

CALIFORNIA HIGHWAY PATROL

GENERAL ORDER 100.102

REVISED MAY 2021

LINEUP PROCEDURES

1. PURPOSE. The purpose of this General Order (GO) is to provide procedures for conducting a lineup and direction for use of the CHP 216L, Lineup Admonishment.

2. POLICY. In order to address new legal requirements mandated by Section 859.7 of the California Penal Code, all members of the CHP shall adhere to the requirements of this GO whenever conducting a lineup.

3. PROCEDURE.
 - a. Types of Lineups. There are four types of lineups. Although they all serve the purpose of identifying the suspect of a crime, they are used in different situations.
 - (1) Live Lineup. The suspect and the fillers are presented in-person. Because live lineups require the presence of the suspect, they are usually used only when the suspect is in custody. For the purposes of this GO, “filler” means a person, a photograph of a person, or the voice of a person who is not suspected of an offense and is included in a lineup.
 - (2) Video Lineup. Employees record a live lineup, but without any witnesses in attendance. The witness later views the recording. Video lineups should be used in the following situations:
 - (a) When an employee cannot arrange to have an attorney present.
 - (b) If a witness is unavailable to attend a live lineup (e.g., witness is hospitalized).
 - (3) Photographic Lineup. The witnesses are shown a photograph of the suspect along with fillers. Photographic lineups are usually used in one of the following situations:
 - (a) The employee has a suspect, but the suspect is not in custody.

(b) The suspect is in custody, but their appearance changed after the crime was committed and the employee has an earlier photograph of the suspect that better reflects their appearance at the time of the crime.

(c) The suspect is in custody, but it is not practical or possible to conduct a live lineup (e.g., suspect was hospitalized).

NOTE: Although live lineups are ordinarily utilized when feasible due to being a better test of the witness ability to identify the suspect, employees are not prohibited from conducting photographic lineups.

(4) Voice-only Lineup. The witness listens to the voices of the suspect and fillers, but does not see their faces. In most cases, the suspect and fillers will say something that the suspect said.

(a) Voice-only lineups may be live or prerecorded.

(b) Voice-only lineups should be used when the witness heard the suspect's voice, but did not see them.

b. Lineup Procedures. When conducting a lineup, employees shall ensure the following procedures are followed.

(1) Suspect Description. Prior to conducting the lineup, and as close in time to the incident as possible, employees shall obtain the description of the suspect from the witness. Employees shall include the description of the suspect on the CHP 202, Driving Under the Influence Arrest-Investigation Report, or CHP 216, Arrest-Investigation Report.

(2) Electronic Recordings. An electronic recording shall be made that includes both audio and visual representations of the lineups being conducted. When it is not possible to make a recording with both audio and visual representations, an audio recording only may be used.

(a) When audio recording without video is used, the employee shall include the reason video recording was not possible on the CHP 202 or CHP 216.

(b) Area commanders shall develop local standard operating procedure (SOP) regarding the audio and video recording of lineups. When developing local SOP, Area commanders should consult the local office of the district attorney to ensure admissibility of lineup identifications and successful prosecution.

(3) Blind/Blinded Administration. The employee conducting the lineup shall use blind administration or blinded administration during the lineup.

(a) Blind Administration. Blind administration means the employee conducting the lineup does not know the identity of the suspect (e.g., an employee not involved in the investigation).

1 Blind administration is the preferred method of conducting a lineup and should be utilized whenever possible.

2 Blind administration shall be the only method of conducting a live lineup.

3 When not used, the employee shall document on the CHP 202 or CHP 216 the reason the presentation of the lineup was not conducted using blind administration, if applicable.

(b) Blinded Administration. Blinded administration means the employee conducting a photographic or recorded lineup may know who the suspect is, but does not know where the suspect has been placed or positioned in the lineup procedure through the use of any of the following:

1 An automated computer program that prevents the employee from seeing which photographs the witness is viewing until after the photographic lineup is completed.

2 The folder shuffle method, which refers to a system for conducting a photographic lineup by placing photographs in folders, randomly numbering the folders, shuffling the folders, and then presenting the folders sequentially so that the employee cannot see or track which photograph is being presented to the witness until after the procedure is completed.

3 A blinded photograph six pack, which refers to a system where an employee, other than the investigator, creates the six pack of photographs to be presented to the witness so that the employee cannot see the photographs until after the procedure is completed.

4 Any other procedure that achieves neutral administration and prevents the employee from knowing where the suspect has been placed or positioned in the lineup.

