

**CCDLA**  
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March 16, 2012

The Honorable Eric D. Coleman  
The Honorable Gerald M. Fox.  
Chairmen  
Joint Committee on Judiciary  
Room 2500, Legislative Office Building  
Hartford, CT 06106

**Re: Raised Bill No. 5011, An Act Concerning Eyewitness Identification**

Dear Chairmen and Committee Members:

My name is Lisa J. Steele. I was appointed by the Connecticut Criminal Defense Lawyers Association (CCDLA) to be a member of the Judiciary Committee's Eyewitness Identification Task Force.

For the past fifteen years, I have represented indigent criminal defendants in appeals to the Connecticut Supreme and Appellate Courts. I have been involved in eyewitness identification litigation since 1998 both as counsel to defendants and as amicus counsel. I have written various articles about eyewitness identification issues and taught numerous CLE classes in several states. I am writing on behalf of CCDLA.

CCDLA is a statewide organization of 350 lawyers dedicated to defending people accused of criminal offenses. Founded in 1988, we works to improve the criminal justice system by insuring that the individual rights guaranteed by the Connecticut and United States constitutions are applied fairly and equally, and that those rights are not diminished.

CCDLA strongly supports and recommends the passage of Raised Bill No. 5011, *An Act Concerning Eyewitness Identification*. This bill amends Public Act 11-252, passed unanimously last year, to establish a clear preference for double-blind identification procedures, and allows blinded procedures where double-blind procedures are not feasible. It also establishes a preference for sequential procedures, where the witness is shown images of the suspect and of other persons one at a time, rather than being able to look at all of the images simultaneously and pick the person who looks most like the culprit.

The bill is based on the testimony of numerous witnesses before the Task Force including Dr. Well and Dr. Dysart (two of the leading researchers in this field); as well as testimony from Police Chief Lovello of the Darien Police Department about his department's experience and procedures; and testimony from a deputy police chief from

Wellesley (a suburb of Boston), and a senior prosecutor from Middlesex County about how similar procedures have been implemented in Massachusetts with great success.

A requirement that law enforcement adopt procedures already in use in states like Massachusetts, New Jersey, and North Carolina, in some local law enforcement agencies like those in Dallas and Austin, Texas, will decrease the likelihood that an identification procedure will result in a wrongful arrest and conviction. When the wrong defendant is prosecuted, not only is this a tragedy for the innocent person, but the true culprit remains at large to perpetrate more crimes in the community.

In Massachusetts, reforms similar to those proposed here are credited with improving conviction rates. See Murphy, *DA Brings in Wins in Homicide Cases; Conley Credits New Procedures*, BOSTON GLOBE, Apr. 12, 2009, at B1. See also Gaertner & Harrington, *Successful Eyewitness Identification Reform: Ramsey County's Blind Sequential Lineup Protocol*, POLICE CHIEF, Apr. 2009, at 26 (experience of Minnesota department with blind, sequential ID procedures).

In addition, the reforms are likely to save money in the long run, by reducing the need for motions to suppress identifications and for defense experts to testify about the potential flaws in the traditional procedures in hearings and at trial. This will likely save time and money for the court system, prosecutors, public defenders, and police departments. The cost of implementing this proposal can be quite small. The benefits are enormous.

## **1. Mistaken Identification Remains the Leading Factor in Wrongful Convictions.**

In *State v. Ledbetter*, 275 Conn. 534 (2005), our Supreme Court recognized "the inherent risks of relying on eyewitness identification". The Innocence Project notes that eyewitness identification mistakes were found in 75% of 289 DNA exoneration cases including Calvin Tillman's case here in Connecticut. Unfortunately, DNA is found in a minority, perhaps 10%, of criminal cases. Larry Miller served over ten years in jail before the true culprit came forward in 1997, providing details that convinced the habeas court that Miller was innocent. See *Miller v. Commissioner of Correction*, 242 Conn. 745 (1997). The DNA exonerations are the canary warning us that there is a large problem that is likely to remain unresolved unless reforms are made.

The *Ledbetter* court also recognized that "eyewitness identification remains a vital element in the investigation and adjudication of criminal acts". It is because of this vitality that proper procedures are critical to a proper police investigation focused on the true culprit, and not delayed by building a case against an innocent person.

## **2. Traditional Eyewitness Identification Procedures: The Science and the Problem.**

One of the best introductions to eyewitness identification science and the law can be found in a report by a New Jersey judge assigned to prepare a report in this area. Justice Palmer, writing separately in *State v. Outing*, refers several times to G. Gaulkin, Report of the Special Master, *State v. Henderson*, New Jersey Supreme Court, Docket No. A-8-08 (June 10, 2010). Many of Judge Gaulkin's recommendations were subsequently adopted by the New Jersey Supreme Court in *State v. Henderson*, 208

N.J. 208, 27 A.3d 872 (2011). Links to the *Henderson* decision, Special Master's Report and the OLR Research Report on the *Henderson* decision can be found on the Task Force website, <http://www.cga.ct.gov/jud/eyewitness/taskforce.asp>.

