

COMMENTARY AND INSTRUCTIONS

INSTRUCTIONAL SUGGESTIONS

*To Accompany “Standards for Florida State and Local Law Enforcement Agencies in Dealing with Photographic or Live Lineups in Eyewitness Identification”
Issued March 1, 2011 And Revised June 15, 2011*

DEVELOPED AND ENDORSED BY THE FLORIDA DEPARTMENT OF LAW ENFORCEMENT, THE FLORIDA SHERIFFS ASSOCIATION, AND THE FLORIDA POLICE CHIEFS ASSOCIATION IN COLLABORATION WITH THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION



This document has been prepared in a collaborative effort by the Florida Department of Law Enforcement, the Florida Sheriffs Association, and the Florida Police Chiefs Association in conjunction with the Florida Prosecuting Attorneys Association and is provided to assist agencies in developing their written photographic and live lineup policies and to provide support to agency training efforts. The June 15 revision takes into account information and issues identified during the 2011 Legislative Session and in meetings of the Florida Innocence Commission. These are suggestions and comments designed to accompany the Standards. Nothing herein is a mandate upon any agency. Nothing herein is intended to create new rights of parties or to grant a right or privilege not otherwise provided by law.

This Commentary should not be construed to mandate the exclusive manner in which eyewitness identifications may be done. The specific facts and circumstances of a particular situation will determine the actual identification process to be utilized.

Definitions of common terms utilized with regard to photographic or live lineups:

Blank Photo: A sheet of paper the same size as the photos utilized in the photo lineup that is blank, with no photo showing. (Blank photos are utilized in sequential photo lineups.)

Filler Photos: Photographs of persons other than the suspect, used to complete a photo array and bring the total number of photos in the array up to a minimum of six photos.

Functional Equivalent Procedures: (FEP) Procedures utilized when an Independent Administrator is not utilized, permitting the investigator to conduct a sequential photographic lineup in a manner that precludes him or her from knowing when the suspect is presented to the witness.

Independent Administrator: An investigator administering a line-up or photo array who has no knowledge of the suspect's identity. (Sometimes referred to as a "Blind Administrator.")

Live Lineup: Live presentation of individuals, before an eyewitness, for the purpose of identifying or eliminating suspects. Live lineups may present the persons in the lineup simultaneously, or sequentially. Live lineups are sometimes called "physical lineups."

Photo Array: The group of photographs utilized in a photographic lineup. A photo array may be presented to the witness simultaneously or sequentially. The process of conducting a photographic lineup is often called the "photo array." (The Florida Commission on Law Enforcement Accreditation utilizes "photo array" in articulating its accreditation standard.)

Photographic Lineup: Showing photographs to an eyewitness for the purpose of identifying or eliminating suspects. Photographic lineups may be presented simultaneously, or sequentially. The group of photos used in a photographic lineup is called a "photo array."

Sequentially: Presentation of photos in a photo group or individuals in a lineup to a witness one-at-a-time rather than all at once (simultaneously).

Simultaneously: Presentation of photos in a photo group or individuals in a lineup to a witness all at once rather than one-at-a-time (sequentially).

Commentary and Instructional Suggestions

(Item References are to the Actual Standards Item¹)

Item A— “Creation, composition, and utilization of the Lineup”

1. A photographic lineup shall consist of a minimum of six photographs. A minimum of five filler photos shall be utilized together with only one photo of the suspect. A filler photo shall be used in the lead photo position in a simultaneous photographic lineup and in a sequential photographic lineup administered by an Independent Administrator.
2. Photo lineups shall use contemporary photographs of individuals who are reasonably similar in age, height, weight, and general appearance and are of the same sex and race, in accord with the witness’s description of the subject. Do not mix color and black and white photos. Use photos of the same size and basic composition. Do not mix mug shot photos with other photos. Do not include more than one photo of the same suspect. Cover or crop any portion of a mug shot or other photo that provides identifying information on the subject or other persons included in the photographic lineup.
3. Live lineups shall utilize a minimum of six persons, including the suspect, who are reasonably similar in age, height, weight, and general appearance and are of the same sex and race, in accord with the witness’s description of the subject.
4. The person preparing a live lineup should create a consistent appearance between the suspect and the fillers with respect to any unique or unusual feature (e.g., scars, tattoos, facial hair) used to describe the perpetrator by artificially adding or concealing that feature.

