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TENTH JUDICIAL CIRCUIT

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# The Importance of Photopaks

## By: Beth Stockdale, Felony Division Chief

One of the most effective ways of identifying unknown suspects is the use of Photopaks [or photo line-ups] with witnesses. Generally, after a crime has been committed, one of the first responding officers gets enough information on the description of the suspect to issue a BOLO for other law enforcement personnel. Then a second interview is conducted during which detailed information is obtained as to the description of the suspect. It is important that you document in your report how you determined that the person you are placing in the Photopak was suspected of committing the crime. A series of photographs are then compiled from the information and shown to the witness. If an identification is made, it serves a dual purpose: Not only does law enforcement have their suspect, but then if the case goes to trial, the out-of-court identification may be admissible.

Generally, the Photopak evidence will be admissible if law enforcement did not use an unnecessarily suggestive procedure in either the make-up of the Photopak, or in the manner in which it was shown to the witness. If the Court determines the procedure was unnecessarily suggestive, the Photopak evidence may still be admissible, unless, considering all the circumstances, the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.

## Witness Interview

It is extremely important to document in your reports the suspect description given to you by the witness. The courts will consider whether the description given by the witness is consistent with whomever they pick from the Photopak. It will also consider the level of detail given by the witness.

Here are some suggestions to assist in gathering the information from the witness to use in compiling the Photopaks and preparing to testify:

**Height, Weight, Build:** You all know from talking to people in the field that some folks do not have a good idea on how much people weigh or how tall



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they are. Usually there are a number of law enforcement personnel at a crime scene. Ask the witness to see if there's anyone at the scene with a similar height, weight, and build and go from there. Ask the witness to compare the suspect to themselves – taller, shorter, bigger, smaller, etc. If the crime occurred at a retail establishment, and the witness saw the suspect exit out a door, use any markings on the door as a guide to help determine the height. Then document the height and weight in terms of a range: For example, between 165-170 pounds, and between 5'8" – 6'0".

**Age, Hairstyle and Facial Features:** If some sort of mask covered any or all parts of the suspect's face, get what description you can, specifically about the eyes, since this may be the one area exposed. Don't just concentrate on a color, but ask about shape, bloodshot versus clear, etc. Ask about birthmarks and tattoos in the facial areas.

**Race:** Again, here the witness may have only seen the skin color around the eyes, and possibly around the hand area. If the witness can't lock into a particular race, go with a skin color, and determine possible races fitting that skin color. Also, if the suspect spoke to your witness, ask whether the suspect spoke English, or some other language, or whether the suspect spoke with an identifiable accent. This may also assist in determining race.

**Particulars:** Ask the witness if there was anything in particular that they remember about the suspect in addition to the above.

**Time and Distance:** Remember to ask the witness approximately how long the witness was able to view the suspect. It could be seconds, it could be minutes, maybe hours or more. The courts will consider the witness' opportunity to view the suspect. This information will be important as to how specific the witness can be in providing any of the above information, and how reliable the information is. Also ask how close the witness actually got to the suspect.



# The Importance of Photopaks

Finally, taking into consideration all of the above, ask the witness if they would be able to identify the suspect. If so, now it is time to compile the Photopak.

## Putting the Photopak Together

The most important thing in putting the Photopak together, is to do it as soon after the witness interview as possible, and present it to your witness. One of the factors the court will consider in determining whether the identification is reliable is the length of time between the crime and the confrontation. The last thing you want to see happen is your witness sees the picture of a possible suspect in the newspaper or television before you have had the opportunity to show the Photopak.

Generally, law enforcement uses certain databases to compile the photographs to be used in the Photopak. There is a program called “MugShots” (which is ironic, because if called to testify, the last thing we as prosecutors want to hear you say on the stand is the word “mugshot”). The D.A.V.I.D. database is also used.

The courts may find the makeup of the Photopak unnecessarily suggestive if the photograph of the suspect stands out from all the others. All the photographs should be of similar race, age, height, weight, hairstyle, facial features, size, brightness, clarity, etc. The backgrounds should also be similar. Try to avoid using actual book-in photographs where the suspect is in orange jail attire. If you need to use a book-in photograph, crop it to remove any indication that the person is in custody – including the removal of the book-in number.

The court may also find that the procedure used during the display of the Photopak was unnecessarily suggestive, and render the Photopak evidence inadmissible. What the court looks at is whether you influenced the witness in any way. Here’s what not to do:

**DO NOT** show the witness a single photograph of a possible suspect, prior to presenting the Photopak.

**DO NOT** tell the witness the name of your suspect. If the witness has no clue who the suspect is,

and you suggest a name, the next thing your witness is going to do is to go onto the Polk County Sheriff’s Office Jail website, and start looking at photographs. This intervening identification will taint the Photopak identification.

