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| <b>LFC Requester:</b> | <b>Eric Chenier</b> |
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**AGENCY BILL ANALYSIS  
2015 REGULAR SESSION**

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*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:  
**Original**     **Amendment**      
**Correction**     **Substitute**   

**Date** January 13, 2015  
**Bill No:** SB 16-305

**Sponsor:** Sen. Cisco McSorley  
**Short Title:** Crim. Procedure; enhance accuracy eyewitness testimony

**Agency Code:** Attorney General's Office  
**Person Writing:** Kevin A. Graham, AAG  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

| Appropriation |      | Recurring or Nonrecurring | Fund Affected |
|---------------|------|---------------------------|---------------|
| FY15          | FY16 |                           |               |
|               |      |                           |               |
|               |      |                           |               |

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

| Estimated Revenue |      |      | Recurring or Nonrecurring | Fund Affected |
|-------------------|------|------|---------------------------|---------------|
| FY15              | FY16 | FY17 |                           |               |
|                   |      |      |                           |               |
|                   |      |      |                           |               |

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

|              | <b>FY15</b> | <b>FY16</b> | <b>FY17</b> | <b>3 Year<br/>Total Cost</b> | <b>Recurring or<br/>Nonrecurring</b> | <b>Fund<br/>Affected</b> |
|--------------|-------------|-------------|-------------|------------------------------|--------------------------------------|--------------------------|
| <b>Total</b> |             |             |             |                              |                                      |                          |

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
Duplicates/Relates to Appropriation in the General Appropriation Act:

**SECTION III: NARRATIVE**

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

**BILL SUMMARY**

Synopsis:

SB 16 is an act creating four (4) new statutes dealing with how law enforcement agencies conduct “eye witness lineups,” “photo lineups” and “showup” identification procedures when an eye witnesses is being requested to attempt to identify a suspect(s) in a criminal matter.

**SECTION 1.**

Contains definitions for terms used in the other new statutes to be created by the bill concerning eye witness identification. The terms defined by SECTION 1 include: “administrator”, “blind”, “blinded”, “eyewitness,” “filler,” “live lineup,” “photo lineup,” “showup” and “suspect.”

**SECTION 2.**

Subsection (A) of the bill imposes a deadline of not later than January 1, 2016, for “every law enforcement agency conducting eyewitness identification procedures” to adopt “written policies for using an eyewitness to identify a suspect upon viewing the suspect in person in a live lineup or showup or upon viewing a representation of a suspect in a photo array.”

Subsection (B) mandates every law enforcement agency to conduct a biennial (every two years) review of the policies to be adopted pursuant to this section.

Subsection (C) mandates that when law enforcement agencies develop or revise the policies to be created pursuant to this section, the agency “shall consider those practices shown by reliable evidence to enhance the accuracy of identification procedures.”

Subsection (D) contains a list of twelve (12) areas/subjects law enforcement agencies “shall consider including” in their policies adopted pursuant to this section “to enhance objectivity and reliability of eyewitness identifications and to minimize the possibility of mistaken identifications. . .” This list includes descriptions of how actual eyewitness identification procedures are to be carried out, such as (1) having an employee “administer” the eyewitness identification who is “blind” (meaning a person who does not know the identity of the suspect as opposed to the other individuals included in the lineup); (6) presenting separate photo lineups or live lineups to different potential eyewitnesses; and (7) having the administrator of the lineup fully document a clear

statement from the witness about the confidence level the witness has in the identification he/she has made.

Subsection (E) specifies that all written departmental eyewitness identification policies shall be made available to the public upon request.

### SECTION 3.

Creates a new duty for the secretary of public safety to create, administer and conduct training programs for law enforcement officers and recruits on the methods and technological aspects of the eyewitness identification practices and procedures shown by reliable evidence to enhance the accuracy of eyewitness evidence referenced in this act.

### SECTION 4.

States the effective date of the provisions of this act to be July 1, 2015.

### **FISCAL IMPLICATIONS**

N/A

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

### **SIGNIFICANT ISSUES**

This bill appears to be intended to address concerns raised in many jurisdictions around the country about the reliability of eyewitness identification of suspects over the past several decades. In addition to concern that an eyewitness may simply be wrong when making an identification of a suspect, there have also been concerns raised about the suggestibility of eyewitnesses if the procedure used for an eyewitness identification is not properly and fairly conducted. Since at least the 1970's the New Mexico appellate courts have considered and ruled on cases where allegations of improperly suggestive eyewitness lineups (both in-person and by photographs) have been conducted. The New Mexico courts have provided guidance for law enforcement agencies and prosecutors on this topic by adopting tests and/or guidelines for evaluating the admissibility of testimony on eyewitness identifications in criminal cases.

The Legislature may wish to review existing New Mexico case law covering the use of eyewitness identification testimony prior to adopting any new statutory language that may unintentionally conflict with existing and settled precedent.

