

**SENECA FALLS POLICE DEPARTMENT  
GENERAL ORDER**

<b>General Order: 412</b>	<b>Rescinds: New Issue</b>
<b>Subject: Eyewitness Identification Procedures</b>	<b>NYS Accreditation:</b>
<b>Effective Date: 07/28/2017</b> <b>By Order Of: Stuart W. Peenstra, Chief of Police</b>	

- I. **PURPOSE:** The purpose of this order is to establish a standardized protocol and forms for the administration of photo array, show-up and live lineup identification procedures for eyewitness identification.
- II. **POLICY:** It is the policy of the Town of Seneca Falls Police Department to appropriately secure reliable and credible testimony from individuals that witness crimes and to conduct proper eyewitness identifications that are not inappropriately suggestive or in conflict with law enforcement guidelines provided through legislative enactments or established case law.
- III. **DEFINITIONS:**
  - A. **Show-Up** - The witness viewing of a single individual for the purpose of either identifying or eliminating that individual as the perpetrator of a particular crime.
  - B. **Live Line-Up** - A selected group of persons presented to a witness containing a possible suspect and several similar-appearing fillers for the purpose of determining whether the witness is able to identify the perpetrator of the crime.
  - C. **Photo Array** - A selected group of photographs of persons presented to a witness containing the possible suspect and several similar-appearing fillers for the purpose of determining whether the witness is able to identify the perpetrator of the crime.
  - D. **Suspect** – Person the police believe has committed the crime.
  - E. **Filler** – A person, other than the suspect, who is used in either a live line-up or a photo array.
  - F. **Administrator** – The person who is conducting the identification procedure.
  - G. **Blind Procedure** – An identification procedure where the administrator does not know the identity of the suspect.
  - H. **Blinded Procedure** – An identification procedure where the administrator may know who the suspect is, but by virtue of procedure’s administration, the administrator does not know where the suspect is in the array viewed by the witness. This procedure is designed to prevent the administrator from being able to inadvertently provide cues to the witness.
  - I. **Confidence Statement** – A statement from an eyewitness immediately following their identification regarding their confidence or certainty about their identification. The witness should be asked to provide their level of certainty in their own words as opposed to using a numerical scale.

## **IV. PROCEDURE:**

### **A. SHOW-UP IDENTIFICATION**

1. Show-up identifications may be conducted when an officer needs to identify or eliminate a subject who may have committed an offense and the following conditions exist and a witness, who had an opportunity to view the person who committed the offense, is identified. The following conditions must be present before a show-up is conducted:
  - a. A high level of certainty in identification is demonstrated by the witness and the witness has expressed an ability to identify the perpetrator of an offense;
  - b. A possible suspect, matching the description, is located within a reasonable time from when the offense occurred;
  - c. A possible suspect, matching the description, is located not far from the location of where the offense occurred. When examining distances from the crime location, officers must consider all possible modes of transportation and the suspects ability to travel those distances with in a particular time; and
  - d. The police have reasonable suspicion to detain a suspect matching the description.
2. A show-up for eyewitness identification should not be conducted when:
  - a. The show-up cannot be done without including overly suggestive elements.
  - b. A credible and confident witness is not available.
  - c. One of multiple witnesses has already positively identified or eliminated a suspect. When one witness has already identified a suspect in a show-up, officers should consider using a photographic line-up for further identification.
  - d. The suspect is detained at police headquarters and headquarters is the only place where the show-up can be conducted.
3. Whenever possible, witnesses should be transported to the suspect's location.
4. When more than one witness is available, officers should identify the best possible or most confident witness; when determining the best witness, officers should ascertain:
  - a. Was the witness able to view the suspect?
  - b. Does the witness know the suspect?
  - c. Can the witness describe the suspect in good detail?
  - d. What is the witness's mental state?
  - e. If the witness is not the victim, what is the relationship between the victim and the witness?
  - f. General questions of known facts in an effort to verify witness recollection.

5. Witnesses should always perform show-ups alone and never be accompanied by other witnesses or other persons who may influence the identification process.
6. Officers who facilitate a show-up should:
  - a. Inform the witness that the subject being detained may or may not be the subject who committed the offense.
  - b. Inform the witness that they are not obligated to make identification.
  - c. Do not lead, influence or provide verbal or physical feedback to the witness in any way.
  - d. Ask the witness to refrain from discussing the show-up with other witnesses.
7. Although it may be considered somewhat suggestive, suspects who are detained for the purpose of a show-up may be handcuffed and/or placed in the rear of a police car to ensure the safety of the officers on scene.
8. All show-ups and their corresponding results must be fully and completely documented in a police report.
9. Officers will complete and issue a 710.30 notice to the defendant following positive show-up identification.

