

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Criminal Justice

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BILL: SB 312

INTRODUCER: Senator Baxley

SUBJECT: Eyewitness Identification

DATE: February 20, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Hrdlicka	CJ	<b>Pre-meeting</b>
2.			JU	
3.			RC	

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**I. Summary:**

SB 312 creates s. 92.70, F.S., relating to eyewitness identifications in criminal cases.

The bill sets forth specific procedures that state, county, municipal, or other law enforcement agencies must implement when conducting lineups in Florida. The bill also provides certain alternative procedures that should benefit smaller law enforcement agencies with staffing issues related to conducting lineups.

The bill also provides judicial remedies should the requirements of the lineup procedure not be followed.

The Criminal Justice Standards and Training Commission is directed to create educational materials and provide training programs on conducting lineups in compliance with the statute. The Florida Department of Law Enforcement estimates that this portion of the bill would cost the department \$7,670, which can be absorbed within existing resources.

The bill becomes effective on October 1, 2017.

**II. Present Situation:**

Eyewitness misidentification of crime suspects has contributed to 64 percent of the Florida cases in which DNA evidence later exonerated the defendant.<sup>1</sup> Of the 349 DNA exonerations nationwide, more than 70 percent had a mistaken identification issue.<sup>2</sup>

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<sup>1</sup> This represents nine of the 14 DNA-based exonerations in Florida. Information provided by Seth Miller, Executive Director, The Innocence Project of Florida (February 8, 2017, e-mail on file with Criminal Justice Committee staff).

<sup>2</sup> Information provided by Seth Miller, Executive Director, The Innocence Project of Florida (February 8, 2017, e-mail on file with Criminal Justice Committee staff).

## Conducting Suspect Lineups

Suspect lineups are conducted when law enforcement has developed a suspect in a criminal investigation. A live lineup includes the suspect in a group of individuals who should look similar to the suspect, and the witness or victim views the lineup to see if he or she recognizes the suspect. The same is true of photographic lineups where a group of photos including the suspect is shown to the witness or victim for identification purposes.

There are many variables in common eyewitness identification procedures. For example, in the presentation of photo lineups, there are two main methods: sequential (only one photo is shown at a time) and simultaneous (photo array shows all photos at once in what is commonly referred to as a photo-pack).

Additional variables include whether the officer conducting the lineup has knowledge of the suspect's identity or is a "blind (or independent) administrator"<sup>3</sup>; how the witness is instructed about the process<sup>4</sup>; and what level of documentation of the process the administrator does.<sup>5</sup>

## Standards for Suspect Lineups

In 2010, the Legislature provided funding for the creation of a commission to study the causes of wrongful conviction and subsequent incarceration. In response, the Florida Supreme Court established the Florida Innocence Commission "to conduct a comprehensive study of the causes of wrongful conviction and of measures to prevent such convictions."<sup>6</sup>

In 2011 the commission voted to support legislation setting forth procedures law enforcement officers must follow when they are conducting photo and live lineups with eyewitnesses to crimes.<sup>7</sup> The Senate bill presented during the 2011 Legislative Session died in messages.<sup>8</sup>

Also in 2011, a collaboration by the Florida Department of Law Enforcement, Florida Sheriffs Association, Florida Police Chiefs Association, and the Florida Prosecuting Attorneys Association, as part of a commission workgroup, created "Standards for Florida State and Local Law Enforcement Agencies Dealing with Photographic or Live Lineups in Eyewitness Identification" and "Commentary and Instructions" regarding conducting eyewitness lineups. The commission voted to recommend that Florida law enforcement agencies adopt the documents with changes suggested by the commission. The primary suggested change created a

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<sup>3</sup> Using a blind administrator helps to prevent any conscious or unconscious cues about the suspect's photo location or appearance in a line-up from being conveyed to the witness. *Identifying the Culprit: Assessing Eyewitness Identification*, National Academy of Sciences (2014), pages 24, 106-107.

<sup>4</sup> Reading standardized instructions to the witness helps minimize the possibility of biasing. *Identifying the Culprit: Assessing Eyewitness Identification*, National Academy of Sciences (2014), pages 25, 107.

<sup>5</sup> For example, does the administrator ask the witness for a "confidence level" when the witness has made an identification? *Identifying the Culprit: Assessing Eyewitness Identification*, National Academy of Sciences (2014), pages 25, 108; see also pages 108-109 recommending recording of the identification process.

