

 <h1 style="text-align: center;">DIRECTIVES</h1> <h2 style="text-align: center;">Oak Creek Police Department</h2>	<b>Effective Date:</b> September 21, 2005	
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<b>Title:</b>  <h3 style="text-align: center;">EYEWITNESS IDENTIFICATION POLICY</h3>	<b>Directive Number:</b> <h3 style="text-align: center;">9-700</h3>	
	<b>Critical Policy</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
<small>*State Statute §175.50(2) – Eyewitness Identification Procedures</small>	<b>Open Record</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<b>Total Pages:</b> 12
		<b>Applicability:</b> Sworn Officers

I. PURPOSE AND OBJECTIVES

It is the purpose of this Directive to establish a uniform procedure for identification of suspects by witnesses in front of an officer and to promote practices which will safeguard innocent persons while ensuring that those who are guilty are arrested and convicted. Procedures which suggest the guilt of a particular suspect to an eyewitness must be avoided. In all cases, the honest recollection of the eyewitness must govern.

II. DEFINITIONS

- A. *Lineup Administrator* – The officer who actually shows the photo array to a witness.
- B. *Fillers* – Photographs used that are not the suspect, but resemble the suspect, including any unusual marks the witness may have described.
- C. *Lead Filler* – The first photograph to be used in the photo array.
- D. *Blank Photos* – Two folders with blank paper to be used at the end of the photo array.
- E. *Confrontations/Show-Ups* – A limited-usage identification procedure in which a suspect is presented singly to the witness.
- F. *Lineups* – A lineup is an identification procedure in which a suspect is placed in a live group setting and presented to a witness.
- G. *Informal Identification* – When an officer arranges to take a witness to observe a suspect who is at liberty. Generally, the suspect will be unaware of the observation. Informal identification may be used when a suspect is not in custody because there has been no offense charged.

III. GENERAL RULES FOR ALL EYEWITNESS IDENTIFICATION PROCEDURES

- A. When Unnecessary

An eyewitness identification procedure may be unnecessary when the witness:

### III. GENERAL RULES FOR ALL EYEWITNESS IDENTIFICATION PROCEDURES – *Continued*

1. Would be unable to recognize the perpetrator being investigated; or
2. Knew the identity of the suspect before the offense occurred or learned the suspect's identity without police assistance after the offense.

#### B. Avoiding Multiple Views in the Field

1. A suspect or likeness (i.e., a photograph, composite drawing or sketch) of a suspect-should not deliberately be displayed to more than one witness at a time.

#### C. Avoiding Viewers' Suggestions

1. A witness who has taken part in an identification procedure must not be permitted to state conclusions within earshot of another person who is about to be, or has been, a viewer.

#### D. Avoiding Officers' Suggestions

1. An officer must not, by word or gesture, suggest opinions to any witness that the suspect committed the crime. Witnesses making inquiries about an officer's opinion shall be informed of this restriction.

#### E. Maintaining a Record

1. A complete record of each identification procedure must be made. The time, location, and the identity of those present, including persons being viewed who are not the suspect, must be noted. Statements made by a witness viewing the suspect must be recorded, along with any significant remarks made by an officer, lawyer or suspect.

### IV. CONFRONTATIONS / SHOW-UPS

#### A. When Permissible

1. An officer may arrange a confrontation between a suspect and a witness whenever the suspect is detained or arrested within a reasonable length of time (consideration should be given to the freshness of the pursuit and the total amount of time elapsed since the offense) and the witness is cooperative and states they might recognize the person who committed the offense.
2. It is the District Attorney's opinion that the Department continue present procedures which require that one-to-one confrontations not occur in the police station. In the event any deviation from this procedure appears appropriate because of unusual circumstances, the officer-in-charge should consult with the on-call ADA in advance in accordance with Section VIII., *When Foregoing Model Rules May Be Disregarded*.

#### B. Confrontation When Probable Cause to Arrest is Present

1. If there is probable cause to arrest a suspect who is located, the suspect should ordinarily be taken into custody prior to any confrontation. The confrontation must then occur as soon as practicable after the arrest.
2. Confrontation with Suspect's Cooperation

#### IV. CONFRONTATIONS / SHOW-UPS – *Continued*

- a. If there is probable cause to arrest a suspect but the suspect is cooperative and consents to take part in a confrontation, an officer may arrange a confrontation without first arresting the suspect.
- b.

#### 3. Location of Confrontation

- a. Under either of the above circumstances, the suspect may be held at the location of the detention or arrest unless exigent circumstances exist for identification. The suspect should not be taken to the police station for a one-to-one confrontation.