In regards to "in-person" lineups, the New Mexico appellate courts have followed a "totality of the circumstances" review when determining when any out-of-court identification of a suspect by an eyewitness will be admitted at evidence at trial. *See State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (1981):

"It is well settled that a witness' in-court or out-of-court identifications of a defendant will be suppressed when, under the totality of the circumstances, an out-of-court identification procedure was so unnecessarily suggestive as to give rise to a substantial likelihood of misidentification, which denies a defendant due process. *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Simmons v. United States*, 390 U.S. 377, 88

S.Ct. 967, 19 L.Ed.2d 1248 (1968); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). See *State v. Nolan*, 93 N.M. 472, 601 P.2d 442 (Ct.App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979); *State v. Vialpando*, 93 N.M. 289, 599 P.2d 1086 (Ct.App.), cert. denied, 93 N.M. 172, 598 P.2d 215 (1979).”

Concerning “photographic” lineups, the appellate courts have out-lined a two-part test for determining the admissibility of testimony at trial on an eyewitness identification resulting from a lineup of photos. See *State v. Salgado*, 126 N.M. 691, 974 P.2d 661 (1999):

“We apply a two-part test to determine whether an out-of-court photographic identification is admissible. First, we must determine “whether the photo array was ‘so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification’ and, if so, ‘under the totality of the circumstances,’ whether the identification is nonetheless reliable.” *State v. McGruder*, 1997–NMSC–023, ¶ 34, 123 N.M. 302, 940 P.2d 150 (quoting *State v. Clark*, 104 N.M. 434, 439, 722 P.2d 685, 690 (Ct.App.1986)).”

In regards to “show-up” identifications, the New Mexico appellate courts have likewise already laid out standards for the admissibility of testimony of eyewitnesses in criminal cases. See *State v. Johnson*, 135 NM 567, 92 P.3d 13 (2004).

“A show-up identification is a pretrial identification procedure in which a suspect is confronted with a witness or victim of a crime. “Reliability of the identification is a due process requirement.” *Id.* ¶ 13. “Due process requires that showup identifications be reliable under the totality of the circumstances to be admissible .” *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 20, 130 N.M. 179, 21 P.3d 1032. We recognize that show-up identifications are inherently suggestive, *see id.* ¶ 21, but when the indicia of reliability are sufficient to outweigh the suggestiveness, the evidence is admissible. *Johnson*, 2004-NMCA-058,16.

See also *State v. Maes*, 100 N.M. 78, 82, 665 P.2d 1169, 1173 (Ct.App.1983)(“[E]ven if the identification procedure is suggestive the evidence is admissible when the totality of the circumstances indicate the identification is reliable.”), *abrogated on other grounds by State v. Fuentes*, 119 N.M. 104, 106-07, 888 P.2d 986, 988-89. The reliability of show-up identifications are measured by the five factor test described in *Johnson*, 2004-NMCA-058, ¶ 13:(1) the witness's opportunity to view the subject at the time; (2) the attention paid by the witness; (3) the accuracy of any pre-identification description; (4) the witness's level of certainty at the identification; and (5) the amount of time elapsed between the incident and the show-up.”

## **PERFORMANCE IMPLICATIONS**

N/A

## **ADMINISTRATIVE IMPLICATIONS**

N/A

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

N/A

## **TECHNICAL ISSUES**

Potential ambiguity/conflict: It is unclear whether the term “every law enforcement agency” in SECTION 2 is meant to apply to only State law enforcement agencies, or to any/all law enforcement agencies operating within the State of New Mexico (federal, tribal, etc.) While

the State of New Mexico has clear authority to impose policy and training requirements on law enforcement agencies which derive law enforcement authority directly from the State of New Mexico, the authority of the State to impose specific law enforcement operational procedures on federal or tribal agencies operating within the State of New Mexico is a much more complicated question.

Potential ambiguity: The language of SECTION 2, Subsection (C) mandates law enforcement agencies “shall consider those practices shown by reliable evidence to enhance the accuracy of identification procedures.” This language is vague. Who determines what constitutes “reliable evidence?” What will the standard be for the level of improvement necessary to constitute “enhancing the accuracy of identification procedures?”

Potential ambiguity/conflict: SECTION 2, Subsection (D) states that a law enforcement agency “shall consider” including policy language concerning the following twelve (12) practices for enhancing the objectivity and reliability of eyewitness identifications. The beginning of that sentence makes it sound like it will be discretionary to the law enforcement agency as to whether each of the twelve (12) listed areas will be included in the individual law enforcement agency’s policies. However, the concluding words of the same sentence (“including the following”) give an impression that each law enforcement agency is required to adopt policies covering all twelve (12) listed areas.

Potential ambiguity: SECTION 3 of the bill also contains language regarding “practices and procedures shown by reliable evidence to enhance the accuracy of eyewitness evidence.” The same concerns about ambiguity in SECTION 2 (C) also apply to the wording in SECTION 3.

#### **OTHER SUBSTANTIVE ISSUES**

N/A

#### **ALTERNATIVES**

N/A

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status Quo

#### **AMENDMENTS**