**B. Live LINE-UPS**

1. Live line-ups will be conducted in coordination with the Seneca County District Attorney's Office.
2. When a suspect is in custody and an accusatory instrument has been filed, the Court process has begun and the defendant is entitled to legal representation during the live line-up. If the suspect is in custody and officers are only in the investigative stage, with no accusatory instrument having been filed, legal representation is not required except when:
  - a. The officers are aware that the suspects attorney is attached, even on an unrelated matter; or
  - b. The suspect requests legal counsel; or
  - c. A court order for a live line-up has been obtained.
3. If possible, and only when circumstances permit, the officer who administers the line-up should not know the identity of the suspect; in other words, he/she should conduct a blind line-up.

4. When more than one witness is available, officers should identify the best possible or most confident witness; when determining the best witness, officers should ascertain:
  - a. Was the witness able to view the suspect?
  - b. Does the witness know the suspect?
  - c. Can the witness describe the suspect in good detail?
  - d. What is the witness's mental state?
  - e. If the witness is not the victim, what is the relationship between the victim and the witness?
  - f. General questions of known facts in an effort to verify witness recollection.

A. Selection of fillers

1. Fillers should be similar in appearance to the suspect in the line-up.
2. While ensuring that the array is not unduly suggestive, the original description of the suspect should be taken into account when selecting fillers to be used.
3. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features, or other distinctive characteristics.
4. An administrator should not use a filler if the administrator is aware that the filler is known to the witness
5. Where practicable there should be five fillers, in addition to the suspect, but in no case, should there be less than four fillers used.
6. Only one suspect should appear per line-up.
7. If necessary, all members of the line-up should be seated to minimize any differences in height.
8. If there is more than one suspect, then different fillers should be used in separate line-ups for each suspect.
9. The suspect should be allowed to pick his/her position within the line-up. If a prior identification was made using a photo array that number should be avoided unless insisted upon by the suspect.

10. The fillers must be instructed not to speak with each other or make unnecessary gestures. All members of the line-up should be instructed to remain still, hold the placard, and look forward unless instructed otherwise by a police officer.

B. Inviting the witness to view the line-up

1. When an investigator calls a witness to arrange for the witness to view a line-up, the investigator should simply ask the witness to come in for the identification procedure and should not say anything about the suspect. For example, the investigator should say to the witness: "We'd like you to come in to view a line-up in connection with the crime you witnessed on (*date and location*)."
2. Investigators should give no opinion on their perception of the witness' ability to make an identification.
3. The investigator should avoid addressing whether or not a person is in custody.
4. Investigators should not inform the witness about any supporting evidence such as confessions, other IDs, or physical evidence that may have been obtained.
5. Witnesses should be prevented from speaking to the victim or any other witnesses about the identification procedure when they arrive to view the line-up.

C. Instructions to witness

1. Consideration should be given to providing written instructions to the witness. The instructions should be communicated in various languages when appropriate. The instructions should be read to the witness and signed by the witness after being read.
2. Before the procedure begins, the administrator should tell the witness what questions will be asked during the identification procedure.

3. The investigator should tell the witness that as part of the ongoing investigation into a crime that occurred on *(date)* at *(location)* the witness is being asked to view the line-up to see if the witness recognizes anyone involved with that crime.
4. These instructions let the witness know that they should not seek assistance from the administrator in either making a selection or confirming an identification. They also address the possibility of a witness feeling any self-imposed or undue pressure to make an identification. The instructions are as follows:
  - a. The perpetrator may or may not be present.
  - b. Do not assume I know who the perpetrator is.
  - c. I want you to focus on the line-up and not to ask me or anyone else in the room for guidance about making an identification during the procedure.
  - d. Individuals presented in the line-up 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.
5. Instructions to the witness about line-up members moving, speaking, or changing clothing:
  - a. Consideration should be given to telling the witness that the line-up members can be asked to speak, move or change clothing, if requested.
  - b. If one line-up member is asked to speak, move, or change clothing then all the line-up members will be asked to do the same.
6. The witness should be informed that if they make an identification at the conclusion of the procedure they will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind. Inform the witness that this question is not intended to suggest how certain or uncertain he/she might be about an identification. Every witness who makes an identification is asked this question.

