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FISCAL IMPACT REPORT

ORIGINAL DATE 02/19/13

SPONSOR McSorley LAST UPDATED _____ HB _____

SHORT TITLE Accuracy of Eyewitness Identification Act SB 489

ANALYST Chenier

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to Senate Bill 490 Accuracy of Eyewitness Procedures

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Defender Department (PDD)
 Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorney (AODA)
 Attorney General's Office (AGO)
 Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

Senate Bill 489 proposes to adopt comprehensive procedures for criminal justice entities to follow when conducting photo and live lineups. Proposed procedures include: requiring criminal justice entities to record detailed descriptions of perpetrators by eyewitnesses; requiring live and photographic displays to be conducted blind; requiring specific instructions to be given to an eyewitness prior to a lineup; requiring that photos of suspects resemble the suspects appearance at the time of the offense; requiring that characteristics in the photographs themselves should not make any individual photograph stand out; requiring that the fillers in a lineup should generally resemble the perpetrator; requiring eyewitnesses to view lineups separately; requiring that no information regarding the suspect's previous indictments or convictions be visible or known to the eyewitness; requiring that each identification procedure include only one suspect; and, requiring administrators to document clear statements at the time of the identification from the eyewitness. SB 489 also lays out comprehensive procedures for showups. When practical the bill requires criminal justice entities to video record identification procedures.

SB 489 also proposes that when the prosecution intends to offer eyewitness testimony at trial, the defendant is entitled to a pretrial evidentiary hearing concerning its reliability. If the court finds that the law enforcement officials or prosecuting agencies failed to comply with procedural requirements or used any suggestive identification procedures or other forms of “contamination” of the evidence, the court must determine whether the eyewitness testimony is admissible, suppress the evidence when there is a substantial probability of misidentification, or give special instructions to the jury concerning problems in obtaining the eyewitness testimony.

FISCAL IMPLICATIONS

The DPS stated that they have a current policy that addresses the general concerns and issues identified in SB 489, therefore there should not be a fiscal impact to develop a new policy or procedure. However, the Act could create a fiscal impact upon law enforcement agencies that currently do not have a policy or procedure but who will be required to develop one.

The PDD stated that it does not appear this bill would result in an increase in criminal caseloads; it may reduce reversals of convictions and the expense of retrials. The bill may increase funding needs by police departments around the state, which are required to train employees and comply with the new procedures, including the video taping of most identification.

The AOC stated that while the Act requires the court to conduct a pretrial evidentiary hearing, requiring the allocation of additional judicial resources, it is possible that such hearings could lead to a decrease in challenges to convictions based on eyewitness identifications, and a symmetrical decrease in the demand for judicial resources. Additionally the AODA stated that there will probably be some fiscal impact on DA offices because of the likelihood of more challenges to eyewitness identifications.

SIGNIFICANT ISSUES

The PDD provided the following:

Psychological studies show the accuracy of memory begins to drop off sharply within 20 minutes following initial encoding, and continues to do so exponentially until it begins to level off around the second day at a dramatically reduced level of accuracy. Over time, eyewitness memory is increasingly susceptible to contamination by subtle extrinsic factors such as may be present with certain investigation practices, although studies exist suggesting that people generally have a better memory for faces than for numbers. Further, factors such as stress, the presence of a weapon, poor lighting and distance impair accuracy of eyewitness testimony.

SB 489 would enact comprehensive police and court procedures that have been identified as increasing the accuracy of eyewitness identification evidence and criminal trials. *State v. Henderson*, 27 A.3d 872 (N.J. 2011), may be the leading judicial opinion addressing this issue. There, the New Jersey Supreme Court comprehensively reviewed the scientific literature and discussed system variables affecting reliability. These include blind administration; pre-identification instructions; lineup construction; multiple viewings; simultaneous v. sequential lineups; composites; and “showups.” All or almost all of these factors are addressed in the proposed bill, its proposed procedures comport with recommendations in the literature on improving the reliability of this type of evidence.

The AGO provided the following:

While this legislation ostensibly seeks to standardize practices of law enforcement in conducting eyewitness identification, its requirements are so extensive and penalties for non-compliance so great that it could result in suppression of otherwise admissible and competent evidence for technical non-compliance with guidelines that may not be appropriate based on case specifics.

The legislation fails to identify factors which would create a real and present need to deviate from the practices it institutes; for example, the legislation requires a photo of the suspect which is “contemporary and resemble[s] the suspect’s appearance at the time of the offense.” This could present a problem in aged or cold cases where law enforcement is forced to decide which mandate is paramount or simply cannot find a contemporary photograph of the suspect.

Moreover, the legislation does not reconcile or distinguish between victims of crime who have protections within the New Mexico Constitution and witnesses. Often, the only eye-witness to a crime is a “victim” within the meaning of the constitution who has the protections of the Victims of Crime Act, NMSA 1978 31-26-1. This legislation directly conflicts with the protections of victims to be treated with dignity, respect and sensitivity at all stages of the criminal justice process. The mandate that the entire identification process must be videotaped may create a strong deterrent for victim cooperation and their right to be reasonably protected from the accused – certainly the knowledge that a victim’s accusation of a suspect will be videotaped and provided to the suspect may discourage cooperation of a victim especially after a violent crime or sexual assault has been committed upon them.

Similarly, the legislation does not account for child victims and eye-witnesses whose statements are often more appropriately collected at safehouse interviews to insure accuracy – this legislation could undermine that process if questions by law enforcement were leading in nature. Additionally, child victim’s identities are to be protected throughout the criminal process which is again problematic with mandates of the proposed act.

ADMINISTRATIVE IMPLICATIONS

The DPS has an active policy that pertains to the intentions of SB 489 and the policy is based on IACP (International Association of Chiefs of Police) Model Policy and CALEA (Commission on Accreditation for Law Enforcement Agencies) guidelines which are both recognized standards in the law enforcement community but do not necessarily meet the specific requirements of SB 489.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The PDD stated that without such procedures, the odds are that innocent people will continue to be convicted in State Courts, despite the best intentions of law enforcement, prosecutors, judges, defense counsel, and juries. Second, without uniformity, the risk exists that reforms will occur piecemeal based on judicial decisions crafted within the confines of a particular case, or that different police departments, prosecutors, or trial judges will establish inconsistent responses to

the problem. This would create unequal treatment across cases and promote confusion and uncertainty, potentially causing cases to go to trial that otherwise might not, if the law is clear.

EC/blm