



STATE OF WISCONSIN
OFFICE OF THE ATTORNEY GENERAL
WISCONSIN DEPARTMENT OF JUSTICE
BUREAU OF TRAINING AND STANDARDS FOR
CRIMINAL JUSTICE



MODEL POLICY AND PROCEDURE FOR EYEWITNESS IDENTIFICATION

INTRODUCTION

In order to implement the most reliable method for the collection of eyewitness evidence, this model policy and procedure recommends that law enforcement officials conduct double-blind, sequential photo arrays and lineups with non-suspect fillers chosen to minimize suggestiveness, non-biased instructions to eyewitnesses, and assessments of confidence immediately after identifications.

This policy is designed to ensure that the highest quality evidence possible is obtained from eyewitnesses. For some of the policy objectives, there is no one right method for implementing the principles. Some methods will require more resources and effort than others. Recognizing that not all law enforcement agencies have the same resources or face the same local challenges, these guidelines, where appropriate, provide alternative procedures designed to allow individual agencies to adapt procedures that best meet local circumstances.

This model and its associated recommendations were written to provide information regarding legal requirements and best practices surrounding collection and preservation of eyewitness evidence. No one document can address all the circumstances and/or exigencies that are encountered in the field. This model and guidelines are not intended to be a comprehensive treatment of all of the factors involved in criminal investigation. Rather, it is a general policy and procedural guide outlining methods for collecting and preserving evidence. Readers should keep in mind that the information and procedures presented here are intended to be used as guidelines when encountering circumstances and factors not specifically covered. These recommendations are not intended to create, do not create, and may not be relied on to create, any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

EYEWITNESS IDENTIFICATION POLICY

Eyewitness¹ identification has always been a powerful tool for investigating and prosecuting criminal cases. Eyewitness evidence can be the most important and convincing evidence in a case. Research and nationwide experience have demonstrated that eyewitness evidence can be a particularly fragile type of evidence, and that eyewitnesses can be mistaken. Eyewitnesses can make significant identification errors, but those errors can be difficult to detect, because the witnesses are sincere and have no motive to lie. When wrong, they usually are not being deceitful, but just simply mistaken.

Recent studies of eyewitnesses and human memory have suggested that eyewitness evidence is much like trace evidence left at a crime scene.² Like trace evidence, eyewitness memory is an imprint left in the mind of the witness. But also like trace evidence, it is susceptible to contamination if not handled properly. The result can be failure to identify the true perpetrator or erroneous identification of an innocent person.

Recently, scientific research has uncovered psychological factors that can cause well-meaning eyewitnesses to make mistakes, and has shown that new methods of conducting eyewitness procedures can address these factors and reduce error.³ These new methods represent the best techniques for accurately capturing and preserving eyewitness memories, thereby enhancing the reliability of criminal investigations and prosecutions.

Eyewitness errors have been linked to two psychological factors: 1) unintentional suggestion to witnesses,⁴ and 2) the ‘relative judgment process’,⁵ which refers to the tendency when viewing a simultaneous presentation (viewing an entire photo array or lineup at once) for eyewitnesses to identify the person who looks the most like the real perpetrator relative to the other people. When the real perpetrator is not in the array, the relative judgment process can lead to misidentification.

¹ In this document, the term ‘eyewitness’ is often synonymous with ‘victim.’

² Wells, G.L., et. al. “Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads,” *Law and Human Behavior*, Vol. 22, No. 6, p. 14, 1998.

³ Wells, G.L. and Olson, E.A. “Eyewitness Testimony.” *Annual Review of Psychology*, Vol. 54, p. 286-289, 2003.

⁴ See footnote 3 at 289.

⁵ See footnote 3 at 286.

The following model procedures address these causes of eyewitness error in a number of ways, but most prominently by recommending the following:

- 1) Utilize non-suspect fillers chosen to minimize any suggestiveness that might point toward the suspect;
- 2) Utilize a ‘double blind’ procedure, in which the administrator is not in a position to unintentionally influence the witness’s selection;
- 3) Give eyewitnesses an instruction that the real perpetrator may or may not be present and that the administrator does not know which person is the suspect;
- 4) Present the suspect and the fillers sequentially (one at a time) rather than simultaneously (all at once). This discourages relative judgment and encourages absolute judgments of each person presented, because eyewitnesses are unable to see the subjects all at once and are unable to know when they have seen the last subject;
- 5) Assess eyewitness confidence immediately after identification;
- 6) Avoid multiple identification procedures in which the same witness views the same suspect more than once.

Scientific Rationale for Major Recommendations

1) Photo arrays and lineups should be constructed with non-suspect fillers chosen to minimize any suggestiveness that might point toward the suspect.

Unintentional suggestion can lead an eyewitness to identify a particular individual in a photo array or lineup. This can occur if one individual stands out from the others due to the composition of the array or lineup.⁶ For instance, if one of the individuals in the array or lineup has unique facial hair or is photographed with a different background, that person may stand out from the others and may be identified or excluded due to that distinguishing characteristic.

Additionally, suggestion can occur if the suspect is the only person in the array or lineup who resembles the witness’s description of the perpetrator.⁷ Therefore, non-suspect fillers should generally be chosen to match the witness’s description of the perpetrator. If a person who has never seen the perpetrator would be able to guess which person in the array or lineup is the suspect based on knowing only the eyewitness’s description of the perpetrator, then the non-suspect fillers may not sufficiently match the description of the perpetrator.⁸

⁶ See Footnote 2 at 23-27.

⁷ See Footnote 2 at 24-27.

⁸ See Footnote 2 at 24-27.

2) *Photo arrays and lineups should use a ‘double blind’ procedure, in which the administrator is not in a position to unintentionally influence the witness’s selection. Individual agencies are free to devise methods for meeting this recommendation consistent with their own staffing and resource constraints.*

Research has demonstrated that human beings, when conducting experiments in any context in which they know the desired or correct outcome, often unwittingly cue the subject of the experiment or misinterpret the results of the experiment based on their knowledge of the desired or correct outcome—even despite their best efforts not to do so.⁹ For this reason, it is a fixture of scientific and medical research that the person conducting the experiment must be ‘blind’ to the desired or correct outcome. For example, in a study of a given drug’s effectiveness, no researcher administering the drug to a subject is allowed to know whether the subject is being given the real drug or a placebo, because administrators’ expectations can affect both how the subject responds to the substance he/she is given and how the administrator interprets the subject’s response. Researchers have learned that the same principle applies to photo array and lineup procedures.¹⁰ Simply stated, if the administrator of a photo array or lineup does not know the identity of the suspect, he/she cannot provide any cues to the eyewitness. This recommendation does not presume any deliberate impropriety by law enforcement officers. It merely recognizes the potential for unintentional suggestion.

