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STATEMENT OF
THE UNITED STATES ATTORNEY'S OFFICE
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Bill 15-1071, THE 'EYEWITNESS IDENTIFICATION PROCEDURE ACT OF 2004."

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Good morning Chairperson Patterson, members of the committee, and other Councilmembers. We are pleased to have the opportunity to testify on Bill 15-1071, the "Eyewitness Identification Procedure Act of 2004." However, we vigorously oppose this bill.

Eyewitness identifications are an important part of most criminal cases, and this jurisdiction has well-established procedures for conducting showups, lineups, and photospread identifications that have been tested time after time in our courts of law. We all understand that eyewitness identifications are not fool-proof, and no one in law enforcement wants to convict an innocent person. But this bill mandates a radical transformation of identification procedures that is unsupported and unwarranted – and will not necessarily yield more accurate identifications.

Our specific objections are that: (1) as a matter of policy, "best practices" should not be legislated; (2) it is not clear to us that the mandated procedures are, in fact, "best practices;" (3) as a matter of fact, the bill deviates substantially from the "best practices" recommended in the National Institutes of Justice's *Eyewitness Identification: a Guide for Law Enforcement* [*Guide*]

(October 1999);[1] (4) the bill is far too rigid; and (5) deviating, even in the slightest, from the prescriptions in the bill risks consequences that are totally out of proportion to the error – specifically, excluding an accurate eyewitness identification and, therefore, letting a guilty person go free. Moreover, certain requirements are likely to have a negative effect on two long-held concerns of the Council: putting more police officers on the street and court-related overtime.

Notwithstanding our opposition to Bill 15-1071, we recognize that it has been a long time since the Metropolitan Police Department's [MPD's] identification procedures have been reviewed and updated. The *Guide* makes a number of useful suggestions that should be considered, in light of circumstances in the District of Columbia and our local law, in developing revisions to the General Orders that govern identification procedures. In addition to revising the general orders, MPD should – and we believe it is willing to – plan and implement system-wide training on the identification procedures that are developed. Our Office is committed to working with MPD to assist in keeping officers abreast of recent developments in the law as well as training them in current best practices relating to criminal law and procedure. The United States Attorney has recently appointed Daniel Friedman, a twenty-year veteran of this Office, as Special Counsel to the United States Attorney for Police Training. Mr. Friedman will undertake this project on our behalf.

Although various jurisdictions, such as Boston and New Jersey, are experimenting with

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[1] "Best practices" are generally based on the actual experience of practitioners in a given field. They experiment with an entirely new approach or alter an old one and empirically demonstrate that this way of doing things yields better results. The NIJ *Guide*, by contrast, contains what might be better described as recommendations for what the members of the Technical Working Group for Eyewitness Evidence (TWGEYE), based on a combination of psychological studies and the efforts of law enforcement officials to improve their own procedures, thought were probably best practices or might be best practices. *Guide* at 2-3. "[N]o attempt was made to conduct validation studies to state the significance or degree of improvement in eyewitness evidence these practices should be expected to yield." *Guide* at 8.

procedures derived from the *Guide*, we are not aware of any community that has gone as far as this bill envisions. In Boston and New Jersey, law enforcement groups have voluntarily adopted guidelines of their own.[2] For example, in 2001 the Attorney General of New Jersey promulgated guidelines for preparing and conducting photo and live lineup identification procedures. Significantly, however, the New Jersey guidelines recognized that it would not be possible or practical to follow the recommendations in every case. More fundamentally, the Attorney General cautioned that "[t]he issuance of these Guidelines should in no way be used to imply that identifications made without these procedures are inadmissible or otherwise in error."

One of the most striking features of this bill is its mandatory nature. Moreover, it erects a rebuttable presumption that evidence will be excluded unless these procedures are followed. It goes far beyond the *Guide* and it ignores many of the *Guide's* caveats. For example, the *Guide* cautions:

> This *Guide* is not a legal mandate; it promotes sound professional practices. The *Guide* is not intended to state legal criteria for the admissibility of evidence

Guide at iii.[3]

> The *Guide* is not intended to state legal criteria for the admissibility of evidence.

