

V e r m o n t L a w E n f o r c e m e n t A d v i s o r y B o a r d

SUMMARY REPORT 2010

ADVISING THE COMMISSIONER OF
PUBLIC SAFETY, THE GOVERNOR, AND
THE GENERAL ASSEMBLY ON ISSUES
THAT AFFECT THE COOPERATION AND
COORDINATION OF MORE THAN ONE
LAW ENFORCEMENT AGENCY.

Prepared by: DPS Law Enforcement Advisory Board
Francis (Paco) X. Aumand III, Chair
Sheriff James Coons, Vice Chair

Date: January 18, 2011

**STATE OF VERMONT
DEPARTMENT OF PUBLIC SAFETY
103 SOUTH MAIN STREET
WATERBURY, VERMONT 05671-2101**

January 15, 2011

The Law Enforcement Advisory Board (LEAB) continues to remain busy building and expanding upon the initiatives presented to the Board by the legislature.

The Law Enforcement Advisory Board continues to use a collaborative process that embraces the knowledge and expertise of several professional organizations. The board seeks to stay abreast of law enforcement initiatives and support those initiatives whenever possible.

The Board's major focus this year was the compliance with H. 470, a bill passed during the 2010 Vermont General Assembly session. The Board was responsible for developing the following;

- Developing a proposal for the preservation of biological evidence.
- The development of a proposal for the retention of physical evidence containing biological material.
- The development of a proposal to establish best practice for the use and administration of show-ups, use of blind administrators for lineups, proper filler selection in live or photo lineups, instructions for eyewitnesses prior to a live or photo lineup, and confidence statements from eyewitnesses.
- The development of a plan for audio and visual recording of any custodial interrogation of a person when it is conducted in a place of detention after the person is arrested in relation to the investigation or prosecution of a felony.

The Law Enforcement Advisory Board also developed a model policy for the law enforcement response to law enforcement involved situation of domestic violence. The Board also took testimony and offered support to the Vermont League of Cities and Towns in their development of police model policies.

All the topics discussed by the Board potentially have significant consequences for the State as it relates to the administration of justice and law enforcement operations.

Sincerely,

Paco Aumand

Francis (Paco) X. Aumand III
Director, Criminal Justice Services
2010 Chair, LEAB

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SUMMARY REPORT 2010

INTRODUCTION

In 2004, the Vermont General Assembly created a Law Enforcement Advisory Board (LEAB) of the Department of Public Safety. The purpose of the Board is to advise the Commissioner of Public Safety, the Governor, and the General Assembly on issues involving the cooperation and coordination of all agencies that exercise law enforcement responsibilities. Membership of the Board is set by statute. The current members are listed in appendix A.

In 2010, the Board met on March 16, 2010, April 13, 2010, May 11, 2010, June 22, 2010, August 31, 2010, December 2, 2010 and January 4, 2011.

During the course of meetings the following topics were discussed by the Board:

1. The model policy concerning the law enforcement response to law enforcement involved domestic violence situations.
2. The LEAB's response to the section 238c, 238d and 238e of H. 470 which passed during the 2010 Vermont General Assembly session.
3. Implementing the all felon probable cause arraignment DNA sample collection law.
4. Human Trafficking Task Force Report from the Commissioner of Public Safety.

This report will focus on the above issues.

The model policy concerning the law enforcement response to law enforcement involved domestic violence situations.

The Law Enforcement Advisory Board (LEAB) spent a considerable amount of time during 2010 reviewing the above policy. As a result the policy that is attached as part of **appendix B** was produced. The board heard from the Vermont League of Cities and Towns (VLCT) on their efforts at developing a model policy book that will be distributed to all police agencies that are part of the PACIF program. The policy manual will also be made available for purchase to other non PACIF member communities. The model policy on law enforcement response to law enforcement involved domestic violence situations is similar to the model policy on the same subject developed by the VLCT.

Recommendation:

The Law Enforcement Advisory Board recommends that any policy that promotes best practices in police operations and administration be promoted, supported and adopted. The LEAB should continue to review and promote the continued police policy development being undertaken by a variety of groups within Vermont.

Action Needed:

The LEAB will distribute to all Vermont law enforcement agencies the model policy on the law enforcement response to law enforcement involved domestic violence situations. In 2011 the LEAB should take testimony from representatives of the Attorney General's office on their bias free policing policy. The LEAB should work to help promote and support the implementation of this policy.

(H.470)

No. 154. An act relating to restructuring of the judiciary.

This act was passed during the 2009-2010 session of the Vermont General Assembly. The Law Enforcement Advisory Board was instructed to issue a report on the requirements of Sections 283c, 283d and 283e of this act.

Section 283c, “Preservation of Evidence”

The Law Enforcement Advisory Board’s (LEAB) implementation proposal is found under **appendix C**. The proposal focuses on pre-conviction evidence storage and post-conviction evidence storage as solutions to implementing this section. Space has also been reserved within the renovations of the Public Safety headquarters building to meet some of the long term storage needs. One of the dilemmas identified during the working group’s discussion was trying to interpret the difference between the meaning of “physical evidence containing biological material” and the definition of “biological evidence”. The implementation proposal put forth is an attempt at meeting both definitions and doing so within available resources, utilizing the facilities of local and state agencies and working with the courts, prosecutors and law enforcement.

Recommendations

Pre-conviction evidence storage shall reside with the investigating agency. The investigating agencies shall retain their *physical evidence containing biological material*. However, the investigating agency may transfer *biological evidence*, a sexual assault forensic examination kit; or semen, blood, saliva, hair, skin tissue, or other identified biological material

collected from physical evidence, to the State facility for storage if they wish to do so.

Post-conviction evidence storage should be the primary responsibility of the State of Vermont. Post conviction evidence connected with a criminal case that involves *biological evidence* should be retained by the State of Vermont or if a local agency wishes the evidence may be retained at the local facility.

The LEAB and BGS are proposing to utilize space within the Department of Public Safety headquarters building in Waterbury, VT. The Department of Public Safety is renovating the existing headquarters building and is proposing to utilize 1,000 square feet of space within the fourth floor attic area. This space will have the necessary climate control systems, lighting, mechanical and electrical equipment necessary to store evidence. The proposal will capitalize on some of the Department of Public Safety's existing facility infrastructure including; security, personnel, bathrooms, parking spaces and access to facilitate the long term storage of evidence. While this evidence storage facility will not be part of the Vermont Forensic laboratory physical space¹, the evidence technician for the laboratory will be utilized to take in evidence and place it in this separate facility. This evidence technician is currently a federally funded position therefore; state funds will have to be found to secure the positions long term stability.

Action Needed

This report should be forwarded to the appropriate House and Senate committees.

¹ Under the Vermont Forensic Laboratory's (VFL) accreditation guidelines, the VFL is not supposed to manage evidence long term.

Section 238d, “Recording Custodial Interrogations; Admissibility of Defendant’s Statement”

A working group was formed to discuss section 238d. Their results are found within **appendix D**.

FINDINGS OF THE WORKING GROUP:

1. Audio and visual recording of custodial interrogations whenever practicable is a best practice that should be adopted by all Vermont law enforcement agencies. (A “Best Practice” statement is attached)
 - a. Practicable as used here means that which is performable, feasible, and possible. The term ‘practicable’ excludes arbitrary and capricious reasons for neglecting to record a custodial interrogation when the equipment is in place, functional, and the interrogator or other person in place knows how to operate it; or if when recorded, the recording is lost through unintentional means.
2. Information obtained from a custodial interrogation – be it a confession, admission, or information that leads to an arrest, recovery of property, or discovery of evidence – should not be summarily excluded *from evidentiary admissibility* but should be retained for its probative value, *examined by the parties* in the discovery process *and subject to court review at hearing on a defense motion to exclude, if appropriate*, to ensure the integrity of the interrogation process and the preservation of rights.

Section 238e, “Eyewitness Identification Best Practices”.

The Law Enforcement Advisory Board (LEAB) discussed this section several times over the course of the board’s meetings. Work on this topical

area has not been completed. The LEAB reviewed the work that is being accomplished in Massachusetts regarding eyewitness identification and agrees in principal with the creation of an eyewitness identification policy along with forms for eyewitness identification, line-ups, photo array instructions, show-up identifications and voice identification line-up instructions. More work is needed to adopt specific language for Vermont in this area.

The Law Enforcement Advisory Board recognizes that reform is needed within the law enforcement community with regard to eyewitness identification issues. This reform can be implemented through policy changes and through creating a heightened awareness around the issues associated with the innocence project.

As mentioned the LEAB has not finished its work regarding this topic area. Specifically, it has not identified the need for or costs associated with purchasing, installing, and maintaining audio and visual recording equipment.

The Vermont Criminal Information Center (VCIC) is developing a mug shot repository that will be used in the near future for photo array line-up information. This will be a database of mug shots that can be sorted electronically to determine best matches of individuals to be used within a photo array. The LEAB is aware of this effort and will coordinate policy changes with regard to photo arrays with VCIC.

The LEAB is sensitive to the need to maintain best practices associated with eyewitness identification issues, custodial interrogation issues and preservation of evidence matters. How the best practices around these matters are kept current was a subject of discussion among the board. It was felt that best practices surrounding law enforcement operations are

best determined and promoted by the policing community through the Vermont Criminal Justice Training Council (VCJTC). However, it was recognized that the VCJTC needs to have legal support and guidance to ensure that best practices are taught at the Vermont Police Academy and police executives are given the necessary information to effect the proper police changes.

Recommendations

- Best practices for police operations should be managed by the police community and training on best practices should be managed through the Vermont Criminal Justice Training Council.
- Vermont police departments should adopt policies and forms regarding eyewitness best practices similar to the work done in Massachusetts.
- The Vermont Criminal Justice Training Council should be given legal resources necessary to maintain and support these best practices into the future.
- The Vermont Criminal Justice Training Council in conjunction with the Law Enforcement Advisory Board should conduct a summit or other group meeting in 2011 to bring attention to reforms needed regarding eyewitness identification and custodial interrogation. This effort should include experts within the national law enforcement community on eyewitness identification and custodial interrogation and representatives from the innocence project.
- Model policies should be adopted similar to the model policy on eyewitness identification from Massachusetts.

Action Needed

The Law Enforcement Advisory Board should continue its work on the issues of eyewitness identification best practices in 2011. Specifically, a

model policy should be developed and a summit designed to educate law enforcement leaders on eyewitness identification reforms and awareness surrounding the innocence project should be conducted. The Vermont Legislature should be a participant in this law enforcement educational opportunity.

The Vermont Legislature should give the Law Enforcement Advisory Board time to continue to work on the issues of eyewitness identification and allow law enforcement to develop best practices.

Implementing the all felon probable cause arraignment DNA sample collection law

In 2009 the Vermont General Assembly passed Act No. 1 (S.13) an act relating to improving Vermont's sexual abuse response system. One of the many provisions of this act calls for the collection of DNA samples from persons whom the court has determined at arraignment there is probable cause to believe that the person has committed a felony in this state. This law takes effect July 1, 2011.

At the time of arraignment, the court shall set a date and time for the person to submit a DNA sample. Additional provisions for destroying the samples and the expunging of records have been instituted. They are:

- If the sample is taken post-arraignment, the felony charge which required the DNA sample is downgraded to a misdemeanor by the prosecuting attorney upon a plea agreement or the person is convicted of a lesser offense that is a misdemeanor other than domestic assault pursuant to 13 VSA 5401.
- If a sample was taken post-arraignment, the person is acquitted after a trial of the charges which required the taking of the DNA sample.

- If the sample was taken post-arraignment, the charges which required the taking of the DNA sample are dismissed by either the court or the state after arraignment unless the attorney for the state can show good cause why the sample should not be destroyed.