3) *Witnesses viewing photo arrays and lineups should be instructed that the real perpetrator may or may not be present and that the administrator does not know which person is the suspect.*

At first glance, it might seem that informing an eyewitness that the perpetrator may or may not be present in an array or lineup would be stating the obvious. However, eyewitnesses may feel pressure to identify someone from a lineup or array because they believe the police would not be presenting the individuals if all were innocent. When the true perpetrator is not present, this tendency may influence eyewitnesses to identify an innocent person. Studies show that telling the witness that the perpetrator may or may not be present counteracts the tendency to identify the person who looks the most like the perpetrator and reduces mistaken identification rates by as much as 41.6%.¹¹ Telling witnesses that the administrator does not know who the suspect is will also help prevent witnesses from mistakenly looking to the administrator for cues about which person is the perpetrator.

⁹ See Footnote 2 at 21-22.

¹⁰ See footnote 3 at 289 and footnote 2 at 21-22.

¹¹ See footnote 3 at 286-7.

4) *Witnesses viewing photo arrays and lineups should view the suspect and fillers one at a time (sequentially) rather than all at once (simultaneously).*

When witnesses are given a simultaneous presentation of multiple photographs or lineup subjects, they tend to make relative judgments, comparing one person to the next and identifying the person who looks the most like the actual perpetrator.¹² Obviously, this tendency does not pose a problem if the perpetrator is present in the array—because if the perpetrator is present, selecting the person who looks the most like the perpetrator will lead to selecting the correct person. However, when the perpetrator is absent from the array, witnesses still tend to make identifications of the person in the array who looks the most like the suspect. If the perpetrator is absent from the array, that person will be a filler or an innocent suspect. To overcome this tendency, researchers have learned that presenting subjects one at a time—sequentially—helps witnesses to make absolute judgments rather than comparative ones. Studies show that witnesses given a simultaneous presentation make approximately twice as many identifications of innocent people as witnesses shown a sequential presentation.¹³ There is some indication that the number of accurate identifications of actual perpetrators diminishes slightly with a sequential presentation, but much of this is largely the effect of pure guessing inherent in the relative judgment process. Therefore, research suggests that the value of identifications made under sequential presentations is significantly greater than those made under simultaneous presentations.

5) *Eyewitnesses' confidence should be assessed immediately after identification.*

An eyewitness's statement of confidence in identification can be very important evidence at trial. However, confidence is particularly susceptible to influence by information provided to the witness after the identification process. Research shows that information provided to a witness after an identification suggesting that the witness selected the right person can dramatically, yet artificially, increase the witness's confidence in the identification.¹⁴ Even worse, this effect is greater for eyewitnesses who receive positive feedback after misidentifications than for eyewitnesses who receive positive feedback after accurate identifications.¹⁵ To protect against artificially inflated confidence levels, it is imperative that the witness's confidence in identification be recorded immediately after an identification procedure to prevent influence from information learned after the procedure.

¹² See footnote 3 at 288.

¹³ See footnote 3 at 288.

¹⁴ Wells, G.L. and Bradfield, A.L. "Good, You Identified the Suspect': Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience." *Journal of Applied Psychology*, Vol. 83, p. 360-76, 1998.

¹⁵ Bradfield, A.L., Wells, G.L., Olson, E.A.. "The Damaging Effect of Confirming Feedback on the Relation between Eyewitness Certainty and Identification Accuracy." *Journal of Applied Psychology*, Vol. 87, p. 112-20, 2002.

6) *Avoid multiple identification procedures in which the same witness views the same suspect more than once.*

The practice of conducting multiple identification procedures with the same witness and the same suspect should ordinarily be avoided because of the potential for suggestiveness and the potential to contaminate a witness's memory.¹⁶ An eyewitness viewing a second procedure with the same suspect may believe that the suspect's presence in both procedures suggests that authorities believe the suspect is the perpetrator. Or, an eyewitness may become confused and identify the suspect based on recognizing him/her from the prior procedure rather than from remembering the suspect's presence at the crime. In either case, the suggestiveness of the second procedure may taint the eyewitness. Therefore, eyewitness identification procedures should be approached with the understanding that officers have one opportunity to conduct an eyewitness procedure. Except in unusual cases, conduct only one identification procedure—the most reliable procedure available under the circumstances—in which the same suspect views the same witness once.

¹⁶ See Hinz, T. & Pezdek, K. "The Effect of Exposure to Multiple Lineups on Face Identification Accuracy." *Law and Human Behavior*, Vol. 25, p. 185-198, 2001; Gorenstein, G.W. & Ellsworth, P.C. "Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness." *Journal of Applied Psychology*. Vol. 65, No. 5, p. 616, 1980.

PROCEDURE FOR PHOTO ARRAYS

Consistent with the policy described previously, a double-blind, sequential presentation is recommended for all photo arrays. However, if a simultaneous presentation is used, it is still important to follow a double-blind procedure, select non-suggestive fillers, and properly instruct the witness. The double-blind requirement may be met in different ways, and individual departments are encouraged to devise appropriate methods that accommodate staffing and resource considerations. These procedures outline two ways to meet the requirement-- with an independent administrator or with a folder system.

METHOD #1: The photo array is conducted by an independent administrator, someone who does not know the suspect's identity.

