

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #:	CS/HB 643	FINAL HOUSE FLOOR ACTION:		
SUBJECT/SHORT TITLE	Eyewitness Identification	117	Y's 1	N's
SPONSOR(S):	Criminal Justice Subcommittee; Harrell	GOVERNOR'S ACTION:	Approved	
COMPANION BILLS:	CS/SB 312			

SUMMARY ANALYSIS

CS/HB 643 passed the House on April 28, 2017, as CS/SB 312. The bill establishes requirements for the conduct of lineups by law enforcement agencies.

In criminal investigations, a photographic lineup is the process of showing photographs to an eyewitness for the purpose of identifying or eliminating a suspect. Similarly, a live lineup involves the live presentation of individuals to an eyewitness for the same purpose. Currently, Florida law does not specify requirements for lineups.

The bill creates a new section of law to require each lineup conducted by a state, county, municipal, or other law enforcement agency to comply with the following requirements:

- The lineup must be administered by an independent administrator who is not participating in the investigation and who is unaware of which person in the lineup is the suspect, or by an alternative method 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 eyewitness must be given a set of instructions before being presented with the lineup, which must specify that:
 - The perpetrator may or may not be in the lineup;
 - The lineup administrator does not know the suspect's identity, unless an alternative method of neutral administration is used;
 - 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 bill provides that a failure to comply with its requirements must be considered by the court when adjudicating a motion to suppress the eyewitness identification and may be admitted at trial in support of a claim of eyewitness misidentification.

Finally, the bill requires the Criminal Justice Standards and Training Commission 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 bill's requirements.

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

The bill was approved by the Governor on June 14, 2017, ch. 2017-91 L.O.F., and will become effective on October 1, 2017.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0643z1.CRJ

DATE: June 19, 2017

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Present Situation

According to nationwide statistics compiled by the Innocence Project of Florida, eyewitness misidentification accounts for 75 percent of convictions that are later overturned based on DNA evidence.¹ Research indicates that various factors contribute to eyewitness misidentification, such as estimator variables and systematic variables. Estimator variables are factors beyond the control of the criminal justice system which may lead to misidentification, such as where the crime took place, visibility, race of the victim and perpetrator, and whether a weapon was present.² Systematic variables are factors that can be controlled by the criminal justice system, such as the method of conducting a lineup and the manner in which police interact with an identifying witness.³

Generally, law enforcement agencies utilize two types 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.⁴ Similarly, a live lineup involves the live presentation of individuals to an eyewitness for the same purpose.⁵ Reforms aimed at reducing misidentification have generally targeted these procedures as they are systematic variables that can be controlled by the criminal justice system. Suggested reforms have included: the blind administration of lineups;⁶ instructing witnesses that the perpetrator may not be included in the lineup; and recording lineup identification procedures when possible.⁷

Standards for Florida Law Enforcement in Eyewitness Identification

In 2011, in an effort to minimize the possibility of misidentification, multiple law enforcement agencies⁸ within the state collaborated to develop guidance entitled, “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 individual agencies should consider in developing an eyewitness identification policy for the purpose of promoting consistency in the administration of photographic or live lineups throughout the state.⁹

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. The Standards suggest that each photographic lineup 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. A live lineup should consist of six persons meeting the same criteria.

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

² *Id.*

³ *Id.*

⁴ 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).

⁵ Live lineups are sometimes called “physical lineups.” *Id.*

⁶ The lineup is administered in such a way that the police officer administering the lineup is not aware of 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 (last visited March 24, 2017).

⁷ *Id.*

⁸ 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 Attorneys 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).

⁹ *Id.*

- 2) Standard instructions to be given to the witness before a photographic or live lineup. Consideration should be given to having a form available for the witness which includes the standardized instructions and requires the witness to acknowledge that he or she has read those instructions.¹⁰
- 3) Directions to the investigator conducting the lineup to avoid any conduct that might directly or indirectly influence the witness's decision.¹¹
- 4) Methods to discern and document the level of confidence in the identification as expressed by the witness, e.g., requiring that any comment or non-verbal communication by the witness be documented.
- 5) Methods to document the procedure and outcome of the lineup.¹²
- 6) Training on the agency policy which must be completed by agency personnel who will administer lineups.

To accompany the Standards, the collaborating law enforcement agencies also published a document entitled, "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 agency use or adaptation.¹³ 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, 2011.¹⁴

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, F.S., 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 conduct.¹⁵ 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.¹⁶ Additionally, the current basic recruit training program for law enforcement includes a lesson on photographic arrays and photographic lineups which incorporates the Standards.¹⁷

Eyewitness Identification Issues in Court

Currently, 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.¹⁸

¹⁰ These should include indications that the person of interest may or may 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.*

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

¹² Including noting the witness's response and exact words. *Id.*

¹³ 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).

¹⁴ 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 (last visited March 24, 2017).

¹⁵ 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).

¹⁶ Florida Department of Law Enforcement, Agency Bill Analysis for HB 643 (2017) (on file with the Criminal Justice Subcommittee).

¹⁷ *Id.*

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

Factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.¹⁹

Additionally, Florida has a special jury instruction regarding eyewitness identification which is given to jurors if requested in a case in which an eyewitness identification is disputed. Jurors are instructed to consider various factors relating to the identification including: whether the identification was the product of the witness's own recollection or 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; and any instance in which the eyewitness did not make an identification when given the opportunity to do so.²⁰

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 terms including: "eyewitness," "independent administrator," "lineup," "lineup administrator," "live lineup," and "photo lineup". The Act applies to any lineup conducted in Florida by a state, county, municipal, or other law enforcement agency and sets requirements for eyewitness identification procedures.

The Act requires all lineups to be conducted by an independent administrator. 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 lineup using an alternative method that is structured to achieve neutral administration and prevent the lineup administrator from knowing which photograph is being displayed during the procedure. Such alternative method 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.

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

- The perpetrator may or may not be in the lineup;
- The lineup administrator does not know the suspect's identity;²¹
- 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 must document such refusal and sign the acknowledgement himself or herself.

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:

¹⁹ *Id.*

²⁰ *See* Florida Standard Jury Instruction in Crim. Case 3.9(c).

²¹ This instruction does not have to be given when an approved alternative method of neutral administration is used.

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

If such evidence is admitted at trial, the jury must 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 FDLE to create educational materials and provide training programs on how to conduct lineups in compliance with the requirements of the Act.

The Act takes effect October 1, 2017.

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. This fiscal impact can be absorbed by the existing resources of the department.²²

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill does not appear to impact local 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 an administrator. The bill, however, also provides an agency with the alternative 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.

²² Florida Department of Law Enforcement, Agency Bill Analysis for HB 643 (2017) (on file with the Criminal Justice Subcommittee).