Guide at 2.

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[2] Illinois has statutorily authorized a pilot project in three jurisdictions to test the effectiveness in the field of sequential line-up procedures. Ill. Ann. Stat. ch. 725, § 107A-10 (1963). The North Carolina Actual Innocence Commission has issued recommended "'best practices' in witness identification procedures; however they leave the details of implementation of these practices to the discretion of law enforcement."

[3] See North Carolina Actual Innocence Commission – Recommendations for Eyewitness Identification ("The recommendations made herein are not intended to create, do not create, and may not be relied on to create, any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Jurisdictional or logistical conditions may preclude the use of particular procedures").

> [L]ocal logistical and legal conditions may dictate the use of alternative procedures. Further, eyewitness identification procedures that do not employ the practices recommended in this *Guide* will not necessarily invalidate or detract from the evidence in a particular case.

Guide at 4.

By excluding eyewitness identification testimony because the procedures were not followed, this bill would radically transform the legal framework for admitting identification testimony. Under current doctrine, established by the Supreme Court, identification testimony is presumptively admissible, and the defendant carries the burden of convincing the trial court that the evidence should be excluded. "[S]uppression on due process grounds is warranted only where the circumstances of an identification were so unduly suggestive that there is a very substantial danger of irreparable misidentification." *United States v. Hunter*, 692 A.2d 1370, 1375 (D.C. 1997).

More fundamentally, evidence is generally not excluded from trial because it is deemed unreliable. "[E]xcept in a very narrow class of cases . . . , it is the function of the jury to determine whether eyewitness identification is reliable." *Hunter*, 692 A.2d at 1374. "Suppression of identification testimony because it is deemed too weak is not proper. That is the function of a timely judgment of acquittal." *Id.* at1376 (quoting *Brown v. United States*, 349 A.2d 467, 468 (D.C. 1975)). The bill stands this framework on its head and takes the issue of reliability away from the jury. Unless an identification has been made in accordance with the strict procedures mandated, there will be a rebuttable presumption that the identification is inadmissible because it is unreliable (Section 6(a)). Instead of the defendant properly bearing the burden of proving that the evidence should be excluded, the government will be required to prove "by clear and convincing evidence that the identification procedure was not suggestive and was reliable, otherwise the identification will be suppressed" (Section 6(a)). We understand how such a transformation of the law will be helpful

to criminal defendants. We do not understand how it serves the cause of justice in this city.

Another troubling aspect of the bill is that it discourages "showup" identifications by providing that they "should only be used in case of exigent circumstances" (Section 5). (Of course the bill does not explain what factors might establish exigent circumstances.) A typical showup might occur after an armed robbery, when someone matching the robber's description has been stopped a short time later. The suspect is shown to the robbery victim in order to determine whether the police have detained the right person. If they have not, the suspect is released and the search for the robber continues. If the victim identifies the robber, he is arrested. MPD General Orders permit a show up identification "[i]f a suspect is arrested within 60 minutes of a alleged offense and within an area reasonably proximate to the scene of the crime." General Order 307-7(I)((A)(1) (December 1, 1971).[4]

Our courts long have recognized the importance of showup identifications. "[A]n immediate on-the-scene confrontation has uniquely powerful indicia of reliability which more than counterbalance any suggestivity, *absent special elements of unfairness.*" *Singletary v. United States,* 383 A.2d 1064, 1068 (D.C. 1978) (emphasis added). "The admission of evidence of such identification is consistent with common sense and sound practice; a prompt showup enhances the reliability of an identification and may . . . exonerate an innocent person who has been mistakenly apprehended." *United States v. Hunter,* 692 A.2d 1370, 1375 (D.C. 1997). Showups occur when the police have been especially vigilant and apprehend suspects a short time after a crime occurs.