1. Gather Photographs. This step should be conducted by the investigating officer. In total, gather one suspect's photo, a minimum of five filler (non-suspect) photos, and at least two blank photos.

a. Suspect's Photo.

i. Multiple Suspects. If there are multiple suspects, include only one suspect's photo in the array.

ii. Multiple Photos of the Suspect. If multiple photos of the suspect are available, choose the photo that most resembles the suspect's appearance at the time of the crime. If you do not know what the suspect looked like at the time of the crime, choose the photo that most resembles the description of the perpetrator.

b. Filler Photos.

i. Number of Fillers. Whenever possible, include a minimum of five fillers in each array. Since increasing the number of fillers tends to increase the reliability of the procedure, include as many above the minimum as desired.

ii. Resemblance of Fillers to Suspect. In general, fillers should resemble the witness's *description* of the perpetrator in significant features (such as face, profile, height, weight, age, build, posture, hair and facial hair, specific articles of clothing, etc., to the extent applicable to the photos being used) or, in cases where a composite was used, fillers should resemble the composite. If a person who has never seen the perpetrator would be able to pick out the suspect from the array based on knowing only the description of the perpetrator given by the eyewitness, then the fillers may not sufficiently resemble the description of the perpetrator.

A. For instance, if the perpetrator was described as having an unusual identifying mark, all fillers should have similar markings or all photos should include similar coverings over the described area.

B. When there is an inadequate description of the perpetrator, or when there is a suspect whose appearance differs from the description of the perpetrator, fillers should resemble the *suspect* in significant features.

iii. Set Aside Lead Filler. Set aside one filler, so that the administrator will know to place it in the lead position.

Explanation: Research suggests witnesses are reluctant to identify someone in the first position and, if that person is the perpetrator, he/she may go free and a misidentification may result.

c. Blank Photos. Set aside two blank photos, so that the administrator will know to place them at the end of the array.

Explanation: Research suggests witnesses should not know when they are viewing the last photo. Witnesses who believe they are viewing the last photo may feel a heightened need to make an identification. Blanks after the last photo will prevent the witnesses from knowing when they are looking at the last photo.

d. Assess the Array. Make sure that no person stands out from the rest.

2. Put Photographs in Order.

Key Principle: Bring in an independent administrator-- someone who does not know who the suspect is-- to conduct the procedure.

a. Arrange the Photos. Give the administrator the suspect's photo and the remaining filler photos. Do not tell the administrator which photo is the suspect's. Have the administrator mix these photos and place them after the lead filler photo and before the two blank photos. Then have the administrator number all the photos in the series.

3. Conduct the Array.

a. Videotape or Audiotape the Identification Procedure. If practical, videotape or audiotape the entire photo identification procedure. Videotaping is preferable. For information on videotaping and audiotaping procedures, see the Wisconsin Department of Justice's Physical Evidence Handbook, p. 42-44 & 53-56.

b. Restrict Availability of Other Results to Witness. Ensure that no writings or information concerning previous identification results are visible to the witness.

c. Presence of Persons Aware of Suspect's Identity. No one should be present during the photo array procedure who knows the suspect's identity.

d. Witness's Awareness of Number of Photos. The witness should not know how many photos will be shown.

e. Instruct the Witness. The photo array administrator should give the witness a written copy of the following instruction and should read the instruction aloud at the beginning of each identification procedure:

In a moment, I am going to show you a series of photos. The person who committed the crime may or may not be included. I do not know whether the person being investigated is included. Even if you identify someone during this procedure, I will continue to show you all photos in the series.

Keep in mind that things like hair styles, beards, and mustaches can be easily changed and that complexion colors may look slightly different in photographs.

You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator.

The photos will be shown to you one at a time and are not in any particular order. Take as much time as you need to look at each one. After each photo, I will ask you "Is this the person you saw [insert description of act here]?" Take your time answering the question. If you answer "Yes," I will then ask you, "In your own words, can you describe how certain you are?"

Because you are involved in an ongoing investigation, in order to prevent damaging the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the way the photo array procedure will be conducted and the other instructions I have given you?

Witnesses should then be asked to read the following additional paragraph and sign and date below. (Some witnesses may decline to sign. When a witness declines to sign, it is sufficient for the investigating officer to document that the witness was appropriately instructed.)

I have read these instructions, or they have been read to me, and I understand the instructions. I am prepared to review the photographs that will be presented to me, and I will follow the instructions provided on this form.

f. Present the Photos. Present each photo to the witness separately, in order. When the witness is done viewing the photo, have the witness hand the photo back.

g. Question the Witness. After the witness has looked at a photo and handed it back to you, ask the witness: "Is this the person you saw [insert description of act here]?" If the witness answers "Yes," ask the witness, "In your own words, can you describe how certain you are?"

h. Document the Witness's Responses. As stated previously, videotaping or audiotaping the entire identification procedure is recommended. Whether or not this is possible, document the witness's response using the witness's own words when possible.

1. After identification, a follow-up interview should assess any relevant factors that support the identification, such as: special facial features, hair, marks, etc.

i. Show All Photos to the Witness. Even if the witness makes an identification, show the witness the next photo until you have gone through all the photographs. If a witness asks why he/she must view the rest of the photos despite already making an identification, simply tell the witness that the procedure requires the officer to show the rest of the photos.

Explanation: Showing all photos in the series ensures that the photo array procedure will reveal as much information as possible. For instance, a witness may make an identification of an early photo, but then change his/her mind after viewing a later photo. This change supplies important information about both the suspect and the witness.

j. Commenting on Selection and Outcome. Do not give the witness any feedback regarding the individual selected or comment on the outcome of the identification procedure in any way. Be aware that witnesses may perceive such things as unintentional voice inflection or prolonged eye contact, in addition to off-handed words or phrases, as messages regarding their selection. Avoid casual comments such as “very good.” Be polite but purposeful when you speak.

k. Request for Additional Viewing. Only upon request of the witness, the witness may view one or more of the photos again after the first photo procedure has been completed. If this occurs, it must be thoroughly documented. The administrator should never suggest an additional viewing to the witness.

Explanation: Allowing a witness to view an array a second time converts the procedure from a sequential to a quasi-simultaneous array, thereby risking the benefits of the sequential procedure. In the interest of facilitating an identification, a witness who asks to see the array a second time may be permitted to do so, but because this can diminish the reliability of the identification it should not be offered without request.

l. Alteration of Materials by Witness. Ensure that if the witness writes on, marks, or in any way alters identification materials, those items are not used in subsequent procedures.