<sup>6</sup> Fla. Supreme Court, Admin. Order No. AOSC10-39, *In Re: Florida Innocence Commission* (July 2, 2010). The Commission's Final Report may be accessed online at <http://www.flcourts.org/core/fileparse.php/248/urlt/finalreport2012.rtf>.

<sup>7</sup> The Florida Innocence Commission, *Interim Report to the Supreme Court of Florida* (June 2011), discussion of March 21, 2011, meeting.

<sup>8</sup> Senate Bill 1206 and House Bill 821 (2011). SB 312, as originally filed, is similar to the 2011 bills.

requirement that a blind administrator conduct lineups.<sup>9</sup> The workgroup declined to adopt the suggested changes. The standards were revised in June 2011 to state that the law enforcement agency may choose to have an independent administrator; it is not required as suggested by the commission.

According to the Florida Department of Law Enforcement, in 2011 the Commission for Florida Law Enforcement Accreditation adopted standards based upon the “Standards for Florida State and Local Law Enforcement Agencies in Dealing with Photographic or Live Lineups in Eyewitness Identification.”<sup>10</sup> Currently, 157 law enforcement agencies are accredited and, thus, maintain compliance with the standards for conducting lineups adopted by the Commission for Florida Law Enforcement Accreditation.

Florida statutes do not currently set forth requirements for law enforcement officers to follow when conducting eyewitness identification procedures during criminal investigations. At least eleven other states have enacted statutes requiring implementation of specific eyewitness identification procedures.<sup>11</sup>

### **Standards Compliance**

If a law enforcement agency has a particular protocol in place and the protocol is not followed, the issue becomes ripe for a challenge on the issue of reliability and therefore, admissibility, of the identification evidence at trial. This possibility provides an incentive for protocol compliance. Conversely, if the protocol is followed, motions to suppress the evidence of identity should rarely be filed as there is likely no good-faith basis for filing them.

### **Florida Law Enforcement Training**

The Criminal Justice Standards and Training Commission (CJSTC), created within the Florida Department of Law Enforcement, is responsible for, among other things, establishing uniform minimum training standards for training officers in the various criminal justice disciplines and establishing minimum curricular requirements for criminal justice training schools.<sup>12</sup>

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<sup>9</sup> See *Final Report to the Supreme Court of Florida*, page 20.

<sup>10</sup> Standards for Florida State and Local Law Enforcement Agencies in Dealing with Photographic or Live Lineups in Eyewitness Identification (rev. June 15, 2011), available at <http://www.fdle.state.fl.us/cms/Documents/Eyewitness-ID/Eyewitness-Identification-Standards.aspx>; Commentary and Instructions: Instructional Suggestions (rev. June 15, 2011), available at <http://www.fdle.state.fl.us/cms/Documents/Eyewitness-ID/Eyewitness-Identification-Commentary-and-Instructi.aspx> (both sites last visited February 14, 2017). Additionally, the FDLE agency bill analysis contains excerpts from the Basic Recruit Training Program related to conducting lineups. Florida Department of Law Enforcement, *2017 Bill Analysis: SB 312* (January 17, 2017).

<sup>11</sup> The eleven states are Connecticut, Illinois, Maryland, Nevada, North Carolina, Ohio, Texas, West Virginia, Wisconsin, Vermont, and Virginia. For example see Ga. Code Ann. Sec. 17-20-1 – 17-20-3 (2016); Conn. Gen. Stat. Sec. 54-1p (2012); N.C. Gen. Stat. Sec. 15A-284.52 (2015); and ORC Ann. 2933.83 (2010). In total at least 18 states have passed legislation to study or regulate procedures regarding eyewitness identification, have had state courts address it, or have had the state Attorney General adopt regulations on procedures. National Conference of State Legislatures (NCSL), *Practices in Eyewitness Identification* (Nov. 2014), available at <http://www.ncsl.org/Documents/cj/PracticesInEyewitnessIdentification.pdf> (last visited February 14, 2017).

<sup>12</sup> Sections 943.11 and 943.12(5) and (8), F.S.

Additionally, the CJSTC is tasked with designing, implementing, maintaining, evaluating, revising, or adopting certain statutorily approved training programs. These programs include basic recruit, advanced, career development, and specialized training.<sup>13</sup>

### III. Effect of Proposed Changes:

The bill creates s. 92.70, F.S., relating to eyewitness identifications in criminal cases.

#### Lineup Procedures

The bill sets forth specific procedures that state, county, municipal, or other law enforcement agencies must implement when conducting lineups in Florida.

