

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 643 Eyewitness Identification  
**SPONSOR(S):** Criminal Justice Subcommittee, Harrell  
**TIED BILLS:** IDEN./SIM. **BILLS:** CS/SB 312

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 0 N, As CS	Hall	White
2) Justice Appropriations Subcommittee	10 Y, 0 N	Welty	Gusky
3) Judiciary Committee			

### SUMMARY ANALYSIS

Eyewitness misidentification has been identified as the single greatest cause of wrongful convictions, accounting for 75 percent of convictions that have been later overturned by DNA evidence nationwide. As a result, recent reform efforts have largely focused on eyewitness identification procedures, including the administration of photographic lineups and live lineups.

A photographic lineup is the process of showing photographs to an eyewitness for the purpose of identifying or eliminating a suspect. A live lineup involves the live presentation of individuals, before an eyewitness, for the purpose of identifying or eliminating suspects. Currently, there is no statute in Florida relating to photographic or live lineups.

This bill sets requirements for any lineup conducted in Florida by a state, county, municipal, or other law enforcement agency. The bill requires that a lineup comply with the following requirements:

- The lineup must be administered by an independent administrator, who is a person not participating in the investigation of the criminal offense and who is unaware of which person in the lineup is the suspect;
- If an independent administrator is not used, the lineup must be conducted using an alternative method that is designed to achieve neutral administration and prevent the lineup administrator from knowing which photograph is being presented to the eyewitness during the identification procedure;
- The witness must be given a set of instructions before being presented with the lineup; and
- The witness must acknowledge, in writing, having received the instructions or the lineup administrator must document the witness's refusal to do so.

The bill provides remedies for the failure to comply with its requirements by making consideration of such failure mandatory during a motion to suppress the eyewitness identification and admissible at trial in support of a claim of eyewitness misidentification. The bill requires the jury to be instructed that they may consider evidence of compliance or noncompliance with the requirements to determine the reliability of eyewitness identification if such evidence is introduced at trial.

The bill requires the Criminal Justice Standards and Training Commission to consult with Florida Department of Law Enforcement ("FDLE") to create educational materials and provide training programs on how to conduct lineups in compliance with the bill's requirements.

The bill has a fiscal impact of \$7,670, which can be absorbed within existing resources of the FDLE. Local governments could have a fiscal impact depending on how they decide to implement the bill.

The bill provides an effective date of October 1, 2017.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

According to statistics compiled by the Innocence Project of Florida (IPF), eyewitness misidentification accounts for 75 percent of convictions that have been later overturned through DNA evidence nationwide.<sup>1</sup> Research indicates that different factors may lead to eyewitness misidentification, including estimator variables and systematic variables. Estimator variables are factors that may lead to misidentification, but are beyond the control of the criminal justice system and include variables such as where the crime took place, visibility, race of the victim and perpetrator, and whether a weapon was present.<sup>2</sup> Systematic variables are aspects of identification that can be controlled by the criminal justice system including variables such as the way lineups are conducted and how police interact with an identifying witness.<sup>3</sup>

Generally, law enforcement agencies utilize two different kinds of lineup procedures for the purpose of suspect identification: a photographic lineup or a live lineup. A photographic lineup is the process of showing photographs to an eyewitness for the purpose of identifying or eliminating a suspect.<sup>4</sup> A live lineup involves the live presentation of individuals, before an eyewitness, for the purpose of identifying or eliminating suspects.<sup>5</sup> Reforms have generally targeted these procedures as they are systematic variables that can be controlled by the criminal justice system. Suggested reforms relating to lineup procedures have included: the blind administration of lineups,<sup>6</sup> instructing the witness that the perpetrator may not be included in the lineup, and recording lineup identification procedures when possible.<sup>7</sup>