4. Document Procedures and Results.

a. Have the Witness Sign and Date the Results. Once the procedure is completed, show the witness the written record of the results, and ask the witness to sign and date that record.

b. Preserve the Photos. Preserve the photos and the order in which they were presented to the witness.

c. Document the Procedure. The administrator should document:

- the administrator’s name
- the procedure employed
- date, time, and location of the procedure
- the total number of filler photos and blank photos
- names of persons present during the array

-if additional viewing occurred

5. Procedures for Multiple Suspects or Multiple Witnesses.

- a. No Communication Between Witnesses. To the extent possible, prevent witnesses from conferring with each other before, during, and after the photo array procedure.
- b. Separate Instructions. Each witness should be instructed outside the presence of the other witnesses.
- c. Showing the Same Suspect to a New Witness. If you need to show the same suspect to a new witness, have the administrator remix all but the lead filler and the two blank photos and renumber them accordingly.

Explanation: Placement in this way reduces any possibility that a subsequent witness identifies someone based on the position number communicated to them by a previous witness.

- d. Showing a Different Suspect to the Same Witness. When showing a different suspect to the same witness, do not reuse the same fillers from a previous array shown to that witness.
- e. Multiple Arrays with Same Suspect and Same Witness. Avoid multiple identification procedures in which the same witness views the same suspect more than once. Should you decide to do more than one identification procedure you are likely to be called upon to clarify and/or justify the action.

Explanation: Showing a witness the same suspect in more than one photo array can be highly suggestive and can influence the witness to pick out that suspect based on remembering the suspect from the first identification procedure, rather than from the crime.

METHOD #2: The photo array is conducted by the investigating officer, but with safeguards to ensure that the investigating officer is not in a position to unintentionally influence the witness's selection.

In some situations, it may be difficult to have an independent administrator conduct the array. In those situations, the investigating officer may conduct the array, but only with safeguards to ensure that he/she is not in a position to unintentionally influence the witness's selection. Departments are encouraged to come up with their own methods for meeting this recommendation. One option is to use a computer to randomly present the photos to the witness out of view of the investigator. A simpler and less expensive alternative is the folder system, described below.

1. Gather Photographs. Follow the procedures described in Method #1 for gathering one photo of the suspect, at least five filler photos, and at least two blank photos. Since increasing the number of fillers tends to increase the reliability of the procedure, include as many above the minimum as desired.

2. Prepare the Folders.

a. Gather Folders. Gather folders, each large enough to hold and fully conceal one photograph.

b. Set Aside Lead Filler. Place a filler's photograph in one folder and set that folder aside.

c. Set Aside Two Empty Folders. Take two of the empty folders and set them aside, separate from the filler folder that you have set aside.

d. Place the Other Photos in Folders. Randomly place the other photos (of the suspect and remaining fillers) into the remaining empty folders, one photograph per folder.

e. Shuffle the Folders. Shuffle the folders you are holding, so that you no longer know which folder contains the suspect's photo.

Explanation: This ensures that you will not be in a position to unintentionally influence the witness's selection.

f. Lead with Filler Photo. Place the single photo containing a filler-- the one you set aside earlier-- on the top of your pile.

Explanation: Witnesses are reluctant to identify someone in the first position and, if that person is the suspect, a failure to identify the perpetrator or a misidentification may result.

g. End with Empty Folders. Place the empty folders- the ones you set aside earlier- at the bottom of your pile.

Explanation: You do not want the witness to know when he/she is viewing the last photo. Witnesses who believe they are viewing the last photo may feel a heightened need to make an identification.

h. Number the Folders.

3. Conduct the Array.

a. Videotape or Audiotape the Identification Procedure. If practical, videotape or audiotape the entire identification procedure. Videotaping is preferable. For information on videotaping and audiotaping procedures, see the Wisconsin Department of Justice's Physical Evidence Handbook, p. 42-44 & 53-56.

b. Restrict Availability of Other Results to Witness. Ensure that no writings or information concerning previous identification results are visible to the witness.

c. Bring in the Witness. Seat the witness at a desk or table or otherwise provide a comfortable environment.

d. Position Yourself. Position yourself close enough to the witness to verbally communicate with him/her but in a place where the witness will be able to open a folder and look at the photo without your being able to see the photo.

Explanation: This will make it impossible for you to unintentionally communicate information to the witness about which folder contains the suspect's photo.

e. Instruct the Witness. Give the witness a written copy of the following instruction sheet and read the instruction aloud:

The folders in front of you contain photos. In a moment, I am going to ask you to look at the photos. The person who committed the crime may or may not be included in the photos. Although I placed the photos into the folders, I have shuffled the folders so that right now I do not know which folder contains a particular photo.

Even if you identify someone during this procedure, I will continue to show you all photos in the series.

Keep in mind that things like hair styles, beards, and mustaches can be easily changed and that complexion colors may look slightly different in photographs.

You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator.

You will look at the photos one at a time and, since I have shuffled them, they are not in any particular order. When you open a folder, please open it in a manner that does not allow me to see the photo inside the folder. Take as much time as you need to look at each one. When you have finished looking at a photo, close the folder and hand it to me. I will then ask you, "Is this the person you saw [insert description of act here]?" Take your time

answering the question. If you answer "Yes," I will then ask you, "In your own words, can you describe how certain you are?"

Because you are involved in an ongoing investigation, in order to prevent compromising the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the way the photo array procedure will be conducted and the other instructions I have given you?

Witnesses should then be asked to read the following additional paragraph and sign and date below. (Some witnesses may decline to sign. When a witness declines to sign, it is sufficient for the investigating officer to document that the witness was appropriately instructed.)

I have read these instructions, or they have been read to me, and I understand the instructions. I am prepared to review the photographs, and I will follow the instructions provided on this form.

f. Give the Witness the Folders. Hand the witness the folders one at a time.

g. Question the Witness. After a witness has looked at a photo and handed the folder back to you, ask the witness: "Is this the person you saw [insert description of act here]?" If the witness answers "Yes," ask the witness, "In your own words, can you describe how certain you are?"

h. Document the Witness's Responses. As previously stated, videotaping or audiotaping the entire identification procedure is recommended. Whether or not this is possible, document the witness's response using the witness's own words when possible.

