THE JUSTICE PROJECT

Eyewitness Identification

A Policy Review

Wrongfully convicted at age 25, Calvin Johnson received a life sentence for the rape of a Georgia woman after four different women identified him. Exonerated in 1999, he walked out of prison a 41-year old man.

The true rapist has never been found.

INTRODUCTION

A measure of fairness and accuracy in the criminal justice system

Eyewitness identification is critical to the apprehension and prosecution of criminals. Eyewitness evidence can also be an important tool for exonerating innocent suspects. Groundbreaking research on eyewitness memory over the past three decades, as well as increasing attention to the problems in the cases of wrongfully convicted individuals, has brought the fallibility of eyewitness memory to the fore.

Eyewitness misidentification is widely recognized as the leading cause of wrongful conviction in the United States, accounting for more wrongful convictions than all other causes combined.[1] Since 1989, DNA evidence has been used to exonerate nearly 200 individuals who were wrongfully convicted. Of those, approximately 75 percent were convicted on evidence that included inaccurate and faulty eyewitness identifications.[2] In some cases, these innocent individuals were misidentified by more than one eyewitness.

In the vast majority of criminal cases, however, DNA or other biological evidence is not available to establish guilt or innocence. Given the persuasive nature of eyewitness evidence, as well as the inherent danger of misidentifications—both in convicting the innocent and allowing the true perpetrator to go free—it becomes imperative that we take stock of the procedures within the control of the criminal justice system that contribute to these problems in order to ensure that the most reliable evidence possible makes it into a courtroom and before a jury.

A number of challenges emerge in pursuit of a more accurate protocol, none more prevalent than an historical lack of communication between scientists and law enforcement.[3] Decades of empirical research have proven that a number of small changes to identification procedures can help improve the accuracy and reliability of eyewitness identifications, and help ensure that the highest quality of eyewitness evidence is collected.

What's more, when put to the test in numerous jurisdictions throughout the country, these reforms have met with real-life success. Thus, it may seem surprising that these reforms have not been implemented in police districts across the board.

While much of the research has been extensively documented and peer-reviewed within the scientific community, and the recommendations for reform are widely accepted by experts in the field, these reforms were initially discussed and developed outside the realm of law enforcement.

Starting in the late nineties, however, leading researchers joined with law enforcement and legal practitioners to bridge the gap and comprehensively address eyewitness identification issues at the intersection of the two fields. As a result, guidelines and best practices for law enforcement were developed with the science in mind.

In October 1999, the Department of Justice released a comprehensive guide for law enforcement on procedures for obtaining more accurate eyewitness evidence.[4] However, there is no current national program or federal agency responsible for educating local departments about these reforms—or in assisting with their practical implementation.[5]

Eyewitness misidentification is widely recognized as the leading cause of wrongful conviction in the U.S., accounting for more wrongful convictions than all other causes combined.

Moreover, as reforms are implemented on a jurisdiction-by-jurisdiction basis in some states, there continues to be little opportunity for sharing information and perhaps even less incentive, given the already overloaded criminal caseloads of police, prosecutors and defenders, and the lack of leadership from the courts or legislature on the issue.

This policy review has been designed to facilitate communication among local law enforcement agencies, policymakers, and others regarding the best practices and methods for enhancing the evidentiary value of correct identifications and at the same time reducing the risk of erroneous identifications. By presenting many of the successful methods employed in local jurisdictions, as well as the science behind them, we hope to create a dialogue around recommendations that will enhance the quality of evidence relied upon in criminal trials, as well as confidence in our system of justice.

RECOMMENDATIONS & SOLUTIONS

Getting it right the first time

A handful of specific improvements have emerged as pragmatic strategies for minimizing eyewitness error. While modernizing identification procedures to incorporate advances in eyewitness memory science requires retooling long-standing lineup methods engrained in police culture, the substantial benefits of implementing the protocol are leading more jurisdictions to update their procedures to catch up with the science.

Because eyewitness evidence, much like trace evidence, is susceptible to contamination, some eyewitness identification procedures actually increase the risk of false identification. By improving these procedures in subtle ways, the actual quality of eyewitness evidence can be improved.

The following recommendations reflect the consensus in the scientific community — confirmed by successful implementation in numerous jurisdictions — as to the procedural changes that will enable law enforcement to extract the most reliable evidence from eyewitnesses for use in a criminal investigation.

These practical changes to the identification process help increase the likelihood of identifying the true culprit while enhancing protections for innocent people accused of crimes.

These reforms are equally effective for photographic lineups and live lineups.

