initial and date the back of Suspect B (#4) photograph. I then met with Agent Smith and advised him of the results of the photo line-up. All the photographs utilized in this line-up were returned to Agent Smith and are being kept in Agent Smith's investigative file.