1. After identification, a follow-up interview should assess any relevant factors that support the identification, such as: special facial features, hair, marks, etc.

i. Show Every Folder. Even if the witness makes an identification, hand the witness the next folder until you have gone through all the folders containing photographs. If a witness asks why he/she must view the rest of the photos despite already making an identification; tell the witness the procedure requires the officer to show the rest of the photos.

Explanation: Showing all photos in the series ensures that the photo array procedure will reveal as much information as possible. For instance, a witness may make an identification of an early photo, but then change his/her mind after viewing a later photo. This change supplies important information about both the suspect and the witness.

j. Commenting on Selection and Outcome. Do not give the witness any feedback regarding the individual selected or comment on the outcome of the identification procedure in any way. Be aware that witnesses may perceive such things as unintentional voice inflection or prolonged eye contact, in addition to off-handed words or phrases, as

messages regarding their selection. Avoid casual conversation comments such as “very good.” Be polite but purposeful when you speak.

k. Request for Additional Viewing. Only upon request of the witness, the witness may view one or more of the photos again after the first photo procedure has been completed. If this occurs, it must be thoroughly documented. The administrator should never suggest an additional viewing to the witness.

Explanation: Allowing a witness to view an array a second time converts the procedure from a sequential to a quasi-simultaneous array, thereby risking the benefits of the sequential procedure. In the interest of facilitating an identification, a witness who asks to see the array a second time may be permitted to do so, but because this may diminish the value of the identification it should not be offered without request.

l. Alteration of Materials by Witness. Ensure that if the witness writes on, marks, or in any way alters identification materials, those items are not used in subsequent procedures.

4. Document Procedures and Results.

a. Have the Witness Sign and Date the Results. Once the procedure is completed, show the witness the written record of the results, and ask the witness to sign and date that record.

b. Preserve the Photos. Preserve the photos and the order in which they were presented to the witness.

c. Document the Procedure. The administrator should document:

- the administrator’s name
- the procedure employed
- date, time, and location of the procedure
- the total number of filler photos and blank photos
- names of persons present during the array
- if additional viewing occurred

5. Procedures for Multiple Suspects or Multiple Witnesses

a. No Communication Between Witnesses. To the extent possible, prevent witnesses from conferring with each other before, during, and after the photo array procedure.

b. Separate Instructions. Each witness should be instructed outside the presence of the other witnesses.

c. Showing the Same Suspect to a New Witness. If you need to show the same suspect to a new witness, re-shuffle all but the lead filler and the two blank photos and renumber them accordingly.

Explanation: Placement in this way reduces any possibility that a subsequent witness identifies someone based on the position number communicated to them by a previous witness.

d. Showing a Different Suspect to the Same Witness. When showing a different suspect to the same witness, do not reuse the same fillers from a previous array shown to that witness.

e. Multiple Arrays with Same Suspect and Same Witness. Avoid multiple identification procedures in which the same witness views the same suspect more than once. Should you decide to do more than one identification procedure you are likely to be called upon to clarify and/or justify the action.

Explanation: Showing a witness the same suspect in more than one photo array can be highly suggestive and can influence the witness to pick out that suspect based on remembering the suspect from the first identification procedure, rather than from the crime. Also, two identification procedures (showup, followed by a live lineup or photo array) are not better than just one. A witness viewing a second procedure with the same suspect may believe that presence in both procedures suggests that authorities believe the suspect is the actual perpetrator.

PROCEDURE FOR LIVE LINEUPS

The principles described in the model policy apply equally to photo arrays and live lineups. Just as witnesses viewing photo arrays can be vulnerable to unintentional suggestion, so can witnesses viewing live lineups; just as witnesses viewing photo arrays tend to identify the person in the array who looks most like the perpetrator, so do witnesses viewing live lineups.

Unfortunately, while photo arrays can be conducted using the folder system, which allows the investigating officer to conduct the array; live lineups cannot be conducted in that way. Live lineups should be conducted by an independent administrator-- someone who does not know which person in the lineup is the suspect.

This may impose a logistical burden because it will mean bringing in an additional person from outside the investigation to conduct the lineup. However, in those rare situations in which a live lineup is necessary, investigators should find another agency or officer or departmental employee who can briefly break away from his/her duties to assist with an investigation. If a lineup is absolutely necessary, and no independent administrator can be found, the investigating officer must take great care to avoid any unintentional cues to the witness.

1. Compose the Lineup.

a. Number of Suspects. Include only one suspect at a time in each lineup.

b. Number of Fillers. Whenever possible, include a minimum of four fillers (non-suspects) per lineup. Since increasing the number of fillers tends to increase the reliability of the procedure, include as many above the minimum as desired.

i. Resemblance of Fillers to Suspect. In general, fillers should resemble the witness's *description* of the perpetrator in significant features (such as face, profile, height, weight, age, build, posture, hair and facial hair, specific articles of clothing, etc., to the extent applicable to the photos being used) or, in cases where a composite was used, fillers should resemble the composite. If a person who has never seen the perpetrator would be able to pick out the suspect from the lineup based on knowing only the description given by the eyewitness, then the fillers may not sufficiently resemble the description of the perpetrator.

A. For instance, if the perpetrator was described as having an unusual identifying mark, all fillers should have similar markings or similar coverings over the described area.

B. When there is an inadequate description of the perpetrator, or when there is a suspect whose appearance differs from the description of the perpetrator, fillers should resemble the *suspect* in significant features.

c. Assess the Lineup. Make sure that no person stands out from the rest.

d. Filler as Lead Subject. Always lead lineups with a filler.

Explanation: Research suggests witnesses are reluctant to identify someone in the first position and, if that person is the suspect, a misidentification may result.

e. Limit Contact between Witnesses and Fillers. Take precautions to ensure that witnesses do not encounter suspects or fillers at any time before or after the identification procedure.

