APPENDIX A

Sec. 8-5. Hearsay Exceptions: Declarant Must Be Available

The following are not excluded by the hearsay rule, provided the declarant is available for cross-examination at trial:

(1) Prior inconsistent statement. A prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise **[**recorded by audiotape**]** audio recorded, **[**videotape**]** video recorded or recorded by some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement.

(2) Identification of a person. The identification of a person made by a declarant prior to trial where the identification is reliable.

COMMENTARY

(1) Prior inconsistent statement.

Section 8-5 (1) incorporates the rule of *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), and later developments and clarifications. *State* v. *Simpson*, 286 Conn. 634, 642, 945 A.2d 449 (2008); see, e.g., *State* v. *Hopkins*, 222 Conn. 117, 126, 609 A.2d 236 (1992) (prior inconsistent statement must be made under circumstances assuring reliability, which is to be determined on case-by-case basis); *State* v. *Holloway*, 209 Conn. 636, 649, 553 A.2d 166 (**[**tape-recorded**]** audio recorded statement admissible under *Whelan*), cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989); *State* v. *Luis F.*, 85 Conn. App. 264, 271, 856 A.2d 522 (2004) (**[**videotaped**]** video recorded statement

admissible); see also *State* v. *Woodson*, 227 Conn. 1, 21, 629 A.2d 386 (1993) (signature of witness unnecessary when **[**tape-**]**recorded statement offered under *Whelan*).

Use of the word "witness" in Section 8-5 (1) assumes that the declarant has testified at the proceeding in question, as required by the *Whelan* rule.

As to the requirements of authentication, see Section 9-1 of the Code.

(2) Identification of a person.

Section 8-5 (2) incorporates the hearsay exception recognized in *State* v. *McClendon*, 199 Conn. 5, 11, 505 A.2d 685 (1986), and reaffirmed in subsequent cases. See *State* v. *Outlaw*, 216 Conn. 492, 497–98, 582 A.2d 751 (1990); *State* v. *Townsend*, 206 Conn. 621, 624, 539 A.2d 114 (1988); *State* v. *Weidenhof*, 205 Conn. 262, 274, 533 A.2d 545 (1987). Although this hearsay exception appears to have been the subject of criminal cases exclusively, Section 8-5 (2) is not so limited, and applies in civil cases as well.

Either the declarant or another witness present when the declarant makes the identification, such as a police officer, can testify at trial as to the identification. Compare *State* v. *McClendon*, supra, 199 Conn. 8 (declarants testified at trial about their prior out-of-court identifications), with *State* v. *Weidenhof*, supra, 205 Conn. 274 (police officer who showed declarant photographic array was called as witness at trial to testify concerning declarant's prior out-of-court identification). Even when it is another witness who testifies as to the declarant's identification, the declarant must be available for cross-examination at trial for the identification to be admissible. But cf. *State* v. *Outlaw*, supra, 216 Conn.

498 (dictum suggesting that declarant must be available for cross-examination either at trial or at prior proceeding in which out-of-court identification is offered).

Constitutional infirmities in the admission of first-time identifications, whether pretrial or in-court, are the subject of separate inquiries and constitute independent grounds for exclusion. See, e.g., *State* v. *Dickson*, 322 Conn. 410, 423–31, 141 A.3d 810 (2016), cert. denied, 582 U.S. 922, 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017); see also id., 445–46 (requiring state to seek permission from trial court prior to presenting first time in-court identification and establishing that trial court may grant permission only if there is no factual dispute as to identity of perpetrator or ability of eyewitness to identify defendant as perpetrator).

General Statutes § 54-1p prescribes numerous rules regarding eyewitness identification procedures used by law enforcement. The statute is silent on the remedy for noncompliance. See *State* v. *Grant*, 154 Conn. App. 293, 312 n.10, 112 A.3d 175 (2014) (procedures in § 54-1p are ‘‘best practices’’ and are ‘‘not constitutionally mandated’’ (internal quotation marks omitted)), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015); see also *State* v. *Guilbert*, 306 Conn. 218, 251–58, 49 A.3d 705 (2012); State v. Ledbetter, 275 Conn. 534, 579–80, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).