



Criminal Justice Subcommittee

Wednesday, February 22, 2017

8:30 AM – 10:30 AM

404 HOB

Meeting Packet

Committee Meeting Notice
HOUSE OF REPRESENTATIVES

Criminal Justice Subcommittee

Start Date and Time: Wednesday, February 22, 2017 08:30 am
End Date and Time: Wednesday, February 22, 2017 10:30 am
Location: Sumner Hall (404 HOB)
Duration: 2.00 hrs

Consideration of the following bill(s):

HB 245 Self-Defense Immunity by Payne, Fischer
HB 305 Law Enforcement Body Cameras by Harrison

Consideration of the following proposed committee substitute(s):

PCS for HB 529 -- Soldiers' and Heroes' Monuments and Memorials Protection Act

NOTICE FINALIZED on 02/15/2017 4:07PM by Gilliam.Ann

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 245 Self-Defense Immunity
SPONSOR(S): Payne and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 128

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		White TW	White TW
2) Judiciary Committee			

SUMMARY ANALYSIS

Florida law currently provides immunity from criminal prosecution and civil suit for a person who justifiably uses or threatens to use force to defend himself or herself, other persons, or property. This law is commonly referred to as "Stand Your Ground" (SYG).

When SYG was adopted in 2005, the law did not specify a procedure by which to raise a claim of immunity. As a result, litigation ensued throughout the state regarding the proper procedure by which to raise the claim. The issue was ultimately resolved in 2015 when the Florida Supreme Court ruled in a five-to-two decision that the appropriate procedure is for the criminal defendant to assert the immunity through a motion to dismiss at a pretrial evidentiary hearing where the defendant bears the burden of proof to establish his or her entitlement to the immunity by a preponderance of the evidence.

The bill amends the SYG law to shift the burden of proof to the State when SYG immunity is asserted. Under the bill, once a criminal defendant raises a prima facie case of self-defense immunity, the State must overcome the asserted immunity with proof beyond a reasonable doubt.

The bill will have an indeterminate impact on state government expenditures. The bill does not appear to have a fiscal impact on local government revenues or expenditures. Please see "FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT," *infra*.

The bill takes effect upon becoming a law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Pre-Stand Your Ground

Overview

Before passage of Florida's "Stand Your Ground" (SYG) law in 2005, both statute and common law governed when a person could justifiably use force in self-defense and in the defense of others or property. In 2004, ss. 776.012 and 776.031, F.S., stated that a person was justified in using:

- Force, other than deadly force, if the person reasonably believed such force was necessary to:
 - Defend himself, herself, or another against another's imminent use of unlawful force; or
 - Prevent or terminate another's trespass on or interference with real property other than a dwelling or certain personal property.
- Deadly force if the person reasonably believed such force was necessary to prevent imminent death or great bodily harm to himself, herself, or another or to prevent the imminent commission of a forcible felony.¹

Statute did not address a duty to retreat; however, Florida common law recognized such duty and required a person to "retreat to the wall" if attacked outside of his or her home or workplace, meaning that a person could not justifiably resort to deadly force without first using every reasonable means to avoid the danger, including retreat.² Within the home or workplace, there was no duty to retreat.³ This exception from the duty to retreat is commonly known as the "Castle Doctrine."⁴

Procedure to Raise Self-Defense

Statute also did not address any procedure by which justifiable use of force could be raised by a defendant; however, pursuant to case law and court rule, such defense had to be raised at trial as an affirmative defense.⁵ According to the appellate courts, under Fla. R. Crim. P. 3.190(c)(4), a pretrial motion to dismiss raising self-defense was authorized only if there were "no material disputed facts and the undisputed facts ... [did] not establish a prima facie case of guilt against the defendant."⁶

Stand Your Ground

Overview

In 2005, the Florida Legislature enacted the "Stand Your Ground" (SYG) law.⁷ This legislation significantly amended justifiable use of force in this state by:

- Abolishing the common law duty to retreat by stating that a person may use force, including deadly force, and does not have to retreat if he or she:
 - Is not engaged in unlawful activity;

¹ Section 776.08, F.S., both in 2004 and now, defines the term "forcible felony" as treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; and any other felony which involves the use or threat of physical force or violence against any individual.

² *Weiland v. State*, 732 So.2d 1044 (Fla. 1999).

³ *Id.*; *Frazier v. State*, 681 So.2d 824 (Fla. 2d DCA 1996).

⁴ *See Hedges v. State*, 172 So.2d 824, 827 (Fla. 1965) and *Pell v. State*, 122 So. 110 (Fla. 1929) (Florida has long recognized that there is no duty to retreat before using force when in one's home - a principle often referred to as the "Castle Doctrine.").

⁵ "An 'affirmative defense' is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question. An affirmative defense does not concern itself with the elements of the offense at all; it concedes them. In effect, an affirmative defense says, 'Yes, I did it, but I had a good reason.'" *State v. Cohen*, 568 So. 2d 49, 51-52 (Fla. 1990).

⁶ *State v. Hull*, 933 So.2d 1279, 1280 (Fla. 2d DCA 2006); (trial court improperly granted defendant's motion to dismiss where defendant's self-defense claim presented questions for the factfinder); *see also Lusk v. State*, 531 So. 2d 1377, 1381 (Fla. 2d DCA 1988) ("The questions of 'reasonable belief' and the 'amount of force necessary' were factual determinations to be made by the jury after a proper instruction.").

⁷ Chapter 2005-27, L.O.F.