2. Conduct the Lineup.

a. Videotape or Audiotape the Lineup. If practical, videotape or audiotape the entire lineup procedure. Videotaping is preferable. For information on videotaping and audiotaping procedures, see the Wisconsin Department of Justice's Physical Evidence Handbook, p. 42-44 & 53-56.

b. Availability of Other Results to Witness. Ensure that no writings or information concerning previous identification results are visible to the witness.

c. No Persons Present Who Know the Suspect's Identity. To the extent possible, ensure that no one who knows the suspect's identity is present during the lineup procedure except defense counsel (if present).

d. Witness's Knowledge of Number of Suspects. The witness should not know how many individuals will be shown.

e. Instruct the Witness. The lineup administrator should give the witness a written copy of the following instruction and should read the instruction aloud at the beginning of each identification procedure:

In a moment, I am going to show you a series of individuals. The person who committed the crime may or may not be included. I do not know whether the person being investigated is included. Even if you identify someone during this procedure, I will continue to show you all individuals in the series.

Keep in mind that things like hair styles, beards, and mustaches can be easily changed.

You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator.

The individuals will be shown to you one at a time and are not in any particular order. Take as much time as you need to look at each one. After each individual, I will ask you "Is this the person you saw [insert description of act]?" Take your time answering the question. If you answer "Yes," I will then ask you, "Can you describe how certain you are?"

Because you are involved in an ongoing investigation, in order to prevent compromising the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the way the lineup procedure will be conducted and the other instructions I have given you?

Witnesses should then be asked to read the following additional paragraph and sign and date below. (Some witnesses may decline to sign. When a witness declines to sign, it is sufficient for the investigating officer to document that the witness was appropriately instructed.)

I have read these instructions, or they have been read to me, and I understand the instructions. I am prepared to review the individuals who will be presented to me, and I will follow the instructions provided on this form.

f. Present Subjects One at a Time. Begin with all lineup participants out of the view of the witness. Present each individual to the witness separately, in a previously determined order, removing those previously shown from the field of view.

g. Question the Witness. After each individual is shown, ask the witness: "Is this the person you saw [insert description of act]?" If the witness answers "Yes," ask the witness, "In your own words, can you describe how certain you are?" Whether or not this is possible, document the witness's response using the witness's own words when possible.

i. After identification, a follow-up interview should assess any relevant factors that support the identification, such as: special facial features, hair, marks, etc.

h. Show Every Subject. Even if the witness makes an identification, show the witness the next subject until all subjects have been shown. If a witness asks why he/she must view the rest of the subjects despite already making an identification; simply tell the witness that the procedure requires the officer to show all the subjects.

Explanation: Showing all subjects in the series ensures that the lineup will reveal as much information as possible. For instance, a witness may make an identification of an early subject, but then change his/her mind after viewing a later subject. This change supplies important information about both the suspect and the witness.

i. Actions of Lineup Members. Ensure that any identification actions (e.g., speaking, moving, etc.) are performed by all members of the lineup.

j. Commenting on Selection and Outcome. Do not give the witness any feedback regarding the individual selected or comment on the outcome of the identification procedure in any way. Be aware that witnesses may perceive such things as unintentional voice inflection or prolonged eye contact, in addition to off-handed words or phrases, as messages regarding their selection. Avoid casual comments such as "very good." Be polite but purposeful when you speak.

k. Request for Additional Viewing. Only upon request of the witness, the witness may view one or more of the subjects again after the lineup has been completed. If this occurs,

it must be thoroughly documented. The lineup administrator should never suggest additional viewing.

Explanation: Allowing a witness to view a lineup a second time converts the procedure from a sequential to a quasi-simultaneous lineup, thereby risking the benefits of the sequential procedure. In the interest of facilitating an identification, a witness who asks to see the lineup a second time may be permitted to do so, but because this diminishes the value of the identification it should not be offered without request.

3. Document Procedures and Results.

a. Have the Witness Sign and Date the Results. Once the procedure is completed, show the witness the written record of the results, and ask the witness to sign and date that record.

b. Photograph the Lineup Subjects. As stated above, video or audiotaping the entire identification procedure is recommended. Whether or not this is possible, photo documentation of the suspect and fillers should be taken. Photo documentation can be of either the group or each individual, but should preserve the appearances of the suspect and fillers and the order of the lineup.

c. Document the Procedure. The administrator should document:

- the administrator's name
- the procedure employed
- date, time, and location of the procedure
- the number of fillers
- names of persons present during the lineup
- if additional viewing occurred

4. Procedures for Multiple Suspects or Multiple Witnesses.

a. No Communication between Witnesses. To the extent possible, prevent witnesses from conferring with each other before, during, and after the lineup procedure.

b. Separate Instructions. Each witness should be instructed outside the presence of the other witnesses.

c. Showing the Same Suspect to a New Witness. Place the suspect in different positions in each lineup. Position all other members of the lineup randomly.

Explanation: Placement in this way reduces the possibility that a second or third witness will identify someone based on the position number communicated to them by the first witness.

d. Multiple Lineups with Same Suspect and Same Witness. Avoid multiple identification procedures in which the same witness views the same suspect more than once. Should you decide to do more than one identification procedure you are likely to be called upon to clarify and/or justify the action.

Explanation: Showing a witness the same suspect in more than one identification procedure can be highly suggestive and can influence the witness to pick out that suspect based on remembering the suspect from the first identification procedure, rather than from the crime.

e. Showing a Different Suspect to the Same Witness. When showing a different suspect to the same witness, do not reuse the same fillers from a previous lineup shown to that witness.

PROCEDURE FOR SHOW-UPS¹⁷

A show-up occurs when law enforcement officials show one suspect to one witness for the purpose of eyewitness identification. Although courts have recognized that showup procedures can be suggestive,¹⁸ showups have benefits for both public safety and innocent suspects. First, in situations in which police lack probable cause to arrest but have temporarily detained a suspect who matches a general eyewitness description, show-ups allow police to conduct an eyewitness identification procedure rather than simply releasing a potentially guilty perpetrator. Second, show-ups benefit innocent suspects because they have the potential to immediately clear an innocent person from suspicion without suffering the indignity of arrest or further investigation.

Despite these benefits, show-ups have risks, as well. First, show-ups can be suggestive, in the sense that they are likely to convey the impression to witnesses that the police think they have caught the perpetrator and want confirmation. In addition, research shows that show-ups produce a greater risk for innocent suspects than properly conducted photo arrays and lineups.¹⁹ However, the reason for this risk is somewhat surprising. Eyewitnesses make identifications at an equal or lesser rate for show-ups than for photo arrays.²⁰ Show-ups are riskier for innocent suspects because some eyewitness errors made during photo arrays are harmless identifications of fillers known to be innocent, while all false identifications during show-ups result in false evidence against innocent suspects.