(4) Lineup Composition. A photographic or live lineup shall be composed so that the fillers generally fit the witness' description of the suspect. A voice-only

lineup should, if possible, be composed so that the fillers generally fit the witness' description of the suspect's voice.

(a) The photograph of the suspect should, if practicable, resemble their appearance at the time of the offense and not unduly stand out.

1 If a witness describes the suspect as having a particular or distinguishing characteristic (e.g., dark wavy hair, mustache, brown eyes, tattoos, scar), fillers should also have this characteristic.

2 It is permissible to modify a photograph (such as by adding a mustache) to help confirm an identification when a witness has already made a tentative identification. Employees shall not make any such modification until after the witness has made at least a tentative selection.

(b) The lineup should contain a minimum of five fillers.

(c) If the employee does not have a suspect, but there is reason to believe the suspect belonged to an identified group, the employee may show the witness photos of members of that group (e.g., gang books, sexual assault registries, school yearbooks).

(d) Only one suspect shall be included in any lineup. A separate lineup shall be completed for each additional suspect.

(e) Writings or information concerning any previous arrest of the possible suspect shall not be visible to the witness. Booking photographs, which contain any information concerning a previous arrest, shall not be used in photographic lineups.

1 For the purposes of this policy, information concerning a previous arrest means anything visible in the photograph, which could lead the average person to believe the subject in the photograph is or was an inmate, or that the photograph was taken during a booking procedure (e.g., the person in the photograph is wearing a prison or jail jumpsuit, the photograph has height indicators in the background, the photograph has any other indicator that it was taken in a jail or prison facility).

2 Booking photographs, which do not contain any information concerning a previous arrest, may be used if there are no other photographs available of the possible suspect, or if other available

photographs no longer resemble the appearance of the suspect at the time of the offense.

3 The use of a booking photograph in a photographic lineup shall be documented on the CHP 202 or CHP 216 along with the reason the booking photograph was used.

(5) Witness Instructions. The employee conducting the lineup shall read the instructions on the CHP 216L to the witness, verbatim, prior to having the witness read the instructions on the CHP 216L and sign the document signifying they understand all instructions.

(6) All witnesses shall be separated when conducting a lineup.

(7) Nothing shall be said to the witness that might influence the identification of the suspect. Inappropriate comments may include the following:

- (a) You caught, or think you caught, the person who committed the crime.
- (b) The victim's property was in the suspect's possession.
- (c) The suspect made admissions or confessed to the crime.

(8) If a witness identifies a person they believe to be the suspect, all the following shall apply.

- (a) The employee shall immediately inquire as to the witness' confidence level in the accuracy of the identification and record the statements in writing, verbatim, on the CHP 216L.
- (b) Identifiable information concerning the identified person shall not be given to the witness prior to obtaining the statement of confidence level and documenting the exact words of the witness.
- (c) The employee shall not validate or invalidate the witness' identification.

NOTE: If the witness did not make an identification but said something or reacted in a manner indicating they recognized someone in the lineup, it is appropriate to question them about this.

(9) Refusal to Participate In Voice or Live Lineup.

- (a) A suspect does not have a right to refuse to participate in a lineup, refuse to speak during a lineup, or refuse to wear clothing for identification

purposes (*People v. Hart* [1999] 20 Cal.4th 546, 625; *Goodwin v. Superior Court* [2001] 90 Cal.App.4th 215, 221). Refusal to participate shall be documented in the CHP 202 or CHP 216.

1 To help ensure admissibility of a refusal at trial, employees should advise the suspect that their refusal to participate may be used against them in court.

2 If a previously *Mirandized* suspect refuses to speak at a lineup, the employee shall notify them the *Miranda* right to remain silent does not give them the right to refuse to participate in a voice lineup (*People v. Johnson* [1992] 3 Cal.4th 1183, 1223, fn.9; *People v. Ellis* [1996] 65 Cal.2d 529, 539).

NOTE: A suspect's refusal to participate is admissible at trial as demonstrating consciousness of guilt even if the suspect did so on the advice of counsel (*People v. Alexander* [2010] 49 Cal.4th 846, 905-906).

(b) If a suspect refuses to appear in a lineup, employees may seek a court order authorizing the use of reasonable force if, after being served with a copy of the order, the suspect still refuses to appear (*United States v. Wade* [1967] 388 U.S. 218, 222; *Schmerber v. California* [1966] 384 U.S. 757, 770-71).