##### *Standards for Florida Law Enforcement in Eyewitness Identification*

In 2011, in an effort to minimize the possibility of erroneous identification, multiple law enforcement agencies<sup>8</sup> within the state collaborated in developing Standards for Florida State and Local Law Enforcement Agencies in Dealing with Photographic or Live Lineups in Eyewitness Identification (“Standards”). These Standards identify the key factors that the individual agencies should consider in developing an eyewitness identification policy with the goal of promoting consistency in how individual agency’s investigators deal with photographic or live lineups. The Standards recommend that each agency develop its own written policies and procedures in conjunction with the local state attorney’s office to conform to the Standards while meeting the needs of the specific agency.<sup>9</sup>

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<sup>1</sup> INNOCENCE PROJECT OF FLORIDA, *Eyewitness Misidentification: The Most Unreliable Form of Evidence*, <http://floridainnocence.org/content/?p=7544> (last visited March 24, 2017).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> FLORIDA DEPARTMENT OF LAW ENFORCEMENT, *Commentary and Instructions, Instructional Suggestions*, <https://www.fdle.state.fl.us/cms/Guidelines/Documents/EyewitnessGuidelinesCommentary.aspx> (last visited March 24, 2017).

<sup>5</sup> Live lineups are sometimes called “physical lineups”. *Id.*

<sup>6</sup> The lineup is administered in such a way that the police officer administering the lineup is not aware which individual is actually the suspect. Research has shown blind administration sharply reduces the risk of misidentification. INNOCENCE PROJECT OF FLORIDA, *Eyewitness ID Reform*, [http://floridainnocence.org/content/?page\\_id=68](http://floridainnocence.org/content/?page_id=68) (last visited March 24, 2017).

<sup>7</sup> *Id.*

<sup>8</sup> The Standards were 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 Attorney’s Association. FLORIDA DEPARTMENT OF LAW ENFORCEMENT, *Standards for Florida State and Local Law Enforcement Agencies in Dealing With Photographic Or Live Lineups In Eyewitness Identification*, <https://www.fdle.state.fl.us/cms/Guidelines/Documents/Standards.aspx> (last visited March 24, 2017).

<sup>9</sup> *Id.*

The Standards recommend that each agency should develop a policy that, at a minimum, addresses the following:

- 1) The creation, composition, and utilization of the photo array or lineup (It is recommended that a photographic lineup should consist of a minimum of six photos, containing one photo of the suspect and five filler photos of individuals reasonably similar in age, height, weight, and general appearance, in accord with the witness's description of the suspect. A live lineup should consist of six persons meeting the same criteria.);
- 2) Standard instructions to be given to the witness prior to a photographic or live lineup (Consideration should be given to having a form available for presentation to the witness which includes the standardized instruction and requires the witness to acknowledge that he or she has read those instructions.);<sup>10</sup>
- 3) Directions to the investigator conducting the lineup to avoid any conduct that might directly or indirectly influence the witness's decision;<sup>11</sup>
- 4) How to discern the level of confidence in identification as expressed by the witness (Any comment made by the witness should be documented word-for-word and any non-verbal communication or action of the witness should be noted.);
- 5) How to document the procedure and outcome of the photographic or live lineup (The Standards do not recommend one method of documentation over another, but encourage each agency to develop its own method that includes documenting the photograph or person selected from the lineup and preserving any photos or forms used in the investigative file.);<sup>12</sup>
- 6) The method of presenting the lineup (An independent administrator may be used, but is not required considering it may impose additional demands on an agency's resources. If an independent administrator is not used, the agency may use a process for random administration of photos using folders.); and
- 7) Required training on the agency policy by any agency personnel who will be administering a photographic or live lineup (Agencies should conduct periodic review and refresher training on the policy with all investigators involved in eyewitness identification efforts and should file a copy of the current policy with the local State Attorney's Office.).