The Department of Public Safety/Division of Criminal Justice Services has put forth an implementation plan to enact this legislation. This plan is contained in **appendix F**. It calls for funding three positions within the laboratory to take care of the added workload and the expungement requirements. It also creates a pool of funds to contract for the collection of samples and also recommends funding for enhancing the Department's ability to electronically collect data.

Recommendation:

The LEAB supports the funding necessary to carry out the implementation plan of the Department of Public Safety.

Action Needed:

Monitor the implementation of the collection of DNA samples and support the funding necessary to ensure that samples are collected in a timely manner and the provisions of the law relating to expungement of samples are adhered to.

Human Trafficking Task Force Report

In accordance with S.272 Commissioner Thomas Tremblay provided a report (**Appendix G**) to the Law Enforcement Advisory Board (LEAB) on the status of efforts by Vermont law enforcement to respond to issues regarding the crime of human trafficking and what recommendations, if any, should be

made the general assembly in order to respond more effectively. Following the report, and in accordance with S.272, the LEAB shall include its findings and recommendations, based upon the Commissioner's report, in its annual report to the General Assembly and Governor as required pursuant to 24 V.S.A. § 1939(d). The LEAB adopts Commissioner Tremblay's recommendations which follow.

Recommendation

1. The Vermont Police Chiefs and Sheriffs Associations have agreed that Vermont Law Enforcement needs to complete an awareness training program for all Vermont law Enforcement Officers. The agreed upon training program is the International Association of Chiefs of Police training developed in cooperation with the Office on Violence Against Women titled "The Crime of Human Trafficking – A law Enforcement Guide to Identification and Investigation". This training is a video series and training guide that is recognized and endorsed by national human trafficking law enforcement experts. This training should also be introduced at the Vermont Police Academy for the basic recruit class.
2. Local, county, state and federal Vermont law enforcement should work together to develop an investigative response team and investigative protocol that can be enacted when a crime of human trafficking is suspected in Vermont. The LEAB should consider creating a subcommittee tasked with developing the response team and investigative protocol.
3. Response team members should receive advanced training in the investigation of human trafficking crimes and be available to leave their current assignments to respond to reports of Human Trafficking. With the current workload and the

stage of development of the regional Special Investigation Units (SIUs), personnel assigned to SIUs should not be assigned as human trafficking response team members, and more importantly, the responsibilities of human trafficking should not fall on the SIUs.

4. The Human Trafficking Task Force (See Attached Members List) was enacted as part of S.272 and has been working diligently to fulfill their obligations of S.272. Vermont Law Enforcement should support the work and recommendations of the Human Trafficking Task Force, including the creation of a new state law.

Action Needed:

The LEAB should consider creating a subcommittee tasked with developing the response team and investigative protocol that can be enacted when a crime of human trafficking is suspected in Vermont.

APPENDIX A

List of Advisory board Members

List of Advisory Board Members

Name	Department	Address	State, City, Zip
Thomas Tremblay Commissioner	Department of Public Safety	103 South Main Street	Waterbury, Vermont 05671-2101
Colonel Thomas L'Esperance	Vermont State Police	103 South Main Street	Waterbury, Vermont 05671-2101
Francis (Paco) X. Aumand, III Director Chair 2010-2011	DPS, Criminal Justice Services	103 South Main Street	Waterbury, Vermont 05671-2101
Matt Valerio, Defender General	Office of Defender General	14-16- Baldwin Street	Montpelier, Vermont 05602-3301
US Attorney Tristram Coffin James Leene, alternate	Office of the US Attorney	P. O. Box 570	Burlington, Vermont 05402
John Treadwell Asst. A.G.	Office of the Attorney General	109 State Street	Montpelier, Vermont 05609-1001
Sheriff James Coons Vermont Sheriff's Association Vice Chair 2010-2011	Addison county Sheriff's Office	33 Court St.	Middlebury, Vermont 05753
Vacant Vermont Police Association			
Karen Horn	Vermont League of Cities & Towns	89 Main St, Suite 4	Montpelier, Vermont 05602-2948
James Hughes, Esq. Dept of State's Attorney & Sheriffs	Franklin County State's Attorney	5 Lemnah Drive	St Albans, VT, 05478
Chief Thomas Hanley Chief of Police Assoc. Chair	Middlebury Police Department	One Lucius Shaw Lane	Middlebury, VT 05753
James Baker, Interim Exec. Director	VT Criminal Justice Training Council	317 Academy Road	Pittsford, Vermont 05763
Sgt. Michael O'Neil VSPU	Vermont State Police		

Appendix B

Domestic Violence involving Law Enforcement

Model Policy

Domestic Violence involving Law Enforcement

Model Policy

1.0 PURPOSE

1.1 This policy recognizes that the profession of law enforcement is not immune from members committing domestic violence. The purpose of this policy is to establish procedures for handling acts of domestic violence committed by members or employees, to offer specific guidance for handling domestic violence cases involving employees of any law enforcement agency, and for implementing early recognition and prevention strategies.

Comment: An alternative to the purpose language above might be to remove the first sentence.

1.2 This policy will provide managers, members, and all department employees with guidance in addressing incidents where one (or more) party at a reported domestic violence incident is a sworn member, of any rank in the department. This policy offers a comprehensive, pro-active approach to domestic violence by members with an emphasis on victim safety. Federal law prohibits persons convicted of qualifying misdemeanor domestic violence crimes from possessing firearms.

1.3 Members found guilty of a qualifying domestic violence crime through criminal proceedings shall be terminated.

2.0 DEFINITIONS

2.1 "Domestic Assault" is defined in the Agency Domestic Violence Response Policy or Vermont Statute.

2.1.1 A domestic assault (T.13 VSA Sec 1041) occurs when any person who attempts to cause or willfully or recklessly causes bodily injury to a family or household member, or willfully causes a family or household member to fear imminent serious bodily injury.

2.2 Member is defined as a sworn member of the law enforcement department or agency.

2.3 Police Officer/Officer is defined as a member of any other police department

2.4 Department Employee is defined as a civilian employee of a department.

3.0 POLICY

3.1 While prioritizing the safety of victims, this policy is designed to:

(1) Address prevention through hiring and training practices,

(2) Provide direction to supervisors for intervention when warning signs of domestic violence are evident,

(3) Institutionalize a structured response to reported incidents of domestic violence involving sworn members as well as all employees of any law enforcement agency, and

(4) Offer direction for conducting the subsequent internal and criminal investigations.

3.2 Components of the policy include:

- (1) Hiring practices;
- (2) Early Warning and Intervention;
- (3) Incident Response Protocol;
- (4) Victim Safety and Protection; and
- (5) Post-Incident administrative and criminal decisions

3.3 Notwithstanding what is contained herein, members are required to follow procedures set forth in the [Agency Domestic Violence Response Policy] regardless of identity of the parties involved in the investigation.

3.4 The department will adhere to a zero-tolerance policy towards members who commit acts of domestic violence.

3.5 Hiring Practices, Early Warning and Intervention

NOTE: It should be noted from the outset that while this early warning and intervention initiative is set forth in this policy directly pertaining to domestic violence, that all members should consider it as a meaningful way to identify and prevent other emerging problems that peers may be experiencing. Members should also be cognizant of behaviors of co-workers that are indications of victimization or perpetration of domestic violence.

(1) Hiring Process Will Include:

(A) All applicants shall be asked if they have engaged in or been investigated for domestic violence related offenses, asked about any past arrests, suspended sentences, diversion programs, and convictions.

(B) All applicants both sworn and non sworn shall be asked if they have ever been served a protective order related to domestic violence, elder abuse, child abuse, sexual assault and/or stalking.

(C) Any answers in the affirmative to the above inquires, may result in the applicants being screened out as necessary.

(2) The Department shall conduct thorough background investigations of all new applicants considered for employment. All applicants shall be questioned about past allegations,

arrests and/or convictions of domestic violence, sexual assaults and stalking as well as past and present protective orders.

(3) Any applicant considered for employment with a history of committing violence, such as domestic violence, child abuse, elder abuse, stalking, animal cruelty, sexual assaults, etc., will not be hired.

(4) Candidates shall be clearly informed of the department's position of zero-tolerance concerning domestic violence by members.

[The use of a polygraph in the hiring process is strongly encouraged.]

3.6 Post-Hire Intervention

(1) The department shall, either in response to observed warning signs or at the request of a member, intimate partner, or other family member, provide non-punitive avenues of assistance, such as the Employee Assistance Program, before an act of domestic violence occurs.

(2) The department shall inform members of the procedure for seeking confidential referrals, either internally (Department Clinician) or externally, to confidential counseling services.

(3) A disclosure on the part of any employee, intimate partner or family member to any member of the department that an employee has personally engaged in domestic violence will be treated as an admission or report of a crime and shall be investigated both internally (via a DPS 1001 as required by Section III, Article III of the VSP Rules and Regulations) and criminally.

3.7 Supervisor Responsibilities

(1) Supervisors shall be cognizant of any pattern of abusive behavior potentially indicative of domestic violence, including but not limited to the following:

(A) Aggressiveness:

- (a) Excessive and/or increased use of force on the job
- (b) Stalking and inappropriate surveillance activities
- (c) Unusually high incidences of physical altercations and verbal disputes
- (d) Citizen and fellow member complaints of unwarranted aggression and verbal abuse
- (e) On- or off-duty member injuries

(B) Domestic Violence-Related Issues:

(a) Monitoring and controlling any family member or intimate partner through such means as excessive phone calls or contact by other means.

(b) Stalking any intimate partner or family member

(2) If the supervisor notes a pattern of problematic or early warning behavior, the supervisor shall:

(A) Address the behaviors through a review or other contact with the member and document all contacts

(B) Forward written reports capturing the behaviors to the member's Commander through the chain of command in a timely manner

3.8 Member Responsibilities

(1) Members are encouraged to take personal responsibility in seeking confidential referrals and assistance from the department to prevent a problem from escalating. (It should be noted that couples counseling is strongly discouraged when domestic violence is suspected as it may compromise victim's safety). Domestic Abuse Education Program is a recommended tool.

(2) Members who engage in the following actions will be subject to discipline:

(A) Failure to report knowledge of abuse or violence involving a fellow member or other department employee.

(B) Failure to cooperate with the investigation of a member domestic violence case (except in the case where that member is the victim)

(C) Interference with cases involving themselves or fellow members, i.e. intimidation/coercion of witnesses or victims, surveillance, harassment, stalking, threatening, or falsely reporting

(3) Members who learn they are the subject of a criminal investigation or response by a law enforcement agency to a domestic violence related call, regardless of jurisdiction, are required to immediately make a report to their supervisors and, if applicable, provide notice of the court dates, times, appearances, and proceedings. Failure to do so will result in discipline.

(4) Members who learn they are the subject of any protective order proceeding, whether or not the order is issued and regardless of jurisdiction, shall immediately notify their supervisor and provide a copy of the order, if issued. If subject to a qualifying protective order (under existing law), the member shall surrender all firearms unless department policy allows for possession of the primary service weapon. Failure to do so will result in discipline.

Any member who threatens, harasses, or abuses another using [the agency's/department] resources such as equipment or work time shall be subject to disciplinary action, up to and including terminations. [This department] shall not tolerate domestic violence against another while in the agency facility, vehicles, or conduction business on this agency's behalf.

When any member of the [named agency] receives a call that involves an agency member and is criminal in nature but occurred within another jurisdiction, the other jurisdiction, if not already notified, will be notified by the [agency head] or his/her designee. The department will advise the other agency of the location, individuals involved, and all other pertinent information. The department will request copies of all reports from the other agency/department.