(c) Area commanders shall develop local SOP regarding obtaining court orders for suspects that refuse to appear in lineups and the procedures for compelling a suspect to appear once a court order has been issued.

c. Right to Counsel at Lineups. Under certain circumstances, a suspect has a right to have counsel present for the purposes of observing the manner in which the lineup was conducted.

(1) A suspect has the right to have counsel present at a live lineup if they have been arraigned on the crime under investigation (*Rothgery v. Gillespie County* [2008] 554 U.S. 191, 213).

(a) The attorney's role at a live lineup is limited to that of a silent observer, taking note of any suggestiveness in the procedure.

(b) The attorney has a right to be present when the witness is asked if anyone in the lineup was the perpetrator.

(c) The attorney does not have the right to be present when employees interview a witness before the lineup begins or after the witness makes the identification.

(2) The right to have counsel present at live lineups can be waived by the suspect if that waiver is made freely. A *Miranda* waiver during interrogation is not a waiver of a suspect's right to have counsel present during lineups.

(a) To obtain a waiver of right to counsel at a live lineup, the suspect must be advised of, and waive, the following (*People v. Thomas* [1970] 5 Cal.App.3d 889, 897; *People v. Banks* [1970] 2 Cal.3d 127, 136; *People v. Wells* [1971] 14 Cal.App.3d 348, 354):

1 You have a right to have counsel present at the lineup.

2 You will not be required to participate in the lineup without the presence of counsel.

3 If you want to have an attorney present but cannot afford one, an attorney will be appointed at no charge to you.

(b) Any waiver of right to counsel at a lineup shall be documented on the CHP 202 or CHP 216. The suspect's waiver statement shall be recorded verbatim.

(3) A suspect does not have a right to have counsel present at a video or photographic lineup.

(4) If the suspect requests a specific attorney who cannot attend the lineup within a reasonable time, or who refuses to participate, employees may conduct the lineup in any of the following ways:

(a) Substitute counsel. Employees may obtain a "substitute counsel" such as a public defender (*People v. Hart* [1999] 20 Cal.4th 546, 625).

(b) Convert to a photographic or video lineup. Employees can photograph or otherwise record the lineup without the witness present, then show the photographs or videotape to the witness without counsel being present.

(c) Proceed with the lineup after attorney refusal. If the suspect's attorney appears but refuses to participate, employees may proceed without them (*United States v. Wade* [1967] 388 U.S. 218, 237; *People v. Wells* [1971] 14 Cal.App.3d 348, 354; *People v. Banks* [1970] 2 Cal.3d

127, 134; *People v. Schafer* [1970] 4 Cal.App.3d 554, 560). Employees shall document the attorney's refusal to participate in the CHP 202 or CHP 216 and videotape the lineup to help prove it was reliable.

NOTE: The courts have not defined what they deem to be a reasonable amount of time for an attorney to attend a lineup; therefore, employees shall use sound professional judgement when determining reasonableness and should notify a supervisor prior to proceeding without the suspect's chosen attorney present. If a suspect's chosen attorney is unavailable to attend a lineup in a reasonable time and an employee decides to continue utilizing a substitute counsel as prescribed in paragraph 3.c.(4)(a), or convert to photographic or video lineup as prescribed in paragraph 3.c.(4)(b), they shall thoroughly document the circumstances necessitating the use of the alternate method on the CHP 202 or CHP 216.

d. Form Preparation and Retention. A CHP 216L shall be completed for all lineups. The CHP 216L is available in the forms directory of the CHP Intranet site.

(1) Employees shall check the appropriate boxes at the top of the CHP 216L for the type of lineup conducted. The CHP 216L shall be attached to and filed with the completed CHP 202 or CHP 216.

(2) Area commanders shall ensure all lineups and the corresponding audio/video recordings are preserved in their original form. This shall be accomplished by booking the original lineup and the corresponding audio/video recording as evidence. A copy of the photographic lineup shall be attached to the original investigation report.

(3) The CHP 216L shall be kept with the investigation report as per the records retention schedule.

e. Field Show-ups. When conducting field show-ups, employees shall comply with the guidelines outlined in the California Peace Officers Legal Sourcebook, which is accessible via the CHP Intranet site.

(1) For the purposes of this GO, "field show-up" means a procedure in which a suspect is detained shortly after the commission of a crime and who, based on their appearance, their distance from the crime scene, or other circumstantial evidence, is suspected of having just committed a crime.

(2) When conducting a field show-up, employees shall thoroughly document the field show-up on the CHP 202 or CHP 216, and document the field show-up on a CHP 216L.

OFFICE OF THE COMMISSIONER

OPI: 061