7. The witness should be advised that the investigation will continue regardless of whether or not they make an identification.
8. Where the procedure is to be recorded by the use of audio or video, the witness should be informed prior to the start of the procedure, and their consent should be requested prior to the recording.
  - a. The witness should sign the form indicating their consent or lack of consent.
  - b. If the witness does not consent, the officer should not record the procedure.

D. Administering the procedure

1. Where practicable, taking into account resource limitations, a blind procedure should be used to conduct and administer a line-up, but is not required.
2. After the instructions are given, the administrator – whether the procedure is to be conducted blind or not – should stand away from the witness during the line-up, in a neutral manner, while still being in a position to observe the witness. The key is for the administrator to stand outside the witness' line of sight while the witness is viewing the line-up. This will reduce any inclination by the witness to look at the administrator for guidance.
3. Generally, it is not advisable for a witness to be involved in multiple procedures involving the same suspect.
4. Witnesses must view the line-up separately.
5. If there are multiple witnesses viewing the line-up, they should be prevented from speaking to each other about the identification procedure before, during, and after the process.
6. The position of the suspect should be moved each time the line-up is shown to a different witness, assuming the suspect and/or defense counsel agree.

7. Attention should be given to the selection of a neutral location for the procedure so that the witness is not influenced by items in the room such as wanted posters or BOLO (be on the lookout) information.
8. The police officer who is monitoring the suspect and fillers in the line-up room should remain out of view of the witness. This will eliminate the potential for any claims of inadvertent suggestions by the police officer and it also removes the potential for distracting the witness as the line-up is being viewed.

E. Post-viewing questions

1. After viewing the line-up the witness should be asked:
  - a. Do you recognize anyone?
  - b. If so, what is the number of the person that you recognize?
  - c. From where do you recognize the person?
2. If the witness' answers are vague or unclear, the administrator will ask the witness what he or she meant by the answer.
3. Confidence statement
  - a. Ask the witness to describe his/her certainty about any identification that is made.
  - b. Ask the witness to use his/her own words without using a numerical scale. For example, say, "Without using numbers, how sure are you?"

F. Documenting the procedure

1. Recording the Procedure
  - a. The entire identification procedure should be memorialized and documented. Where practicable and where the witness' consent has been gained the procedure should be memorialized using audio or video recording.

- b. Where the procedure is to be recorded by the use of audio or video, the witness' consent should be obtained and documented by the use of a form prior to recording. If the witness does not consent to the recording, the officer should not record the identification procedure and should request that the witness sign a form saying he/she refused to be recorded.
  - c. Audio or video recording may not always be possible or practicable. Some reasons that may prevent the identification procedure from being recorded include, but are not limited to:
    - (i) If it is law enforcement's belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant;
    - (ii) recording equipment malfunctions;
    - (iii) recording equipment is not available because it was otherwise being used;
    - (iv) the identification procedure is conducted at a location not equipped with recording devices and the reasons for using that location are not to subvert the intent of this policy.
    - (v) inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel; or
    - (vi) a lack of consent from the witness.
  - d. The line-up should be preserved by photograph. The witness should sign the photograph to verify that it is the line-up that he or she viewed.
2. Any physical or verbal reaction to the line-up should be memorialized in a standardized manner. If this is done in writing, anything said by the witness should be verbatim.
  3. The confidence statement should be documented verbatim.
  4. Document where the procedure took place, who was present, the date and time it was administered.

5. Document all people in the viewing room with the witness and the line-up room with the suspect.
6. Document the officer or person who escorts the witnesses to and from the line-up room.
7. Document requests made by the defense counsel and whether they were granted, and if not, why not. Reasonable requests from defense counsel should be honored and documented. Any defense request for a change in the line-up that is not, or cannot be, honored must also be documented.
8. Where an identification is made, complete a CPL 710.30 Notice. Note: Failure to provide notice of the identification could prevent its use in court.

G. Defendant's right to counsel

1. There are circumstances where during a line-up a suspect may have a defense attorney present.
2. Investigators should consult with their District Attorney's Office for guidance regarding a defendant's right to counsel.
3. When in attendance, the defense attorney must be instructed not to speak in the viewing room when the witness is present.