CAUTIONARY INSTRUCTIONS

Prior to presenting the lineup members, the eyewitness should be instructed that the perpetrator may or may not be included in the lineup, and that she should not feel compelled to make an identification.

Cautionary instructions respond, in part, to the tendency of witnesses to make a relative judgment by removing some of the pressure on the eyewitness to choose a suspect when the culprit may not be in the lineup.

EFFECTIVE USE OF FILLERS

Only one suspect should appear in each lineup. In addition, at least five fillers should be included in a photo lineup, and at least four fillers in a live lineup. The fillers should resemble the witness's description of the perpetrator, and the suspect should not unduly stand out.

Fillers, if chosen correctly, allow authorities to judge the reliability of an eyewitness. The effective use of fillers is critical to ensuring that an innocent individual is not identified simply because of the composition of the lineup.

DOCUMENTATION

The identification procedure should be carefully documented. Documentation includes preservation of photos in a photo array or photographs taken of a live lineup, recording all individuals present at the lineup, documentation of the witness's statements regarding the lineup members during the procedure, and, if an identification is made, documentation of the witness's degree of confidence in the identification, in the witness's own words, prior to any feedback from authorities.

Careful documentation of the lineup procedures, including a witness's level of certainty that she has correctly identified the perpetrator, when taken immediately following the identification, helps the jury to assess the eyewitness evidence appropriately and minimizes the effects of reinforcing feedback that can distort the confidence level of an eyewitness between the time of the identification and the trial.

DOUBLE-BLIND ADMINISTRATION

The person who administers the lineup should not know the identity of the suspect. This procedure prevents well-intentioned officials from giving inadvertent clues to the witness as to which person in the lineup is the police suspect.

SEQUENTIAL PRESENTATION

The lineup members should be presented to the witness "sequentially" (one at a time) rather than simultaneously (all at once). Sequential presentation should only occur, however, if the identification procedures comply fully with the double-blind administration recommendation.

Presenting the lineup members one at a time to the witness reduces the tendency for witnesses to engage in "comparison shopping." Rather, an eyewitness must judge whether each lineup member matches her memory of the perpetrator, as opposed to making a relative judgment.

PSYCHOLOGICAL FACTORS

Preventing unreliable evidence in the courtroom

Reliable eyewitness evidence is critical to criminal investigation and prosecution, and it plays a powerful role within the criminal justice system. The repeated discovery of misidentifications contributing to wrongful convictions, however, has prompted inquiries into the nature of eyewitness evidence used to convict criminal suspects, and the problems that arise in utilizing human memory in criminal investigations.

The scientific community has brought the knowledge built through decades of research and experiments to bear on eyewitness identification procedures. Important lessons learned in the laboratory, and in the decades of research devoted to eyewitness memory science, are of enormous value in the legal and law enforcement communities. This substantial body of research has revealed that several natural psychological phenomena can undermine the accuracy of eyewitness identification, and that these psychological factors, left unchecked, can lead to unreliable evidence being presented in the courtroom.

Several natural psychological phenomena can undermine the accuracy of eyewitness identification, and these psychological factors, left unchecked, can lead to unreliable evidence being presented in the courtroom.

LINEUPS AS EXPERIMENTS

Just as trace physical evidence (such as DNA or fingerprints) can be contaminated if it is not collected precisely and carefully, so too eyewitness evidence can be spoiled if it is gathered in ways that do not properly control for known sources of error.[6]

As some researchers have described, a lineup is essentially an experiment designed to test a hypothesis: whether the suspect matches the witness's memory of the perpetrator.[7] Like scientific experiments, careful controls must be put in place to ensure accuracy and prevent the witness's memory from being contaminated or skewed.

Essentially, the lineups as experiments analogy suggests that the logic used to conduct experiments — i.e., isolating variables and implementing careful control conditions — can and should be applied to the legal system when conducting lineups. Using some of the tried and true scientific methods for conducting experiments when conducting a lineup greatly reduces, or in some cases eliminates, the risk of contamination of the data (i.e., eyewitness identification evidence).

RELATIVE JUDGMENT

Relative judgment refers to the natural tendency of a witness to consider lineup participants in comparison with one another, as opposed to a more direct comparison of each lineup member with the witness's memory of the culprit. A witness viewing a lineup will thus tend to identify the person who looks most like the perpetrator in comparison to the other members in the lineup.[8] While, at face value, this process seems unproblematic, it can actually lead to inaccurate and unreliable identifications under certain conditions — namely, when the police suspect is innocent.