Judge Gaulkin reviewed the research in this area and concluded that "Of all the substantive uses of social science in law . . . nowhere is there a larger body of research than in the area of eyewitness identification." Special Master's Report at 9. There are thousands of published, peer-reviewed papers in major psychology journals discussing eyewitness identification. These papers come to a general consensus on key issues, including those raised in this Bill.

Not only is there is ample solid science in the eyewitness identification field to support this legislation, similar principles are found in the traffic safety and accident reconstruction field and in research and training on use-of-force by police officers and reconstruction of officer-involved shooting incidents. See in Dewar & Olson, *HUMAN FACTORS IN TRAFFIC SAFETY* (2d Ed. 2007); Dept. of Justice, *VIOLENT ENCOUNTERS: FELONIOUS ASSAULTS ON AMERICA'S LAW ENFORCEMENT OFFICERS*, 61-73 (2007). This bill is supported by good, solid science.

To the extent that opponents of this bill might disagree or argue that the science is not yet definitive, Justice Borden repeatedly asked the members of the Task Force to seek out contrary opinions so their testimony could be heard. If there are remaining skeptics, CCDLA suggests this Committee ask the opponents to provide specific citations to the materials which they feel support their skepticism. The eyewitness identification research which underlies this Bill has been found persuasive by our own Task Force, as well as by the Department of Justice, various state task forces, numerous police departments and law enforcement agencies, and many courts including Connecticut appellate courts. To dismiss the research in this area as merely academic studies of undergraduate students does a disservice to Connecticut's residents.

Opponents of this bill may again suggest that legislation is not needed – law enforcement can adopt procedures on its own. First, CCDLA notes that the Department of Justice first recommended many of the procedures contained in this bill in 1999. Many of the Department of Justice's reforms were adopted in Public Act 11-252, nearly twelve years later,

Second, to the extent that some departments have voluntarily adopted some reforms, their adoption has been inconsistent and haphazard. Fisher, *Eyewitness Identification Reform in Massachusetts*, 91:2 MASS. L. REV. 52, 65 (2008). This bill recommends that the Police Officer Standards and Training Council (POST) and the Division of State Police create uniform mandatory guidelines and procedures, standardized forms, and appropriate training. This is vitally important. Investigative procedure should not depend on where a crime occurs – uniform procedures incorporating well-settled science will best serve Connecticut's citizens.

#### **A. Double-Blind Procedures**

A test is "blind" when the test subject does not know the expected answer. A test is "double-blind" when neither the person taking the test nor the person giving the test know the expected answer. Double-blind procedures are standard and uncontroversial in many areas of science. A double-blind identification procedure would mean that the

police officer administering the line-up or photo array would not know which image is the suspect. He or she could not inadvertently give a verbal or nonverbal cue to the witness about who he or she ought to pick.

This is not a difficult or expensive process. As the Task Force heard, identification procedures in Connecticut "virtually always" involve the use of photographs. A "live" lineup is an extreme rarity in Connecticut. A double-blind procedure would briefly involve a second officer to show the images to the witness and record their choice.

Where a double-blind procedure is not feasible, the bill suggest a "blinded" procedure. A police officer who is unavoidably aware of the identity of the suspect conducts the procedure in a way in which he or she cannot tell what images the witness is looking at and thus cannot provide conscious or subconscious feedback on the witness' choice. A police officer could place the photographs of the suspect and filler in manila envelopes and hand them to the witness to view, telling the witness not to let the officer see which photographs he or she is looking at and then to initial the one he or she picks. The "folder method" was first suggested in 1999, and has been successfully used by several departments. See Klobuchar, et als, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381, 409, 411 (2006); RHODE ISLAND EYEWITNESS IDENTIFICATION TASK FORCE REPORT (2010) at 8, n. 14. It is not expensive and requires nothing more than standard office supplies.

The intent of this amendment to P.A. 11-252 is to clarify a preference for double-blind identification procedures and to clearly permit the use of "blinded" procedures where double-blind is not feasible.

There is no dispute among researchers about the efficacy of double-blind identification procedures as described in P.A. 11-252 and in this bill. To the extent that "blinded" procedures may be necessary in unusual situations, they should be permitted.

## **B: Sequential Procedures**

In a traditional identification procedure, the witness is shown all of the photographs or all of the live persons in a line-up at the same time. The witness can then compare the images or people to find the one that looks "most like" the culprit in a process called "relative judgement". See e.g. *State v. Ledbetter*, 275 Conn. 534 (2005). If the actual culprit is present, he obviously looks most like himself. However, if the culprit is not present, witnesses tend to pick the person who looks most like their memory by process of elimination rather than pick no one. Scientific research supports the use of sequential procedures in preference to simultaneous ones. To the extent that the Supreme Court debated the merits of sequential procedures in *State v. Marquez*, 291 Conn. 122 (2009), subsequent research, as described in testimony to the Task Force, clearly shows that sequential procedures do work in the real world

Sequential procedures have been adopted by numerous law enforcement agencies across the country and should be adopted in Connecticut.

### **3. Conclusion**

Numerous states and law enforcement agencies have adopted the reforms set forth in this bill. The reforms are supported by solid empirical science. They are necessary to protect the innocent from being wrongfully arrested and prosecuted. On behalf of CCDLA, I urge you to pass Raised Bill #5011.

Respectfully submitted,

Lisa J. Steele, Esq.