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**Testimony to the Senate Judiciary Committee
In Opposing SB428
February 17, 2016**

Chairman King and Committee Members,

Our associations are opposed to SB428 which would fix law enforcement procedures for eyewitness identification in statute. SB428 has taken an extreme form of what could be model policy, procedure and training and proposed to make it a statutory requirement. This does not allow for easily adopting new research findings or eliminating procedures that research later shows to be faulty. While we agree steps must be taken to assure best practices are used in this area of law enforcement procedure, we believe the answer is in training and establishing agency policy based on best practice and research. We do not believe detailed policy should be set as a rigid statutory requirement. While some clear conclusions have been reached in the area of eyewitness identification, research is still going on in this area of law enforcement procedure.

Rigid and unyielding procedures established in statute will serve to set up system failure over minor deviations in process. For example, on page 6, lines 36 and 37, the bill requires: “. . .the court shall examine whether law enforcement failed to substantially comply with any requirement contained in this section. . .” This means any failure of the many points in a seven-page bill will likely result in suppression of an otherwise sound identification. If the person administering the lineup were to deviate from any of these points the court could suppress. Look at how this could be applied to subsection (b)(3) starting on page 3, line 4. Some of those points are very subjective. For example, on page 3, lines 20-22, “. . .the photograph of the suspect shall be contemporary and shall resemble such suspect’s appearance at the time of the offense.” Does this mean if our most recent photograph of the suspect he is unshaven and at the time of the offense he was shaven we can’t use it? A different style of shirt? And how recent of a photo is required to be “contemporary.” Or on page 3, lines 23-25, “. . .there shall be no characteristics of the photographs themselves or the background context in which they are placed that shall make any of the photos unduly stand out.” Will we even be able to compile a photo lineup meeting these standards?

Another example of where an innocuous deviation could result in suppression is on page 2, lines 38-40, “The eyewitness shall also be asked if such eyewitness needs glasses or contact lenses. . .” If an officer doesn’t ask because the witness is clearly wearing eyeglasses or personally knows the witness requires eye glasses, does that result in the identification being suppressed?

What is the rationale on page 3, lines 17-19, requiring the witness to be told not to speak with the media? If the officer fails to make that request will the identification be suppressed? Should we even be telling every witness that in every crime without an identified need?

There are also discrepancies in the bill such as that found between the provisions on page 2, line 43- page 3, line 3 stating in certain circumstances deviation from the “blind” requirement is permitted, while on page 3, line 9, the officer is required to tell the witness “the administrator does not know who the perpetrator is.” By the definition of “blinded” on page 1 starting on line 34 the administrator may know who the perpetrator is. In addition, the investigation may have revealed who the perpetrator is and the administrator may know the name but not which photo is the suspect. These kind of details in a statute allowing any deviation to lead to suppression is problematic.

Once we start down the path of making detailed law enforcement procedure a statute, where will we draw the line? For these reasons, we believe the best approach for eyewitness identification is to pursue best practices through model policies, training, and collaboration on procedural issues with local prosecutors. Our associations have been working with the Kansas County and District Attorney Association’s Best Practices Committee developing such a model policy. The final version of that policy was approved for publication last week and we are currently rolling it out to our agencies. That policy covers all of the law enforcement procedural issues contained in this bill, while still allowing adjustments for new research and findings. In addition, the model policy accomplishes this in a clearer and more understandable form than the proposed bill.

We respectfully request you reject SB428 in its current form.

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