H. Speaking with the witness after the procedure

1. The administrator, or other appropriate person, should document the statements, comments or gestures of the witness regarding the identification procedure before talking with the witness about next steps.
2. Once the identification procedure is concluded and documented, the administrator can talk to the witness about how the case will proceed or what the next steps in the case may be.
3. The administrator should not comment or make gestures on the identification itself by saying things such as: "Great job" or "We knew you would recognize him" or even nodding their head in agreement.
4. The witness should be told not to discuss what was said, seen, or done during the identification procedure with other witnesses, nor should the investigator discuss any other identification procedures with the witness.

5. Officers should complete and issue a 710.30 notice to the defendant following positive physical line-up identification.
6. All members who will be involved in the administration of a live line-up shall receive training on how to properly administer line-ups.

### **C. Photo Array -**

1. Fillers should be similar in appearance to the suspect in the array.
2. While ensuring that the array is not unduly suggestive, the original description of the suspect should be taken into account when selecting fillers to be used.
3. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features, or other distinctive characteristics.
4. An administrator should not use a filler if the administrator is aware that the filler is known to the witness.
5. There should be at least five fillers, in addition to the suspect.
6. Only one suspect should be in each array.
7. If there is more than one suspect, then different fillers should be used in separate arrays for each suspect.
8. Photo quality, color and size should be consistent. Administrators should ensure that the photos do not contain any stray markings or information about the subject. Color and black and white photos should not be mixed.
9. Any identifying information contained on any of the photos should be covered and those areas of the other photos used should be similarly covered.

### **B. Inviting the witness to view the array**

1. When a suspect is known and the investigator calls a witness to arrange for the viewing of a photo array, the investigator should simply advise the witness that he/she intends to conduct an identification procedure and should not say anything about the suspect. For example, the investigator should say to the witness: "We'd like you to come in to view a photo array in connection with the crime committed on (*date and location*)."

2. The investigator should avoid addressing whether or not a person is in custody.
3. Investigators should give no opinion on their perception of the witness's ability to make an identification.
4. Investigators should not inform the witness about any supporting evidence such as confessions, other identifications, or physical evidence that may have been obtained.
5. Witnesses should be prevented from speaking to the victim and any other witnesses about the identification procedure when they arrive to view the array.

C. Instructions to witness

1. Consideration should be given to providing written instructions to the witness. The instructions should be communicated in various languages when appropriate. The instructions should be read to the witness and signed by the witness after being read.
2. Before the procedure begins, the administrator should tell the witness what questions will be asked during the identification procedure.
3. The investigator should tell the witness that as part of the ongoing investigation into a crime that occurred on (*date*) at (*location*) the witness is being asked to view the photo array to see if the witness recognizes anyone involved with the crime.
4. These instructions let the witness know that they should not seek assistance from the administrator in either making a selection or confirming an identification. They also address the possibility of a witness feeling any self-imposed or undue pressure to make an identification. The instructions are as follows:
  - a. The perpetrator may or may not be pictured.
  - b. Do not assume I know who the perpetrator is.
  - c. I want you to focus on the photo array and not to ask me or anyone else in the room for guidance about making an identification during the procedure.

5. Instructions to the witness about the quality of the photographs.
  - a. Individuals presented in the photo array 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.
  - b. Photographs may not always depict the true complexion of a person; it may be lighter or darker than shown in the photo.
  - c. Pay no attention to any markings that may appear on the photos, or any other differences in the type or style of the photographs.
6. The witness should be informed that if they make an identification at the conclusion of the procedure they will be asked to describe their level of confidence about that identification in their own words and should avoid using a numerical scale of any kind. Inform the witness that this question is not intended to suggest how certain or uncertain he/she might be about an identification. Every witness who makes an identification is asked this question.
7. The witness should be advised that the investigation will continue regardless of whether or not they make an identification.
8. Where the procedure is to be recorded by the use of audio or video, the witness should be informed prior to the start of the procedure, and their consent should be requested prior to the recording.
  - a. The witness should sign the form indicating their consent or lack of consent.
  - b. If the witness does not consent, the officer should not record the procedure.

D. Administering the procedure

1. Photo arrays must always be conducted using either a "blind procedure" or "blinded procedure". A "blind" procedure is preferable, where circumstances allow and it is practicable.
2. If the procedure is blinded, the administrator should handle and display the array so that the administrator does not know suspect's position in the array until the procedure has completed.