To accompany these Standards, the collaborating law enforcement agencies also published Commentary and Instructions, Instructional Suggestions ("Commentary"), which offers more detailed instructions for complying with the Standards as well as sample instructional scripts and forms for consideration or adaption for agency use.<sup>13</sup> Standards one through five are encompassed by the mandatory standards required for state accreditation by the Florida Commission on Law Enforcement Accreditation, Inc. adopted on February 3, 2011.<sup>14</sup>

### *The Criminal Justice Standards and Training Commission*

The Criminal Justice Standards and Training Commission ("CJSTC") is an independent policy making body established within the FDLE. Section 943.12, Florida Statutes, describes the powers, duties, and functions of the CJSTC, including the responsibility for creating entry-level criteria and certification testing for Florida law enforcement officers, establishing minimum standards for employment and certification, and revoking the certifications of officers who fail to comply with minimum standards of

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<sup>10</sup> These should include indications that the person of interest might or might not be in a photo array or lineup, that the witness is not required to make an identification, that it is as important to exclude innocent persons as it is to identify perpetrators, and that the investigation will continue regardless of whether there is an identification. *Id.*

<sup>11</sup> This would include an instruction to avoid comments or actions that suggest the witness did or did not identify the suspect. *Id.*

<sup>12</sup> Including noting the witness's response and exact words. *Id.*

<sup>13</sup> See FLORIDA DEPARTMENT OF LAW ENFORCEMENT, *Commentary and Instructions, Instructional Suggestions*, <https://www.fdle.state.fl.us/cms/Guidelines/Documents/EyewitnessGuidelinesCommentary.aspx> (last visited March 24, 2017).

<sup>14</sup> Additionally, the Florida Commission of Law Enforcement Accreditation Standards require the agency to conduct initial and periodic training on the policy for employees involved in eyewitness identification efforts, as well as file the agency's current eyewitness identification policy with the local State Attorney's Office. COMMISSION FOR FLORIDA LAW ENFORCEMENT ACCREDITATION, INC., *Standard Manual Edition 5.0*,

[www.flaccreditation.org/docs/standards/CFA%20Edition%205.0%20February%202016.pdf](http://www.flaccreditation.org/docs/standards/CFA%20Edition%205.0%20February%202016.pdf) (last visited March 24, 2017).

conduct.<sup>15</sup> Currently, 157 law enforcement agencies in the state are accredited, requiring in relevant part, that they maintain compliance with the associated standards related to eyewitness identification.<sup>16</sup> Additionally, the current basic recruit training program for law enforcement includes a lesson on photographic arrays and photographic lineups that incorporates the Standards.<sup>17</sup>

#### *Eyewitness Identification in Florida Courts*

Florida statute does not currently address eyewitness identification procedures. If a claim of suggestiveness is made by a criminal defendant in a pretrial motion to suppress, courts employ a two-prong test which questions:

- 1) Whether the police employed an unnecessarily suggestive procedure in obtaining an out-of-court identification; and
- 2) If so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification.<sup>18</sup>

Additionally, Florida has a special jury instruction regarding eyewitness identification that is given to jurors if requested in a case in which eyewitness identification is disputed. Jurors are instructed to consider various factors relating to the eyewitness identification including: whether the identification was the product of the witness's own recollection or was the result of influence or suggestiveness; the circumstances under which the defendant was presented to the witness for identification; any inconsistent identifications made by the eyewitness; any instance in which the eyewitness did not make an identification when given the opportunity to do so; and five other factors.<sup>19</sup>

#### **Effect of the Bill**

The bill creates s. 92.70, F.S., to establish the "Eyewitness Identification Reform Act" ("the Act"). The Act provides definitions for relevant terms including: "eyewitness", "independent administrator", "lineup", "lineup administrator", "live lineup", and "photo lineup". The Act applies to any lineup conducted in this state by a state, county, municipal, or other law enforcement agency and sets requirements for eyewitness identification procedures.

The Act requires that any lineup must be conducted by an independent administrator, with certain exceptions. An independent administrator is defined as "a person who is not participating in the investigation of a criminal offense and is unaware of which person in the lineup is the suspect." The Act provides that if an agency does not use an independent administrator, it must conduct the procedure using an alternative method. An alternative method must be structured to achieve neutral administration of the lineup and prevent the lineup administrator from knowing which photograph is being displayed during the procedure and may include:

- An automated computer program that administers the photo lineup directly to the witness and prevents the lineup administrator from seeing which photograph the witness is viewing until after the completion of the procedure.
- A procedure in which photographs are placed into randomly numbered folders, shuffled, and then presented to the witness such that the lineup administrator cannot see or track which photograph is being presented to the witness until after the completion of the procedure.
- Any other procedure that achieves neutral administration and prevents the lineup administrator from knowing which photograph the witness is viewing until after the completion of the procedure.

