

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 821 Eyewitness Identification

SPONSOR(S): Judiciary Committee; Criminal Justice Subcommittee; Thurston and others

TIED BILLS: None **IDEN./SIM. BILLS:** CS/CS/SB 1206

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 2 N, As CS	Williams	Cunningham
2) Judiciary Committee	16 Y, 2 N, As CS	Williams	Havlicak
3) Appropriations Committee			

SUMMARY ANALYSIS

Florida statutes do not currently set forth requirements for law enforcement officers to follow when conducting photographic and live lineups with eyewitnesses to crimes during criminal investigations.

CS/CS/HB 821 creates the 2011 Eyewitness Identification Policies Act and establishes standards for the effective administration of live lineups and photo arrays in an effort to promote accurate and reliable eyewitness identification with eyewitnesses to crimes. The bill:

- Requires each state and local law enforcement agency to establish and implement written policies and procedures addressing eyewitness identification and provides what such policies and procedures must include.
- Requires each state and local law enforcement agency to submit the policies and procedures to its respective State Attorney by November 1, 2011.
- Requires the Florida Prosecuting Attorneys Association to develop draft jury instructions for evaluating eyewitness identification testimonies in criminal cases and to submit such instructions to the appropriate Supreme Court committee for consideration by July 1, 2011.
- Requires the Criminal Justice Standards and Training Commission, in consultation with the Florida Department of Law Enforcement to develop and make available to state and local agencies, educational materials regarding the standards for eyewitness identification procedures and practices set forth in the bill.
- Requires each state and local law enforcement agency to provide eyewitness identification training to its law enforcement personnel.

The bill does not appear to have a fiscal impact and is effective July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Eyewitness misidentification has been a factor in 75 percent of the 267 cases nationwide in which DNA evidence has helped prove wrongful convictions. According to Gary Wells, an Iowa State University psychologist who has studied the problems with eyewitness identification for more than 20 years, it is the number one reason innocent people are wrongfully convicted.¹ According to the Innocence Project of Florida, the same percentage applies in the 12 Florida cases, nine of which involved issues of eyewitness misidentification.²

Eyewitness Identification Procedure

Florida statutes do not currently set forth requirements for law enforcement officers to follow when conducting photographic and live lineups with eyewitnesses to crimes during criminal investigations. At least three other states, including North Carolina, Maryland, and Ohio have enacted statutes regarding eyewitness identification procedures.

There are many variables in eyewitness identification procedures. First, there are different ways to conduct them. For example, in the presentation of photo lineups, there are two main methods: sequential (one photo is shown at the time) and simultaneous (photo array shows all photos at once). Then there are the variables such as what an officer should or shouldn't say to an eyewitness about the procedure, whether the procedure should be videotaped or otherwise recorded, and whether officers have been trained to control body language or other suggestive actions during the procedure.

Some law enforcement agencies, although not statutorily required to follow a particular procedure, have included eyewitness identification procedures in their agency's Standard Operating Procedures. A survey of 230 Florida agencies, conducted by the Innocence Project of Florida, indicated that 37 of those agencies had written eyewitness identification policies while 193 did not.³

As Dr. Roy Malpass, a professor in Legal Psychology at the University of Texas at El Paso, and an expert in the field of eyewitness identification, explained during his presentation to the Florida Innocence Commission (Innocence Commission)⁴ during its January 2011 meeting, it is important to have protocol compliance.⁵ Dr. Malpass also recommended videotaping the identification procedure.⁶

Dr. Malpass made further recommendations and offered certain opinions during his presentation to the Innocence Commission in January. These included:

- There is no definitive study showing that sequential or simultaneous photo lineups is the superior method of presentation, although he believes that sequential photo lineups suppresses all identifications.
- A "confidence statement" from the witness is not a good predictor of accuracy.

¹ Presentation to Innocence Commission, November 22, 2010. Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later, Wells, Quinlivan, *Law Hum Behav* (2009) 33:1-24. See also, (http://articles.orlandosentinel.com/2011-03-21/news/os-innocence-commission-vote-20110321-19_1_lineups-florida-s-innocence-commission-florida-innocence-commission) (last accessed March 25, 2011).

² E-mail correspondence with Seth Miller, Executive Director, Innocence Project of Florida, March 23, 2011 (on file with House Criminal Justice Subcommittee staff).

³ Survey on file with House Criminal Justice Subcommittee staff.

⁴ On July 2, 2010, Chief Justice Charles T. Canady established, by Administrative Order AOSC10-39, the Florida Innocence Commission. The primary objective of the Florida Innocence Commission is to make recommendations to the Supreme Court which reduce or eliminate the possibility of the wrongful conviction of an innocent person. See Florida State Courts, Florida Innocence Commission: Mission and Objectives. (http://www.flcourts.org/gen_public/innocence.shtml) (last accessed March 25, 2011).

⁵ Innocence Commission meeting Minutes, January 2011 meeting (on file with House Criminal Justice Subcommittee staff).