If there are multiple witnesses to view a lineup, the following shall be considered:

- a. A witness presented a lineup shall be directed to not discuss the identification procedures or the results with any other witness.
- b. A photographic or live lineup shall be presented to only one witness at a time. If multiple witnesses are being presented a lineup at generally the same time and place, they shall be kept separate to assure that they are not aware of the responses of the other witnesses and do not have an opportunity to discuss the lineup procedure.
- c. Suspects should be placed in different positions in each lineup, both across cases and with multiple witnesses in the same case. When the “Functional Equivalent Procedure” is used in a sequential photographic lineup, placement of the suspect will be random in each lineup by reason of shuffling of the folders.

¹ See items at page 3, “Part III” of the Standards.

Item B— “Instructions”

1. Standardized instructions promote consistency in administering lineups. Agency policy shall provide the standardized instructions for its investigators and shall require documentation describing and explaining any actual variance from the standardized instructions.
2. The instructions shall be read to the witness prior to administering the lineup. The witness should acknowledge the specific instructions prior to beginning review of the photo array or the lineup unless the witness refuses or is unable to provide the acknowledgment.
3. Example of a Standard Instruction:

Witness Instructions: (adapt to photographic or live lineup)

You will be asked to view a group of [photos of individuals] [persons].²

The person of interest might or might not be present in the photographic array or lineup and the [photos] [persons] are not in any particular order.

It is just as important to exclude innocent persons from suspicion as it is to identify the perpetrator.

You should not feel you have to make an identification. Take as much time as you need to look at each [photograph] [person]. If you do identify someone, I will note your exact words regarding your identification.

(Optional) Individuals presented in [these photographs] [the group] may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.

We will continue to investigate the incident with or without an identification by you.

After viewing all the [photographs] [persons], if you can make an identification, [please initial and date the photograph of] [please indicate] the person you have identified, [and close the folder].

Since this is an ongoing investigation, you should not discuss this [photo array] [lineup] or the results.

(For sequential lineup): The [photos] [persons] will be shown to you one at a time and are not in any particular order. Take as much time as you need to examine each [photo] [person]. If you make an identification, I will continue to show you the remaining [photos] [persons] in the group.

(For simultaneous lineup): The [photos] [persons] will be shown to you simultaneously and are not in any particular order. Take as much time as you need to examine them.

I, _____ hereby acknowledge that the above instructions have been read aloud to me and that I understand how this [photo array] [lineup] will be administered.³
(witness's signature/date/time) (administrator's signature/date/time)

² If an Independent Administrator is conducting the process, this additional instruction should be given: "I don't know whether the person being investigated is included or not."

³ The administrator should document if a witness refuses to make the acknowledgment or why he or she is unable to complete the acknowledgment.

4. The instructions should be available to the administrator in written form and shall be used in each lineup performed unless special circumstances prompt a variance from the instructions. Documentation describing and explaining any actual variance from the standardized instructions shall be required.
5. Consideration should be given to having a form available for presentation to the witness which includes the standardized instructions, and then having the witness acknowledge that he or she has read those instructions. Sample forms are included at the end of this document.