- Is attacked in any other place where he or she has a right to be; and
- Reasonably believes such force is necessary to prevent death, great bodily harm, or the commission of a forcible felony.⁸
- Creating a presumption, subject to certain exceptions,⁹ that a person using deadly force was in reasonable fear of death or great bodily harm to himself, herself, or another when faced with an unlawful intruder in a dwelling, residence, or occupied vehicle.¹⁰
- Granting a person who justifiably uses force immunity from criminal prosecution and civil action. The term “criminal prosecution” was defined to include arresting, detaining in custody, and charging or prosecuting a defendant, and specified that a person who uses force may not be arrested until law enforcement has probable cause that the force used was unlawful.¹¹

Since 2005, the above-described SYG laws have only been amended once. The amendments, which were adopted in 2014, were primarily for purposes of: (a) expanding SYG criminal and civil immunity so that it applies not only to the actual use of force but also to the threatened use of force; (b) clarifying that a person is not entitled to SYG immunity if the person was engaged in a criminal activity (formerly referred as “unlawful activity”) when using or threatening to use deadly force; and (c) limiting the immunity from civil actions to actions filed by the person against whom the force was used or threatened and the personal representative or heirs of such person.¹²

Procedure to Raise SYG Immunity

Like the pre-2005 statutes governing the justifiable use of force defense, SYG did not specify a procedure for a defendant to raise a claim of immunity. Shortly after the law took effect, litigation ensued regarding the means by which to raise the claim. Criminal defendants argued it should be raised through a pretrial motion to dismiss. Prosecutors countered that such motion was not authorized where the facts were disputed. Two District Courts of Appeal (DCAs) split on the issue with the:

- First DCA holding in *Peterson v. State*¹³ that the wording in SYG “makes clear that [the Legislature] intended to establish a true immunity and not merely an affirmative defense” As such, the proper procedure for claiming such immunity is for the defendant to raise the claim pretrial at which time “the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches.”^{14, 15}
- Fourth DCA holding in *Velasquez v. State*¹⁶ and *Dennis v. State*¹⁷ that Fla. R. Crim. P. 3.190(c)(4), requires denial of a motion to dismiss whenever the facts are in dispute. Although SYG may permit an immunity determination at any stage because of the manner in which the law defined “criminal prosecution,” such determination may not be made through a pretrial motion to dismiss unless the facts are undisputed.¹⁸

⁸ s. 776.013(3), F.S. (2005). Sections 776.012 and 776.031, F.S., addressing justifiable use of force, were retained by the 2005 legislation, but were amended to conform to the legislation’s abolition of the duty to retreat.

⁹ The presumption does not apply if: (a) the person against whom the defensive force was used had the right to be in the dwelling, residence, or vehicle, was the parent, grandparent, or guardian of the person sought to be removed, or, under specified circumstances, was a law enforcement officer; or (b) the person who used defensive force was engaged in unlawful activity or was using the dwelling, residence, or vehicle to further unlawful activity. s. 776.013(2), F.S. (2005).

¹⁰ Such presumption arose if: (a) the person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person’s will from the dwelling, residence, or occupied vehicle; and (b) the person using the force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred. s. 776.013(1), F.S. (2005).

¹¹ s. 776.032, F.S. (2005).

¹² ch. 2014-195, L.O.F.

¹³ 983 So.2d 27 (Fla. 1st DCA 2008).

¹⁴ *Peterson*, 983 So.2d at 29.

¹⁵ “Preponderance of the evidence” means “proof which leads the factfinder to find that the existence of a contested fact is more probable than its nonexistence.” *Department of Health and Rehabilitative Services v. M.B.*, 701 So. 2d 1155 (Fla. 1997).

¹⁶ 9 So.3d 22 (Fla. 4th DCA 2009).

¹⁷ 17 So.3d 305 (Fla. 4th DCA 2009).

¹⁸ *Velasquez*, 9 So.3d at 23-24.

Thereafter, the Florida Supreme Court (FSC) addressed the conflict in *Dennis*. The FSC approved the procedure adopted in *Peterson*, stating that SYG, “grants defendants a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force.”¹⁹ Accordingly, “the procedure set out by the First District in *Peterson* best effectuates the intent of the Legislature....”²⁰

After *Dennis*, defendants continued to argue that the burden of proof (BOP) to establish they were entitled to the immunity should not have been placed on them. The Fifth DCA considered this argument in *Bretherick v. State*,²¹ wherein the defendant asserted that “[p]lacing the burden on a person who acted in self defense, after they have been charged makes the immunity granted largely illusory” The Fifth DCA rejected this argument because it was bound by the holding in *Dennis*.²²

In a concurring opinion in *Bretherick*, Judge Schumann wrote that while she agreed *Dennis* is controlling, she did not think the FSC directly addressed the BOP issue in that case.²³ She also stated, “Kentucky and Kansas, states with statutes that were modeled directly on our ‘Stand Your Ground’ law, have found that the burden of proof properly rests with the State at the pretrial stage to demonstrate that the use of force in self-defense was unjustified. This construction creates a better procedural vehicle to test the State’s case at the earliest possible stage of a criminal proceeding. Self-defense immunity statutes are designed to relieve a defendant from the burdens of criminal prosecution from arrest through trial.”^{24, 25}

In response to Judge Schumann’s concurrence, the majority in *Bretherick* certified the following question: “ONCE THE DEFENSE SATISFIES THE INITIAL BURDEN OF RAISING THE ISSUE, DOES THE STATE HAVE THE BURDEN OF DISPROVING A DEFENDANT’S ENTITLEMENT TO SELF-DEFENSE IMMUNITY AT A PRETRIAL HEARING AS IT DOES AT TRIAL?”²⁶