4.0 PROCEDURES

4.1 Incident Response Protocols

(1) Department-Wide Response

(A) The department shall accept, document, and preserve all calls or reports, including those made anonymously, regarding domestic violence as on-the-record information.

(B) All reports of possible criminal activity implicating members or other police employees from any agency in domestic violence shall be documented in accordance with the policies governing the handling of reports of domestic violence involving civilians.

(2) Communications Response

(A) Emergency Communications Dispatchers shall immediately notify the supervisor on duty of any suspected domestic violence call received that involves, or appears to involve, a police employee, regardless of the involved employee's jurisdiction. If no supervisory is on duty then one shall be notified.

(B) Emergency Communications Dispatchers shall prepare and preserve documentation of the facts and circumstances of the call, including the 911 recordings, for use in potential administrative or criminal investigations.

(3) Responding Unit's Responsibilities

(A) Upon arrival on the scene of a domestic dispute call or incident involving a police employee from any agency, the primary responding unit shall immediately notify dispatch and request the on-duty member in charge report to the scene, regardless of the involved officer or employee's jurisdiction. **Standard domestic violence and investigation procedures shall be followed.**

In responding to domestic violence incidents in which both parties involved are sworn officers (regardless of agency), standard domestic violence response and investigation procedures shall be followed. If an arrest is made, all service weapons assigned to the accused officer will be confiscated. When possible a supervisor should make the arrest.

(4) On-Scene Supervisor Response

(A) A supervisor shall report to the scene of all police officer domestic dispute incidents including a police employee, regardless of the involved employee's jurisdiction. Members responding to a report of a domestic dispute involving a member of the department /agency will, when possible, call for a member of a higher rank than the member involved in the domestic dispute to respond. **The Chief of Police shall be notified or his/her designee. If the supervisor's Chief of Police is involved, the supervisor will contact the [state's attorney, town manager, mayor, etc].**

(a) The on-scene supervisor shall assume command and ensure that the crime scene is secured and that all evidence is collected. Photographic and/or video documentation of the parties involved and scene shall be recorded where such resources are available.

(i) The supervisor shall ensure that the [Agency/department Domestic Violence Response Policy] is adhered to in every respect.

(b) Whenever a member or employee involved domestic violence call does not result in an arrest, the supervisor shall explain in a written report.

(c) The on-scene supervisor shall notify the member's Commander/Chief as soon as possible of the incident. In the event that the officer or employee is from another jurisdiction, the Commander/Chief or his/her designee shall ensure that the officer's chief is notified. All notifications, and attempts to notify, shall be fully documented.

(5) Department Follow-Up

(A) In a timely manner, the member's Commander shall ensure that all members who responded to a police employee domestic dispute call are debriefed. The debriefing shall include the following:

- (a) A review of department confidentiality guidelines
- (b) A direct order prohibiting discussion of the incident outside of the official inquiry.
- (c) A clear delineation of assignments.

(B) Follow-up investigators shall seek out information on existing protective orders and, if found, shall enforce them and any applicable state and federal firearms laws and determine whether the employee violated department policy by failing to report the protective order.

(C) Arrest warrants charging members with domestic violence and protective orders issued at a later time shall be served by no fewer than two members with at least one being a supervisor to the member/officer being served. In cases where firearms have not previously been seized, department-issued firearms shall be seized in accordance with any administrative order issued by the department and other firearms via any other legal means.

(D) In the event the protection order expires or the victim asks that it be discontinued, the department shall still conduct a thorough internal investigation.

(E) Following any reported incident for which Vermont State Police is the investigating agency, the department shall designate a member of the command staff to perform the following duties:

- (a) Act as a principal point of contact to keep the victim apprised of all developments
- (b) Offer safety planning to the victim
- (c). Report the findings of the safety planning to the Colonel who will make decisions concerning appropriate sanctions, administrative actions, and referrals for the accused member.
- (d) Refer the victim to the community based victim advocates and advocacy groups.

4.2 Victim Safety and Protection

(1) The command staff member designated as principal contact for the victim shall inform the victim of confidentiality policies and their limitations, and attempt to ensure that confidentiality is maintained throughout the case.

(2) All employees shall be aware of possible victim/witness intimidation or coercion and the increased danger when the victim leaves an abusive partner. The designated principal contact shall assist the victim and children in safety planning and caution the victim to be alert to stalking activities and provide instructions regarding the need to report any concerning behavior or conduct.

(3) If an employee suspect's intimidation or coercion of the victim/witness is occurring, the employee shall prepare a written report to be delivered immediately to the investigator in charge of the case and the members Commander through the chain of command;

(A) In order to determine whether the victim/witness is being intimidated or coerced, the investigator in charge shall seek out secondary sources of information.

(B) Given the possibility that a victim will recant or choose not to participate in court proceedings, supplemental evidence shall be sought out and preserved.

(C) Victim should be referred to the police-based victim advocate or to the 24-hour community based advocacy groups.

In the event that a department member is a victim of domestic violence, that member will, if applicable, be provided with the time off necessary to attend hearings in which he/she is involved.

4.3 Post-Incident Administrative and Criminal Decisions

(1) The department shall conduct internal and criminal investigations of alleged incidents of member domestic violence in a manner that maintains the integrity of both investigations and promotes zero-tolerance.

(2) If the facts of the case indicate that domestic violence has occurred or any department policies have been violated, administrative action shall be taken independent of any criminal proceedings as soon as practicable.

(3) The department will adhere to and observe all necessary protocols to ensure accused member's departmental, union, and legal rights are upheld during the administrative and criminal investigations.

(A) Where sufficient information/evidence exists, the department shall take immediate administrative action against the accused member that may include removal of credentials and service weapons, reassignment, discipline, or termination as appropriate.

(B) When an investigation of an incident uncovers employees who had knowledge of violence on the part of another member or other department employee but failed to notify the department or engaged in actions intended to interfere with the investigation, the department shall investigate those members/employees and take disciplinary action as appropriate.

(C) If the department determines through an internal investigation that the member violated department policy, regardless of whether the member plead nolo contendere in response to criminal charges, the department may employ the full range of administrative sanctions.

(D) Any member determined through an administrative investigation to have committed domestic violence shall be subject to discipline up to, and including, termination.

4.4 Other Members Will Not Accompany Suspects to Court Proceedings

(1) Agency/Department members will not accompany member suspects to any domestic related court proceedings while on duty unless subpoenaed to appear or ordered to do so by their chain of command. If appearing while off duty they will neither carry nor display any departmental equipment to include assigned firearms(s) or insignias on their person, concealed or not. They must be aware of the fact that their mere presence in domestic violence related actions may appear intimidating to the victims.

4.5 Using Department Resources to Commit Domestic Violence is Prohibited

(1) Any member, who threatens, harasses, or abuses someone using Departmental resources such as work time, workplace phones, Fax machines, mail, E-mail, or other means shall be subject to corrective or disciplinary action.

4.6 No Contact Order

(1) The department may issue and administrative no contact order ordering the member not to have contact with the victim. A violation of the order will result in an insubordination charge against the violator. The administrative order should be served by a ranking member of the department.

Appendix C
Section 283c, “Preservation of Evidence” Report

Act No. 154. An act relating to restructuring of the judiciary (H.470).

The Charge

The Law Enforcement Advisory Board was charged by the provisions of H.470, which passed during the 2010 Vermont General Assembly, with developing a proposal for implementing Section 238c, concerning the “Preservation of Evidence”.

The Law

Sec. 238c. PRESERVATION OF EVIDENCE

(a)(1) The general assembly finds that it is in the interest of justice that Vermont establish a system for the preservation of any item of physical evidence containing biological material that is secured in connection with a criminal case or investigation by the government entity having custody of the evidence for the period of time that:

(A) the statute of limitations has not expired for a crime that remains unsolved;
and

(B) a person remains incarcerated, on probation or parole, or subject to registration as a sex offender in connection with a criminal case.

(2) For purposes of this section, criminal case or investigation shall include only the following offenses:

(A) arson causing death as defined in 13 V.S.A. § 501;

(B) assault and robbery with a dangerous weapon as defined in 13 V.S.A. § 608(b);

(C) assault and robbery causing bodily injury as defined in 13 V.S.A. 608(c);

(D) aggravated assault as defined in 13 V.S.A. § 1024;

(E) aggravated murder as defined in 13 V.S.A. § 2311 and murder as defined in 13 V.S.A. § 2301;

(F) manslaughter as defined in 13 V.S.A. § 2304;

(G) kidnapping as defined in 13 V.S.A. § 2405;

(H) unlawful restraint as defined in 13 V.S.A. § 2406 or 2407;

(I) maiming as defined in 13 V.S.A. § 2701;

(J) sexual assault as defined in 13 V.S.A. § 3252(a)(1) or (a)(2);

(K) aggravated sexual assault as defined in 13 V.S.A. § 3253.

(L) burglary into an occupied dwelling as defined in 13 V.S.A. § 1201(c); and

(M) lewd and lascivious conduct with a child as defined in 13 V.S.A. § 2602.

(3) For purposes of this section, “biological evidence” means:

(A) a sexual assault forensic examination kit; or

(B) semen, blood, saliva, hair, skin tissue, or other identified biological material.

(b) The Vermont Law Enforcement Advisory Board shall develop a proposal for implementation of this section and present it to the senate and house committees on judiciary no later than January 15, 2011.

(c) The department of public safety, the department of buildings and general services, the police chiefs’ association, and the sheriffs’ association shall develop a proposal for establishing one or more facilities for retention of items of physical evidence containing biological material that is secured in connection with a criminal case or investigation. Such facilities would be available for use by all Vermont law enforcement agencies. The proposal shall be presented to the senate and house committees on judiciary, the house committee on corrections and institutions, and the senate committee on institutions no later than January 15, 2011.

Method of Review and Discussion of Issues

A working group was formed that was representative of a variety of law enforcement agencies and groups and States Attorney’s and included a representative from the Department of Building and General Services. The group met several times along with several meetings and discussions with the Law Enforcement Advisory Board. One key issue that continued to surface among the parties was the interpretation of the term “physical evidence containing biological material” versus the definition of “biological evidence”. Several members felt the more evidence that was retained in any criminal matter the greater the chance the proper administration of justice would be maintained. If someone was found not guilty after many years there would be a greater chance to retry the case using the larger quantity of evidence that would be kept using the broader interpretation of evidence retention that is found in the term “physical evidence containing biological material. However, contrary to this thought it was felt by some that the State of Vermont’s responsibility should be to only save that evidence that is contained in the definition of “biological evidence”. The retention of this evidence is

smaller in quantity and could be retained in a smaller physical space. The retention of this type of evidence may however, limit the retrying of the criminal case in future years if the criminal conviction was overturned. Further, the retention of this type of evidence may not be evidence that is a material piece of information that lead to a person's conviction but could be used as the basis of overturning a conviction in the future.

The Law Enforcement Advisory Board feels that the best recommendation for storing the proper amount of evidence is to have two facilities within the state. These facilities would be strategically located and would meet any requirements for the storage of evidence associated with the provisions of section 283c. However, the Law Enforcement Advisory Board and the working group has determined that absent being able to meet this recommendation a smaller space could be made available within the new public safety headquarters building to meet the needs of storing "biological evidence. Therefore, the advisory board is in agreement with the recommendation of the previous committee studying the preservation of evidence.

The Law Enforcement Advisory Board is forwarding an implementation proposal that best meets the needs of the financial resources that are available today.

Implementation Proposal

The Law Enforcement Advisory Board's (LEAB) proposal is to first identify two circumstance for evidence storage; pre-conviction evidence storage and post-conviction evidence storage.