Researchers have pointed out another advantage lineups and photo arrays have over show-ups: they provide a test of a given eyewitness's reliability. If an eyewitness viewing a photo array identifies an innocent filler, the police can conclude that the witness is not useful for future identification procedures. However, if an eyewitness viewing a show-up incorrectly states that the suspect is not the perpetrator, the police are likely to continue to rely upon that eyewitness for other identification procedures despite the witness's unreliability. This can have negative consequences if the unreliable witness is later shown a photo array or lineup and identifies an innocent person.

The Wisconsin Supreme Court recently weighed these risks and benefits and implemented a rule for the admissibility of evidence obtained using show-ups. According to *State v. Dubose*, show-up identification evidence will be inadmissible unless, based on the totality of the circumstances, the show-up was necessary.²¹ A show-up will not be deemed necessary unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array. Furthermore, the admissibility of show-up identification evidence will turn on whether police conducting a show-up utilized appropriate safeguards to minimize the suggestiveness of the procedure.²² Specifically, factors such as whether the show-up was conducted in a squad car and whether the

¹⁷ The Wisconsin Supreme Court has recently ruled in *State v. Dubose*, regarding the admissibility of show-up identification evidence.

¹⁸ *State v. Marshall*, 92 Wis.2d 101, 119 (1979).

¹⁹ Wells, G.L. "Police Lineups: Data, Theory, and Policy." *Psychology, Public Policy, and the Law*. Vol. 7, No. 4, p. 795, 2001.

²⁰ See footnote 19.

²¹ *Dubose*, 2005 WI 126, ¶ 2.

²² *Id.* at ¶ 35-37.

witness was given a non-biased instruction before the show-up will be relevant to whether show-up identification evidence is admissible.²³

Given the risks and benefits of show-ups and WI Supreme Court's Legal ruling regarding admissibility, the use of show-ups should strike a delicate balance. Before conducting a show-up, officers should consider the fact that properly conducted photo arrays and lineups are more reliable than show-ups and decide whether a show-up, instead of a photo array or lineup, is necessary and appropriate under the circumstances. It is not possible to list all the factors that figure in to this decision, nor is it possible to devise a precise formula for when show-ups are appropriate. However, certain factors are clearly relevant. For instance, law enforcement officers should consider the proximity-- both geographic and temporal-- of the suspect to the crime. Show-ups should generally be avoided if they cannot be conducted close in time and place to the crime. In any case, if officers plan to make an arrest with or without a show-up, they should consider conducting a photo array or lineup after the arrest instead of a show-up. Finally, officers should consider exigent circumstances such as the future availability of witnesses. If a witness will be unavailable in the future, a show-up may be necessary. Otherwise a proper lineup or photo array will ordinarily be more appropriate as it avoids the inherent suggestiveness of the show-up.

The use of a show up can provide investigative information at an early stage, but the inherent suggestiveness of a show up requires careful use of procedural safeguards. The following procedures are designed to address those risks and outline the proper use of show-ups. The procedures apply regardless of whether other practices would be legally permissible. For instance, even if a given suspect consents to a show-up, a show-up still should not be conducted unless the investigating officer decides that the exigencies of the situation outweigh any possible risk of misidentification presented by conducting a show-up. Consent may legally authorize police to detain a suspect for a show-up, but it does nothing to remove the suggestiveness of the procedure.

1. Prepare for the Show-up.

a. Document the Witness's Description. Before the show-up is conducted, it is important the witness be asked to give a detailed description of the perpetrator, and this description should be carefully documented.

b. Location of Suspect. Whenever practical, transport the witness to the location of the detained suspect (as opposed to transporting the suspect to the witness) to limit the potential legal impact of the suspect's detention and to minimize the influence on the witness of seeing the suspect transported under custody.

i. Show-ups should not be conducted at a police station or other law enforcement building.

c. Videotape or Audiotape the Procedure. If practical, videotape or audiotape the entire show-up procedure. Videotaping is preferable. For information on videotaping and audiotaping procedures, see the Wisconsin Department of Justice's Physical Evidence Handbook, p. 42-44 & 53-56.

²³ *Id.*

2. Conduct the Show-up.

a. Instruct the Witness. Witnesses should be given a written copy of the following instruction and the instruction should be read aloud:

In a moment, I am going to show you an individual. That person may or may not be the true perpetrator. I do not know if the person is the true perpetrator.

You should not feel you have to make an identification. It is as important to exclude innocent persons as it is to identify the perpetrator.

After you have observed the individual, I will ask you "Is this the person you saw [insert description of act]?" Take your time answering the question. If you answer "Yes," I will then ask you, "In your own words, can you describe how certain you are?"

Because you are involved in an ongoing investigation, in order to prevent compromising the investigation, you should avoid discussing this identification procedure or its results.

Do you understand the way this procedure will be conducted and the other instructions I have given you?

Witnesses should then be asked to read the following additional paragraph and sign and date below. (Some witnesses may decline to sign. When a witness declines to sign, it is sufficient for the investigating officer to document that the witness was appropriately instructed.)

I have read these instructions, or they have been read to me, and I understand the instructions. I am prepared to observe the individual who will be presented to me, and I will follow the instructions provided on this form.

b. Present the Suspect. If possible and safe, have the witness view the suspect while the suspect is not restrained by handcuffs or by the officer, and while the suspect is not seated in a squad car. When circumstances dictate that the suspect must be controlled and/or separated from the witness then take practical steps to minimize the suggestiveness of the procedure.

c. Avoid Suggestive Words or Conduct. Words or conduct of any type that may suggest to the witness that the individual is or may be the perpetrator must be carefully avoided.

d. Question the Witness. After the witness views the suspect, ask the witness, "Is this the person you saw [insert description of act]?" If the witness answers "Yes," ask the witness, "In your own words, can you describe how certain you are?"

e. Document the Witness's Responses. Record the witness's responses to each question. Whether or not video or audio recording is possible, document the witness's response using the witness's own words when possible.

i. After identification, a follow-up interview should assess any relevant factors that support the identification, such as; special facial features, hair, marks, etc.