In a July 2015 opinion, five of the seven justices of the FSC answered the certified question in the negative, stating, “[w]e now make explicit what was implicit in *Dennis*—the defendant bears the burden of proof by a preponderance of the evidence at the pretrial evidentiary hearing. This is the conclusion reached by every Florida appellate court to consider this issue both before and after *Dennis*, and it is a conclusion fully consistent with the legislative intent to provide immunity to a limited class of defendants who can satisfy the statutory requirements.”²⁷

The majority provided the following reasons in support of its conclusion:²⁸

- The Legislature did not confer blanket immunity from criminal prosecution with SYG. It provided immunity only if the use of force was justified under SYG. The *Dennis* procedure gave effect to that immunity by authorizing a defendant to establish his or her immunity pretrial. Such procedure provides a defendant with greater protection than the mere ability to assert self-defense at trial.²⁹

¹⁹ *Dennis v. State*, 51 So.3d 456, 458, 462 (Fla. 2010).

²⁰ *Id.* at 463-464.

²¹ 135 So.3d 337 (Fla. 5th DCA 2013).

²² *Id.* at 340.

²³ *Id.* at 342.

²⁴ *Id.* at 344.

²⁵ The BOP placed on the State in Kentucky and Kansas is that the State must establish that there is probable cause that the defendant’s use of force was not legally justified. *See Rodgers v. Commonwealth*, 285 S.W.3d 740, 752-56 (Ky. 2009) (“The burden is on the Commonwealth to establish probable cause and it may do so by directing the court’s attention to the evidence of record including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record.”); Ky. Rev. Stat. § 503.085; *see State v. Ultreras*, 296 Kan. 828, 844-45 (2013) (“the standard of proof for whether a defendant is entitled to immunity from criminal prosecution ... is probable cause. We further find that the State bears the burden of establishing proof that the force was not justified as part of the probable cause determination....”); Kan. Stat. Ann. § 21-5231.

²⁶ *Id.* at 341.

²⁷ *Bretherick v. State*, 170 So.3d 766, 769 (Fla. 2015).

²⁸ *Id.* at 775.

²⁹ *Id.*

- No court in this country has “required, at a pretrial evidentiary hearing, the prosecution to disprove beyond a reasonable doubt that the use of force by a defendant was justified. The highest courts in three states—Colorado, Georgia, and South Carolina—agree with a procedure similar to that described in *Peterson*. . . . These courts have adopted a procedure in which the defendant bears the burden of proof, by a preponderance of the evidence at a pretrial evidentiary hearing, in the context of their analogous immunity law.”³⁰
 - Defendant’s reliance on cases from Kentucky and Kansas is misplaced. Neither require the State to disprove beyond a reasonable doubt that the force was justified; rather, it was held that the State must only establish probable cause that the force was not legally justified. Probable cause is the standard the State argued for in *Dennis*. We rejected this argument because this standard does not provide defendants with any greater protection from prosecution than the law did before SYG. Under Fla. R. Crim. P. 3.133, the court must make a probable cause determination before or within 48 hours after arrest.³¹
- Placing the BOP on the defendant is consistent with the procedures for other motions to dismiss. Such procedures “all require the defendant to offer the evidence in support of the motion, rather than placing the burden on the State.”³²
- Placing the burden on the State to prove, beyond a reasonable doubt, that the defendant is not entitled to immunity requires the State to establish the same degree of proof twice—once pretrial and again at trial. This essentially results in two full-blown trials: one before a judge and a second before a jury. Such two-trial process would:
 - Expend tremendously more resources. Undoubtedly, the interests in expense and judicial economy do not outweigh a defendant’s right to a fair determination of guilt or innocence; however, such right is not diminished by placing the BOP on the defendant at the pretrial stage because the State must still prove all of the elements of the crime beyond a reasonable doubt at trial.
 - Enable a defendant to file a motion to dismiss, which may not be supported by any evidence, to obtain a preview of the State’s case. Moreover, if at the time of the pretrial hearing, the State did not yet possess all the evidence to refute the alleged justifications for the defendant’s use of force, the defendant would be found immune. The result is a process is “fraught with potential for abuse.”³³
- The issue in the pretrial evidentiary hearing is whether the defendant was justified in the use of force, not whether the defendant committed the crime. As recognized by the Colorado Supreme Court, “the accused presumably has a greater knowledge of the existence or nonexistence of the facts which would call into play the protective shield of the statute and, under these circumstances, should be in a better position than the prosecution to establish the existence of those statutory conditions which entitle him to immunity.”³⁴

Justice Canady wrote a dissent in which Justice Polston concurred. Justice Canady indicated:

- The majority fails to recognize that the issue the trial court must resolve pretrial is the same issue that must be resolved by the factfinder at trial; i.e., “whether the evidence establishes beyond a reasonable doubt that the defendant’s conduct was not justified under the governing statutory standard. The State does not dispute that a defendant presenting a Stand Your Ground defense can only be convicted if the State proves beyond a reasonable doubt that the defense does not apply. . . . By imposing the burden of proof on the defendant at the pretrial evidentiary hearing, the majority substantially curtails the benefit of the immunity from trial conferred by the Legislature under the Stand Your Ground law. There is no reason to believe that the Legislature intended for a defendant to be denied immunity and subjected to trial when that defendant would be entitled to acquittal at trial on the basis of a Stand Your Ground

³⁰ *Id.* (citations omitted).

³¹ *Bretherick*, 135 So.3d at 775-776; *Dennis*, 51 So.3d at 463.

³² *Bretherick*, 170 So.3d at 769.

³³ *Id.* at 777-778.