#### 4. Release After Confrontation

- a. If the suspect is not identified by the witness, the suspect should be released after obtaining the suspect's name and DOB, pursuant to appropriate Departmental procedures, unless probable cause still exists to believe the suspect committed the offense.

#### C. Confrontation Following Temporary Detention

1. If an officer reasonably suspects that a person located has committed the offense, but probable cause to arrest the person is not present, the officer may detain the person for a reasonable period of time for confrontation purposes. In exercising this authority, the officer may use such force (*Terry v OHIO, 392 U.S. 1 [1968]*) as is reasonably necessary to stop the person or to cause the person to remain in the officer's presence.
2. Location of Confrontation
  - a. The witness should be brought to the scene of the detention as soon as possible. A suspect should not be taken to the police station for a one-to-one confrontation.
3. Extending Detention
  - a. The suspect cannot be detained for longer than a reasonable period of time unless probable cause to believe the suspect committed the offense has developed during the detention, or the suspect, after being clearly informed that he/she need not cooperate, consents to take part in the confrontation.

#### D. Impartiality During Confrontation Procedure

1. When presenting a suspect to a witness for identification, an officer should not say or do anything to lead the witness to believe that incriminating items were found on the suspect when searched or "frisked" or that the suspect is believed to be the perpetrator.

#### E. Multiple Witnesses

1. If there are several witnesses to a crime, and confrontation of a suspect is feasible and proper, arrangements should be made for each witness to confront the suspect separately.

#### IV. CONFRONTATIONS / SHOW-UPS – *Continued*

##### F. Cruising Area of Offense

1. Nothing in these guidelines bans the common procedure of transporting witnesses in police cars to cruise the general area in which a crime has occurred in hopes of spotting the perpetrator and arranging a confrontation.

##### G. Emergency Confrontations

1. In emergency circumstances such as when a witness is in danger of death or blindness, or when a suspect is in danger of death, an immediate confrontation may be arranged if medical authorities permit. In these situations, time and location limitations contained in the preceding guidelines can be disregarded. However, if the suspect will be hospitalized for a lengthy period and is not in danger of death, then it is proper to follow the “Informal” Identification Procedure.

##### H. Right to a Lawyer

1. No person has a right to have a lawyer present at any confrontation procedure.

#### V. PHOTOGRAPHS (AND OTHER LIKENESSES)

##### A. When Photographs May be Used

1. The use of photographs to identify criminal suspects is permissible only when a “live” identification procedure is impractical (e.g., there is no suspect; there is a suspect but probable cause to arrest is absent; the suspect cannot be found; a suspect or witness refused to cooperate; or the suspect is in custody some distance from the prospective viewer).

##### B. Saving Witnesses to View Lineup

1. Whenever a witness makes a positive identification from a photograph and probable cause to arrest the suspect is thereby established, photographs should not be displayed to other witnesses if they will later view the suspect at a lineup.

##### C. Use of Sequential and Simultaneous Photo Lineups

1. When possible, photo lineup identification procedures should be conducted sequentially, showing one photo at a time to the witness, rather than simultaneously. Children ages 10 and under should not be shown a sequential photo lineup but can be shown a simultaneous photo array. To assure an accurate photo array identification, a reasonable number of photographs—currently six—should be shown to a witness, even if the suspect is selected almost immediately.

##### D. Sequential Photo Lineup Procedure

1. In order to ensure that inadvertent verbal cues or body language do not influence a witness identification, the person conducting the photo lineup should use the folder system, or lineup Administrator.
2. In composing a photo lineup, the person administering the identification procedure should ensure that the lineup is comprised in such a manner that the suspect does not unduly stand out. However, complete uniformity of features is not required.