3. Document Procedures and Results.

a. Have the Witness Sign and Date the Results. Once the procedure is completed, show the witness the written record of the results, and ask the witness to sign and date that record.

b. Photograph the Suspect. Whenever possible, photograph the suspect at the time of the show-up.

c. Document the Procedure. The administrator should document:

- the administrator's name
- the procedure employed
- date, time, and location of the procedure
- names of persons present during the show-up

d. Multiple Witnesses. Show-ups should not be conducted with more than one witness present at a time. If there are multiple witnesses and one witness makes an identification during a show-up, that identification should provide probable cause for an arrest, and the remaining witnesses should ordinarily be shown a photo array or lineup rather than a show-up.

e. Multiple Show-ups with Same Suspect and Same Witness. Avoid multiple identification procedures in which the same witness views the same suspect more than once. Should you decide to do more than one identification procedure you are likely to be called upon to clarify and/or justify the action.

4. Multiple Suspects. If there are two suspects, the witness should view two separate show-ups, each conducted in accordance with these procedures. Two or more suspects should not be shown to the witness at the same time.

PROCEDURE FOR FACIAL COMPOSITES

In some investigations, law enforcement authorities have an eyewitness description but have either 1) no specific suspect or 2) no visual likeness of a known suspect. The use of composite images can yield investigative leads in cases in which no suspect has been determined. In these situations, some law enforcement authorities may try to produce a facial composite of the perpetrator based on the eyewitness's description. Various methods exist for carrying out this goal, including manual sketches, mechanical systems such as Identikit, and, more recently, computer-based systems such as E-fit. Composites produced with these methods have been used to gather suspects who resemble the composite or to confirm that an unavailable suspect's appearance matches the description given by an eyewitness.

Because of concerns about the reliability of composites and their potential to taint eyewitnesses' memories, law enforcement authorities should use them cautiously. Research tends to show that none of the existing methods can reliably produce recognizable composites in real-world settings.²⁴ In the experiments, subjects look at a target photo, the photo is taken away, and the subjects are then asked to produce a composite using one of the methods mentioned above. Despite the best efforts of the subjects making the composites, people who know the person in the target photo are generally not able to recognize the person depicted in the composite.

The unreliability of composites raises concern about the possibility that an inaccurate composite might taint an eyewitness's memory and lead to a misidentification. For instance, if authorities produce a composite and then arrest a person who resembles the composite but who unknown to them is innocent, the eyewitness may then identify the innocent suspect because of the suspect's resemblance to the composite. In this way, an inaccurate composite, and the innocent suspect who resembles it, can contaminate an eyewitness's actual memory of the perpetrator.

New research also suggests that the process of making a composite can damage an eyewitness's ability to identify the true perpetrator in a later lineup.²⁵ In an experiment, eyewitnesses were first directed to build a composite of a perpetrator using a computer-based system. Later, the same eyewitnesses were asked to try to pick the same perpetrator out of a lineup. Compared to eyewitnesses who did not build composites, the eyewitnesses who built composites were less able to identify the perpetrator in a lineup.

In addition to the concerns discussed above, inaccurate information from outside an eyewitness's memory can taint a composite. As with photo arrays, lineups, and show-ups, composites can be compromised if the witness's description relies on information learned from external sources after the crime or if the person administering the procedure either unintentionally supplies the witness with information or unintentionally incorporates outside knowledge of the case into the production of the composite. For this reason, in the rare situation in which a composite must be used, these guidelines recommend a double-blind composite

²⁴ Davies, G., van der Willik, P., and Morrison, L.J. "Facial Composite Production: A Comparison of Mechanical and Computer-Driven Systems." *Journal of Applied Psychology*, Vol. 84, Issue 1, February 1, 2000.

²⁵ See Manuscript of Wells, G.L., et al, "Building Face Composites Can Harm Lineup Identification Performance," at http://www.psychology.iastate.edu/faculty/gwells/Composite_damage_manuscript.pdf.

procedure, in which both the witness and the person making the composite are unaware of external information about the case. It may not be feasible in some circumstances to conduct a completely double-blind procedure because it may not be possible to prevent both the witness and the administrator from learning about the case. In such situations, witnesses should be told to rely on their independent recollection of the event- not information learned from other sources- and administrators should be mindful of the natural tendency to incorporate prior knowledge into the interaction with the witness and into the production of the composite itself.

Procedure: Preparing the composite:

1. Assess the ability of the witness to provide a description of the perpetrator.
2. Select the procedure to be used from those available (e.g., identikit-type templates, artist, or computer-generated images).
3. Unless part of the procedure, avoid showing the witness any photos immediately prior to development of the composite.
4. Select an environment for conducting the procedure that minimizes distractions.
5. Conduct the procedure with each witness separately.
6. Determine with the witness whether the composite is a reasonable representation of the perpetrator. (These recommendations are consistent with two recent publications of the United States Department of Justice.²⁶)

A NOTE ON “MUG BOOKS”

PHOTO COLLECTION DISPLAYS

“Mug books” (i.e., collections of photos/images of previously arrested persons) may be useful in cases in which a suspect has not yet been determined and other reliable sources have been exhausted. This technique may provide investigative leads, but results should be evaluated with caution. Avoid individual photos/images that are suggestive or cause any one to stand out unnecessarily.

Mug books must be objectively compiled to yield investigative leads that will be admissible in court. Individuals should be selected who are uniform with regard to physical characteristics such as race, age, gender, etc.



In the tradition of the Wisconsin Idea, these model policies and procedures spring from a partnership of the Attorney General and the Frank J. Remington Center at the University of Wisconsin Law School. Just as other products of this partnership have improved the state’s criminal justice system, these policies and procedures are designed to bring to bear the best techniques for the collection of eyewitness evidence.



²⁶ The two publications are: *Eyewitness Evidence: A Guide for Law Enforcement* (October 1999), and *Eyewitness Evidence: A Trainer’s Manual for Law Enforcement* (September, 2003). These publications are included in the Jan. ’04 instructor manual/CD in the Investigations Unit for basic law enforcement training.