³⁴ *Id.* at 777.

defense. But the majority's decision here guarantees that certain defendants who would be entitled to acquittal at trial will nonetheless be deprived of immunity from trial."³⁵

- The majority's argument that "the burden should be placed on the defendant because it is easier for a defendant to prove entitlement to immunity than it is for the State to disprove entitlement to immunity has no more force in the context of a pretrial evidentiary hearing than it does in the context of a trial, where it admittedly has no application. That argument has no basis in the text of the Stand Your Ground law."³⁶
- The majority's valid concern that placement of the burden of proof on the defendant may result in two full-blown trials does not justify curtailing immunity from trial for those who lawfully used or threatened force and is a practical matter for the Legislature to consider and resolve.³⁷

Effect of the Bill

The bill amends s. 776.032, F.S., to reverse the effect of the FSC's holding in *Bretherick* and shift the BOP to the State at the pretrial stage of a criminal prosecution when the defendant files a motion to dismiss based on SYG immunity. Under the bill, once a criminal defendant raises a prima facie³⁸ case of self-defense immunity, the State must overcome the asserted immunity with proof beyond a reasonable doubt.

The bill takes effect upon becoming a law.

B. SECTION DIRECTORY:

Section 1. Amends s. 776.032, F.S., relating to immunity from criminal prosecution and civil action for justifiable use or threatened use of force

Section 2. Provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill does not appear to have any impact on state government revenues.
2. Expenditures: The Criminal Justice Impact Conference (CJIC) has not yet met to consider this bill; however, the CJIC considered legislation last year which was substantively the same as this bill and determined that the legislation will have a negative indeterminate impact on the Department of Corrections (i.e., an unquantifiable reduction in the need for prison beds).

Due to the bill's reduction in the level of proof required to be asserted by a defendant filing a motion to dismiss based on SYG immunity, there may be an increase in the number of motions filed and in the number of cases in which the State will be required to present its full case both at a pretrial hearing and trial. These increases may result in additional costs to prosecutors, public defenders, and the court. Such additional costs, however, may be offset by a reduction in costs that could result from cases that: (a) do not continue to trial because the defendant's motion to dismiss is granted at the pretrial stage; or (b) result in a plea because the defendant's motion to dismiss is denied at the pretrial stage.

³⁵ *Id.* at 779-780.

³⁶ *Id.* at 780.

³⁷ *Id.*

³⁸ "'Prima facie' means that the proponent has fulfilled his duty to produce evidence and there is sufficient evidence for the court to consider the issue." Charles W. Ehrhardt, Florida Evidence § 301.2 (2002). "Prima facie evidence is evidence sufficient to establish a fact unless and until rebutted." *State v. Kahler*, 232 So.2d 166, 168 (Fla. 1970).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill does not appear to have any impact on local government revenues.
2. Expenditures: The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.
2. Other: None.

B. RULE-MAKING AUTHORITY: The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

1 A bill to be entitled
 2 An act relating to self-defense immunity; amending s.
 3 776.032, F.S.; requiring that the burden of proof in a
 4 criminal prosecution be on the party seeking to
 5 overcome the immunity claim under certain
 6 circumstances; providing an effective date.

7
 8 Be It Enacted by the Legislature of the State of Florida:

9
 10 Section 1. Subsection (1) of section 776.032, Florida
 11 Statutes, is republished, and subsection (4) is added to that
 12 section, to read:

13 776.032 Immunity from criminal prosecution and civil
 14 action for justifiable use or threatened use of force.—

15 (1) A person who uses or threatens to use force as
 16 permitted in s. 776.012, s. 776.013, or s. 776.031 is justified
 17 in such conduct and is immune from criminal prosecution and
 18 civil action for the use or threatened use of such force by the
 19 person, personal representative, or heirs of the person against
 20 whom the force was used or threatened, unless the person against
 21 whom force was used or threatened is a law enforcement officer,
 22 as defined in s. 943.10(14), who was acting in the performance
 23 of his or her official duties and the officer identified himself
 24 or herself in accordance with any applicable law or the person
 25 using or threatening to use force knew or reasonably should have

26 | known that the person was a law enforcement officer. As used in
27 | this subsection, the term "criminal prosecution" includes
28 | arresting, detaining in custody, and charging or prosecuting the
29 | defendant.

30 | (4) In a criminal prosecution, once a prima facie claim of
31 | self-defense immunity from criminal prosecution has been raised
32 | by the defendant at a pretrial immunity hearing, the burden of
33 | proof beyond a reasonable doubt is on the party seeking to
34 | overcome the immunity from criminal prosecution provided in
35 | subsection (1).

36 | Section 2. This act shall take effect upon becoming a law.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 305 Law Enforcement Body Cameras
SPONSOR(S): Harrison and others
TIED BILLS: IDEN./SIM. BILLS: SB 624

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Merlin <i>JL</i>	White <i>TW</i>
2) Judiciary Committee			

SUMMARY ANALYSIS

A body camera is a portable electronic recording device that is worn on a law enforcement officer's (LEO's) person that records audio and video data of the LEO's law-enforcement-related encounters and activities.

Current law in Florida requires law enforcement agencies (LEAs) that permit LEOs to wear body cameras to develop policies and procedures governing the proper use, maintenance, and storage of body cameras and recorded data. These policies and procedures must include:

- General guidelines for the proper use, maintenance, and storage of body cameras;
- Any limitations on LEO authority to wear body cameras;
- Any limitations on law-enforcement-related encounters in which LEOs are permitted to wear body cameras; and
- General guidelines for the proper storage, retention, and release of audio and video data recorded by body cameras.

Florida's body camera laws do not address whether a LEO may or may not review body camera footage prior to writing a report or making a statement about an incident.