V. PHOTOGRAPHS (AND OTHER LIKENESSES) -- *Continued*

## E. The Sequential Photo Lineup Procedure

1. Include only one suspect in each identification procedure.
2. Select fillers (non-suspects) who generally fit the witness' description of the perpetrator. When there is a limited or inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect; fillers should resemble the suspect in significant features.
3. Select a photo that resembles the suspect's description or appearance at the time of the incident, if multiple photos of the suspect are reasonably available to the investigator.
4. Include five (5) fillers (non-suspects) per identification procedure.
5. Avoid re-using fillers in lineups shown to the same witness when showing a new suspect.
6. Ensure that no writings or information concerning previous arrest(s) will be visible to the witness.
7. View the array, once completed, to ensure that the suspect does not unduly stand out.
8. Preserve the presentation order of the photo lineup. The photos themselves should be preserved in their original condition.
9. Read the "Witness Photo Lineup Instructions" to the witness.
10. Confirm that the witness understands the nature of the sequential procedure.
11. Present each photo to the witness separately, in a previously determined order, removing those previously shown.
12. Avoid saying anything to the witness that may influence the witness' selection.
13. Document, in writing, the lineup procedure, including:
  - a. Identification information and source of all photos used.
  - b. Names of all persons present at the photo lineup.
  - c. Date and time of the identification procedure
  - d. If positive identification is made. Ask the witness to sign the back of the photograph. Include the date, time, and location of lineup.
14. When conducting an identification procedure, the lineup administrator or investigator shall preserve the outcome of the procedure by documenting any identification or no identification results obtained from the witness. Preparing a complete and accurate record of the outcome of the identification procedure is crucial. This record can be a critical document in the investigation and any subsequent court proceedings. When conducting an identification procedure, the lineup administrator or investigator should:

V. PHOTOGRAPHS (AND OTHER LIKENESSES) -- *Continued*

- a. Record both identification and no identification results in writing, including the witness' own words.
  - b. Ensure that the photo results are signed and dated by the witness on the bottom or back of the photo.
  - c. Ensure that no materials indicating previous identification results are visible to the witness.
  - d. Ensure that the witness does not write on or mark any materials that will be used in other identification procedures.
15. The witness may, if requested, view one or more of the photos again after the sequential photo array procedure has been completed, The District Attorney's Office advises this departure from protocol should be allowed and must be thoroughly documented. This should occur only if the witness requests it after the procedure is completed and should never be at the suggestion of the person administering the photo array.

## F. Creating the Sequential Photo Lineup Using the Folder System

1. There should be five (5) filler photographs and one suspect photograph.
2. Place one filler photograph in folder Number 1.
3. Have someone out of your sight place the remaining four filler photographs and the suspect photograph in folders Number 2 through 6.

**OR**

You place the four filler photographs and the suspect photograph into the folders and shuffle the folders so you do not know which folder the suspect is in, then number the folders Number 2 through 6.

4. Folders Number 7 and 8 are empty and are used so the witness does not know when they have seen the last photo.
5. Read the "Witness Photo Lineup Instructions" to the witness (attached).
6. Hand the first folder to the witness for viewing, making sure you **cannot** see who is in the photo and inform the witness not to show you the photo. When the witness is done viewing the photo, he/she will hand it back to the investigator. The second folder will then be handed to the witness and the above process will be repeated through folder Number 6.
7. Photos will be placed in property.
8. Sign the "Witness Photo Lineup Instructions" form and attach it to the report.

## G. Creating the Sequential Photo Lineup Using a Lineup Administrator

1. There should be five filler photographs and one suspect photograph. (This should be put together by the case Detective or Officer.)

## V. PHOTOGRAPHS (AND OTHER LIKENESSES) -- *Continued*

2. Give the Lineup Administrator one filler photograph to be used as the first photo to be shown. (This is done by case Detective or Officer.)
3. Give the Lineup Administrator the suspect photo and remaining four filler photos and have him/her mix up the photos and number them 2-6. Do not tell the Lineup Administrator, which photo is the suspect.
4. Photos Number 7 and 8 are blank and are not shown to the witness by the Lineup Administrator, but are used so the witness does not know when they are viewing the last photo.
5. The Lineup Administrator reads the "Witness Photo Lineup Instructions" to the witness.
6. The Lineup Administrator will hand the first photograph to the witness for viewing. When the witness is done viewing the photo, she/he will hand the photo back. The second photo will then be handed to the witness and the above process will be repeated through photo Number 6. If the case detective or officer is present during the lineup, they need to be in a position that they **cannot** see who is in the photo. The witness should be informed not to show any of the photos to the case detective or officer.
7. Photos will be placed in property by the case detective or officer.
8. The Lineup Administrator will sign the "Witness Photo Lineup Instructions" form and attach it to the report.

## H. Simultaneous Photo Line-Up Procedure

1. Although the sequential photo line-up procedure is the preferred protocol, there may be occasional times when a simultaneous photo line-up procedure will be used. The simultaneous photo line-up procedure is the preferred method procedure when working with children aged 10 and under. It may also be appropriate with disabled victims.
2. When using the simultaneous line-up procedure, whenever a photograph depicting a definite suspect is displayed to a victim or eyewitness, it should be arranged at random with six or more photographs of different persons. The persons depicted in the photo display, along with the photographs themselves (if several are used), must be of substantially similar general appearance. However, if a photograph of a proper lineup that includes the suspect is available, it may be displayed singly without any other photographs.