The purpose of a lineup is to differentiate innocent suspects from those who actually committed crimes using an eyewitness's memory of an event. Thus, when conducting a lineup, law enforcement officers do not know if a suspect included in a lineup is, in fact, the true perpetrator or simply an innocent person suspected of a crime. If the lineup is full of innocent people (an innocent suspect and a group of innocent fillers), however, relative judgment would mean that an innocent person may be identified, because it is likely that there will always be someone in the lineup who looks more like the person who committed the crime than the other members of the lineup.

Sometimes this person will be a filler, and a witness identification will be dismissed. But sometimes an innocent suspect will be the victim of this tendency toward "comparison shopping," because the witness is always making a relative judgment — the witness is always picking the person who looks closest to the culprit relative to the other lineup members, even if the lineup is full of innocent people.

Take for example a six-person lineup that contains the actual culprit. It has been proven that wit-

nesses who saw the same event will often pick someone out of a lineup when the culprit is removed. In other words, regardless of whether a culprit is in a lineup, witnesses tend to pick the person who looks closest to the culprit, even when the culprit is not present. As leading researchers have noted, "The problem with the relative judgment process, therefore, is that it includes no mechanism for deciding that the culprit is none of the people in the lineup."[9]

MALLEABILITY OF WITNESS CERTAINTY

Traditionally, a witness's self-reported degree of certainty in an identification was considered a good indicator of accuracy. Unfortunately, a great deal of research in recent decades has proven this intuitive assumption false. The level of certainty a witness expresses in her eyewitness testimony does not necessarily correlate with the level of accuracy of the identification. An eyewitness's confidence that she has identified the culprit can fluctuate as a result of factors that occur after the identification and have little to do with memory. This is what is referred to as confidence malleability.[10]

For example, experiments have been conducted in which witnesses were shown a staged crime and asked to identify the culprit from a lineup. The lineup they were shown, however, did not contain the culprit. After the witnesses unknowingly made false identifications, they were then asked their level of confidence. Before doing so, however, some of the witnesses were given various types of reinforcing feedback. Those witnesses who received some confirmation of their false identification, whether the information that a co-witness identified the same individual or some other confirming feedback, were far more confident in their identifications than other witnesses who were given no feedback — despite having given false identifications. These witnesses also distorted and exaggerated certain details, such as how good their view was, how much of an opportunity they had to view the culprit, etc.[11] Our new and better understanding of the influence feedback plays on a witness's self-described level of confidence strongly suggests that measures that control for this influence be adopted in our identification procedures.

THE SCIENCE

Demanding changes in eyewitness identification procedures

Scientific treatments of eyewitness evidence began over 100 years ago, most notably with Harvard Professor Hugo Munsterberg's 1908 book, *On the Witness Stand*.[12] While Munsterberg established that eyewitness evidence was much more fallible than previously thought, his research did not show a way forward. Based on the science of the day, the legal system had no capacity for dealing with these mistakes, and the system could not sort the mistakes from the true identifications.[13] The science, at first, only documented the problem, but it could provide no solutions.

In the late 1970's, however, eyewitness memory scientists began to zero-in on the particular sources of eyewitness error and test revised identification procedures that reduced the risk of mistakes. The guiding principle of this new research was that we must do all we can to ensure good quality evidence on the front end of the process, rather than trying to second guess identifications after the fact. For the research on eyewitness fallibility to be useful, it had to be applied to the criminal justice system in a way that allowed the system to prevent or reduce future mistakes. Scientists thus focused on the ways that the system of collecting eyewitness evidence could *itself* cause mistakes, in hopes that these mistakes could be prevented before they occurred.[14]

The past three decades of eyewitness research and discussion have coalesced around this purpose — preventing false identifications with research-based improvements to the system. Largely, these improvements focus on controlling the suggestiveness of the lineup procedures themselves. A discussion of the science behind these improvements follows.

