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Testimony of the Division of Criminal Justice

In Opposition to:

**H.B. No. 5832 (RAISED) An Act Concerning Eyewitness Identification
Presented by Michael Dearington, State's Attorney, Judicial District of New Haven
Joint Committee on Judicial - March 20, 2008**

Good morning, I am Mike Dearington, the State's Attorney for the New Haven Judicial District.

I am here today speaking on behalf of the Division of Criminal Justice with respect to Raised Bill No. 5832 captioned "An Act Concerning Eyewitness Identification." As you are only too well aware, this bill or similar bills have been introduced several times over perhaps the last four or five years.

As you are also well aware, the basis for the bill is to increase the reliability of witness or victim identification in a criminal investigation. It is estimated that around 75% of wrongful convictions are based upon an erroneous identification of a supposed suspect.

The principal matters contained in the bill involve the implementation of the so-called sequential identification procedure and the so-called double blind procedure.

The latter involves an investigative officer, before showing photographs or people in a live lineup, advising a witness or victim that the perpetrator may not be in the array, that, there is no obligation to make an identification and the investigation will continue irrespective whether an identification is made. Moreover, the officer must in no way suggest which person or photo is considered a suspect.

In cooperation with this Committee, the Office of the Chief State's Attorney about three years ago, recommended to the Connecticut Chiefs of Police Association that this procedure be adopted by the State Police and all municipal police departments. As a result, this protocol is now in effect statewide. I have attached to my statement the forms mandated to be used by police in connection to identification procedures.

The so-called second part of the double blind procedure is that the viewing procedure be conducted by an officer who is not aware of the identity of the suspect. Because of the impracticality of this due to police departments with a limited number of personnel Bill no. 5832 indicates that this should be done "when practicable." Thus, an effort is being made to comply with this section of the bill.

The utilization of the much heralded sequential identification procedure, that is the showing of photographs one at a time, is touted by many social scientist as important in reducing the number of erroneous identifications.

However as pointed out by New Haven Senior Assistant State's Attorney Jim Clark before this Committee in April of last year the "jury" is still out as to "why do we say nobody knows" whether sequential or simultaneous presentation is better? Because the research in this area is not sufficiently advanced to tell us much about identification presented to real witnesses to real crime." This is in large part due to the fact that academic research which is the basis for nearly all studies concerning the efficacy of sequential identification is based upon classroom recreation of crimes. Mr. Clark's statement is attached.

Although such procedure has been adopted statewide at least in three states and in numerous departments around the country questions about its intended effectiveness are increasingly being raised. There is as yet no consensus as to the value of the sequestration protocol in terms of reducing bad identifications. In fact there is information that sequential identifications may more than simultaneous procedure result in more faulty identifications in certain situations.

What I believe is extremely important to this Committee and commonly overlooked is that even as the debate over sequential identification continues, it is important to consider what Professor Gary Wells who claims to be a founder of and is recognized as an active supporter of the sequential identification has stated:

In fact, however, I think that it is unfortunate that the sequential procedure has come to dominate so much of the discussion regarding lineup procedures. Most of my research and writing over the years has been addressed at problems with lineup procedures that are independent of the simultaneous versus sequential lineup

issues. Regardless of whether one uses a simultaneous or sequential procedure, there are other important problems with lineups that have to be addressed. These other problems include: instructions to eyewitnesses, the selection of lineup fillers, how witness certainty is assessed, how to eliminate inadvertent influences from the lineup administrator, what records must be kept, and so on. Fixation on the sequential procedure is creating a certain degree of myopia with regard to seeing the broad problems with lineups.

In the spirit of Mr. Wells statement this Committee in conjunction with prosecutors and law enforcement has fostered improved identification procedures and education of the law enforcement community which assumably will result in fewer faulty identifications.

In conclusion, the Division of Criminal Justice believes H.B. No. 5832 is premature and unnecessary given the inconclusive nature of the research to date and the ongoing good-faith efforts being undertaken by the law enforcement community to address the underlying issues.

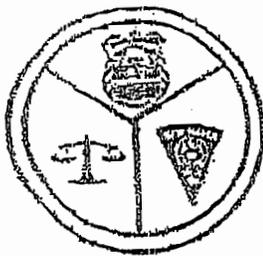
The Division of Criminal Justice would respectfully request the Committee reject H.B. No. 5832.

Thank you.

New Haven 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.



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Francisco Ortiz
 Chief of Police

John DeStefano Jr.
 Mayor

Witness Instructions for Photo Identification

Case Number: _____ 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 _____

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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 1998², 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 procedures] . . . may be premature because the conditions under which sequential lineups are superior to simultaneous lineups are not well understood given the current

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 lineups⁵. 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”,

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.	Academic 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>.