Item C— “Directions to the investigator”

1. The person administering the photo array or live lineup shall scrupulously avoid any conduct that might directly or indirectly influence a witness’s decision.
2. The administrator should give the witness the instructions for the array or lineup, then step away from the witness’s immediate vicinity. If possible, the investigator should not be in the witness’s direct line of sight. This helps minimize the opportunity for inadvertent behavior that might influence the witness’s decision, and provides the witness a more relaxed opportunity to view the lineup.
3. The administrator shall avoid providing any verbal or non-verbal feedback to the witness on the witness’s identification process. Do not make comments such as “Good job! You picked our suspect!” or any other comment that suggests to the witness that he or she has or has not picked the suspect.

Item D— “Discerning level of confidence”

Any comment made by the witness during the entire process shall be carefully documented word-for-word. Any non-verbal communication or action of the witness shall also be noted in the administrator’s notes. For example, “Upon viewing the photo number four, the witness stated, ‘That’s the one. He’s the one who told me he was going to kill me,’ and the witness began crying.”

Item E— “Documenting”

1. Florida’s law enforcement agencies vary greatly in size and in the human and physical resources each has available for investigative efforts. While documentation of an array or lineup in one form or another is important, the Standards do not recommend one method of documentation over another. Each agency shall establish by policy its required method of array and lineup documentation.
2. Consultation with the agency’s legal advisor or, when no such advisor is available, with the State Attorney’s Office handling the agency’s investigations may assist the agency in articulating in its policy regarding how its arrays and lineups will be documented.
3. Agency policy shall establish the agency’s preferred means of documentation of arrays and lineups.

4. Regardless of the method of documentation utilized, any such method shall note the person(s) present during the array or lineup, and document any statements of the witness uttered during the process, taking care to indicate the precise words uttered by the witness.
5. With regard to live lineups, documentation should include as a minimum a photograph of the simultaneous live lineup, or of each person utilized in a sequential live lineup. The photo(s) should be retained in the investigative file.
6. If an identification is made, documentation of the precise photograph or person selected shall be made.
7. The photographs used in a photo array shall be preserved in the investigative file.
8. All forms utilized in the array or lineup shall be preserved in the investigative file.

Item F— “The Method(s) of Presenting the Photo Array or Lineup”⁴

1. Agency policy shall specifically indicate whether the sequential or simultaneous method of conducting photo arrays, or both methods, is/are authorized. Consultation with the agency’s legal advisor or, when no such advisor is available, with the State Attorney’s Office handling the agency’s investigations may assist the agency in articulating in its policy regarding which method(s) is/are to authorized.
2. Regardless of the particular method utilized, the administrator of a photo array or live lineup should provide standardized instructions to the witness.
3. No additional commentary by the administrator shall be made beyond the reading of the standardized instructions. Any additional comment could inadvertently suggest to a witness which photograph or person is believed to be the suspect.
4. Agencies may choose to have an Independent Administrator conduct the photo array or live lineup. An Independent Administrator does not know who the suspect is. If an Independent Administrator is used, the instructions to the witness shall include a statement that the Administrator does not know whether the person being investigated is included in the group to be viewed. The use of an Independent Administrator may impose additional demands on an Agency’s investigative resources. Agencies should take into account that any Independent Administrator becomes an important witness in the case, and will be subject to deposition and being called as a witness at trial.
5. When an Independent Administrator is not utilized, the investigator presenting the photo array or live lineup shall assure that he or she is positioned in a way to avoid influencing the witness’s decision-making.
6. If a sequential photo array is administered by an Independent Administrator, at least two blank photos should be introduced following the sixth photo. This prevents the witness from knowing he or she has viewed the last actual photo. Some believe that knowing the “last” photo is being viewed may increase the pressure on the witness to select that “final” photo or person. In sequential live lineups, simply avoid telling the witness how many people he or she will be viewing. This prevents the witness from knowing when the “last” person is being presented for viewing.