- **Pre-conviction evidence storage** shall reside with the investigating agency. The LEAB recognizes that evidence collection and preservation along with its proper storage is a function that is being performed today by investigating agencies for all cases that are unsolved. Unsolved criminal investigations when the *statute of limitations has not expired* is a responsibility currently being addressed by investigating agencies and should continue to be the responsibility of the investigating agency. Best

practices associated with policy and procedures for the collection, preservation and storage of evidence should be developed.

- Investigating agencies shall retain their *physical evidence containing biological material*. However, the investigating agency may transfer *biological evidence*, a sexual assault forensic examination kit; or semen, blood, saliva, hair, skin tissue, or other identified biological material collected from physical evidence, to the State facility for storage if they wish to do so.

- **Post-conviction evidence storage** should be the primary responsibility of the State of Vermont. Post conviction evidence connected with a criminal case that involves biological evidence should be retained by the State of Vermont or if a local agency wishes the evidence may be retained at the local facility. When the court finds no further need to retain evidence entered into trial, the court shall notify the State's Attorney's office the evidence may be removed. The local State's Attorney's office and the investigating agency together shall retrieve the evidence. The *biological evidence* shall be retained by the investigating agency or shall be transported to the State facility for the storage and preservation of evidence. The proper chain of custody procedures for evidence transfer shall be maintained.
 - If the prosecutor determines that *physical evidence containing biological material* beyond the material associated with the *biological evidence* needs to be retained then that evidence shall also be retained and preserved.
 - *Note: This section presumes that a state storage facility exists such that storage of larger items of physical evidence can be adequately collected and stored. The current plans call for a smaller space to be made available within the Department of Public Safety Headquarters building therefore only **biological evidence** will be stored.*

- The investigating agency retains the right to decide to transfer evidence to the State facility or retain the evidence in their local evidence room. However, the investigating agency must ensure that the *physical evidence containing biological material or biological evidence* is maintained in a proper way such that it is secure and is preserved as long as the *person is incarcerated, on probation or parole, or subject to registrations as a sex offender*.
- The State facility and the management of the preservation of evidence associated with post-conviction evidence storage shall be the responsibility of the Department of Public Safety. The Vermont Forensic Laboratory shall not be used as the State facility. This means that evidence stored in compliance with this law shall not be physically located with the Vermont Forensic Laboratory facility.

Also language was placed within this section for several law enforcement organizations and BGS to develop a proposal for an evidence storage facility. This language is below.

(c) The department of public safety, the department of buildings and general services, the police chiefs' association, and the sheriffs' association shall develop a proposal for establishing one or more facilities for retention of items of physical evidence containing biological material that is secured in connection with a criminal case or investigation. Such facilities would be available for use by all Vermont law enforcement agencies. The proposal shall be presented to the senate and house committees on judiciary, the house committee on corrections and institutions, and the senate committee on institutions no later than January 15, 2011.

As many of the organizations are represented on the Law Enforcement Advisory Board (LEAB) it was decided that board should work with BGS on this initiative.

The Law Enforcement Advisory Board (LEAB) in conjunction with the Department of Building and General Services (BGS) incorporated the development for a proposal for a state facility(s) which is designed for the *retention of items of physical evidence containing biological material* into this implementation proposal. The LEAB and BGS reviewed the work previously completed by the Preservation of Evidence Study

Committee and their report submitted to the House and Senate committee on Judiciary on December 14, 2007. The LEAB and BGS concurs with the committees report that states in part,

“Under our Vermont forensic Laboratory’s accreditation guidelines, they are not supposed to manage evidence long term. Therefore, the Vermont Forensic Laboratory will not be an answer to the long-term retention of evidence. Moreover, once a case is over when an appeal becomes final, it the District court is holding the evidence, the court no longer has the responsibility to preserve the evidence. In addition the District Courts have very limited space to store any trial evidence.

The ideal solution is to have one, new statewide evidence repository.”²

The LEAB and BGS are proposing to utilize space within the Department of Public Safety headquarters building in Waterbury, VT. The Department of Public Safety is renovating the existing headquarters building and is proposing to utilize 1,000 square feet of space within the fourth floor attic area. This space will have the necessary climate control systems, lighting, mechanical and electrical equipment necessary to store evidence. The proposal will capitalize on some of the Department of Public Safety’s existing facility infrastructure including; security, personnel, bathrooms, parking spaces and access to facilitate the long term storage of evidence. While this evidence storage facility will not be part of the Vermont Forensic laboratory physical space, the evidence technician for the laboratory will be utilized to take in evidence and place it in this separate facility. This evidence technician is currently a federally funded position therefore; state funds will have to be found to secure the positions long term stability.

² Report of the Preservation of Evidence Study Committee, Submitted to Senate and House Committee on Judiciary December 14, 2007, page 6.

Appendix D

Section 238d. “Recording Custodial Interrogations; Admissibility of Defendant’s Statements”.

December 28, 2010

TO: Paco Aumand, Chair, Law Enforcement Advisory Board

FR: Chief Tom Hanley, Chair, Working Group on Custodial Interrogations

The working group consisted of Chief Tom Hanley, Capt. Tim Clouatre, VSP, Det. Lt. Todd Illingworth, VSP, John Treadwell, Office of the Attorney General, and Lt. Jim Gosslin of the South Burlington Police Department.

The working group convened 3 meetings between October and December, 2010, and submits the following report:

The Law Enforcement Advisory Board Working Group on Recording of Custodial Interrogations makes several assumptions on the intent of the relevant language in H.470:

Mandate: An audio OR an audio and visual recording SHALL be made

When: AFTER a person is ARRESTED in *relation* to the investigation or prosecution of a FELONY

Where: The interrogation is conducted in A PLACE OF DETENTION

1. The mandate creates an offense if the interrogation is not at least audio recorded. There is no penalty to the actor but we assume the intent of the legislature will be to exclude the confession, admission, or information developed from the interrogation from trial if not recorded.
2. "Place" of detention includes anywhere a person is detained, under arrest, and not free to leave. This can be a police vehicle, a police station, correctional facility, sheriff's office, prosecutor's office, courthouse, and probation and parole office.
3. The arrest has only to be in relation to the investigation of a felony or prosecution of a felony. This would seem to include an arrest for an offense which could be a misdemeanor, if it was related to the INVESTIGATION of a felony. The term "arrest" is very specific and appears to exclude a detention for the purposes of other processes (DUI, Citation), if used in the context of Rule 3.

FINDINGS OF THE WORKING GROUP:

3. Audio and visual recording of custodial interrogations whenever practicable is a best practice that should be adopted by all Vermont law enforcement agencies. (A "Best Practice" statement is attached)

5. Mandated recording requires an uninterruptable power supply, readily available backup equipment (for terminal, recording, and storage equipment), a reliable means to determine whether or not the system is operating correctly, and a failsafe method of turning it on and off.
6. Mandated recording requires a place convenient to the parties that can be adapted for recording equipment.
7. Many of Vermont's law enforcement agencies, i.e., places of detention, are in antiquated facilities that are inadequate for the recording mandate. These facilities have no dedicated interview rooms, and interrogation may most likely occur in rooms equipped or furnished for other purposes, be they a select board meeting room, a clerical office, or a multiuse room.
8. In a major event, interviews/interrogations may be held simultaneously in several rooms; a simple interview may transition to an interrogation and an arrest in a room not equipped for recording.
9. Many communities lack the financial resources to equip rooms with adequate recording equipment. Reliable equipment, properly installed, is estimated at \$1,500- \$5,000 per camera unit (camera, camera housing, microphone, microphone housing, cabling and wiring, power supplies, DVR recording and storage equipment, media, switching, and electronic means to download and reproduce recorded images in archived quality).
10. Police cruiser recording equipment is susceptible to failure due to its deployment in 24 X 7 operations and under a variety of adverse conditions. Many police cruisers in the state are not equipped with recording equipment, especially unmarked vehicles (rental or department owned).
11. Managing recordings requires the diversion of police officers from police work or the assignment of clerical staff for downloading, preserving, archiving, and duplicating images for transmittal on request.

Law Enforcement Agency Survey:

The working group undertook a survey of law enforcement agencies in the state to ascertain the current status of audio-visual recording capability. About 30% of the agencies responded. Of those that responded, most (92%) had some form of audio-visual recording equipment in at least one room in their facilities. About the same percentage of respondents had some form of audio-visual recording equipment in their marked police cars.

The comments indicated many of the systems that are in place are happenstance at best, many still using older VHS technology. The majority of respondents cited difficulty in managing, duplicating, and transmitting of images and data due to a lack of sufficient staff, or the diversion of police officers from their primary responsibilities to manage the data. Discovery requests have put a large burden on many of the departments.

BEST PRACTICES STATEMENT FOR LAW ENFORCEMENT
STATE OF VERMONT

RECOMMENDATIONS FOR

ELECTRONIC RECORDING OF CUSTODIAL INTERVIEWS¹

1. Any custodial interrogation of a person, who is in a fixed place of detention and who, at the time of the interrogation, is suspected of having committed a felony offense should be electronically recorded in its entirety.
2. Any custodial interrogation of a person, who is not in a fixed place of detention and who, at the time of the interrogation, is suspected of having committed a felony offense, where practicable, be electronically recorded in its entirety.
3. The interrogating entity should preserve any electronic recording made of a custodial interrogation until the time that a conviction for any offense relating to the interrogation is final and all direct and collateral appeals are exhausted or the prosecution for that offense is barred by law. To facilitate storage and protection of the record during the time period specified above, the interrogating entity may make true, accurate, and complete copies of the electronic recording.
4. The guidelines for electronic recording of a custodial interrogation are not applicable if:
 - a. The suspect refuses to speak to law enforcement if the interrogation is electronically recorded. Such refusal should be documented either by electronic recording demonstrating such refusal, or through a written statement signed by the suspect.
 - b. Access to recording equipment required to electronically record an interrogation is not reasonably available during the period of time that the suspect is lawfully detained.
 - c. The equipment malfunctions and replacement equipment is not reasonably available.
 - d. The law enforcement officers, in good faith, fail to record the custodial interrogation because the officers inadvertently fail to operate the recording equipment properly, or without the officer's knowledge the recording equipment malfunctions or stops operating.
 - e. The law enforcement officers conducting the custodial interrogation reasonably believe that the crime of which the person is suspected is not a felony.
 - f. Exigent circumstances make electronic recording impossible or impractical.
5. Definitions applicable to this best practices statement are as follows:

a. "Custodial interrogation" refers to police interrogation of a suspect at which time the suspect is in police custody and is not free to leave and should be informed of his or her "Miranda" rights, until the time that the interrogation ends.

b. "Electronic recording" refers to either audio recording or combined audio and video recording. The latter is recommended. Law enforcement officers are encouraged, if videotaping, to position the camera to capture the suspect's face.

c. "Fixed place of detention" means a police or sheriff's station, state police barracks, a holding cell, or a correctional or detention facility.

d. A person is "suspected of" committing a felony if law enforcement officers have probable cause, at the time of the interrogation, to believe that the person committed a felony.

6. Law enforcement officers should continue to prepare written summaries of custodial questioning, and continue to obtain written statements from suspects.

[NOTE: This document provides recommendations for electronic recording of custodial questioning. No document can address all the circumstances or exigencies which officers may encounter, and this model is not intended to be a comprehensive treatment of all the factors involved in criminal investigations. While it is a general guide outlining methods for custodial questioning, the recommendations are intended to be used as guidelines, and are not intended to create any substantive or procedural rights.]

Appendix E

Section 238e, “Eyewitness Identification Best Practices”.

Section 238e, “Eyewitness Identification Best Practices”.

