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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 1/14/15

**SPONSOR** McSorley **LAST UPDATED** \_\_\_\_\_ **HB** \_\_\_\_\_

**SHORT TITLE** Eyewitness ID Accuracy Procedures **SB** 16

**ANALYST** Chenier

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

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

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Department of Public Safety (DPS)  
 Administrative Office of the Courts (AOC)  
 New Mexico Sentencing Commission (NMSC)  
 Administrative Office of the District Attorneys (AODA)  
 Attorney General's Office (AGO)

### SUMMARY

#### Synopsis of Bill

Senate Bill 16 requires law enforcement agencies to adopt and biennially review policies for using eyewitnesses for identifying suspects in a live lineup, showup, or photo lineup. The bill requires agencies to consider adopting policies to enhance objectivity and reliability and lists policy options to do this. The bill would also require the secretary of the Department of Public Safety to create, administer, and conduct training programs for law enforcement on the methods and technical aspects to enhance the accuracy of eyewitness evidence.

### FISCAL IMPLICATIONS

DPS provided the following: There are no discernable fiscal implications to DPS, no impact to the New Mexico Law Enforcement Academy (LEA), and none to the New Mexico State Police.

## SIGNIFICANT ISSUES

DPS stated that the Law Enforcement Academy currently provides training on photo lineups to recruits and officers, upon passage only minor changes would be required in current lesson plans. The State Police has policies that include current best practices and the recommendations presented in the proposed legislation. DPS also stated that the proposed legislation recommends law enforcement agencies record the photo lineup and live lineup activities which could prove to be problematic for small rural law enforcement agencies that may not have that capability.

The AOC provided the following: In her 2008 article in the Duke Journal of Constitutional Law & Public Policy, Professor Sarah Anne Mourer sets out the current constitutional standards as follows:

If a court determines that a pretrial identification was unnecessarily suggestive, it then ascertains whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. A court will find a substantial likelihood of irreparable misidentification only if the identification is found to be unreliable. Therefore, even if the court concludes that a police identification procedure was suggestive, it may be admissible if the court finds that the identification is nevertheless likely to be accurate. A court will balance the suggestiveness of the identification procedure against the likelihood that the identification is correct, resulting in an unprincipled rule of law that turns on the court's subjective assessment of the defendant's guilt.

In *Perry v. New Hampshire*, the Supreme Court held that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. As noted in the syllabus to the case provided by the court.

The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen the evidence for reliability before allowing the jury to assess its creditworthiness. The Court's unwillingness to adopt such a rule rests, in large part, on its recognition that the jury, not the judge, traditionally determines the reliability of evidence. It also takes account of other safeguards built into the adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability.

The AGO stated that in a review of case law covering the use of eyewitness identification testimony proposed language 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*

"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*."

In photographic lineups “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.” *See State v. Salgado*

## **TECHNICAL ISSUES**

The AGO stated that there may be potential ambiguity with the term “every law enforcement agency”. 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.

Additionally, the language of Section 2, Subsection (C) that law enforcement agencies “shall consider those practices shown by reliable evidence to enhance the accuracy of identification procedures” may be vague. Who determines what the standard will be for the level of improvement necessary to constitute “enhancing the accuracy of identification procedures?”

Also, 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.

EC/je