HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 821 Eyewitness Identification
SPONSOR(S): Criminal Justice Subcommittee; Thurston
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		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/HB 821 creates a procedure that law enforcement officers must follow when they are conducting photographic and live lineups with eyewitnesses to crimes. The bill provides:

- Eyewitness identification procedures that must be utilized when conducting a photographic or live eyewitness lineup.
- Authorization to use alternative methods for eyewitness identification that have been approved by the Criminal Justice Standards and Training Commission (Commission).
- Remedies for a defendant when eyewitness identification procedures are not followed.
- A requirement that the Commission, in consultation with the Florida Department of Law Enforcement, develop training materials and conduct training programs on eyewitness identification procedures.

The bill may have a fiscal impact on law enforcement agencies. See Fiscal Section.

This bill 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.

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[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-commisssion) (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:
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> [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/HB 821 creates a new section of Florida Statutes relating to eyewitness identifications in criminal cases. It is a comprehensive bill that sets forth specific procedures that state, county, municipal, and other law enforcement agencies must implement when conducting lineups. This section is cited as the "Eyewitness Identification Reform Act."

Definitions

The bill provides definitions for the following terms relating to eyewitness identification procedures:

- "Eyewitness" means a person whose identification by sight of another person may be relevant in a criminal proceeding.
- "Filler" means a person or a photograph of a person who is not suspected of an offense but is included in a lineup.
- "Independent administrator" means a person who is not participating in the investigation of a criminal offense and is unaware of which person in the lineup is the suspect.
- "Lineup" means a photo lineup or live lineup.

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[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, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

[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).

- "Lineup administrator" means the person who conducts a lineup.
- "Live lineup" means a procedure in which a group of people is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.
- "Photo lineup" means a procedure in which an array of photographs is displayed to an eyewitness for the purpose of determining if the eyewitness is able to identify the perpetrator of a crime.

Procedures to be Followed
An independent administrator must conduct the lineup. This is sometimes referred to as a "blind" administrator. The independent administrator is not participating in the investigation and does not know the identity of the suspect. This is one element of the scientific studies on eyewitness identification that is most agreed upon by the scholars in the area of study as being critical to untainted suspect identification.

Prior to the lineup, officers are required to instruct the eyewitness that:

1) The perpetrator might or might not be in the lineup;
2) The lineup administrator does not know the suspect's identity;
3) The eyewitness should not feel compelled to make an identification;
4) It is as important to exclude innocent persons as it is to identify the perpetrator; and
5) The investigation will continue with or without an identification.

The eyewitness must also be given a copy of these instructions. If he or she refuses to sign a document acknowledging receipt of the instructions, the lineup administrator is directed to sign it and make a notation of the eyewitness's refusal.

Alternative Methods for Identification Procedures
The bill provides that in lieu of using an independent administrator, a photo lineup procedure may be conducted using an alternative method specified and approved by the Criminal Justice Standards and Training Commission (Commission).[12] Any alternative method must be carefully structured to achieve neutral administration and to prevent the administrator from knowing which photograph is being presented to the eyewitness during the identification procedure. Alternative methods may include any of the following:

- Automated computer programs that can automatically administer the photo lineup directly to an eyewitness and prevent the lineup administrator from seeing which photo the witness is viewing until after the procedure is completed.
- A procedure in which photographs are placed in folders, randomly numbered, and shuffled and then presented to an eyewitness such that the administrator cannot see or track which photograph is being presented to the witness until after the procedure is completed.
- Any other procedures that achieve neutral administration.

Remedies as Consequence of not Following Statutory Procedures
The court must consider noncompliance with the statutory suspect identification procedures when deciding a motion to suppress the identification from being presented as evidence at trial. A failure on the part of a person to comply with eyewitness identification procedures is admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible.

[12] In Florida, the Criminal Justice Standards and Training Commission (CJSTC), housed within the Florida Department of Law Enforcement, establishes uniform minimum standards for the employment and training of full-time, part-time, and auxiliary law enforcement, correctional, and correctional probation officers. Every prospective law enforcement officer, correctional officer, and correctional probation officer must successfully complete a CJSTC-developed Basic Recruit Training Program in order to receive their certification. (http://www.fdle.state.fl.us/Content/getdoc/91a75023-5a74-40ef-814d-8e7e5b622d4d/CJSTC-Home-Page.aspx) (last accessed March 28, 2011).

When evidence of compliance or non-compliance has been presented at trial, the bill requires the jury to be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.

Education and Training
The Commission, in consultation with the Florida Department of Law Enforcement, is required to develop educational materials and conduct training programs for law enforcement on the eyewitness identification procedures set forth in the bill.

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:

The bill requires the Commission, in consultation with the Florida Department of Law Enforcement, to create educational materials and conduct training programs for law enforcement on the eyewitness identification procedures. This may have a fiscal impact on the Commission.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The use of photo lineups with eyewitnesses to crimes occurs often in most law enforcement organizations. County Sheriff's Offices alone do hundreds every year.[13] Nonetheless, smaller law enforcement agencies, in particular, may experience some fiscal impact from the implementation of the requirements of this bill.

Agencies that have few officers on a shift at any given time may have to call in additional officers anytime a lineup that requires an independent administrator is conducted due to the fact that all or most officers on the shift are a part of the investigation. An officer who has knowledge of the identification of a suspect would not be eligible to conduct the lineup under the provisions of the bill. It should be noted, however, that alternative methods of conducting eyewitness identification procedures are provided in the bill. The alternative methods should allow the smaller agencies flexibility since an independent administrator is not required.

The Florida Sheriffs Association reports that the bill will force significant increased costs upon law enforcement agencies, not only in overtime costs, but in training and court costs.[14]

[13] Email from Frank Messersmith, Florida Sheriff's Association. March 25, 2011 (on file with House Criminal Justice Subcommittee staff).
[14] *Id.*

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

To the extent that counties (local law enforcement agencies) are obligated to expend funds in order to meet the requirements of the eyewitness identification procedures provided by the bill, the bill could constitute a mandate as defined in Article VII, Section 18 of the Florida Constitution for which no funding source is provided.

Laws that have an insignificant fiscal impact are exempt from the requirements of Article VII, Section 18 of the Florida Constitution. For purposes of legislative application of Article VII, Section 18 of the Florida Constitution, the term "insignificant" has been defined as a matter of legislative policy as an amount not greater than the average statewide population for the applicable fiscal year times ten cents. Based on Florida's 2010 census report,[15] a bill that has a statewide fiscal impact on counties and municipalities in aggregate or in excess of $1.8 million would be characterized as a mandate.
It is unknown at this time how much law enforcement agencies would be required to spend in order to meet the requirements of the eyewitness identification procedures provided by the bill. If the fiscal impact is less than $1.8 million, the impact is insignificant, and an exemption to the mandates provision exists.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill requires the jury to be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications. Jury instructions must be adopted by the Florida Supreme Court, therefore, this part of the bill will require action by the court after it is presented with a proposed instruction for consideration. Standard Jury Instructions for criminal cases are often proposed and adopted based upon the Legislature's revision of the criminal statutes, soon after the end of each legislative session. However, in the meantime, an attorney could present his or her own proposed instruction to the trial court and it could be given to the jury. The trial court has the prerogative to give instructions outside the Standard Jury Instructions, however the court runs the risk of that issue being raised on appeal.

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:

[15] http://www.edr.state.fl.us/Content/population-demographics/2010-census/index.cfm (last accessed March 28, 2011).

- 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.

This analysis is drafted to the Committee Substitute.