The Law Enforcement Advisory Board (LEAB) discussed this section several times over the course of the board’s meetings. Work on this topical area has not been completed. The LEAB reviewed the work that is being accomplished in Massachusetts regarding the eyewitness identification and agrees in principal with the creation of an eyewitness identification policy along with forms for eyewitness identification, line-ups, photo array instructions, show-up identifications and voice identification line-up instructions. More work is needed to adopt specific language for Vermont in this area.

The Law Enforcement Advisory Board recognizes that reform is needed within the law enforcement community with regard to eyewitness identification issues. This reform can be implemented through policy changes and through creating a heightened awareness around the issues associated with the innocence project.

As mentioned the LEAB has not finished its work regarding this topic area. Specifically, it has not identified the need for or costs associated with purchasing, installing, and maintaining audio and visual recording equipment.

The Vermont Criminal Information Center (VCIC) is developing a mug shot repository that will be used in the near future for photo array line-up information. This will be a database of mug shots that can be sorted electronically to determine best matches of individuals to be used within a photo array. The LEAB is aware of this effort and will coordinate policy changes with regard to photo arrays with VCIC.

The LEAB is sensitive to the need to maintain best practices associated with eyewitness identification issues, custodial interrogation issues and preservation of evidence matters. How the best practices around these matters are kept current was a subject of discussion among the board. It was felt that best practices surrounding law enforcement operations are best determined and promoted by the policing community through the Vermont Criminal Justice Training Council (VCJTC). However, it was recognized that the VCJTC needs to have legal support and guidance to ensure that best practices are taught at the Vermont Police Academy and police executives are given the necessary information to effect the proper police changes.

Recommendations

- Best practices for police operations should be managed by the police community and training on best practices should be managed through the Vermont Criminal Justice Training Council.
- Vermont police departments should adopt policies and forms regarding eyewitness best practices similar to the work done in Massachusetts.
- The Vermont Criminal Justice Training Council should be given legal resources necessary to maintain and support these best practices into the future.
- The Vermont Criminal Justice Training Council in conjunction with the Law Enforcement Advisory Board should conduct a summit or other group meeting in 2011 to bring attention to reforms needed regarding eyewitness identification and custodial interrogation. This effort should include experts within the national law enforcement community on eyewitness identification and custodial interrogation and representatives from the innocence project.

- Model policies should be adopted similar to the model policy on eyewitness identification from Massachusetts.

Action Needed

The law enforcement advisory should continue its work on the issues of eyewitness identification best practices in 2011. Specifically, a model policy should be developed and a summit designed to educate law enforcement leaders on eyewitness identification reforms and awareness surrounding the innocence project should be conducted. The Vermont Legislature should be a participant in this law enforcement educational opportunity.

The Vermont Legislature should give the Law Enforcement Advisory Board time to continue to work on the issues of eyewitness identification and allow the law enforcement to develop best practices.

Information regarding the work completed in Massachusetts follows.

MASSACHUSETTS MAJOR CITY CHIEFS



BEST PRACTICES FOR EYEWITNESS IDENTIFICATION AND THE RECORDING OF SUSPECT INTERVIEWS

JUNE 2010

Introduction

In December 2009 the Boston Bar Association published, "Getting it Right, Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts". The report was the result of work performed by a task force of defense attorneys, prosecutors, and police officers that came to strongly support the adoption of reform procedures by the police.

The Boston Bar report made recommendations in four general areas. Two of those categories, eyewitness identification procedures and interviews of suspects and witnesses, are the direct responsibilities of the police. The report concluded by calling upon the legal and law enforcement communities to give recommendations their full support. A copy was sent to every Massachusetts police department.

The Massachusetts Major City Chiefs support the work of the Boston Bar Task Force to Prevent Wrongful Convictions and are committed to the implementation of its recommendations. MMCC, with assistance from the Massachusetts Chiefs of Police Association, has produced this document in order to acknowledge best practices in the area of eyewitness identification. We have also assembled a sample policy that will be disseminated to our member chiefs.

We recognize that it is as much the responsibility of the police to protect the innocent from conviction as it is to assist in the conviction of the guilty. We believe that Massachusetts police departments should adopt reform procedures and that department policy should be uniform across the Commonwealth.

Eyewitness Identification

Over the past decade or so, an astonishing number of convicted felons have been exonerated by DNA. At last count, over 240. When those cases were examined, it became evident that about 75% were convicted at least in part on the basis of eyewitness evidence.

Things may actually be worse than they appear. Most of those exonerated by DNA had been serving time for homicides and sex assaults, crimes where DNA evidence can be plentiful. If over 240 innocent people were serving time for these types of crimes, how many innocents are in prison for crimes like robberies and aggravated assaults, but cannot be exonerated because there is no DNA evidence to prove they did not commit the offense?

In addition to sending innocent people to prison, wrongful convictions leave true perpetrators on the street to continue offending, deny crime victims justice, and erode the public's confidence in law enforcement.

Attempts to examine the reliability of eyewitness evidence have been occurring all around us. In 1999, the U.S. Attorney General formed a research group called the Technical Working Group for Eyewitness Evidence. The group's work resulted in the DOJ Publication, "Eyewitness Evidence, A Guide for Law

Enforcement". The Guide recommended new procedures, but many departments have been slow to implement them. And twice in 2009, the Supreme Judicial Court cautioned that it expected Massachusetts police departments to adopt reform procedures, hinting that sanctions may be around the corner if they do not.

The traditional view of the criminal justice system is that it is divided into parts, with each part playing a specific role. The police identify the suspect, the prosecutor's office puts the suspect on trial, and the court determines whether the suspect is responsible. But the identification of a suspect by an eyewitness, often within a procedure designed by the police, has created a momentum in hundreds of cases that has resulted in the convictions of innocent people.

Department Policy

Every police department should have a written policy on eyewitness identification. Policies should be uniform, or at least consistent, statewide.

At a minimum, department policy and procedures should include the following:

Before conducting any identification procedure, it is critical the police obtain and document as complete a description of the suspect as possible.

Formal instructions are given to eyewitnesses prior to all identification procedures. The witness instructions follow the recommendations of the U.S. Department of Justice as contained in the publication Eyewitness Evidence, A Guide for Law Enforcement. Specifically:

- that the person who committed the crime may or may not be the person who has been stopped (for a show-up) or in the lineup or photo array;
- that it is just as important to clear a person from suspicion as to identify a person as the wrongdoer;
- in the case of a photo array (or a lineup done some time after the crime), that individuals in the photographs or in the lineup may not appear exactly as they did on the date of the incident because features such as weight, and head and facial hair are subject to change;
- that regardless of whether an identification is made or not made, the investigation will continue; and
- that the procedure requires the administrator to ask the witness to state, in his or her own words, how certain he or she is of any identification.

Patrol officers and detectives carry or have immediate access to cards containing witness instructions for use during show-ups.

The department uses witness instruction forms for photo arrays, line-ups and voice identification procedures.

Absent compelling countervailing considerations, identification procedures are conducted by “blind” administrators--that is, officers who do not know which of the individuals in a lineup or photo array is the suspect. Blind administration prevents the officer conducting the lineup from providing even unconscious suggestions that may influence the witness’s identification, or indicating to the witness that he or she selected the “correct” photograph.

The individuals in the lineup and the array are presented to the witness sequentially, rather than simultaneously.

At the conclusion of an identification procedure where the witness has made an identification, the officer should ask the witness to describe his or her level of certainty about the identification.

Officers are required to submit a report on every identification procedure, whether or not a subject is selected, including the instructions given to the witness, the exact words spoken by the eyewitness pertaining to any identification made, and the witness’ statement of certainty. The department turns over to the district attorney’s office documents containing the instructions given to a witness prior to an identification procedure, as well as the responses of eyewitnesses and their statements of certainty.

It is recommended that the policy also include procedures for voice identification.

Training

Every police department should provide the training listed below to its sworn personnel.

1. All patrol officers and supervisors should receive training about eyewitness identification procedures to include managing witnesses, one-on-one procedures, blind administration and photo arrays.
2. All detectives should receive advanced training in eyewitness identification to include recognition memory, cognitive interview techniques, variables affecting eyewitness recall, procedures for show-ups, photo arrays, line-ups and voice identification procedures, and issues related to composites and sketches.
3. Roll call training on eyewitness identification should be provided to all sworn personnel at least annually.

Photo Array Instruction Form

1. You are being asked to view a set of photographs.
 - a. You will be viewing the photographs one at a time.
 - b. Please look at all of them. I am required to show you the entire series.
 - c. They are in random order.
 - d. Please make a decision about each photograph before moving on to the next one.
2. The person who committed the crime may or may not be in the set of photographs you are about to view.
3. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.
4. The officer showing the photographs does not know whether any of the people were involved in the crime.
5. The individuals in the photographs you view may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
6. Regardless of whether or not you select a photograph, the police department will continue to investigate the incident.
7. The procedure requires the officer to ask you to state, in your own words, how certain you are of any identification.
8. If you do select a photograph(s), please do not ask the officer questions about the person you have selected, as no information can be shared with you at this stage of the investigation.
9. Regardless of whether you select a photograph(s), please do not discuss the procedure with any other witnesses in the case.
10. Do you have any questions before we begin?

Witness Signature _____ Date _____

Officer Signature _____ Date _____

Administrator Signature _____ Date _____

If identification is made:

Without using a numeric scale, tell me how certain you are

Line-up

Witness #:

Witness:

Notes:

Did anyone look familiar?

(If identification is made) Without using a numerical scale, tell me how certain you are.

Officer's signature:

EYEWITNESS IDENTIFICATION

Sample Model Policy

BACKGROUND:

The identification of a suspect by an eyewitness can be an important component of a criminal investigation, but can be equally significant in clearing an innocent suspect. Many people who have been convicted of serious crimes, only to later be exonerated by scientific evidence, were originally convicted based in large part on mistaken identification by a witness. Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in over 75% of convictions overturned through DNA testing.¹ The [INSERT] Police Department recognizes that it is as much the responsibility of the police to protect the innocent from conviction as it is to assist in the conviction of the guilty.

The identification of criminal offenders must be approached with extreme caution as the court may exclude eyewitness evidence if it determines that police methods were unnecessarily suggestive.

POLICY:

It is the policy of the _____ Police Department that:

1. Eyewitnesses will be given specific instructions prior to being shown a suspect;
2. Photo arrays and line-ups will be conducted using sequential rather than simultaneous presentation; and
3. Photos arrays, line-ups and voice identifications will be conducted using blind administration.

DEFINITIONS:

Show-up: The presentation of one suspect to an eyewitness shortly after the commission of a crime.

Field View: The exposure of an eyewitness to a group of people in a public place on the theory that the subject may be among the group. A field view differs from a show-up in that it may be conducted well after the commission of the crime, and may be conducted with or without a suspect in the group.

Photo Array: The showing of photographs of several individuals to an eyewitness for the purpose of obtaining an identification.

Line-up: The live presentation of a number of people to an eyewitness for the purpose of obtaining an identification. A line-up differs from a field view in that it is conducted in a controlled setting, such as a police station, a known suspect is in the mix, and the participants are aware that an identification procedure is being conducted.

Voice Line-up: A procedure whereby a witness is permitted to hear the voices of several people for the purpose of obtaining an identification of a suspect's voice.

PROCEDURES:**Right to Counsel During Identification Procedure**

Once a suspect has been arraigned or indicted, his/her right to have counsel present at an in-person identification procedure attaches. No right to the presence of counsel exists simply because a complaint has been filed, even if an arrest warrant has issued.

No right to counsel attaches for non-corporeal identification procedures, such as those involving photographs or composite drawings, whether conducted before or after the initiation of adversarial criminal proceedings.