⁶ *Id.*

- With regard to training on eyewitness identification, much depends upon the “buy-in” of the people being trained.
- Appropriate instructions regarding the procedure should be developed and given to witnesses. For example: the suspect may or may not be in the lineup; there is no requirement to identify a particular person; and if an identification is not made, the investigation will continue.
- There should be no extraneous comments made by law enforcement officers because informal interaction has the potential to create bias.
- The quality of the photo spread is very important.
- “Blind” administration, where the officer conducting the procedure is unaware of the identity of the suspect, is a good method for use in both sequential and simultaneous photo lineups.⁷

If an agency has a particular eyewitness identification protocol in place and the protocol is not followed, the issue becomes ripe for a challenge on the issue of reliability and therefore, admissibility, of the identification evidence at trial. This possibility provides an incentive for eyewitness identification protocol compliance. Conversely, if the eyewitness identification protocol is followed, motions to suppress should rarely be filed as there is likely no good-faith basis for filing them.

The Florida Supreme Court has ruled on the admissibility of eyewitness identifications at trial as follows:

The test for suppression of an out-of-court identification is two-fold: (1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.⁸ The factors to be considered in evaluating the likelihood of misidentification include:

[T]he 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.⁹ If the procedures used by the police in obtaining the out-of-court identification were not unnecessarily suggestive, however, the court need not consider the second part of the test.^{10,11}

Effect of the Bill

CS/CS/HB 821 creates a new section of Florida Statutes relating to eyewitness identifications in criminal cases. The bill establishes standards for the effective administration of live lineups and photo arrays in an effort to promote accurate and reliable eyewitness identification with eyewitnesses to crimes. This section is cited as the “2011 Eyewitness Identification Policies Act.”

Policies and Procedures

The bill requires each state and local law enforcement agency (state and local agency) to establish and implement written policies and procedures addressing eyewitness identification. These policies and procedures must include, at the minimum, the following:

- A description of how live lineups and photo lineups will be created and conducted to maintain the neutrality and impartiality of the identification process.
- A description of how an eyewitness will indicate that a positive identification has been made.
- A description of how an eyewitness will acknowledge receipt of the instructions.
- A description of any other documentation requirements deemed necessary by the agency to conduct live lineups or photo arrays.

⁷ *Id.*

⁸ *See Thomas v. State*, 748 So.2d 970, 981 (Fla.1999); *Green v. State*, 641 So.2d 391, 394 (Fla.1994); *Grant v. State*, 390 So.2d 341, 343 (Fla.1980).

⁹ *See Grant*, 390 So.2d at 343 (quoting *Neil v. Biggers*, 409 U.S. 188, 199-200).

¹⁰ *See Thomas*, 748 So.2d at 981; *Green*, 641 So.2d at 394; *Grant*, 390 So.2d at 344.

¹¹ *Rimmer v. State*, 825 So.2d 304 (Fla. 2002).

The policies and procedures must also include a standard set of instructions that the witness must be given before reviewing the live lineup or photo array that includes the following:

- The person of interest might or might not be in the lineup or photo array;
- The witness does not have to make an identification;
- It is as important to exclude innocent persons as it is to identify the perpetrators; and
- The investigation will continue with or without an identification.

Each state and local agency is required to submit the policies and procedures to its respective State Attorney by November 1, 2011.

Jury Instructions

The bill requires the Florida Prosecuting Attorneys Association to develop draft jury instructions on evaluating eyewitness identification testimonies in criminal cases. These instructions must be developed and submitted to the appropriate Supreme Court committee for consideration by July 1, 2011.

Education and Training

The Criminal Justice Standards and Training Commission, in consultation with the Florida Department of Law Enforcement, is required to develop and make available to state and local agencies educational materials regarding the standards for eyewitness identification procedures and practices set forth in the bill. The bill also requires each state and local agency to provide eyewitness identification training to its law enforcement personnel.

B. SECTION DIRECTORY:

Section 1. Creates an unnumbered section of the Florida Statutes related to eyewitness identification.

Section 2. Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable because the bill does not appear to: require the counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties and municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 29, 2011, the Criminal Justice Subcommittee adopted a strike-all amendment to the bill and reported the bill favorably as a Committee Substitute. The amendment removes the following eyewitness identification procedure requirements from the bill:

- That sequential presentation of individuals or photos be presented to witnesses when conducting a lineup.
- That six photos or people be included in a lineup.
- That a witness's confidence level of the identification be sought and documented.
- That the suspect be placed in a different position in the lineup for each witness and the eyewitness not be told anything regarding the suspect's position in the lineup nor anything else that might influence the identification procedure.
- That a video recording of a live lineup be made.

On April 12, 2011, the Judiciary Committee adopted a strike-all amendment to the bill and reported the bill favorable as a Committee Substitute. The amendment:

- Requires each state and local law enforcement agency to establish and implement written policies and procedures addressing eyewitness identification and provides what such policies and procedures must include.
- Requires each state and local law enforcement agency to submit the policies and procedures to its respective State Attorney by November 1, 2011.
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- Requires each state and local law enforcement agency to provide eyewitness identification training to its law enforcement personnel.

This analysis is drafted to the Judiciary Committee Substitute.