State of Connecticut
DIVISION OF CRIMINAL JUSTICE

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Testimony of the Division of Criminal Justice

In Opposition to:

S.B. No. 1240 (RAISED) AN ACT CONCERNING EYEWITNESS IDENTIFICATION

Presented by:
Senior Assistant State's Attorney James G. Clark
Judicial District of New Haven

Joint Committee on Judiciary – April 10, 2007

It is in the interest of society to use the best procedures possible to identify perpetrators of crimes against our citizens. Incorrect identifications help no one; they can lead to arrest of the innocent, and failure to arrest the guilty.

The question before this Committee is whether the bill, AAC Eyewitness Identification, would result in more accurate or less accurate identifications. Right now, the answer to that question is "Nobody knows."

This bill seeks to legislate an identification procedure called "sequential" presentation (sections (b)(2), (b)(3 D, E, F), (b)(9), and (b)(14)(D)of the bill). In a sequential identification procedure photos or suspects are presented to the witness one at a time. The alternative to this procedure is the traditional "photoboard" method, termed "simultaneous" presentation, in which six or eight photographs are presented to the witness as a group.[1]

Why do we say "Nobody knows" whether sequential or simultaneous presentation

[1] The same procedures can be used for live lineups, by exhibiting the participants either one at a time, or as a group. Most Connecticut identification procedures use photographs, and I will use "lineup" as shorthand for both photographic and live lineups in my presentation today.

is better? Because the research in this area is not sufficiently advanced to tell us much about identification procedures presented to real witnesses to real crimes.

Very little research into the accuracy of eyewitness identifications has been done using real crime victims or witnesses. The academic research in this area is typically done by showing undergraduate psychology students a grainy video of a simulated crime and then asking the students to identify the perpetrator in a photo array. The researchers rarely account for those in the class who may be asleep, sending text messages, or surfing the internet on their computers. The students have no personal interest in getting the answer right; they know it is an experiment and that there are no consequences to anyone from their selection. Crime victims, of course, have a personal interest in the crime, have seen a real human being, usually at close quarters, and know that their choice could lead to an arrest. Their personal engagement both at the observation and identification stages is much different than that of a college student in an undergraduate lecture hall.

At least one well-respected academic advocate of sequential presentation has concluded within the last year that the research leading to his initial recommendation of that procedure is seriously flawed. A growing body of research based on real world lineup studies using actual crime victims has, within the last two years, also cast serious doubt on the prior conclusions about the superiority of sequential identifications. The currently available information is insufficient for this Committee to conclude that one procedure is better than another.

Dr. Roy Malpass of the University of Texas El Paso, was a co-author of an often-cited paper published in 1998[2], which discussed sequential lineups at length, and strongly argued the superiority of the sequential method.[3] In a detailed research paper published in 2006, however, Dr. Malpass completely changed his position. He carefully detailed and analyzed the academic research giving rise to a suggestion of sequential superiority and found that research to be flawed and incomplete. The abstract summarizing his conclusions stated the case succinctly:

> "Public policy changes [recommending sequential aprocedures] . . . may be premature because the conditions under which sequential lineups are superior to simultaneous lineups are not well understood given the current

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[2] Wells, Small, Penrod, Malpass, Fulero & Brimacombe (1998). Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, *Law and Human Behavior*, 22, 126-165.

[3] Significantly, the paper made four specific suggestions for reform, but did *not* include sequential procedures among those recommendations. *Id.,* p 157. Three of the recommendations – neutral instructions similar to section (b)(3A & B), lineup composition similar to section (b)(4), and a confidence statement similar to section (b)(13 & 14) – were adopted by the State's Attorneys more than three years ago. The fourth recommendation, "blind administration" similar to section (b)(1), poses serious manpower difficulties for small departments in finding a person to administer the photo array who does not know the identity of the suspect. Attached to this testimony is a letter sent to a police chief in Connecticut by former Chief State's Attorney Christopher L. Morano regarding the procedures to be followed in pursuing an identification by an eyewitness. Also attached are forms used by police departments throughout the state describing those procedures.

> literature: many studies are reported with insufficient detail needed to judge the adequacy of the research design, new data show that the sequential superiority effect may vary as a function of study methodology, theoretical assumptions have not been adequately tested, and important comparisons that may rule out the ostensible superiority of the sequential lineup have not been studied."