The bill amends s. 943.1718(2), F.S., to require a LEA that permits the use of body cameras to have general guidelines authorizing a LEO, who uses a body camera during an incident, to review relevant video footage of an incident from the camera before writing a report or providing a statement about the incident.

The bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Law Enforcement Body Cameras

In Florida, a body camera is a portable electronic recording device that is worn on a law enforcement officer's ("LEO's") person which records audio and video data of the officer's law-enforcement-related encounters and activities.¹ Data from the 2015 Criminal Justice Agency Profile ("CJAP") shows that out of the 399 law enforcement agencies ("LEAs") in this state, 91 have reported using body cameras.² Similarly, preliminary data from the 2016 CJAP survey shows that out of the 399 LEAs in this state, 107 have reported using them.³

Currently, s. 943.1718(2), F.S., requires LEAs that permit LEOs to wear body cameras to develop policies and procedures governing the proper use, maintenance, and storage of body cameras and recorded data, and provides that these policies and procedures must include:

- General guidelines for the proper use, maintenance, and storage of body cameras;
- Any limitations on LEO authority to wear body cameras;
- Any limitations on law-enforcement-related encounters in which LEOs are permitted to wear body cameras; and
- General guidelines for the proper storage, retention, and release of audio and video data recorded by body cameras.

Florida's body camera laws do not address whether a LEO may or may not review body camera footage prior to writing a report or making a statement about an incident.

Internal Affairs Investigations

As in most states, the subject of an internal affairs ("IA") investigation in Florida is afforded certain protections as set forth in the Law Enforcement Officer's Bill of Rights ("BOR").⁴ Generally, the purpose of an IA investigation is to investigate allegations of professional misconduct that could lead to discipline, not criminal charges. The subject of an IA investigation in Florida is permitted to view the "complaint, all witness statements, including all other existing subject officer statements, and all other existing evidence, including, but not limited to, incident reports, GPS locator information, and audio or video recordings relating to the incident under investigation."⁵

In many states, if IA investigators fail to comply with the BOR, the officer who is being investigated may challenge any recommended discipline or termination, and the investigation may be dismissed.⁶ In

¹ s. 943.1718, F.S. A similar definition is found in Florida's Public Records Act, s. 119.071(2)(l)(1)(a), F.S. (defining a "body camera" as "a portable electronic recording device that is worn on a law enforcement officer's body and that records audio and video data in the course of the officer performing his or her official duties and responsibilities.").

² CJAP data is compiled by the Criminal Justice Standards and Training Commission and published by the Florida Department of Law Enforcement ("FDLE"). See Criminal Justice Agency Profile Survey Results *available at* <http://www.fdle.state.fl.us/cms/CJSTC/Publications/CJAP/CJAP.aspx> (last viewed Jan. 30, 2017). The CJAP results are based on self-reporting. There are 399 law enforcement agencies in Florida. This number includes local police departments, sheriff's offices, school and port police departments, and state agencies. Based on preliminary 2016 CJAP data, state agencies have not been using body cameras. Email from Ronald Draa, Director of External Affairs, the Florida Department of Law Enforcement, Body Cam Data (Jan. 30, 2017) (on file with the Florida House of Representatives, Criminal Justice Subcommittee).

³ *Id.*

⁴ ss. 112.532-34, F.S.

⁵ s. 112.532(1)(d), F.S.

⁶ Olson, Walter, *Police Misconduct and 'Law Enforcement Officers' Bill of Rights' Laws*, CATO Institute, April 24, 2015, *available at* <https://www.cato.org/blog/police-misconduct-law-enforcement-officers-bill-rights> (last viewed Feb. 15, 2017); see also Riggs, Mike, *Why Firing a Bad Cop is Damn Near Impossible*, GET REASON MAGAZINE, Oct. 19, 2012, *available at* <http://reason.com/archives/2012/10/19/how-special-rights-for-law-enforcement-m> (last viewed February 15, 2017).

Florida, an investigator has an opportunity to cure any noncompliance with the BOR. If the investigator fails to cure the violation or continues the violation after notice, the investigator may be referred to a review panel, removed from the investigation, and subjected to disciplinary action.⁷

Reviewing Body Camera Footage before Making Statements and Writing Reports

In a 2014 report from the International Association of Chiefs of Police (“IACP”) National Law Enforcement Policy Center,⁸ it was noted that body cameras may be used by LEAs for documenting evidence; evaluating a LEO’s conduct and effectiveness; offering training, guidance, or discipline; preventing and resolving complaints brought by members of the public; strengthening the transparency, performance, and accountability of law enforcement; ensuring that events are presented accurately; and assisting in civil, criminal, and administrative proceedings.⁹

A 2014 Report from the Police Executive Research Forum (“PERF”) discussed the potential in allowing LEOs to review body camera footage before making a statement or writing a report about an incident in which they were involved.¹⁰ The issues discussed by PERF and the recommendations by IACP were addressed in a December 12, 2016, presentation by the Lexipol training organization,¹¹ which included the following points and counterpoints:

Point	Counterpoint
<ul style="list-style-type: none"> • Video is not always an accurate representation of events.¹² <ul style="list-style-type: none"> ○ Video does not: reproduce the LEO’s subjective fear, capture tactile clues, track with the eyes, accurately reproduce what the human eye sees, capture 3D or represent accurate distances, or always accurately represent motion and force.¹³ <hr/> <ul style="list-style-type: none"> • Watching the video before writing a report makes the LEO’s account of the incident vulnerable to scrutiny.¹⁴ <ul style="list-style-type: none"> ○ Some believe that a LEO may change, or may feel pressure to change, his or her account to match something the LEO does not remember happening. Once viewed, the LEO cannot “un-view” it.¹⁵ 	<ul style="list-style-type: none"> • Video may assist the LEO in obtaining the truth of what occurred and aid in his or her memory recall.²⁰ <ul style="list-style-type: none"> ○ Video corrects a distorted sensory perception, is often better than human recollection, and helps uncover the truth of what happened.²¹ <hr/> <ul style="list-style-type: none"> • Watching the video before making a statement will result in a statement that is more difficult to pick apart in court.²² <ul style="list-style-type: none"> ○ Watching the video results in one statement that addresses all issues and does not provide the LEO with new information.²³

⁷ s. 112.534, F.S.