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[4] There are some exceptions to the 60-minute rule, including whether the suspect or the victim has been admitted to the hospital in critical condition. *Id.* at (I)(C). Showup identifications are also permitted in second-sighting situations, where the victim spots the perpetrator and calls the police, but then loses sight of him or her. *Id.* at (I)(B).

We believe it is very short-sighted to discourage such identification procedures when the witnesses' memories are likely to be at their best.

Although showups occur in fast-moving situations, the bill unwisely superimposes unwieldy procedures. For example, Section 5(b) unrealistically provides that '[i]f possible, investigators will encourage the suspect to consent to voluntary detainment to participate in a live lineup or to consent to being photographed for use in a photo lineup." Normally police are not expected to give legal advice to criminal suspects. Moreover, the detention may be a long one. Given the complicated procedures required by this bill, it could take several hours at best for the police to arrange a live lineup or to assemble a photo lineup. We do not understand why such a prolonged detention is preferable to the immediacy of a showup procedure. On one hand, we can be sure that if the suspect is identified in the lineup, he will argue that he had no idea that he would be detained so long and that he therefore was illegally detained by the police. On the other hand, if the suspect is not identified in the lineup, the police will have lost valuable time in their search for the real perpetrator.

Section 5(e) states that "[i]f practical, investigators should transport the witness to the location of the detained suspect to limit the legal impact of the suspect's detention." The current general order specifies that the suspect "shall be returned to the scene of the offense or the eyewitnesses shall be transported to the scene of the arrest for identification of the suspect." General Order 304-7(I)(A)(1) (December 1, 1971). There is no logical reason in the abstract that one method would be preferable to the other – although in real life there might be.[5] We would hope that

[5] The companion to the *Guide*, National Institutes of Justice, *Eyewitness Evidence: A Trainer's Manual for Law Enforcement* (September 2003) [*Manual*], appears to base this consideration on the fact that "there are likely to be legal restrictions concerning transporting suspects to the scene." *Manual* at 30. We are not aware of any such restrictions here. Other factors the Manual mentions for bringing the witness to the suspect are avoiding contamination

at least equal concern would be shown for the impact on the victim/witness as for the defendant.

The bill has significant other flaws, such as requiring that certain procedures be followed rather than considered (e.g., the use of sequential instead of simultaneous live or photo lineups,or displaying the suspect to only one witness in a showup procedure); mandating procedures that the *Guide* left to further study (e.g., "double blind procedures"); altering fundamental principles (e.g., how fillers are to be chosen[6]); and adding requirements that are not mentioned elsewhere (e.g., use of expert witnesses). But fixing these flaws would not cure the overriding defect that Bill 15-1071 is fundamentally misconceived. We urge the Council to reject it.

Thank you for the opportunity to testify. We request that this testimony be made a part of the record and would be pleased to answer any questions you may have.

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of the crime scene or exposure to the media. *Id.* Such factors should be considered, but should not necessarily be dispositive. For example, the victim/witness may not be at the crime scene or there may be no media about.

[6] The bill requires that the persons in a live lineup or photo array "have reasonably similar characteristics." The *Guide*, by contrast recommends that law enforcement

> [s]elect fillers who *generally fit the witness' description of the perpetrator*. When there is a limited/inadequate description of the perpetrator provided by the witness, or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.

Guide at 29, *Manual* at 33 (emphasis added). The *Manual* emphasizes that "[t]his does not mean that the fillers must closely resemble the suspect." *Manual* at 33. Indeed, the Manual cautions that "making the fillers closely resemble the suspect is not advised because a lineup in which all people look very similar to one another actually reduces the chance of an accurate identification by a witness. . . . Fillers must merely match the *description* of the offender as given by a witness viewing that lineup, as long as the policy is upheld that the suspect does not unduly stand out." *Manual* at 34.