**DO NOT** tell the witness that a photograph of the suspect is in the photographs displayed. Tell the witness a suspect may or may not be in those displayed.

**DO NOT** have multiple witnesses participate in the Photopak identification at the same time. Separate each witness.

If your witness is able to identify a suspect, have the witness do so on the actual Photopak. Have the witness sign and date the Photopak. You should then sign and date it as well. The Photopak should be placed in evidence, with a copy made a part of your report. It is important that the Photopak copy looks exactly as it was shown to the witness.

## Testifying About the Photopak Out-of-Court Identification

If the case goes to trial, you will be asked to testify about the Photopak identification. There is a legal predicate, or series of questions, you will be asked before the Photopak is put into evidence. Those questions will include the following: The date and time you displayed the Photopak, at what location it took place, how many photographs were displayed, how they were displayed, whether a single photograph was shown to the witness prior to viewing the Photopak, whether the witness participated in a physical lineup prior to viewing the Photopak, and finally which photograph the witness selected.

Even if the Photopak identification is tainted in some respect, the in-court identification may still be admissible if the witness has some independent basis for identifying the defendant.

The most important thing is to talk to your prosecutor as soon as possible if there are any issues with the Photopak identification. The sooner we are aware of a potential issue, the better we can work at a solution together.





<http://www.sao10.com>

**Bartow Phone Numbers:**

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DOMESTIC VIOLENCE	534-4882
VICTIM ASSISTANCE	534-4987
FELONY INTAKE	534-4987
FELONY	534-4964
INVESTIGATIONS	534-4804
VIOLATION OF PROBATION	534-4803
CHILD ABUSE	534-4857
HOMICIDE DIVISION	534-4959
ON CALL PHONE	860-8243
WORTHLESS CHECKS	534-4874
JUVENILE DIVISION	534-4905
FAX-MALROOM	534-4945
WITNESS MANAGEMENT	534-4021
MISDEMEANOR/TRAFFIC	
WITNESS MANAGEMENT	534-4020
FELONY	
WITNESS MANAGEMENT	534-4020
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# FROM THE COURTS...

## UNLOADED WEAPON WAS NOT READILY ACCESSIBLE.

In this Polk County case, the defendant was charged with carrying a concealed firearm and filed a motion to dismiss, asserting that the state could not establish a prima facie case. The facts on which the motion was based were that the defendant had an unloaded firearm in his vehicle wedged between the two front seats. Ammunition for the firearm was located in the closed center console. The trial court granted the motion, and on appeal, the Second District affirmed, holding that the firearm was not readily accessible for immediate use. *State v. Weyant*, 33 FLW D2331 (Fla. 2d DCA Sept. 19, 2008).

## THE DEFECTIVE MIRANDA WARNINGS CASE.

The defendant was charged with possession of a firearm by a convicted felon. At his trial, the defense sought to exclude his confession on the grounds that the Miranda warnings, which were given to him, were defective because they did not inform him of his right to consult with a lawyer during questioning. The trial court overruled the objection, and the defendant was convicted as charged. On appeal, the Supreme Court reversed, holding that the Miranda warnings given to the defendant were insufficient because they did not explicitly tell him of his right to consult with a lawyer during questioning. In so holding, the Court stated that the decision was not to be applied retroactively to cases that were final as of the date of its opinion. *State v. Powell*, 33 FLW S778 (Fla. Sept. 29, 2008).

## IT WAS AN ESCAPE.

The defendant was charged with escape. At his trial, the evidence established that an officer asked him for consent to search his person. The defendant agreed and took off his shoes. The officer looked in the shoes and saw a controlled substance. He told the defendant that he was under arrest and ordered him to put his hands behind his back. As he reached out to grab one of the defendant's wrists, the defendant slapped his hand away and then pushed him in the chest and fled. The defendant was convicted as charged. On appeal, the Fourth District affirmed, holding that there was sufficient evidence to show that the defendant was in custody at the time he fled. *Spann v. State*, 33 FLW D2419 (Fla. 4th DCA Oct. 15, 2008).

## DOG SNIFF WAS LEGAL

The defendant was charged with trafficking in cannabis and filed a motion to suppress evidence. The facts on which the motion was based were that police obtained a search warrant based, in part, on a positive alert by a drug-detection dog at the front door of the defendant's residence. The trial court granted the motion, finding that the use of the detection dog constituted an illegal and unreasonable search. On appeal, the Third District reversed, holding that a dog sniff is not a Fourth Amendment search. *State v. Jardines*, 33 FLW 2455 (Fla. 3d DCA Oct. 22, 2008).