⁸ *Body-Worn Cameras, Concepts and Issues Paper*, IACP NATIONAL LAW ENFORCEMENT POLICY CENTER, April 2014 available at <http://www.theiacp.org/Portals/0/documents/pdfs/MembersOnly/BodyWornCamerasPaper.pdf> (“IACP Report”) (last viewed Feb. 6, 2017).

⁹ *Id.*

¹⁰ See Police Executive Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, COMMUNITY ORIENTED POLICING SERVICES (2014) (“PERF Report”) at 29.

¹¹ Wallentine, Ken, Scarry, Laura, and Fredericks Grant, *Point/Counterpoint: The Debate Over Officer Viewing of BWC Video*, Lexipol Powerpoint Presentation from Webinar (“Lexipol Presentation”) (Dec. 12, 2016).

¹² Lexipol Presentation at 5.

¹³ *Id.* at 6.

¹⁴ *Id.* at 19.

¹⁵ *Id.* at 20.

<ul style="list-style-type: none"> • Allowing a LEO to watch the video may contribute negatively to police/community relations and to the department's reputation for transparency and legitimacy.¹⁶ <ul style="list-style-type: none"> ○ The public knows non-police witnesses are not afforded the same opportunity.¹⁷ <hr/> <ul style="list-style-type: none"> • Allowing LEOs to view the video before writing a report contradicts the approach used in other investigations and raises the issue of why all suspects are not allowed to view video evidence that relates to their cases.¹⁸ <ul style="list-style-type: none"> ○ Creates a double standard as police departments typically do not allow other non-police witnesses to view video.¹⁹ 	<ul style="list-style-type: none"> • Community/police relations rest on far more than video footage related to any single incident.²⁴ <hr/> <ul style="list-style-type: none"> • While LEO-involved shooting incidents are investigations, they are unique situations. Such investigations are not automatically criminal investigations.²⁵ <ul style="list-style-type: none"> ○ The LEO was there. The video does not show the LEO anything he or she has not previously seen. LEOs are encouraged to review video for all other events. The goal of the investigation is not to determine a culpable mental state; rather, the goal is to determine whether the LEO acted in an objectively reasonable manner.²⁶
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Other State Laws relating to the Viewing of Body Camera Footage by LEOs

According to the National Conference on State Legislatures ("NCSL"), 30 states and the District of Columbia have created laws for body cameras,²⁷ several of which include provisions for writing reports or making statements:

- In Texas, a LEA that uses body cameras must adopt policies entitling a LEO to access any recording of an incident involving the officer before the LEO is required to make a statement about the incident.²⁸
- In Connecticut, a LEO may review a recording from his or her body camera to assist the LEO with the preparation of a report or otherwise in the performance of his or her duties.²⁹ Further, if a LEO is giving a formal statement about the use of force or if a LEO is the subject of a disciplinary investigation in which a recording from a body camera is being considered as part of a review of an incident, the LEO shall: (1) have the right to review such recording in the presence of the LEO's attorney or labor representative; and (2) have the right to review recordings from other equipment capturing the LEO's image or voice during the incident.³⁰

²⁰ *Id.* at 17.

²¹ *Id.* at 18.

²² *Id.* at 21.

²³ *Id.* at 22.

¹⁶ *Id.* at 23.

¹⁷ *Id.* at 24.

¹⁸ *Id.* at 31.

¹⁹ *Id.* at 32.

²⁴ *Id.* at 25.

²⁵ *Id.* at 33.

²⁶ *Id.* at 34.

²⁷ See NCSL data, footnote 2.

²⁸ Tex. Occ. Code § 1701.655(b)(5).

²⁹ Conn. Gen. Stat. Ann. § 29-6d(e).

³⁰ Conn. Gen. Stat. Ann. § 29-6d(f).

- In the District of Columbia, a LEO may review their body camera recording to assist in initial report writing, except in cases involving a police shooting.³¹
- In Illinois, the recording LEO and his or her supervisor may access and review recordings before completing incident reports or other documentation if the LEO or his or her supervisor discloses that fact in the report or documentation.³²
- In Minnesota, most body camera video is exempt from release or considered “nonpublic,” subject to limited exceptions.³³ With respect to report writing by LEOs, Minnesota law provides that, “the responsible authority for a law enforcement agency must establish written procedures to ensure that law enforcement personnel have access to the portable recording system data that are not public only if authorized in writing by the chief of police, sheriff, or head of the law enforcement agency, or their designee, to obtain access to the data for a legitimate, specified law enforcement purpose.”³⁴

Effect of the Bill

The bill amends s. 943.1718(2), F.S., to require a LEA that permits the use of body cameras to have general guidelines authorizing a LEO, who uses a body camera during an incident, to review relevant video footage of an incident from the camera before writing a report or providing a statement about the incident.

The bill provides an effective date of July 1, 2017.

B. SECTION DIRECTORY:

Section 1. Amends s. 943.1718, F.S., relating to body cameras; policies and procedures.