Prior to the lineup, officers are required to give the eyewitness five instructions. These are:

- 1) The perpetrator might or might not be in the lineup;
- 2) The lineup administrator does not know the suspect's identity (this instruction is not necessary if an alternative method is used in lieu of using an independent administrator);
- 3) The eyewitness should not feel compelled to make an identification;
- 4) It is as important to exclude innocent persons as it is to identify the perpetrator; and
- 5) The investigation will continue with or without an identification.

The eyewitness must be given a copy of these instructions. If he or she refuses to sign a document acknowledging receipt of the instructions, the lineup administrator is directed to sign it and make a notation of the eyewitness refusal.

The lineup must be conducted by an independent administrator. This approach is sometimes referred to as "blind" administration. The independent administrator does not know the identity of the suspect.

In the case of photo lineups, the bill provides that an alternative method may be used in lieu of an independent administrator if the method is specified and approved by the CJSTC.

Two required features of any alternative method are: achieving neutral administration and preventing the administrator from knowing which photograph is being presented to the eyewitness. The alternative methods may include:

- Using automated computer programs that administer the photo lineup directly to the eyewitness in a manner such that the administrator cannot see which photograph is being viewed;
- Placing randomly numbered photographs in folders, shuffling them, and then presenting them in a manner such that the administrator cannot see or track which photograph is being presented to the eyewitness; or
- Employing any other procedure that achieves neutral administration and prevents the administrator from knowing which photograph is being presented to the eyewitness during the process.

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<sup>13</sup> Section 943.17(1)(a)-(e), F.S.

The alternative photo lineup procedures should help eliminate staffing issues that otherwise could arise in smaller agencies if using an independent administrator were the only statutorily approved procedure.

### **Remedies for Noncompliance**

The bill also provides judicial remedies should the requirements of the lineup procedure not be followed.

The court may consider noncompliance with the statutory suspect identification procedures when deciding a defense motion to suppress the identification of the defendant from being presented as evidence at trial.

The bill also provides that the court may allow the jury to hear evidence of noncompliance in support of claims of eyewitness misidentification raised by the defendant. Additionally, if evidence of compliance or noncompliance with the statutory requirements is presented at trial, the jury must be instructed that it can consider that evidence to determine the reliability of eyewitness identification.

Because the bill creates specific judicial remedies and the possibility that the jury may hear evidence of compliance or noncompliance with the statutory procedures, jury instructions must be adopted by the Florida Supreme Court. Standard Jury Instructions for criminal cases are quite often proposed and adopted based upon the Legislature's revision of the criminal statutes, soon after the end of each legislative session.

### **Education and Training**

The bill requires the CJSTC, in consultation with the Florida Department of Law Enforcement, to develop educational materials and conduct training programs for law enforcement on the eyewitness identification procedures set forth in the bill.

This bill is effective October 1, 2017.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

It is possible that the requirements of the bill could result in local fund expenditures due to staffing issues related to the accessibility of an independent lineup administrator, however the bill does provide for alternative methods of conducting lineups. If local funding for additional staffing becomes necessary, such funding will directly relate to the process of crime suspect arrest, therefore under subsection (d) of Article VII, Section 18 of the Florida Constitution, it appears there is no unfunded mandate.

### **B. Public Records/Open Meetings Issues:**

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Florida Department of Law Enforcement estimates that \$7,670 is needed to conduct curriculum development workshops and validate training associated with the bill.<sup>14</sup> It is expected that the expense can be accommodated utilizing current resources.<sup>15</sup>

The Florida Police Chiefs Association has not yet determined the potential impact of this bill.

**VI. Technical Deficiencies:**

Staff suggests that bill language delegating decisions to the CJSTC about an appropriate alternative lineup method (lines 50-57) appears to be unnecessary for accomplishing the purpose of the bill. Further, the language appears to create a responsibility outside the CJSTC's current purview.

The bill could be amended to read: using an alternative method specified in subparagraphs 1.-3. of this paragraph. Any alternative method must be carefully structured to achieve neutral administration and to prevent the lineup administrator from knowing which photograph is being presented to the eyewitness during the identification procedure. Alternative methods may include any of the following:

The amendment eliminates the delegation of authority to the CJSTC and keeps the requirements of the bill purely statutory.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 92.70 of the Florida Statutes.

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<sup>14</sup> Florida Department of Law Enforcement, *2017 Bill Analysis: SB 312* (January 17, 2017).

<sup>15</sup> February 14, 2017, e-mail from department staff on file with Criminal Justice Committee staff.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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