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<sup>15</sup> FLORIDA DEPARTMENT OF LAW ENFORCEMENT, *Overview of the Professionalism Division*, <http://www.fdle.state.fl.us/cms/CJSTC/Overview.aspx> (last visited March 7, 2017).

<sup>16</sup> Florida Department of Law Enforcement, Agency Bill Analysis for HB 643 (2017) (on file with Justice Appropriation Subcommittee).

<sup>17</sup> *Id.*

<sup>18</sup> See *Grant v. State*, 390 So. 2d 341, 343 (Fla. 1980) (quoting *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)).

<sup>19</sup> See FL Standard Jury Instruction in Crim. Case 3.9(c).

Additionally, the Act requires the administration of mandatory instructions before a witness may view the lineup. The witness must be instructed that:

- The perpetrator might or might not be in the lineup;
- The lineup administrator does not know the suspect's identity;<sup>20</sup>
- The eyewitness should not feel compelled to make an identification;
- It is as important to exclude innocent persons as it is to identify the perpetrator; and
- The investigation will continue with or without an identification.

The Act requires a witness to acknowledge in writing that he or she has received a copy of the lineup instructions. If a witness refuses to make a written acknowledgement, the lineup administrator is required to acknowledge the document.

Further, the Act provides remedies and consequences for compliance or noncompliance with any of its requirements. The failure to comply with any part of the Act results in the following:

- Mandatory consideration of such failure by the court adjudicating a motion to suppress eyewitness identification.
- Evidence of such a failure is admissible in support of a claim of eyewitness misidentification, as long as such evidence is otherwise admissible.

If such evidence is admitted at trial, the Act requires the jury to be instructed that they may consider the evidence to determine the reliability of eyewitness identifications.

Finally, the Act requires the CJSTC to consult with the Florida Department of Law Enforcement ("FDLE") to create educational materials and provide training programs on how to conduct lineups in compliance with the requirements of the Act.

The Act encompasses the Standards already established for Florida law enforcement agencies related to the use of an independent administrator or alternative method and instructions to be given to an eyewitness. However, the Act requires all law enforcement agencies to adopt these procedures, while the Standards provide a suggested set of guidelines for agencies to reference in developing their own policies and procedures for eyewitness identifications.

The bill provides an effective date of October 1, 2017.

## B. SECTION DIRECTORY:

Section 1: Creating s. 92.70, F.S., relating to eyewitness identification.

Section 2: Providing an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill does not appear to impact state government revenues.
2. Expenditures: The FDLE estimates a fiscal impact of \$7,670 for revision of the law enforcement basic recruit training curriculum and online training course and creation of additional training materials for local agencies to train officers, which can be absorbed within existing resources of the department.<sup>21</sup>

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<sup>20</sup> This instruction does not have to be given when an approved alternative method of neutral administration is used.

<sup>21</sup> Florida Department of Law Enforcement, Agency Bill Analysis for HB 643(2017) (on file with the Justice Appropriation Subcommittee).

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues: The bill does not appear to impact state government revenues.
2. Expenditures: If a local agency elects to use an independent administrator to comply with the bill, there could be additional costs for such administrator. The bill, however, also provides an agency with the ability to use other procedures that achieve neutral administration which may not require additional expense.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:** None.

**D. FISCAL COMMENTS:** None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision: The bill appears to be exempt from the requirements of Art. VII, Section 18 of the Florida Constitution because it is a criminal law.
2. Other: None.

**B. RULE-MAKING AUTHORITY:** The law does not appear to require rulemaking or rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:** None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 15, 2017, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute (CS). The CS removes the requirement for the Criminal Justice Standards and Training Commission to approve alternative methods for lineups. This analysis is drafted to the CS as passed by the Criminal Justice Subcommittee.