Section 2. Provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: This bill does not appear to have an impact on state revenues.
2. Expenditures: This bill does not appear to have an impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: This bill does not appear to have an impact on local government revenues.
2. Expenditures: This bill does not appear to have an impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

³¹ D.C. Mun. Regs. 24-39, § 3900.9.

³² 50 Ill. Comp. Stat. Ann. 706/10-20(a)(6).

³³ Minn. Stat. § 13.825(2), (3), and (4).

³⁴ Minn. Stat. § 13.825(7)(b).

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities

2. Other: None.

B. RULE-MAKING AUTHORITY: This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

1 A bill to be entitled
 2 An act relating to law enforcement body cameras;
 3 amending s. 943.1718, F.S.; requiring law enforcement
 4 agencies to develop guidelines authorizing an
 5 officer's review of camera footage of an incident
 6 before writing a report or providing a statement;
 7 providing an effective date.

8
 9 Be It Enacted by the Legislature of the State of Florida:

10
 11 Section 1. Paragraph (d) of subsection (2) of section
 12 943.1718, Florida Statutes, is redesignated as paragraph (e),
 13 and a new paragraph (d) is added to that subsection, to read:

14 943.1718 Body cameras; policies and procedures.—

15 (2) A law enforcement agency that permits its law
 16 enforcement officers to wear body cameras shall establish
 17 policies and procedures addressing the proper use, maintenance,
 18 and storage of body cameras and the data recorded by body
 19 cameras. The policies and procedures must include:

20 (d) General guidelines authorizing a law enforcement
 21 officer using a body camera during an incident to review the
 22 relevant video footage of the incident from the camera before
 23 writing a report on or providing a statement about the incident.

24 Section 2. This act shall take effect July 1, 2017.

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 529 Soldiers' and Heroes' Monuments and Memorials Protection Act
SPONSOR(S): Criminal Justice Subcommittee
TIED BILLS: IDEN./SIM. **BILLS:** SB 418

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Criminal Justice Subcommittee		Fields LF	White TW

SUMMARY ANALYSIS

Currently, s. 806.13, F.S., provides that a person commits the offense of criminal mischief if he or she willfully and maliciously injures or damages, by any means, real or personal property belonging to another. Punishment for a violation of s. 806.13, F.S., ranges from a second degree misdemeanor to a third degree felony depending on the value of the damage caused and location of the damage. Criminal mischief that damages a church, public telephone, or sexually violent predator facility constitutes a third degree felony.

The bill makes it a third degree felony to willfully and maliciously injure, damage, or deface a memorial which honors or commemorates a soldier, a military organization or unit, a first responder, or an astronaut.

The bill may increase the need for prison beds. The Criminal Justice Impact Conference has not yet met to consider the bill. The bill may reduce the need for jail beds to the extent that criminal mischief, which damages a soldier's or hero's memorial, is now a third degree felony, rather than a second or first degree misdemeanor.

The bill is effective October 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Criminal Mischief

Section 806.13, F.S., provides that a person commits the offense of criminal mischief if he or she willfully and maliciously injures or damages, by any means, real or personal property belonging to another. Such injury or damage includes, but is not limited to, the placement of graffiti thereon or other acts of vandalism.¹ Criminal mischief varies in severity depending on the value of the damage caused and is punishable as a:

- Second degree misdemeanor² if the damage to such property is \$200 or less.³
- First degree misdemeanor⁴ if the damage to such property is greater than \$200 but less than \$1,000.⁵
- Third degree felony⁶ if the damage to such property is \$1,000 or greater, or if there is interruption or impairment of a business operation or public communication, transportation, supply of water, gas or power, or other public service which costs \$1,000 or more in labor and supplies to restore.⁷

If the person has one or more previous convictions for violating s. 806.13(1), F.S., then any offense under that subsection shall be reclassified as a third degree felony.⁸ Moreover, as discussed below, s. 806.13, F.S., specifies enhanced penalties when the criminal mischief occurs in certain locations, with the use of graffiti, or is committed by minors.

Churches

A person who willfully and maliciously defaces, injures, or damages, by any means, any church, synagogue, mosque, or other place of worship, or any religious article contained therein, commits a third degree felony if the damage to the property is greater than \$200.⁹

Public Telephones

A person commits a third degree felony if:

- The person, without the consent of the owner, willfully destroys or substantially damages any public telephone, or telephone cables, wires, fixtures, antennas, amplifiers, or any other apparatus, equipment, or appliances;
- The destruction or damage renders a public telephone inoperative or opens the body of a public telephone; and
- A conspicuous notice of the provisions of this subsection and its penalties is posted on or near the destroyed or damaged instrument and visible to the public at the time of the commission of the offense.¹⁰

¹ s. 806.13(1)(a), F.S.

² A second degree misdemeanor is punishable by a term of imprisonment not exceeding 60 days and a fine not exceeding \$500. ss. 775.082 and 775.083, F.S.

³ s. 806.13(1)(b)1., F.S.

⁴ A first degree misdemeanor is punishable by a term of imprisonment not exceeding 1 year and a fine not exceeding \$1,000. ss. 775.082 and 775.083, F.S.

⁵ s. 806.13(1)(b)2., F.S.

⁶ A third degree felony is punishable by a term of imprisonment not exceeding 5 years and a fine not exceeding \$5,000. ss. 775.082 and 775.083, F.S.

⁷ s. 806.13(1)(b)3., F.S.

⁸ s. 806.13(1)(b)4., F.S.

⁹ s. 806.13(2), F.S.

¹⁰ s. 806.13(3), F.S.