McQuiston-Surrett, Malpass, Tredoux (2006). Sequential vs. Simultaneous Lineups: A Review of Methods, Data, and Theory, *Psychology, Public Policy and Law,* 12(2), 137-169.[4]

Just nine years ago, Dr. Malpass strongly recommended the sequential procedure. He has changed his mind upon more careful analysis of the available research. When a staunch advocate of a position changes his mind, it is telling evidence that something about the previous conclusion is not right. This reevaluation does not tell us that simultaneous is better than sequential presentation. All it implies is that the research community has more work to do before this Committee can know which procedure is most accurate.

That research is being done, but it is not nearly complete. Real world studies involving actual witnesses have been designed and implemented in several states, with more on the way. The published results of those studies all demonstrate one thing clearly: the academic research on this subject does not reflect the realities of how identification procedures affect actual crime victims and witnesses. A study commissioned by the Illinois legislature in 2003 compared the efficacy of the traditional simultaneous lineup with the academically recommended sequential procedure in 548 photo and live lineups[5]. A Queens, New York, study analyzed more than 2500 live lineups using simultaneous presentation. A Hennepin County, Minnesota study looked at 280 sequential photo lineups. The results of those studies are summarized in Table I.

Before turning to Table I, however, it is important to note a few things. Real world lineups can tell us how often a witness identified the "suspect" the police believe to be involved in the crime, but because we often cannot know with certainty that the "suspect" is actually guilty, a suspect identification should not be construed as "correct" without independent proof.[6] Conversely, we *can* accurately know the rate of "false identification",

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[4] This paper is available on the internet at: http://eyewitness.utep.edu/Documents/McQuiston-SurrettMalpassTredoux2006SimultSequentLineupReview.pdf

[5] The full report is found at: http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.pdf . The addendum to the report, responding to criticisms of its methods, and providing a shorter summary of results is at: http://www.chicagopolice.org/Addendum%20to%20IP-Report.pdf

[6] Comparison of suspect identifications *can* be used, with caution, to compare rates of identification between studies and methods. We just cannot know how many identifications are "right". In a large sample, however, we can draw tentative conclusions about the likelihood of one procedure being more accurate than another. Researchers are designing further studies that will compare "suspect" identifications to known guilt as shown by DNA, confessions, or other persuasive evidence.

where the witness chooses one of the "fillers" in the lineup. A filler is placed in the lineup precisely because police know the filler did not commit the crime.

TABLE I

	Illinois simul.	Queens simul.	Illinois seq.	Hennepin seq.	Academic simul.	Academi c seq.
Suspect ID	59.9 %	53.7%	45%	54%	50%	35%
Filler ID	2.8%	2.9%	2.8%	8%	24%	19%
No ID	37.6%	43.4%	47.2%	38%	26%	46%

Table I graphically illustrates at least two facts: (1) the filler identification rates, i.e. the demonstrably false identification rates, predicted by the academic research to be 19-24 percent for both simultaneous and sequential identifications, were dramatically lower than predicted – around 3 percent for simultaneous lineups and between 2.8 percent and 8 percent for sequential; and (2) the Illinois and Queens data showed no statistical difference between the two methods in filler identifications but a much lower rate of suspect identifications using the sequential procedure. Those results also contradict the trends claimed by the academic studies.[7]

The point of the real world research and the Malpass re-analysis for this Committee is direct: the academic research and studies in this area are not definitive or complete enough to make a legislative determination requiring a particular lineup procedure at this time. Because the data available cannot conclusively tell us which method is superior for lineups used to investigate real world crimes, a legislative mandate risks eliminating a procedure that may be proven, in time, to do a better job both of identifying the guilty and protecting the innocent.

[7] Another study from Brooklyn, NY based on 1010 traditional simultaneous live lineups yielded: 69% suspect IDs, just over 1% filler IDs, and 30% no identifications. Addendum to the Report to the Legislature of the State of Illinois: the Illinois Pilot Program on Sequential Double-Blind Identification Procedures, pp. 10-11. The Addendum can be found at: http://www.chicagopolice.org/Addendum%20to%20IP-Report.pdf.
In the table, Illinois and Queens data are taken from the Illinois Report, pp. 38, 43. The figures for "Academic" studies and Hennepin County data comes from the report on the Hennepin County study, at http://www.wmitchell.edu/lawreview/Volume32/Issue1/1Klobuchar.pdf.

