

STATEMENT OF THE DISTRICT OF COLUMBIA ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS CONCERNING
BILL 15-1071, THE "EYEWITNESS IDENTIFICATION PROCEDURE ACT OF 2004"

The District of Columbia Association of Criminal Defense Lawyers (DCACDL) welcomes the opportunity to comment on Bill 15-1071, the "Eyewitness Identification Procedure Act of 2004." These written comments are intended to supplement the oral testimony of the chair of our legislative committee, Richard Gilbert, to be given before the Judiciary Committee on November 15, 2004.

As an organization composed of criminal defense lawyers practicing in the District of Columbia, we are keenly interested in significant changes to criminal procedure in the District of Columbia. Bill 15-1071 is precisely such a measure. A comprehensive approach to an age-old problem in the criminal justice system, it seeks to implement the best available practices in eyewitness identification. DCACDL enthusiastically supports this legislation.

I. THE OTHER WITNESSES

The Committee is to be congratulated on assembling an exceptional list of witnesses on this important topic. Professor Gary Wells is one of the leading academic experts on perception and memory as it affects eyewitness identification; we understand he is scheduled to give an in-depth presentation on the extensive social science research supporting the provisions in Bill 15-1071. Lori Linskey, the Deputy Attorney General for the State of New Jersey is scheduled to give a presentation on how such measures as double-blind sequential lineups were introduced throughout the entire state and the successful results of that effort. Donald Salzman, the president of the Innocence Project of the National Capital Region, has prepared extensive testimony on the scope of the problem of mistaken eyewitness identifications and how the existing research

supports the key provisions of Bill 15-1071. We know that the Public Defender Service has circulated both copies of the Metropolitan Police Department's (MPD) existing procedures for conducting eyewitness identification procedures as well as the results of a survey of potential District of Columbia jurors showing a significant degree of misunderstanding of the principles behind eyewitness identification.

Given this impressive list of witnesses, there is little reason for DCACDL to try and duplicate their efforts. Instead, we will attempt to briefly describe the need for this legislation and address some of the objections we anticipate that the government witnesses may pose to the legislation.

II. THE NEED FOR THE LEGISLATION

Out-of-court procedures in which victims or witnesses identify a suspect as the person who committed the crime often seal the fate of an accused long before trial, for judges, juries, and the public place overwhelming weight on the testimony of eyewitnesses and victims of crime when they point to a defendant in court and state: "That is the person who committed this crime." Yet, this confidence is often misplaced, for mistaken pretrial eyewitness identifications may well be the leading factor that causes innocent people to be convicted of crimes they did not commit. Seventy-five percent of the more than 100 DNA exonerations nationwide involve mistaken eyewitness identifications.¹

A significant aspect to the problem of mistaken identifications is that once made, the witness's confidence in the correctness of his or her identification usually increases over time (even though studies show that the degree of confidence in an identification is not correlated to

¹ Gary L. Wells and Elizabeth A. Olson, "Eyewitness Testimony," ANNU. REV. PSYCHOL. 54:277, 278 (2003).

B. Increased "Formality" Of Eyewitness Identification Procedures

It is the experience of our members that the overwhelming number of identification procedures are photographic lineups, not live lineups. In practice, these photographic lineups have been conducted in a quite informal fashion; a detective may grab a collection of photographs and drive out to the witness's house to show them. This would change dramatically under Bill 15-1071. The requirement of a neutral administrator, the instruction to be given the witness beforehand and the need to document those instructions as well as any results, and the recording requirement will combine to make the identification procedure much more formal, and presumably, more work for the detectives. DCACDL thinks this is the way it should be; a pretrial identification procedure should be a significant event. A mistaken identification once made is very, very difficult to reverse. There should be an emphasis on getting it right, even if that does entail more work.

C. The Evidentiary Presumption

We expect the MPD, the Office of the United States Attorney, and the Attorney General of the District of Columbia, will all complain about the proposed rebuttable presumption that an identification which is made during an identification procedure which does not conform to the law is unreliable. Unfortunately, the MPD experience with recording of interrogations has demonstrated that there simply must be some real incentive to comply with the law. As with the recording issue, DCACDL does not suggest a blanket exclusionary rule. We fully understand that there will be some circumstances when an identification is made in the course of an identification procedure which does not comply with the requirements of the statute, but through no bad faith on the part of the police. In such cases, the government should be able to easily overcome the presumption, especially where the other factor in the case support a finding of reliability. Indeed,

if they are candid, we expect that the Office of the United States Attorney will admit that trial judges find almost every proffered identification reliable.² Because we expect as a practical matter, that the rebuttable presumption will actually exclude very few identifications, we support the additional provisions of the bill which will permit the jury to be informed and instructed about the importance of using the best practices in those cases when they have not been followed, but the trial judge has allowed the identification into evidence anyway.

In conclusion, we believe that Bill 15-1071 is an extremely important and worthwhile piece of legislation. We understand that the principles which govern perception and memory are complex and often counterintuitive. We appreciate that the Committee has undertaken to address this crucial, but often misunderstood issue. We strongly urge the passage of this legislation.

Thank you for your consideration.

Respectfully



Richard K. Gilbert
Chair, Legislative Committee
DCACDL

² Some of this may be the product of the fact that the legal tests for reliability do not match what we know about the actual process of identification, see Gary L. Wells & Donna M. Murray, *What Can Psychology say About the Neils vs. Biggers Criteria for Judging Eyewitness Identification Accuracy?* 68 J. Applied Psych. 347. (1983). However, such an issue is beyond the scope of this bill.