

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL: CS/SB 1206

INTRODUCER: Criminal Justice Committee and Senators Negron and Joyner

SUBJECT: Eyewitness Identification

DATE: April 1, 2011 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	Fav/CS
2.	<u>Boland/Maclure</u>	<u>Maclure</u>	<u>JU</u>	Pre-meeting
3.	_____	_____	<u>BC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill creates procedures that law enforcement officers must follow when they are conducting photo and live lineups with eyewitnesses to crimes. In particular, it specifies that a lineup must be conducted by someone who is not participating in the criminal investigation and is unaware of which person in the lineup is the suspect.

Further, the bill provides remedies for a defendant when the specified eyewitness identification procedures are not followed. The court may allow a jury in a criminal trial to hear evidence of officer noncompliance, and the court may consider the noncompliance in a motion to suppress the identification of the defendant. The bill requires instructions to the jury regarding the reliability of eyewitness identifications under certain circumstances.

Lastly, the bill requires education and training of law enforcement officers on the new eyewitness identification procedures.

This bill creates an undesignated section of the Florida Statutes.

II. Present Situation:

Eyewitness Identification

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 The Innocence Project of Florida reports that the same percentage applies in the 12 Florida cases, nine of which involved issues of eyewitness misidentification.²

Florida statutes do not currently set forth requirements for law enforcement officers to follow when conducting eyewitness identification procedures 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 should not 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. There is no statewide standard, however, and a survey of 230 Florida agencies, conducted by the Innocence Project of Florida, indicated that 37 of those agencies had written 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 Innocence Commission at its January 2011 meeting, it is important to have protocol compliance. Dr. Malpass also recommended videotaping the identification procedure.

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

¹ Presentation to Innocence Commission, Nov. 22, 2010. Gary L. Wells and Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 1 (2009). See also Rene Stutzman, "Florida Innocence Commission to cops: Fix photo-lineup problems," Orlando Sentinel (Mar. 21, 2011), available at http://articles.orlandosentinel.com/2011-03-21/news/os-innocence-commission-vote-20110321-19_1_lineups-florida-s-innocence-commission-florida-innocence-commission.

² E-mail correspondence with Seth Miller, Executive Director, Innocence Project of Florida, Mar. 23, 2011.

³ Survey on file with the Criminal Justice Committee.

- There is no definitive study showing that sequential or simultaneous presentation is the superior method of presentation, although he believes that sequential administration suppresses all identifications.
- A “confidence statement” from the witness is not a good predictor of accuracy.
- 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 line-up; 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, in which the officer conducting the procedure is unaware of the identity of the suspect, is a good method for use in both sequential and simultaneous administration.⁴

If an agency has a particular 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 protocol compliance. Conversely, if the 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. *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). 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. *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)). 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. *See Thomas*, 748 So.2d at 981; *Green*, 641 So.2d at 394; *Grant*, 390 So.2d at 344.⁵

⁴ Innocence Commission meeting minutes, January 2011 meeting.

⁵ *Rimmer v. State*, 825 So. 2d 304 (Fla. 2002).

Very recently, a central Florida trial court judge has found himself focused on the issue of eyewitness identification after a woman was wrongfully convicted of a crime based on the testimony of three eyewitnesses in his courtroom.⁶ The state filed a motion to set aside the conviction, and she has since been released from jail. Then in a robbery case that was set for trial before the same central Florida judge, a defense attorney successfully argued last month for a special jury instruction on eyewitness identification.⁷ The state is appealing the court's ruling on the special instruction.

Florida Innocence Commission

During the 2010 Regular Session, the Legislature provided funding for the creation of commission to study the causes of wrongful conviction and subsequent incarceration. In response, the Florida Supreme Court established the Florida Innocence Commission "to conduct a comprehensive study of the causes of wrongful conviction and of measures to prevent such convictions."⁸ The commission shall submit an interim report to the Court no later than June 30, 2011, and a final report and recommendations no later than June 30, 2012.⁹ At its March 21, 2011, meeting, the commission vote to support legislation that would prescribe procedures law enforcement officers must follow when they are conducting photo and live lineups with eyewitnesses to crimes.¹⁰

III. Effect of Proposed Changes:

The bill 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 law enforcement agencies must implement when conducting lineups.

The bill provides definitions of common terms relating to eyewitness identification procedures used in the law enforcement community.

Under the provisions of the bill, law enforcement must fulfill certain criteria in conducting a lineup. The bill also provides remedies should the requirements of the lineup procedure not be followed in conducting the lineup.

Lineup Procedures

Prior to the lineup, officers are required to give the eyewitness five instructions. These are:

- 1) The perpetrator might or might not be in the lineup;

⁶ Anthony Colarossi, "Anatomy of a botched conviction: How was innocent Haitian woman convicted?," Orlando Sentinel (Oct. 2, 2010), available at http://articles.orlandosentinel.com/2010-10-02/news/os-anatomy-botched-conviction-20101002_1_kittsie-simmons-malenne-joseph-officer-jose-m-varela/4.

⁷ Anthony Colarossi, "Jurors in robbery trial asked to consider whether to believe eyewitness testimony," Orlando Sentinel (Feb. 17, 2011), available at <http://articles.orlandosentinel.com/2011-02-17/news/os-witness-identification-motion-20110217>.

⁸ Fla. Supreme Court, Admin. Order No. AOSC10-39, *In Re: Florida Innocence Commission* (July 2, 2010).

⁹ *Id.* at 2.

¹⁰ Stutzman, *supra* note 1.

- 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 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 refusal.

An independent administrator must conduct the lineup. This approach is sometimes referred to as a "blind" administration. 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 which is most agreed upon by the scholars in the area of study as being critical to untainted suspect identification.

Remedies for Noncompliance

The court may consider noncompliance with the statutory suspect identification procedures when deciding a motion to suppress the identification from being presented as evidence at trial. The court may allow the jury to hear evidence of noncompliance in support of claims of eyewitness misidentification raised by the defendant.

The bill also provides that the jury shall 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 particular 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 quite 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.

Education and Training

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

Effective Date

The bill has a July 1, 2011, effective date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The use of lineups with eyewitnesses to crimes occurs on a limited basis in most law enforcement organizations. 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.

Regarding specialized training, currently law enforcement training on eyewitness identification procedures in Florida, provided by the Criminal Justice Standards and Training Commission, occurs at the Basic Recruit Training Level. Some agencies have indicated that statewide training requirements are more costly than in-house training; therefore those agencies would experience a fiscal impact if statewide training on eyewitness identification procedures is required.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Criminal Justice on March 28, 2011:**

The committee substitute deleted details related to the lineup procedures provided for in the original bill, including:

- Restrictions on the type of photograph of the suspect and fillers that must be utilized in a particular case;
- The number of fillers that must be used;
- The placement of the suspect in the live or photographic lineup for each witness;
- Restrictions on eyewitness contact with live lineup participants;
- Requirements for live lineup participants performing gestures, speech, or other movements;
- Prohibition on communication with the eyewitness regarding the suspect's position in the lineup or other influential communication;
- Procurement of an eyewitness's "confidence statement" by the lineup administrator;
- Separation of witnesses from one another; and
- Videotaping or audiotaping the lineup procedure, or if neither is practical, a full written record by the lineup administrator including the nine requirements set forth in the bill.

The committee substitute also removed the alternative method for identification provided for in the bill.

B. Amendments:

None.