Sexually Violent Predator Facility

A person who willfully and maliciously defaces, injures, or damages, by any means, a sexually violent predator detention or commitment facility, or any other property contained therein, commits a third degree felony if the damage to property is greater than \$200.¹¹

Graffiti

A person who violates s. 806.13, F.S., when the violation is related to the placement of graffiti shall, in addition to any other criminal penalty, be required to pay a fine of at least:

- \$250 for a first conviction.
- \$500 for a second conviction.
- \$1,000 for a third or subsequent conviction.¹²

In addition, a person convicted of an offense under 806.13, F.S., when the offense is related to the placement of graffiti, shall be required to perform at least 40 hours of community service and, if possible, perform at least 100 hours of community service that involves the removal of graffiti.¹³

Minors

Section 806.13, F.S.(16)(c), makes a minor's parent or legal guardian liable for payment of a fine. If a minor commits an act by placing graffiti on public or private property, the court may direct the Department of Highway Safety and Motor Vehicles to revoke the minor's driver license for up to one year.¹⁴

Effect of the Bill

The bill amends s. 806.13(5), F.S., to make it a third degree felony for a person to willfully and maliciously injure, damage, or deface a soldier's or hero's memorial. The term "soldier's or hero's memorial" means real or personal property belonging to another person which honors or commemorates:

- A soldier or member of the military for the original 13 colonies, the United States, the District of Columbia, or a territory of the United States.
- A military organization or unit of the original 13 colonies, the United States, the District of Columbia, or a territory of the United States.
- A first responder¹⁵ or an astronaut for the National Aeronautics and Space Administration.

The bill also conforms a cross-reference in s. 806.13(9), F.S.

The bill takes effect October 1, 2017.

B. SECTION DIRECTORY:

Section 1. Establishes the "Soldiers' and Heroes' Memorials Protection Act."

Section 2. Amends s. 806.13, F.S., relating to criminal mischief.

Section 3. Provides an effective date of October 1, 2017.

¹¹ s. 806.13(4), F.S.

¹² s. 806.13(6)(a), F.S.

¹³ s. 806.13(6)(b), F.S.

¹⁴ s. 806.13(7)(a), F.S.

¹⁵ The term "first responder" means "a law enforcement officer as defined in s. 943.10, a firefighter as defined in s. 633.102, or an emergency medical technician or paramedic as defined in s. 401.23 employed by state or local government. A volunteer law enforcement officer, firefighter, or emergency medical technician or paramedic engaged by the state or a local government is also considered a first responder of the state or local government for purposes of this section." s. 112.1815, F.S.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill does not appear to have an impact on state revenues.
2. Expenditures: The bill may increase the need for prison beds because it creates a new third degree felony. The Criminal Justice Impact Conference has not yet met to consider this bill.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill does not appear to have an impact on local government revenues.
2. Expenditures: The bill may reduce the need for jail beds to the extent that criminal mischief, which damages a soldier's or hero's memorial, is now a third degree felony, rather than a second or first degree misdemeanor.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.
2. Other: None.

B. RULE-MAKING AUTHORITY: The bill does not appear to create the need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

N/A

1 A bill to be entitled
 2 An act relating to the Soldiers' and Heroes' Memorials
 3 Protection Act; providing a short title; amending s.
 4 806.13, F.S.; providing criminal penalties for
 5 criminal mischief that causes damage to certain
 6 memorials that honor or commemorate a soldier, member
 7 of the military, a military organization or unit, a
 8 first responder, or an astronaut; defining the term
 9 "memorial"; conforming a cross-reference; providing an
 10 effective date.

11
 12 Be It Enacted by the Legislature of the State of Florida:

13
 14 Section 1. This act may be cited as the "Soldiers' and
 15 Heroes' Memorials Protection Act."

16 Section 2. Present subsections (5) through (9) of section
 17 806.13, Florida Statutes, are redesignated as subsections (6)
 18 through (10), respectively, present subsection (8) is amended,
 19 and a new subsection (5) is added to that section, to read:

20 806.13 Criminal mischief; penalties; penalty for minor.—

21 (5) A person who willfully and maliciously injures,
 22 damages, or defaces a soldier's or hero's memorial commits a
 23 felony of the third degree punishable as provided in s. 775.082,
 24 s. 775.083, or s. 775.084. As used in this subsection, the term
 25 "soldier's or hero's memorial" means real or personal property

26 belonging to another person which honors or commemorates:
 27 (a) A soldier or member of the military for the original
 28 13 colonies, the United States, the District of Columbia, or a
 29 territory of the United States;
 30 (b) A military organization or unit of the original 13
 31 colonies, the United States, the District of Columbia, or a
 32 territory of the United States; or
 33 (c) A first responder as defined in s. 112.1815 or an
 34 astronaut for the National Aeronautics and Space Administration.
 35 (9) ~~(8)~~ A minor whose driver license or driving privilege
 36 is revoked, suspended, or withheld under subsection (8) ~~(7)~~ may
 37 elect to reduce the period of revocation, suspension, or
 38 withholding by performing community service at the rate of 1 day
 39 for each hour of community service performed. In addition, if
 40 the court determines that due to a family hardship, the minor's
 41 driver license or driving privilege is necessary for employment
 42 or medical purposes of the minor or a member of the minor's
 43 family, the court shall order the minor to perform community
 44 service and reduce the period of revocation, suspension, or
 45 withholding at the rate of 1 day for each hour of community
 46 service performed. As used in this subsection, the term
 47 "community service" means cleaning graffiti from public
 48 property.
 49 Section 3. This act shall take effect October 1, 2017.