⁴ *This Item is not one of the Florida Commission on Law Enforcement Accreditation, Inc. standards.*

7. If an Independent Administrator is not utilized in a sequential photo array, blank photos shall be included in the group as noted in the “Functional Equivalent Procedure,” (see #8) but the sequence of each photo will be random since the folders containing each photo will be shuffled prior to presentation to the witness.
8. This “Functional Equivalent Procedure” (FEP) shall be used when an Independent Administrator is not utilized in a sequential photo array:
 - a. Place the suspect and filler photos in folders. Include two blank photos in folders, for a minimum of eight folders.
 - b. Shuffle the folders before giving them to the witness.⁵
 - c. The investigator administering the photo lineup shall position himself or herself away from the witness, and in a position that he or she cannot see inside the folders as they are viewed by the witness.
9. Number all photos and blanks used in a photo array. This can be done prior to presentation to the witness of a simultaneous photo array, or prior to the presentation by an Independent Administrator of a sequential photo array. However, when a sequential photo array is not presented by an Independent Administrator, the photos and blanks should not be numbered until after the folders have been shuffled and the witness has been presented the sequence. This assures the investigator presenting the lineup does not know where the suspect’s photo appears in the sequence after folders have been shuffled. In a sequential photo array, consider having the witness not only mark the “identification” photo as the one selected, but also initial the other photos used, indicating he or she did not pick them. This makes it clear which photos were actually viewed by the witness.
10. Do not comment on the witness’s selection or outcome of the process in any way. Avoid statements that confirm a witness’s selection, such as, “Good job. You picked our suspect.” Avoid non-verbal actions that confirm or deny whether the witness selected the suspect.
11. In a sequential photo array, after all photos or persons have been displayed and ONLY if the witness requests it, the entire display may be repeated once in the same sequence as originally presented. The entire sequence shall be presented even if the witness only requests to see one or a few photos or persons again.
12. Note and document the witness’s exact words during the entire process, including any comments made if the witness makes an identification. Note any non-verbal communications (e.g. crying upon viewing of a photo or person) of the witness.
13. If a witness form is utilized, have the witness complete it.

⁵ To avoid a predictable question from the witness, the investigator may indicate prior to allowing the witness to view the photos that there will be some blank photos included in the presentation, and that this is part of the normal procedure. See Sample Form 3 at end of this document.

14. The entire photo array utilized, together with the documentation about the process, shall be preserved in the investigative file. Photos of the persons utilized in a live lineup shall be maintained in the investigative file.⁶
15. **All live lineups must conform with specific legal requirements.** If the right to counsel has attached, the counsel representing the accused is entitled to have sufficient time to confer with his or her client prior to the lineup, and to observe the lineup itself. Any waiver of right of counsel must conform with the requirements of law. Consultation with the agency's legal advisor or, when no such advisor is available, with the State Attorney's Office handling the agency's investigations may assist the agency in articulating in its policy regarding how live lineups should be conducted.
16. In any lineup, no person aware of the suspect's identity other than the investigator who is administering the lineup and (in the case of a live lineup where the right to counsel has attached) the suspect's attorney may be present.

Item G— “Training And Filing A Current Copy of Policy or Procedure”⁷

1. Each agency shall ensure that any agency investigator conducting a lineup understands the agency's policy regarding eyewitness identification.
2. Acknowledgment by the investigator that he or she has read and understands the policy shall be documented in a manner stated in the policy, and any such documentation retained by the agency.
3. Periodic review and refresher training on the policy shall be done by all agency investigators involved in eyewitness identification efforts. The policy shall specify when such training shall occur.
4. A copy of the current policy shall be filed with the State Attorney's Office in the circuit in which the agency is located, and in the case of state agencies, in the Office of the State Attorney of the Second Judicial Circuit.

⁶ *If an agency uses a computerized or other alternative method of presenting a photo array, its utilization should be in a manner conforming with the “Standards” and consistent with the guidance in this Commentary.*

⁷ *This Item is not part of the Florida Commission on Law Enforcement Accreditation, Inc. standards.*

FIVE SAMPLE FORMS FOR CONSIDERATION OR ADAPTATION FOR AGENCY USE

Note: These forms are not mandatory. They are provided as examples for consideration by agencies as they develop their eyewitness identification policies.