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All Police Chiefs

September 23, 2005

Chief Kevin Hale
Town of Ansonia
2 Elm St.
Ansonia, CT 06401

Re: Eyewitness Identification Protocol

Dear Chief Hale:

Enclosed please find copies of the "Officer Instruction" and "Witness Instruction" forms for use in eyewitness identifications that were agreed upon as a result of the meetings of the Chief State's Attorney's Law Enforcement Council held in January, February and April of this year. These forms were also explained at the John M. Bailey legal update training provided by POST. The council included members of the Connecticut Police Chiefs Association, the Connecticut State Police, P.O.S.T., and the thirteen State's Attorneys.

At the outset, it was agreed by all that the promotion of reliable eyewitness identifications is paramount. Some of the members voiced the concern that the problems that have forced other states to adopt wholesale the recommendations of Prof. Gary Wells, an Iowa State University professor who is the nation's leading proponent of the movement to alter the method of conducting eyewitness identification procedures, simply do not exist in Connecticut. Nevertheless, it is imperative that the law enforcement community continue to examine investigative procedures, with an eye toward improving our constant search for justice.

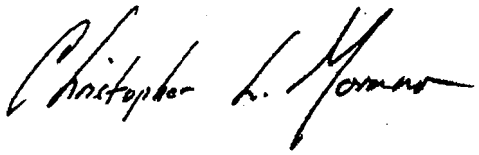
As part of the ongoing effort to ensure accuracy and reliability in identifications, while also reducing any hint of suggestibility, it was agreed that training in this area would be enhanced. With the use of the "Officer Instruction" form in training, we can educate our officers as to the criticisms and concerns that exist and how they can protect against those potential problems. Together with the training that they currently receive on state and federal constitutional legal requirements, we can proceed with further confidence in the identifications made by eyewitnesses.

The "Witness Instruction" forms are meant to supplement existing police work and not to replace any current procedures. It ensures that across the state, our law enforcement community is "on the same page" in this area. Moreover, the forms are dated as of September 2005 for ease in administrative purposes. Should we ever have any changes to the forms, the date would then be reflected.

The importance of the use of these forms is most recently highlighted by the September 19, 2005 decision by the Connecticut Supreme Court in *State v. Ledbetter.* A challenge was raised to the eyewitness identification of the defendant made during a show-up that occurred in the vicinity of the crime a short time after the incident. The court noted that it was aware of the scientific research on the potential dangers of eyewitness identification and recognized that the studies are not definitive. Nevertheless, the court felt that the importance of eyewitness identification in our criminal justice system is of such a magnitude that, from now on, if an officer in conducting an eyewitness identification **fails** to give the warning that "the perpetrator may or may not be present," the trial court must give the jury an instruction that the failure to so warn tends to increase the probability of a misidentification. Utilization of the agreed upon procedure and new forms will ensure that no jury will have to hear such an instruction.

I would like to commend the members of the Law Enforcement Council for the effort and attention they have given to the examination of this crucial issue. It is gratifying to see the law enforcement community come together to address these issues that affect our daily work and our ultimate goal to pursue justice.

Sincerely yours,



CHRISTOPHER L. MORANO
CHIEF STATE'S ATTORNEY

CLM/md
Enclosures

Anywhere Police Department

Officer Instructions for Photo Identification

A fair and objective identification procedure promotes an accurate and reliable identification or non-identification by the witness.

1. Read the witness instructions verbatim, and have the witness initial each line.

2. Confirm that the witness understands the instructions.

3. Avoid words, gestures, or expressions which could influence the witness' selection. If practical, take a position where the witness cannot see you.

4. If the witness makes an ID, refrain from making any comment on the witness' selection.

5. Write any identification results. Note the witness' statements made at the time of the identification in the "comments" section.

6. Document the date and time of the identification procedure, the names of anyone present, and the subjects and sources of all photos used. Preserve the array.

Anywhere Police Department
Witness Instructions for Photo Identification

Incident #_____ Date _____ Time _____

1. I will ask you to view a set of photographs. _____

2. It is as important to clear innocent people as to identify the guilty. _____

3. Persons in the photos may not look exactly as they did on the date of the incident, because features like facial or head hair can change. _____

4. The person you saw *may or may not* be in these photographs. _____

5. The police will continue to investigate this incident, whether you identify someone or not. _____

I understand the instructions, have viewed the photos, and have identified #_____.

Witness comments regarding identification:

_____

_____

_____

_____

Witness' name (print): _____

Witness' Signature: _____

Officer's Signature: _____ ID#_____