General Considerations

Due process requires that identifications be conducted in a fair, objective, and non-suggestive manner. Due process is violated when identification procedures arranged and/or conducted by the police are unnecessarily suggestive and conducive to irreparable mistaken identification.²

Prior to conducting an identification procedure, officers should take from the witness and document a full description of the offender.

If practicable, the officer should record the procedure and the witness' statement of certainty. If not, the officer should jot down the witness' exact words and incorporate them into his/her report. The witness should be asked to initial and date the front of the photograph selected.

A report of every show-up, photo array, line-up or voice identification procedure, whether an identification is made or not, shall be submitted. The report shall include a summary of the procedure, the persons who were present for it, instructions given to the witness by the officer (this should be accomplished by submitting the appropriate witness instruction form), any statement or reaction by the witness, and any comments made by the witness regarding the identification procedure.

Witness Instructions

Whenever practicable, an officer conducting an identification procedure will read the witness a set of instructions from a departmental form (show-up card, or photo array or line-up instruction form). Those instructions should include the following:

- The person who committed the crime may or may not be (the person, or in the set of photographs) you are about to view.
- You should remember that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
- The individuals you view may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change. (Not for use during show-ups or voice identifications.)
- Regardless of whether or not you select someone, the police department will continue to investigate the incident.
- The procedure requires the officer to ask you to state, in your own words and without using a numerical scale, how certain you are of any identification.
- If you do select someone, please do not ask the officer questions about the person you have selected, as no information can be shared with you at this stage of the investigation.
- Regardless of whether you select a person, please do not discuss the procedure with any other witnesses in the case.

Show-ups

1. Show-up identification procedures should only be used soon after a crime has been committed, typically within two hours, or under exigent circumstances, such as the near death of the only available witness. Show-ups should be conducted live whenever possible and not photographically. Officers should not attempt to obtain identifications using RMV photos on their cruiser MDT's, unless a dire emergency exists.

2. When a show-up is arranged in an emergency situation, where either a witness or a victim is in imminent danger of death or in critical condition in a hospital, and the circumstances are such that an immediate confrontation is imperative, the emergency identification procedure shall be conducted in a non-suggestive manner.
3. Every show-up must be as fair and non-suggestive as possible.³ Specifically, if the suspect is handcuffed, he/she should be positioned so that the handcuffs are not visible to the witness. Unless necessary for the safety of the officers or others, the suspect should not be viewed when he/she is inside a police vehicle, in a cell, or in jail clothing.
4. Detaining a person who fits the description of a suspect in order to arrange a show-up is lawful where the officer has reasonable suspicion that the suspect has committed a crime, even if probable cause to arrest has not yet developed.
5. If the witness fails to make a positive identification and sufficient other evidence has not developed to provide probable cause to make an arrest, the suspect must be permitted to leave. His/her identity should be recorded and included in the officer's report.
6. If a suspect is stopped within a short time after the commission of the crime, he/she may be taken to a location where he/she can be viewed by a witness for possible identification; or, he/she may be detained at the site of the stop and the witness taken there to view him/her. Transporting the witness to the site of the stop is preferred if circumstances permit.
7. Suspects should not be brought into a crime scene as contamination may result. For the same reason, clothing articles found at the crime scene should not be placed on or in contact with a suspect. A suspect should not be brought back to the home of a victim or witness unless that was the scene of the crime.
8. Police officers must not do or say anything that might convey to the witnesses that they have evidence of the suspect's guilt. Officers should turn down their radios so that the witness they are transporting does not pick up information about the stop of the suspect.
9. The suspect should be viewed by one witness at a time and out of the presence or hearing of other witnesses. Witnesses who have viewed the suspect should not be permitted to communicate with those who have not.
10. Where multiple witnesses are available to identify the subject, officers should permit the subject to be identified by only one or two. Once one or two witnesses have identified the subject during a show-up, further identifications should be attempted by means of a photo array or line-up.
11. Officers may transport victims or witnesses in police vehicles to cruise the area where a crime has just occurred in order for them to attempt to point out the perpetrator. While checking the area, officers must be careful not to make any statements or comments to the witnesses which could be considered suggestive.

12. Officers should make written notes of any identifications and any statements made by witnesses at the time of confrontation with the suspect. Once a witness has indicated his/her opinion regarding the identity of the subject, the officer should ask the witness how certain he/she is of the identification. Officers should ask the witness not to use a numerical scale, but rather to indicate certainty in his/her own words. All statements by the witnesses should be incorporated into the officers' report.

Preparing a Photo Array

1. Photo arrays should be shown to witnesses as soon as possible after the commission of a crime.
2. Include one suspect and seven fillers (non-suspects) in each array. Mark the back of each photo with numbers one through eight.
3. Try to use photographs of the same size and basic composition. Do not include more than one photograph of the same person.
4. Use a photo of the suspect that closely depicts his/her current appearance.
5. Select fillers who generally fit the witness' description of the offender. Avoid fillers who so closely match the suspect that a person familiar with the suspect would have difficulty distinguishing the filler.
6. Ensure that photos bear no markings indicating previous arrests.
7. Create a consistent appearance between the suspect and fillers with respect to any unique or unusual feature such as facial scars or severe injuries by adding or covering the feature.
8. Once the array has been assembled, examine it to ensure that nothing about the suspect's photo makes him/her stand out.
9. Consider changing the order of photos from one witness to the next, or when a witness asks to see the array a second time.
10. When showing a witness an array containing a new suspect, avoid using fillers from a previous array.

Showing a Photo Array

1. The procedure must be conducted in a manner that promotes reliability, fairness and objectivity.
2. Allow each witness to view the photographs independently, out of the presence and hearing of the other witnesses.

3. Never make suggestive statements that may influence the judgment or perception of the witness.

4. A second officer who is unaware of which photograph depicts the suspect should actually show the photographs. This technique, called blind administration, has been recommended by the National Institute for Justice, and is intended to ensure that the witness does not interpret a gesture or facial expression by the officer as an indication as to the identity of the suspect. The technique also allows the prosecution to demonstrate to the judge or jury at trial that it was impossible for the officer showing the photographs to indicate to the witness, intentionally or unintentionally, which photograph he/she should select.

5. The investigating officer or the second officer (the administrator) should carefully instruct the witness by reading from a departmental Photo Array Instruction Form, and the witness should be asked to sign the form indicating that he/she understands the instructions. The investigating officer and the administrator should also sign and date the form.

6. For the reasons above, the officers should explain to the witness that the officer showing the array does not know the identity of the people in the photographs. The investigating officer should leave the room while the array is being shown by the administrator.

7. The officer should show the photographs to a witness one at a time and ask the witness whether or not he/she recognizes the person.

8. When the witness signals for the next photograph, the officer should move the first photograph so that it is out of sight and ask the witness whether he/she recognizes the next photograph.

9. The procedure should be repeated until the witness has viewed each photograph. If the witness identifies a subject before all the photographs have been viewed, the officer should remind the witness that he/she is required to show the rest of the photographs.

10. If the witness fails to make an identification, but asks to view the array a second time, the officer administering the identification should ask the witness if he/she was able to make an identification from the original viewing. If the witness is unable to make an identification, but feels that it would be helpful to repeat the procedure, then it is permissible to show the entire array a second time. The order of the photographs should be shuffled before the array is shown for the second time. An array should not be shown more than twice.

11. If the witness identifies the suspect, the officer should ask the witness how certain he/she is of the identification. Officers should ask the witness not to use a numerical scale, but rather his/her own words.

12. The photo array should be preserved as evidence in the same configuration as when the identification was made.

13. If more than one witness is to view an array and a witness has already marked one of the photos, a separate unmarked array shall be used for each subsequent witness.

Line-ups

1. Line-ups shall be conducted under the direction of a detective supervisor, or in his/her absence the Chief of Police or the Deputy Chief and, when feasible, after consultation with the District Attorney's Office.

2. A suspect cannot be detained and compelled to participate in a line-up without probable cause to arrest.⁴ If a suspect refuses to participate in a line-up, the District Attorney's Office may be asked to apply for a court order to compel the suspect to cooperate.

3. Before any suspect who has been arraigned or indicted is shown to eyewitnesses in a line-up or other live identification procedure, he/she must be informed of his/her right to have an attorney present at the line-up and of his/her right to be provided with an attorney without cost if he/she is unable to afford such legal counsel. Unless a valid waiver is voluntarily and knowingly made, in writing if possible, no such identification may proceed without the presence of the suspect's attorney.⁵

4. Select a group of at least five fillers who fit the description of the subject as provided by the witness(es). Because line-ups will be administered by an officer who does not know the identity of the suspect, the fillers selected should not be known to the officer administering the line-up. In selecting line-up fillers, abide by the guidelines for photo array fillers as described above.

5. All persons in the line-up should carry cards that identify them only by number and should be referred to only by their number. As with photo arrays, each witness must view the line-up independently, out of the presence and hearing of the other witnesses.

6. The investigating officer should explain to the witness that a second officer (the line-up administrator) will be conducting the line-up, and that he/she does not know the identity of the people in the photographs.

7. The investigating officer should carefully instruct the witness by reading from a departmental Line-up Instruction Form, and the witness should be asked to sign the form indicating that he/she understands the instructions. The officer should also sign and date the form.

8. The investigating officer should leave the room while the line-up administrator conducts the line-up.

9. The line-up should be conducted so that the suspect and fillers do not actually line up, but rather so that they are displayed to the witness one at a time. This can be accomplished either by having them stand with their back to the witness and then face

the witness one at a time, or by having them enter the room individually and leave before the next one enters.

10. The procedure for showing the participants to the witness and for obtaining a statement of certainty is the same as for photo arrays. If practicable, the officer should record the procedure.

11. When an attorney for the suspect is present, the attorney should be permitted to make reasonable suggestions regarding the composition of the line-up and the manner in which it is to be conducted. Any suggestions made by the suspect's attorney should be included as part of the line-up report.

12. Allow counsel representing the accused sufficient time to confer with his/her client prior to the line-up. Once the line-up is commenced, attorneys should function primarily as observers and he/she should not be permitted to converse with the line-up participants, or with the witnesses, while the line-up is underway. The concept of blind administration requires that no one be present who knows the identity of the suspect. For this reason, the attorney should leave the room before the line-up begins.

13. The suspect's attorney is not legally entitled to the names or addresses of the witnesses attending a line-up if the suspect has not yet been arraigned or indicted.⁶ If an attorney in such a situation insists on having information about line-up witnesses, advise him/her to direct his/her request to the District Attorney's Office.

14. During a line-up, each participant may be directed to wear certain clothing, to put on or take off certain clothing, to take certain positions or to walk or move in a certain way.⁷ If officers are to ask the participants to wear an article of clothing, they must guard against circumstances where the article only fits the suspect. All line-up participants shall be asked to perform the same actions.

15. Line-up participants must not speak during the line-up. If identification of the suspect's voice is desired, a separate procedure must be conducted. (See section on voice identification below.)

16. After a person has been arrested, he/she may be required to participate in a line-up regarding the crime for which he/she was arrested.⁸ After arrest, a suspect may lawfully refuse to participate in a line-up only if he/she has a right to have counsel present (post arraignment/indictment) and the counsel is absent through no fault of the suspect or his/her attorney.

Voice Identification

1. Although considerably less common than visual identifications, voice identifications may be helpful to criminal investigations where the victim or other witness was blind, the crime took place in the dark, the subject was masked, the witness' eyes were covered by the perpetrator, or they were never in the same room with the perpetrator but heard his/her voice. If officers wish to conduct a voice identification procedure with a witness who also saw the subject, they must first consult with the a detective supervisor, or in his/her absence the Chief of Police or the Deputy Chief and, when feasible, the District Attorney's Office.