## I. Recording and Preserving

1. An adequate record of each photograph shown in each display must be made. Photographs must be preserved so that the display can be reconstructed at trial, and photo arrays should be property tagged as evidence.

## J. Right to a Lawyer

1. No person has a right to have a lawyer present at any pictorial identification procedure, whether it takes place before or after an arrest.

V. PHOTOGRAPHS (AND OTHER LIKENESSES) -- *Continued*

K. Post-Arrest Photo Display

1. Photo displays may be used after the arrest of the suspect only when a lineup is impractical for one of the reasons specified in holding a lineup.

L. Exceptions

1. Sketches and Composites
  - a. When there is no suspect and the use of the photo array has been, or is likely to be unsuccessful, a non-photographic pictorial representation (e.g., free-hand sketch, Identi-Kit) may be used. If this leads to definite identification of a suspect, no other sketch, composite, or photograph should be displayed to any other witness. However, if probable cause for an arrest still does not exist, a photograph of the suspect should be obtained and the photo display procedure followed.

VI. LINEUPS

A. Holding a Lineup: Exceptions

When identification by a witness may be obtained, a lineup should be held following the arrest of a suspect, unless one of the following circumstances makes a lineup unwise or impractical:

1. Unusual Appearance of Suspect
  - a. Lack of suitable persons to include in the lineup group.
2. Prior Knowledge
  - a. The witness knew the identity of the suspect before the offense occurred or learns the identity without police assistance after the offense; or the prospective viewer has had an opportunity to identify the suspect in an earlier confrontation procedure.
3. Inconvenience
  - a. The suspect is in custody at a place too far from the witness.
4. Lack of Viewers
  - a. There is no witness willing or able to view a lineup.
5. Uncooperative Suspect
  - a. The suspect threatens to disrupt the lineup.
6. Suspect Released from Custody
  - a. The suspect was released on bond or recognizance, before being viewed, and a court order has not yet been obtained ordering the suspect to appear in a lineup.



## VI. LINEUPS – *Continued*

### B. Time of the Lineup

1. A lineup, when conducted, should take place as soon as practicable after the arrest of a suspect.

### C. Right to a Lawyer

1. A suspect has the right to a lawyer for any lineup and has the right to have a lawyer appointed for this purpose if he/she cannot afford one.

### D. Advising the Suspect of the Right to a Lawyer

The suspect shall be told of the right to have a lawyer present to observe the lineup procedure; that if he/she cannot afford a lawyer, one will be provided free of charge; and that the lineup will be delayed for a reasonable time until the lawyer appears.

#### 1. Counsel Already Retained

- a. If the suspect already has a lawyer—whether retained or appointed—and indicates he/she wants the lawyer to attend the lineup, he/she must be allowed to notify the lawyer about the planned lineup and the offense involved.

#### 2. Non-Indigent Suspect Without Lawyer

- a. If the suspect has no lawyer but wants one to attend the lineup, and the suspect states that he/she can afford a lawyer, a reasonable time to retain a lawyer must be allowed.

#### 3. Indigent Suspect Without Lawyer

- a. If the suspect has no lawyer, cannot afford a lawyer, but wants an attorney to attend the lineup, the officer conducting the lineup should contact the District Attorney's Office to provide a lawyer.

### E. Lineup Procedure

#### 1. Number of Participants

- a. All lineups shall consist of at least four (4) persons besides the suspect. Whenever possible, though, the lineup shall be composed of seven (7) other persons besides the suspect. A suspect should not be presented to a victim or witness singly in the police station.

#### 2. Physical Similarity

- a. Persons placed in the lineup should have approximately similar physical characteristics. Factors such as age, height, weight, hair length and color, and physical build should be considered. Sex and race should be the same for all participants, except in unusual cases where the characteristics are difficult to determine (e.g., female impersonator).

#### 3. Positioning Suspect

- a. The suspect may choose the initial position in the lineup and may change position after each viewing.

## VI. LINEUPS – *Continued*

### 4. Eliminating Suggestion

- a. Officers should not say or do anything to distinguish the suspect from the other lineup participants.

### 5. Uniform Conduct of Participants

- a. The non-suspects in the lineup should be instructed to conduct themselves so as not to single out the actual suspect.

### 6. Compelled Actions

- a. The suspect can be instructed to utter specified words, make gestures, or assume a particular pose, if the viewer so desires. All participants should do whatever reasonable act is required of the suspect.