In addition to the sample forms in this Appendix, examples of eyewitness identification policies utilized by Florida law enforcement agencies are available directly from the Florida Sheriffs Association and the Florida Police Chiefs Association.

(Sample Form 1) SEQUENTIAL PHOTO ARRAY FORM (Administrator)

Case Number: _____

Lineup ID# _____

WITNESS: _____

Administrating Investigator/Officer: _____

Does

Does Not Know Identity of Suspect

Instructions (read BEFORE showing photo array):

If sequential photo array is being utilized by an investigator/officer who DOES know identity of the suspect, the Functional Equivalent Procedure (FEP) shall be used. The FEP means 1) that the administrator cannot see, and does not know, the order of the photos and that 2) the witness knows the administrator does not know the order of the photos.

Using the **WITNESS PHOTO ARRAY FORM**, fill out the case information at top of the form. Orally read the instructions to the witness and have the witness read the instructions and initial them. In sequential photo displays, show the photos one at a time. (In simultaneous photo displays, present the folder to witness and display the entire photo back at one time.)

In a sequential display, after all photos have been displayed and *ONLY* if the witness requests it, the entire display may be repeated once. In any repeat, ALL photos must be displayed in the same sequence, even if the witness only requests to see only one or a few photos again. →Sequential lineup (if utilized) was shown () ONCE () TWICE.

During the process, document the witness's exact words, and note any non-verbal communication.

Ask the witness to complete the witness portion of the Witness Form and sign it. If any selection is made, have the witness sign, date, and designate the photo selected. Have the witness initial and date the other photos and indicate not selected. If a witness refuses to make or is unable to make the requested signatures or notations, document why no signature or notations were made by the witness. The photo display actually used, along with this and the witness form must be maintained in the case file.

Scrupulously avoid the use of statements, clues, and casual comments or providing unnecessary or irrelevant information that in any manner may influence the witness's decision-making process or perception. (This includes after-the-fact confirmation to a witness that he or she identified the suspect.) Be careful not to provide any feedback to a witness indicating the witness has, or has not, identified the suspect.

After the witness portion of the form has been completed, complete the administrator portion of the form, including any explanations as may be necessary. A separate investigative report or report supplement shall be completed pursuant to agency requirements.

During photo display: All comments made by the witness during the photo display. (Include photo # if relevant):

Additional observations: (e.g. non-verbal communication, physical responses, other witness comments, etc.):

Administrator's Signature/ID Number

Date: _____ Time: _____

Have witness complete the witness page. Attach the photo display used. Have witness sign, date, and designate any photo picked. Have witness initial, date and indicate the remaining non-identified photos.

(Sample Form 2) **Independent Administrator -- Sequential Photo Array Form – WITNESS**

Witness Name: _____

Date: _____ **Time:** _____ **Display ID#** _____

Read to witness before the photo display and have witness then read and initial below:

You will be asked to view a series of photos of individuals.

It is just as important to clear innocent persons from suspicion as to identify guilty parties.

The person of interest may or may not be in this photo array and the photos are not in any particular order.

I don't know whether the person being investigated is included in this series.

(Optional) Individuals presented in the series may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.

You should not feel you have to make an identification. If you do identify someone, I will have you designate the photograph of the person you have identified.

Regardless of whether you make an identification, we will continue to investigate the incident.

The photos will be shown to you one at a time and are not in any particular order. There are some blank photos in the series. This is part of the normal process. Take as much time as you need to examine each photo. If you make an identification, I will continue to show you the remaining photos in the series.

Since this is an ongoing investigation, you should not discuss the identification procedures or results.

Please initial here if you understand the above instructions: _____

Complete AFTER the photo array:

The sequential photo array I was shown consisted of _____ photos.

Choose:

() I am unable to select any photo as being the person who _____.