2. As with any in-person identification or confrontation, if the suspect has been arraigned or indicted, he/she has a right to the presence of counsel at the voice identification procedure.

3. Where a voice identification is attempted, the following procedures should be employed to the extent possible:⁹

a. As in a line-up, there should be at least six persons whose voices will be listened to by the witness; one-on-one confrontations should be avoided. Because line-ups will be administered by an officer who does not know the identity of the suspect, the fillers should not be known to the officer administering the procedure, and officers should abide by the guidelines for photo array and line-up fillers as described above;

b. The suspect and other participants shall not be visible to the witness; this can be done by using a partition, or by similar means;

c. All participants, including the suspect, shall be instructed to speak the same words in the same order;

d. The words recited by the participants shall not be the ones spoken by the offender during the crime; the line-up participants should speak neutral words in a normal tone of voice;¹⁰

e. When both a visual and voice line-up are conducted, the witness should be informed that the line-up participants will be called in a different order and by different numbers;¹¹

f. If there are two or more suspects of a particular crime, present each suspect to witnesses in separate line-ups. Different fillers should be used to compose each line-up.

4. As with any identification procedure, police officers should avoid any words or actions that suggest to the voice witness that a positive identification is expected or who they expect the witness to identify.

5. The investigating officer should carefully instruct the witness by reading from a departmental Voice Identification Line-up Instruction Form, and the witness should be asked to sign the form indicating that he/she understands the instructions. The officer should also sign and date the form. If practicable, the officer should record the procedure.

6. Adhere to the principles of blind administration as described above. As is the case with photo arrays and line-ups, the investigating officer should leave the room while the administrator conducts the procedure.

Courtroom Identification

Prior to conducting any courtroom identification procedure, officers should consult the District Attorney's Office. The same right to an attorney and the same due process considerations that apply to all other identification procedures also apply to station house and courtroom identifications.

1. If the suspect has been arraigned or indicted, he/she has a right to have counsel present at any in-person identification/confrontation.
2. Live confrontations and informal viewings of the suspect by witnesses must be conducted in such a manner as to minimize any undue suggestiveness.
3. Officers shall not state or suggest that the suspect has been arrested or booked or that he/she has made any confession or incriminating statement or that any incriminating evidence has been uncovered. The witness' identification, particularly if it takes place in a police station or courtroom, must be a result of his/her recollection of the appearance of the perpetrator and must not be unduly influenced by information or suggestions originating from the police.

Drawings and Identi-Kit Composites

An artist's sketch, computerized drawing, composite, or other depiction can sometimes aid an investigation, but are most effective when a witness has a good recollection of the offender's facial features. However, research has shown that a person selected based on resemblance to composite is more likely to be mistakenly identified. Additionally, building a composite has been shown to lower a witness' accuracy for identifying the original face.

Prior to attempting a sketch or composite, officers should take from the witness and document a full description of the offender.

1. A sketch prepared by a trained artist is preferred over a composite.
2. Sketches and composites should not be attempted prior to the showing of a photo array or line-up.
3. Once the sketch or composite has been completed, the witness should be asked to state in his/her own words how accurately the composite reflects how the suspect appeared during the crime and a report should be prepared regarding the sketch or composite procedure.
4. The fact that a suspect resembles a sketch or composite is not, without more, probable cause to believe that the suspect is the offender.

Mug Shots

When an investigation has failed to identify a suspect, it may be advisable to have eyewitnesses come to the police station to look through photographic files.

However, officers should not resort to this procedure until other investigative avenues have been exhausted.

1. Remove or hide any information on the photographs that might in any way influence the witness;
2. Ensure that the files contain only one photograph of each individual and that the photographs are reasonably current;
3. Do not refer to the photographs as “mug shots”;
4. If photographs of various formats are used, ensure that several of each format are used;
5. Permit the witness to look at a number of photographs before making his/her selection;
6. Do not call to the attention of the witness any particular photograph;
7. A report shall be filed following the procedure, regardless of whether an identification is made. The report should describe the photographs viewed by the witness(s).
8. Officers should be extremely cautious before charging a subject based on this type of identification alone.

Hypnotically Aided Identification

Hypnotically aided testimony is not admissible at trial. Memory recalled prior to hypnosis which was the subject of a hypnotic session may be excluded as hypnotically aided.¹² In light of the serious consequences which could result from asking or permitting a witness to undergo a hypnotic session, such a procedure shall not be undertaken until the entire matter has been reviewed by the Chief of Police or the Deputy Chief, the District Attorney's Office, and appropriate hypnosis experts.

¹ The Innocence Project

² *Com. v. Ellis*, 432 Mass. 746 (2000); *Com. v. Odware*, 429 Mass. 231, 235 (1999)

³ *Com. v. Storey*, 391 N.E.2d 898, 378 Mass. 312 (1979)

⁴ *Com. v. Bumpus*, 209 N.E.2d 167, 362 Mass. 672 (1972)

⁵ *Com. v. Torres*, 442 Mass. 554 (2004)

⁶ *U.S. v. Wade*, 388 U.S. 218 (1967)

⁷ *Id.*

⁸ *Id.*

⁹ *Com. v. Marini*, 378 N.E.2d 51, 375 Mass. 510 (1978)

¹⁰ *Id.*

¹¹ *Com. v. Demaria*, 703 N.E.2d 1203, 46 Mass. App. Ct. 114 (1999)

¹² *Com. v. Kater*, 447 N.E.2d 1190, 388 Mass. 519 (1983)

Instruction Card for Show-up Identification Attempt

- 1. You are going to be asked to view someone.**
- 2. The person who committed the crime may or may not be the person you are about to view.**
- 3. You should remember that it is just as important to clear innocent persons from suspicion as it is to identify the guilty.**
- 4. Regardless of whether or not you identify the person, we will continue to investigate the incident.**
- 5. When we are done, our procedures require me to ask you to state, in your own words, how certain you are of any identification.**
- 6. If you do select someone, please do not ask us questions about the person you have selected, as no information can be shared with you at this stage of the investigation.**
- 7. Regardless of whether you select a person, please do not discuss the procedure with any other witnesses in the case.**
- 8. Do you have any questions before we begin?**

If identification is made, ask “Without using a numeric scale, how certain are you?”

Voice Identification Line-up Instruction Form

1. You are being asked to listen to several people speak.
 - a. You will be hearing them one at a time.
 - b. Please listen to all of them.
 - c. They are in random order.
 - d. Please make a decision about each person before moving on to the next one.

2. The person who committed the crime may or may not be one of the people you are about to hear.

3. You should remember that it is just as important to clear innocent persons from suspicion as to identify the guilty.

4. The officer administering this procedure does not know whether any of the people were involved in the crime.

5. Please pay no attention to the content of the words spoken. They have been chosen at random.

6. Regardless of whether or not you select a person, the police department will continue to investigate the incident.

7. The procedure requires the officer to ask you to state, in your own words, how certain you are of any identification.

8. If you do select someone, please do not ask the officer questions about the person you have selected, as no information can be shared with you at this stage of the investigation.

9. Regardless of whether you select a person, please do not discuss the procedure with any other witnesses in the case.

10. Do you have any questions before we begin?

Witness Signature _____ Date _____

Officer Signature _____ Date _____

Administrator Signature _____ Date _____

If an identification is made:

Without using a numeric scale, tell me how certain you are.

Appendix F

DNA samples collected from persons whom the court has determined at arraignment there is probable cause to believe that the person has committed a felony in this state.

In 2009 the Vermont General Assembly passed Act No. 1 (S.13) an act relating to improving Vermont's sexual abuse response system. One of the many provisions of this act calls for the collection of DNA samples from persons whom the court has determined at arraignment there is probable cause to believe that the person has committed a felony in this state. This law takes effect July 1, 2011.

At the time of arraignment, the court shall set a date and time for the person to submit a DNA sample. Additional provisions for destroying the samples and the expunging of records have been instituted. They are:

- If the sample is taken post-arraignment, the felony charge which required the DNA sample is downgraded to a misdemeanor by the prosecuting attorney upon a plea agreement or the person is convicted of a lesser offense that is a misdemeanor other than domestic assault pursuant to 13 VSA 5401.
- If a sample was taken post-arraignment, the person is acquitted after a trial of the charges which required the taking of the DNA sample.
- If the sample was taken post-arraignment, the charges which required the taking of the DNA sample are dismissed by either the court or the state after arraignment unless the attorney for the state can show good cause why the sample should not be destroyed.

Working Group Meetings

Several meetings have been held to discuss the implementation of the law. One meeting was held with a larger group that included courts and corrections and two smaller meetings were held with law enforcement and a representative from the State's Attorney's discussing collection requirements. The Law Enforcement Advisory Board has also discussed the implementation strategies for collection.

The following points have been raised during these meetings.

- The Department of Corrections is involved with post adjudication sample collections and will not play a role in pre adjudication sample collections unless the offender is sent to a correctional facility.
- This law will result in the sample collections going from 1500 per year to 4500 per year.
- **The collection point** needs to be as close to the place of arraignment as possible. The further away you are the greater possibility that a system breakdown will occur. This is why the best place to collect the sample should be at the courts.
- Who will process the affidavit if someone refuses to submit to a sample? There is a right of refusal in the statute.
- The **electronic exchange of information** on offenders between VCIC and the Lab can occur today within an approximate 5 week window. It was felt this was too long and needs to be shortened to as close to real time as possible. The time period between probable cause being found and a change in the felony status of the crime may be short and thus will create problems for the lab if a delay in reporting the status occurs. An electronic exchange of information needs to be developed.

Overall Strategy

The strategies for implementation focus on sample collection and electronic arraignment and disposition reporting.

Sample Collection

Three alternatives have been developed for collecting samples.

1. The Sheriff's who generally have a presence in the courtroom should assume responsibility for this task and receive a budget for this work. Generally, this was meant with resistance from the Sheriff's collectively as they do not as a group want to be mandated to perform this function. Some Sheriff's would like to take on this task but as a group they could not come to consensus that this should be a mandated function.
2. A budget would be determined that would allow for a competitive bid process to select one or more persons or entities to perform this function. An appropriation would be needed and contracts written to those person's or entities that could best meet the need for the sample collections. This alternative was found to be the best alternative because it provides the greatest amount of flexibility in terms of allowing for different agencies, persons or entities to bid on the work and as the sample collection will be done in real time it will minimize the quality issues associated with sample collection.
3. The third alternative involves placing the sample collection responsibility with the agency that makes the felony arrest. This alternative would entail an officer from the agency either being at district court at the time of arraignment or at the time of arraignment, the court would set a time and date for the person to submit to the taking of a DNA sample. This was deemed not an acceptable alternative as it places an unfunded mandate on local or county agencies and provides the greatest opportunity for quality control problems to occur.

It should be noted that the quality issues mentioned above involve the potential delay in capturing samples, and the potential for an individual who is not the defendant to provide a sample.

Electronic arraignment and disposition reporting

A system needs to be developed that electronically collects arraignment and conviction data in as close to real time as possible. This information needs to be made available to the Forensic lab so that it can determine when samples can be destroyed and records expunged.

Implementation Strategy

The Department of Public Safety plan for implementation of the DNA sample collection provisions of S.13 includes the following.

- Seek *federal funding* to support the implementation of these provisions.