3. Two methods that can be used to successfully accomplish a blinded procedure are:
  - a. "Two person shuffle" – the array is assembled by someone other than the administrator and then it is placed into an unmarked folder for the administrator.
  - b. "One person shuffle" – multiple arrays are created by the administrator and the suspect's position is different in each. Three sealed envelopes containing the arrays are provided to the witness who selects one to use. The envelopes should be identical and free of any markings. The witness should sign and date the two unused envelopes across the seal. These envelopes should also be preserved.
4. Regardless of the method of administration that is to be used, the administrator should be positioned in such a way so that they are not in the witness' line of sight during the viewing of the array. Where practicable, the administrator should still be able to view the witness and hear what they say.
5. If there are multiple witnesses viewing the array, they should be prevented from speaking to each other about the identification procedure before, during, and after the process.
6. The witnesses must view the array separately. Multiple copies of the same array may be used for the same suspect for each new witness viewing the array.
7. To protect the integrity of the identification procedure, the administrator must remain neutral so as not to, even inadvertently, suggest a particular photograph to the witness.
8. Attention should be given to the location of the procedure so that the witness is not influenced by items in the room such as wanted posters or BOLO (be on the lookout) information.
9. Generally, it is not advisable for a witness to be involved in multiple procedures involving the same suspect.

E. Post viewing questions

1. After viewing the array ask the witness the following questions:
  - a. Do you recognize anyone?
  - b. If so, what number photograph do you recognize?
  - c. From where do you recognize the person?
2. If the witness' answers are vague or unclear, the administrator will ask the witness what he or she meant by the answer.
3. Confidence Statement
  - a. Ask the witness to describe his/her certainty about any identification that is made.
  - b. Ask the witness to use his/her own words without using a numerical scale. For example, say, "Without using numbers, how sure are you?"

F. Documentation

1. Document any changes made to any of the photographs used.
2. Document where the procedure took place, who was present, the date and time it was administered.
3. Preserve the photo array in the original form that was shown to each witness.
4. Each witness should complete a standardized form after viewing the array and the actual array used should be signed and dated by each witness.
5. Recording the Procedure
  - a. The entire identification procedure should be memorialized and documented. Where practicable and where the witness' consent has been gained the procedure should be memorialized using audio or video recording.

- b. Where the procedure is to be recorded by the use of audio or video, the witness' consent should be obtained and documented on a form prior to recording. If the witness does not consent to the recording, the officer should not record the identification procedure and should request that the witness sign a form saying he/she refused to be recorded.
- c. Audio or video recording may not always be possible or practicable. Some reasons that may prevent the identification procedure from being recorded include, but are not limited to:
  - (i) If it is law enforcement's belief that such recording would jeopardize the safety of any person or reveal the identity of a confidential informant;
  - (ii) Recording equipment malfunctions;
  - (iii) Recording equipment is not available because it was otherwise being used;
  - (iv) The identification procedure is conducted at a location not equipped with recording devices and the reasons for using that location are not to subvert the intent of this policy;
  - (v) Inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel; or
  - (vi) A lack of consent from the witness.
- 6. Any physical or verbal reaction to the array should be memorialized in a standardized manner. If this is done in writing, anything said by the witness should be verbatim.
- 7. The confidence statement should be documented verbatim.
- 8. Where an identification is made, complete a CPL 710.30 Notice. Note: Failure to provide this notice could prevent its use in court.

G. Speaking with the witness after the procedure

1. The administrator, or other appropriate person, should document the statements, comments or gestures of the witness regarding the identification procedure before talking with the witness about next steps.
2. Once the identification procedure is concluded and documented, the administrator can talk to the witness about how the case will proceed or what the next steps in the case may be.
3. The administrator should not comment or make gestures on the identification itself by saying things such as: "Great job" or "We knew you would recognize him" or even nodding his/her head in agreement.
4. The witness should be told not to discuss what was said, seen, or done during the identification procedure with other witnesses, nor should the investigator discuss any other identification procedures with the witness.

H. All members who will be involved in the administration of a photo array shall receive training on how to properly administer photo arrays.

**D. SINGLE WITNESS IDENTIFICATION**

1. Police identification procedures have been routinely criticized and attacked as being unduly suggestive.
2. The general reliability and accuracy of eyewitness identification has also recently been questioned.
3. As a general rule, the Seneca County District Attorney's Office will not prosecute a case where the only evidence against a defendant comes from one-witness identification without the victim having prior independent knowledge of the defendant or without any other corroborating evidence.
4. When preparing for eyewitness identification, officers shall identify and collect as much corroborating evidence as possible.