() I have selected photo # _____ as the person who _____.

Your signature

Date

Witnessed By:

Investigator Administering Photo Array

Date

Note: Document any refusal or inability of the witness to complete this form.

Functional Equivalent Procedure: Sequential -- Photo Array Form – WITNESS

Witness Name: _____

Date: _____

Time: _____

Display ID# _____

Read to witness before the photo display and have witness then read and initial below:

You will be asked to view a series of photos of individuals.

It is just as important to clear innocent persons from suspicion as to identify guilty parties.

The person of interest may or may not be in this photo array and the photos are not in any particular order.

(Optional) Individuals presented in the series may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.

You should not feel you have to make an identification. If you do identify someone, I will have you designate the photograph of the person you have identified.

Regardless of whether you make an identification, we will continue to investigate the incident.

The photos will be shown to you one at a time and are not in any particular order. I do not know the order of the photos. There are some blank photos in the series. This is part of the normal process. Take as much time as you need to examine each photo. If you make an identification, I will continue to show you the remaining photos in the series.

Since this is an ongoing investigation, you should not discuss the identification procedures or results.

Please initial here if you understand the above instructions: _____

Complete AFTER the photo array:

The sequential photo array I was shown consisted of _____ photos.

Choose:

() I am unable to select any photo as being the person who _____.

() I have selected photo # _____ as the person who _____.

Your signature

Date

Witnessed By:

Investigator Administering Photo Array

Date

Note: Document any refusal or inability of the witness to complete this form.

(Sample Form 4) Independent Administrator -- Simultaneous Photo Array Form – WITNESS

Witness Name: _____

Date: _____

Time: _____

Display ID# _____

Read to witness before the photo array and have witness then read and initial below:

You will be asked to view a group of photos of individuals.

It is just as important to clear innocent persons from suspicion as to identify guilty parties.

The person of interest may or may not be in this photo array and the photos are not in any particular order.

I don't know whether the person being investigated is included in this group.

(Optional) Individuals presented in the photo group may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.

You should not feel you have to make an identification. If you do identify someone, I will have you designate the photograph of the person you have identified.

Regardless of whether you make an identification, we will continue to investigate the incident.

The photos will be shown to you simultaneously and are not in any particular order. Take as much time as you need to examine the photos

Since this is an ongoing investigation, you should not discuss the identification procedures or results.

Please initial here if you understand the above instructions: _____

Complete AFTER the photo array:

The photo array I was shown consisted of _____ photos.

Choose:

() I am unable to select any photo as being the person who _____.

() I have selected photo # _____ as the person who _____.

Your signature

Date

Witnessed By:

Investigator Administering Photo Array
Note: Document any refusal or inability of the witness to complete this form.

Date

Functional Equivalent Procedure: Simultaneous Photo Array Form – WITNESS

Witness Name: _____

Date: _____ **Time:** _____ **Display ID#** _____

Read to witness before the photo array and have witness then read and initial below:

*You will be asked to view a group of photos of individuals.
It is just as important to clear innocent persons from suspicion as to identify guilty parties.
The person of interest may or may not be in this photo array and the photos are not in any particular order.
(Optional) Individuals presented in the group may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
You should not feel you have to make an identification. If you do identify someone, I will have you designate the photograph of the person you have identified.
Regardless of whether you make an identification, we will continue to investigate the incident.
The photos will be shown to you simultaneously and are not in any particular order. Take as much time as you need to examine the photos
Since this is an ongoing investigation, you should not discuss the identification procedures or results.*

Please initial here if you understand the above instructions: _____

Complete AFTER the photo array:

The photo array I was shown consisted of _____ photos.

Choose:

() I am unable to select any photo as being the person who _____.

() I have selected photo # _____ as the person who _____.

Your signature

Date

Witnessed By:

Investigator Administering Photo Array

Date

Note: Document any refusal or inability of the witness to complete this form.