- New grants have been applied for and not received. *Equipment purchases* in the lab will be made, to the extent possible, out of existing laboratory federal grants.
- Seek a budget for the *collection procedures* that involve contracting for this service.
 - If no funds are procured the collection procedures will be the responsibility of the arresting agency.
 - The actual collection will take place in the same manner using the same forms as is currently being done for DNA sample collection.
 - This process will be refined as the program develops.
 - The Department of Corrections will perform the DNA sample collection for all those individuals who are returned to their custody.
- Seek a budget for *software* that will allow for the electronic real time capture of arraignment, and disposition information.
 - This should require approximately \$30,000. While this software is being purchased. The lab will work within the existing electronic and manual systems that are available to them. A close relationship with VCIC will have to be maintained. Quality issues and sampling removal errors may occur.
- Seek funding for a *new Administrative Assistant position* within the lab and continued funding for two existing chemist positions.
 - Continuation of funding for a chemist position whose federal funding will expire on December 31, 2010 is needed in order for the chemist to begin setting up the equipment and program so we can begin accepting samples on July 1, 2011.
 - The other chemist and administrative assistant will be included in the FY 12 budget process so these positions can be filled on or about July 1, 2011.

	FY 11 - Start-up	FY 12	Ongoing
Personnel - Salary and Benefits			
(1) Chemist	\$ 60,000	\$ 110,000	\$ 135,000
(1) Chemist		\$ 110,000	\$ 135,000
(1) Administrative Assistant		\$ 47,000	\$ 55,000
Contractual		\$ 150,000	\$ 150,000
Equipment			
Instruments/equipment	\$ 100,000	\$ 90,400	\$ 9,000
Reagents (4465X\$40)		\$ 178,600	\$ 178,600
Cabinets for storage		\$ 3,000	
Software Upgrades/enhancements		\$ 33,000	\$ 3,000
	\$ 160,000	\$ 722,000	\$ 665,600
Federal Funds Available	\$ 100,000	\$ -	\$ -
Total	\$ 60,000	\$ 722,000	\$ 665,600

Appendix G

Report on Human Trafficking

TO: Law Enforcement Advisory Board
FROM: Commissioner Thomas R. Tremblay
SUBJECT: Report on Human Trafficking in Accordance with S.272
DATE: January 4, 2011

In accordance with S.272 (See Attached) I offer the following report to the Law Enforcement Advisory Board (LEAB) on the status of efforts by Vermont law enforcement to respond to issues regarding the crime of human trafficking and what recommendations, if any, should be made the general assembly in order to respond more effectively. Following my report, and in accordance with S.272, the LEAB shall include its findings and recommendations, based upon the Commissioner's report, in its annual report to the General Assembly and Governor as required pursuant to 24 V.S.A. § 1939(d).

Vermont Law Enforcement needs to become more aware, better educated and develop a response plan for the growing state, national and international crime of Human Trafficking. Human trafficking includes both sexual servitude and labor servitude and can involve both minors and adults. Human Trafficking is a very complex crime that can and will occur within a local or state jurisdiction, but often involves crossing state, national and international borders. As a result there is a need for a coordinated local, county, state and federal law enforcement response that will involve both state and federal prosecutors' offices. The coordinated law enforcement response would benefit from having an updated state law that corresponds with current federal law that would allow for greater protection and services for the victim, the opportunity to further the investigation across borders, and create prosecutable cases that will bring the offenders to justice.

I make the following recommendations to the LEAB:

1. The Vermont Police Chiefs and Sheriffs Associations have agreed that Vermont Law Enforcement needs to complete an awareness training program for all Vermont law Enforcement Officers. The agreed upon training program is the International Association of Chiefs of Police training developed in cooperation with the Office on Violence Against Women titled "The Crime of Human Trafficking – A law Enforcement Guide to Identification and Investigation". This training is a video series and training guide that is recognized and endorsed by national human trafficking law enforcement experts. This training should also be introduced at the Vermont Police Academy for the basic recruit class.

2. Local, county, state and federal Vermont law enforcement should work together to develop an investigative response team and investigative protocol that can be enacted when a crime of human trafficking is suspected in Vermont. The LEAB should consider creating a subcommittee tasked with developing the response team and investigative protocol.

3. Response team members should receive advanced training in the investigation of human trafficking crimes and be available to leave their current assignments to respond to reports of Human Trafficking. With the current workload and the stage of development of the regional Special Investigation Units (SIUs), personnel assigned to SIUs should not be assigned as human trafficking response team members, and more importantly, the responsibilities of human trafficking should not fall on the SIUs.

4. The Human Trafficking Task Force (See Attached Members List) was enacted as part of S.272 and has been working diligently to fulfill their obligations of S.272. Vermont Law Enforcement should support the work and recommendations of the Human Trafficking Task Force, including the creation of a new state law (See Attached).

S.272

Sec. 3. LAW ENFORCEMENT ADVISORY BOARD

(a) On or before November 15, 2010, the commissioner of public safety shall report to the Law Enforcement Advisory Board on the status of efforts by Vermont law enforcement to respond to issues regarding the crime of human trafficking and what recommendations, if any, should be made to the general assembly in order to respond more effectively to those issues.

(b) Prior to making this report, the commissioner shall consult with the following groups:

- (1) a representative of the Vermont association of chiefs of police;
- (2) a representative of the Vermont sheriffs' association;
- (3) the attorney general, or his or her designee from the criminal division;
- (4) a state's attorney, appointed by the executive director of the department of state's attorneys and sheriffs;
- (5) a representative from the Vermont center for crime victim services;
- (6) a representative from the network against domestic and sexual violence;
- (7) a representative from the coalition of Vermonters against slavery today;
- (8) the executive director of the Vermont police academy or his or her designee;
- (9) the United States' attorney for Vermont or his or her designee;
- (10) representatives from federal law enforcement agencies in Vermont;
- (11) the human trafficking task force; and
- (12) any other groups or individuals the commissioner deems appropriate.

(c) The Law Enforcement Advisory Board shall include its findings and recommendations, based upon the commissioner's report, in its annual report to the general assembly and governor as required pursuant to 24 V.S.A. § 1939(d).

Appendix G

H. 470 Compliance Working Groups

H. 470 Compliance Working Groups

The relevant portions of H. 470 are outlined below along with committee assignments:

Sec. 238c. PRESERVATION OF EVIDENCE

Sec. 238c. PRESERVATION OF EVIDENCE

(a)(1) The general assembly finds that it is in the interest of justice that Vermont establish a system for the preservation of any item of physical evidence containing biological material that is secured in connection with a criminal case or investigation by the government entity having custody of the evidence for the period of time that:

- (A) the statute of limitations has not expired for a crime that remains unsolved; and*
 - (B) a person remains incarcerated, on probation or parole, or subject to registration as a sex offender in connection with a criminal case.*
- (2) For purposes of this section, criminal case or investigation shall include only the following offenses:*
- (A) arson causing death as defined in 13 V.S.A. § 501;*
 - (B) assault and robbery with a dangerous weapon as defined in 13 V.S.A. § 608(b);*
 - (C) assault and robbery causing bodily injury as defined in 13 V.S.A. 608(c);*
 - (D) aggravated assault as defined in 13 V.S.A. § 1024;*
 - (E) aggravated murder as defined in 13 V.S.A. § 2311 and murder as defined in 13 V.S.A. § 2301;*
 - (F) manslaughter as defined in 13 V.S.A. § 2304;*
 - (G) kidnapping as defined in 13 V.S.A. § 2405;*
 - (H) unlawful restraint as defined in 13 V.S.A. § 2406 or 2407;*
 - (I) maiming as defined in 13 V.S.A. § 2701;*
 - (J) sexual assault as defined in 13 V.S.A. § 3252(a)(1) or (a)(2);*
 - (K) aggravated sexual assault as defined in 13 V.S.A. § 3253.*
 - (L) burglary into an occupied dwelling as defined in 13 V.S.A. § 1201(c); and*
 - (M) lewd and lascivious conduct with a child as defined in 13 V.S.A. § 2602.*
- (3) For purposes of this section, “biological evidence” means:*
- (A) a sexual assault forensic examination kit; or*
 - (B) semen, blood, saliva, hair, skin tissue, or other identified biological material.*

(b) The Vermont Law Enforcement Advisory Board shall develop a proposal for implementation of this section and present it to the senate and house committees on judiciary no later than January 15, 2011.

(c) The department of public safety, the department of buildings and general services, the police chiefs’ association, and the sheriffs’ association shall develop a proposal for establishing one or more facilities for retention of items of physical evidence containing biological material that is secured in connection with a criminal case or investigation. Such

facilities would be available for use by all Vermont law enforcement agencies. The proposal shall be presented to the senate and house committees on judiciary, the house committee on corrections and institutions, and the senate committee on institutions no later than January 15, 2011.

Chair – Paco Aumand
VSP Representative – Lt. JP Sinclair and Capt. David Covell
Sheriff’s Representative – Roger Marcoux
Burlington PD Representative – Deputy Chief Walt Decker
BGS Representative – Wanda Minoli
Lab Representative – Eric Buel
State’s Attorney Representative – Thomas Kelly
Dept. of State’s Attorney’s – Jim Mongeon

***Sec. 238d. RECORDING CUSTODIAL INTERROGATIONS;
ADMISSIBILITY OF DEFENDANT’S STATEMENT***

(a) It is the intent of the general assembly that on and after July 1, 2012, a law enforcement agency shall make an audio or an audio and visual recording of any custodial interrogation of a person when it is conducted in a place of detention after the person is arrested in relation to the investigation or prosecution of a felony.

(b) The Vermont Law Enforcement Advisory Board shall develop a proposal for implementation of this section and present it to the senate and house committees on judiciary, the house committee on corrections and institutions, and the senate committee on institutions no later than January 15, 2011. The proposal shall address the costs associated with purchasing, installing, and maintaining audio and visual recording as required by this section.

(c) In the first year of the 2011–2012 biennium, the senate and house committees on judiciary shall consider the proposal required by subsection (b) of this section for the purpose of enacting statutes by the date of adjournment in 2012 to implement a plan for audio and visual recording of any custodial interrogation of a person when it is conducted in a place of detention after the person is arrested in relation to the investigation or prosecution of a felony.

Chair – Tom Hanley
VSP Representative – Lt. Todd Illingworth and Lt. Tim Cloutre and Capt. David Covell
Burlington PD Representative – Deputy Chief Walt Decker
Sheriff’s Representative – Roger Marcoux
S. Burlington PD Representative – Lt. James Gosslin
State’s Attorney Representative – David Fenster
Attorney General’s Office Representative – John Treadwell

Sec. 238e. EYEWITNESS IDENTIFICATION BEST PRACTICES

(a) The general assembly finds that eyewitness misidentification remains the single largest contributing factor to wrongful conviction. According to the Innocence Project, there are

currently 249 DNA exonerations across the nation, and in nearly 80 percent of them, there was at least one misidentification.

(b) A statewide study committee created by No. 60 of the Acts of 2007 reported that the Vermont police academy currently teaches best practices regarding eyewitness identification.

(c) To ensure that law enforcement agencies statewide are employing best practices with regard to eyewitness identification, the Vermont Law Enforcement Advisory Board shall practices that are well suited for Vermont and its many small rural law enforcement agencies, including consideration of conditions for the use and administration of show-ups, use of blind administrators for lineups, proper filler selection in live or photo lineups, instructions for eyewitnesses prior to a live or photo lineup, and confidence statements from Vermont Law Enforcement Advisory Board shall present its proposal to the senate and house committees on judiciary, the house committee on corrections and institutions, and the senate committee on institutions no later than January 15, 2011. The proposal shall address the costs associated with purchasing, installing, and maintaining audio and visual recording as required by this section.

This group will need more time to work on the findings of the LEAB

Chair – Jim Coons

VSP Representative – Lt. Tim Oliver and Capt. David Covell

Sheriff's Representative - Roger Marcoux

Burlington PD Representative – Deputy Chief Walt Decker

Dept. of State's Attorney's – Jim Hughes

Attorney General's Office Representative – John Treadwell

VLCT Representative – Corey Gustafson

VCJTC – Jim Baker or designee