

	KENOSHA POLICE DEPARTMENT			
	POLICY AND PROCEDURE			
	42.2 Identifications – Eye Witnesses			
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I. PURPOSE

To ensure that Constitutional safeguards are observed in the process of identifying the perpetrators of a crime.

II. POLICY

All reasonable efforts should be taken to positively identify or clear the suspect as the perpetrator of the crime in accordance with applicable statutory and case law, taking extreme care to avoid suggestive methods.

III. DEFINITIONS

- A. Show-up: The presentation of one suspect to an eyewitness in a short time frame following the commission of the crime.
- B. Photographic Identification: The showing of several photographs, including the suspect, for the purpose of obtaining identification.
- C. Lineup: The simultaneous presentation of a number of individuals, including the suspect, before an eyewitness.

IV. INTEGRITY OF IDENTIFICATION

Officers should consider the totality of the circumstances when employing a specific identification procedure. Factors to be considered included the opportunity of the witness to view the perpetrator at the time of the crime, the witness's degree of attention, the level of certainty demonstrated by the witness in the identification process and the length of time between the crime and identification process.

Officers conducting identification processes will do so in a manner which ensures that individual witnesses are not influenced by any other witnesses or incidents, or by any behavior of police personnel. The following guidelines should be employed in any type of identification procedure:

- ◆ Whenever possible, witnesses should view the suspects out of the presence of other witnesses
- ◆ Witnesses who have taken part in identification procedures must not be permitted to discuss their observations or conclusions within the hearing of other witnesses before, during or after the identification procedure
- ◆ When presenting a suspect to an eyewitness for identification, officers will remain neutral.
- ◆ Officers must not by word or gesture, before, during, or after the identification procedure, suggest that a suspect committed the crime being investigated

42.2 Identifications – Eye Witnesses

- ◆ Officers should not say or do anything to lead the witness to believe that a suspect has been formally arrested or detained, that a suspect has confessed, or that the suspect has had incriminating evidence in his/her possession

V. DOCUMENTATION

Officers, when conducting any identification shall document through a written report the following information:

- ◆ Time and location
- ◆ Persons present
- ◆ How was the identification conducted
- ◆ Duration
- ◆ Statements of witnesses attempting the identification
- ◆ Other circumstances which may assist in determining the validity of the identification

V. PROCEDURES

A. SHOW-UP

1. **Whenever a person is arrested, or could be arrested, the use of a show-up for eyewitness identification is not appropriate.**
2. A show-up should only be used when absolutely necessary and within the geographic and temporal proximity to the crime cite. Absolutely necessary means there are urgent and exigent circumstances or there is not yet enough probable cause to arrest the suspect.
3. A suspect apprehended near the scene of the crime, within a relatively short period of time after the commission of the crime, may be exhibited in a "show-up." In a show-up a single suspect is viewed by a victim or witness immediately following the commission of a crime for the purpose of identification or eliminating the suspect as the perpetrator. This procedure normally takes place during the initial investigation.
4. If a show-up is to be performed, it should be done in as neutral a manner as possible. The subject should be not be handcuffed, should not be in a police squad, and the eyewitness should be told that the subject to be observed may or may not be the perpetrator and that the investigation will continue regardless of whether a positive identification is made.
5. Specifically instruct the eyewitness that the real perpetrator may or may not be present.
6. A show-up should not be conducted with more than one witness present at a time. If identification is conducted separately for more than one witness, witnesses should not be allowed to communicate before or after any procedures regarding the identification.
7. Show-up suspects should not be required to put o clothing worn by the perpetrator.
8. Whenever practical, transport the eyewitness to the location of the suspect. A show-up should not be conducted at the public safety building.
9. Words or conduct of any kind by officers that may suggest to the witness that the individual is or may be the perpetrator must be avoided.
10. Assess eyewitness confidence immediately following an identification.

B. IDENTIFICATION THROUGH THE USE OF PHOTOGRAPHS

42.2 Identifications – Eye Witnesses

1. The use of photographs for identification purposes prior to an arrest is permissible provided the suspect's photograph is grouped with at least five (5) other photographs of the same general description.
2. Adequate records of the photographs shown to each witness are to be kept so that the exact group of photographs from which an identification was made can be presented in court at a later date to counter any claim of undue suggestion and enhance the reliability of the identification. A record of the photographs used must be placed into evidence.
3. Each witness is to view the photographs independently, out of the immediate presence of the other witnesses.
4. The following procedure will be followed for photographic identification. A double-blind, sequential presentation is recommended for all photo arrays.
 - i. 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.

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

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.

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.

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. 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.

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.

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

42.2 Identifications – Eye Witnesses

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.

- ii. Put Photographs in Order.

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

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.

- iii. Conduct the Array.

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

- a. Presence of Persons Aware of Suspect's Identity. No one should be present during the photo array procedure who knows the suspect's identity.
- b. Witness's Awareness of Number of Photos. The witness should not know how many photos will be shown.
- c. 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.

42.2 Identifications – Eye Witnesses

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.

- d. 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.
- e. 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?”
- f. Document the Witness’s Responses. Document the witness’s response using the witness’s own words when possible.

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

- g. 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 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.

- h. 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 these selection. Avoid casual comments such as “very good.” Be polite but purposeful when you speak.

42.2 Identifications – Eye Witnesses

- i. 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.

- j. 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.

iv. Document Procedures and Results.

- a. Have the Witness Sign and Date the Results. Once the procedure is completed, create a 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

v. 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.

42.2 Identifications – Eye Witnesses

- 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.

C. LINEUP

1. RIGHT TO COUNSEL

VI. The U.S. Supreme Court has held that a suspect has the right to counsel when appearing in a lineup. In Wisconsin, this right arises once a warrant or summons has been issued or an information or indictment returned. The attorney has no right to ask anyone questions. His/her only function is to assure that the lineup procedure is fair or to object when the procedure is unfair or "unduly suggestive." Better practice suggests that a suspect be informed of his/her right to have counsel present at the lineup.

2. UNFAIR PROCEDURE

The lineup procedure must be fair. Thus, where a witness to a crime saw a black man, the black suspect may not be in a lineup with all white men. If the criminal is young, the others must not all be elderly. The suspect must not be the only one wearing the particularly distinctive clothing worn by the criminal. The suspect must not be identified by one witness deliberately in the presence of other witnesses or only the suspect's photograph shown to witnesses prior to the lineup. The procedure must not be designed to call attention specifically to the suspect.

3. ACCEPTABLE PROCEDURE

A suspect may be compelled to appear in a lineup. The suspect may be made to read a statement where all persons in the lineup read it, assume a certain pose or walk or wear particular clothing where all persons in the lineup do the same. Lineups may be recorded by audio-video tape for future showings, which future showings do not require notice to the participants nor presence of counsel. They are to be treated in the same way as picture identification.