### 7. Donning Distinctive Clothing

- a. If a witness describes the suspect as wearing a distinctive item of clothing, and the item (or something similar) is in police custody, the suspect can be compelled to wear the item. Each participant must don the clothing in the order of their appearance in the lineup.

### 8. Photographs

- a. Photographs shall be taken of all lineups.

## F. Refusal to Participate

1. Suspects who refuse to participate in a lineup, or to perform as required by the Lineup Procedure shall be informed that they have no right to refuse, and that evidence of their refusal may be used against them at trial. A record of the precise words of the refusal should be made for subsequent use.
2. If suspects continue to refuse, they should not be physically forced to participate in the lineup or to perform a certain act. Instead, a court order should be obtained directing the suspect to cooperate and participate in the lineup.

## G. Role of the Lawyer

### 1. In General

- a. The suspect's lawyer shall be allowed to consult with the suspect prior to the lineup, and to observe the lineup procedure. The lawyer may make suggestions, but may not control nor obstruct the procedure.

### 2. Lawyer's Suggestion

- a. Any suggestions the lawyer makes about the procedure should be considered and recorded. Those suggestions which would render the procedure more consistent with these guidelines should be implemented.

## VI. LINEUPS – *Continued*

### 3. Lawyer's Participation

- a. A lawyer should be permitted to be present when a witness states a conclusion about the lineup. However, the lawyer should be instructed to remain silent during both the lineup and the giving of the witness' conclusion. The lawyer may speak with any witness after the procedure if the witness agrees to speak with the lawyer.

### 4. Communicating with the Witness

- a. Witnesses taking part in a lineup procedure may be told that they are under no obligation to speak with the lawyer, but that they are free to speak with the lawyer if they wish. The witness' name and address will not be revealed to the lawyer without consent.

## VII. "INFORMAL" IDENTIFICATION PROCEDURES

### A. General Rule

#### 1. Exceptional Circumstances: Released on Bail

- a. If a suspect has been charged with the offense but has been released on bail, "informal" identification procedures shall not be used unless the *Hospitalization Exception* (below) applies. Rather a court order shall be obtained directing the suspect to appear in a lineup.

#### 2. Exceptional Circumstances: Hospitalization

- a. An "informal" identification procedure may be used when prompt identification is essential and a suspect has been charged with the offense under investigation, but the suspect is hospitalized for extended treatment under non-emergency circumstances. An attorney for the suspect shall be present if the suspect so desires.

### B. Specific Procedures

#### 1. Single Locale

- a. A witness may be taken to a single locale where the suspect is likely to appear, provided the locale is a place where a large number of people of physical characteristics roughly similar to the suspect are likely to be, or pass by at random. This technique can be used when the suspect is known, or when the suspect is unknown but is believed to frequent the locale chosen for viewing.

#### 2. Multiple Locales

- a. When no single locale is likely to meet the above requirement, then the witness may be taken to five or more similar locales—one of which the suspect is believed to be.

### C. Recording Informal Procedures

1. A detailed record of any "informal" identification procedure must be made. Such a record should include:

VII. “INFORMAL” IDENTIFICATION PROCEDURES – *Continued*

- a. the precise location of any observation;
- b. the approximate number of people, similar in description to the suspect, that were viewed;
- c. the time period during which the identifications were made;
- d. the suspect’s reaction if they became aware that they were being observed; and
- e. the witness’ reaction upon seeing the suspect.

VIII. WHEN FOREGOING MODEL RULES MAY BE DISREGARDED

Whenever a situation arises in which there is a need for eyewitness identification and none of the foregoing guidelines appear to be adequate or appropriate for the situation presented, no eyewitness identification shall be attempted until:

- A. Authorization for the needed procedure is obtained from the District Attorney’s Office, or
- B. A court order validating the needed procedure is issued.

IX. DISCLAIMER

The Eyewitness Identification Policy developed by the Oak Creek Police Department is for internal use only, and does not enlarge an officer's civil or criminal liability in any way. It should not be construed as the creation of a higher standard of safety or care in an evidentiary sense, with respect to third party claims. Violations of the Eyewitness Identification Policy can only be the basis of a complaint by this Department, and then only in a non-judicial administrative setting.

REFERENCE:

State of Wisconsin D.O.J., Bureau of Training and Standards for Criminal Justice, *Model Policy and Procedures for Eyewitness Identification*

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Steven J. Anderson  
Chief of Police

(Attachment)  
• *Witness Instructions for the Sequential Photo Lineup Procedure*

DSA/tp