CAUTIONARY INSTRUCTIONS

Regardless of whether the true perpetrator is in a lineup, an eyewitness may feel pressure to make an identification. Witnesses know that, at the very

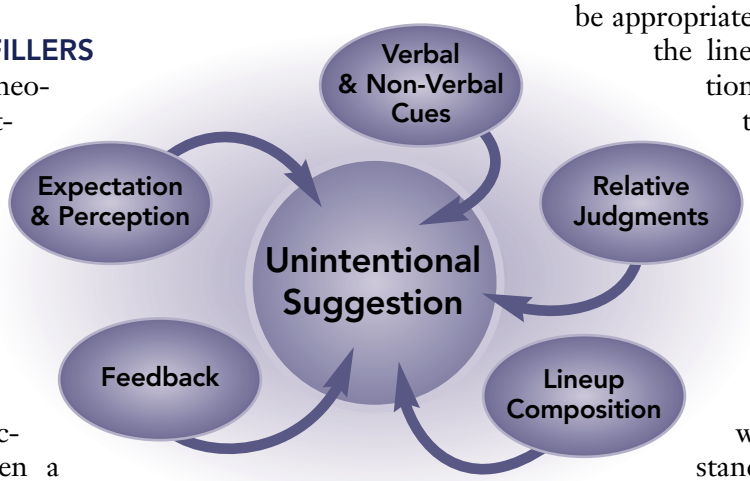
least, a lineup contains a police suspect. When the culprit is not, in fact, present in the lineup, this perception, combined with the natural tendency to compare lineup participants and make a relative judgment, may influence an eyewitness to identify an innocent person.

Cautioning an eyewitness that the offender may or may not be in the lineup reminds witnesses that the answer may be "none of the above."[15]

Research has shown that this extra step, while on its face pointing out a fact that should be obvious, significantly lowers the rate of inaccurate identifications without reducing the number of true identifications.[16]

EFFECTIVE USE OF FILLERS

Relative judgment theory means that an eyewitness viewing a simultaneous lineup tends to make a judgment about which individual in the lineup looks most like the perpetrator relative to the other members of the lineup. This is particularly problematic when a lineup only contains innocent people (i.e., a number of fillers and an innocent suspect).



Research has shown, however, that the effective use of fillers when composing a lineup can help combat the tendency for the relative judgment process to lead to the identification of an innocent suspect.[17]

First, ensuring that the suspect in the lineup does not stand out, or that the fillers resemble the witness's prior description of the culprit at least as much as the suspect does, guards against the eyewitness choosing an innocent suspect simply because the suspect is the only lineup member that resembles the perpetrator.

For example, if the eyewitness describes the perpetrator as an Asian man with a mustache, and there is only one man in the lineup who is Asian and has a mustache, then the lineup is obviously suggestive, and the evidentiary value of any identification is nil. In contrast, if all of the lineup members resemble the prior description of the culprit (or all of the lineup members are Asian men with mustaches), then the eyewitness will have to rely more on comparisons to her own memory of the culprit. In short, no lineup participant can unduly stand out for a lineup to be effective. This holds true in general, but especially with regard to features of the witness's description of the culprit. For example, if a witness describes the perpetrator as having a particular feature such as a mustache, the lineup must be composed with all members sharing that feature.

There are certainly cases where selecting fillers is not as clear-cut. For example, if the suspect does not fit the witness's prior description of the suspect but other evidence creates suspicion of guilt, then it may be appropriate to place that suspect in the lineup, as witness descriptions can sometimes be off the mark. If so, however, the fillers must be chosen to be similar to the appearance of the suspect.[18] There are methods for dealing with contingencies, but the true test of this rule is whether the suspect stands out relative to the other fillers.[19] In other words, if a person who is not involved in the case is given a description of the perpetrator, would she be able to pick the suspect out of the lineup? Including only one suspect in a lineup is also a fundamental safeguard against misidentification. Lineups not only allow police to judge whether a suspect is innocent, they also allow investigators to judge the reliability of an eyewitness. If a lineup contains more than one suspect, however, its ability to test reliability is diminished. This is because it increases the likelihood that a witness would select a suspect based on a guess rather than recognition. The more choices in the lineup test that could be considered "correct" (i.e., suspect identification), the less the lineup can control for witnesses with weak memories or those who guess. The same considerations underpin the need to include an adequate number of fillers. Doing so also reduces the likelihood of an eyewitness identifying an innocent suspect based on a guess. For example, if there is only one suspect and one filler,

the likelihood that an innocent suspect will resemble the culprit more than the other lineup members is 50 percent. If three fillers and one suspect, the likelihood is 25 percent; and so on.[20] While there is no magic number of fillers that should be used, the science has shown that the greater the number of fillers, the greater the reliability of the procedure.

DOCUMENTATION

Lineup identifications are a critical component of the investigation of criminal cases. Given the overwhelming importance of eyewitness testimony and the weight afforded to it by juries, it is essential to provide sufficient contextual information about an identification in order for fact-finders to evaluate its evidentiary weight correctly. Careful documentation of lineup procedures, where possible, means that a complete and accurate record of the methods used to obtain an identification is preserved for review. Recording the identification and the non-identification results, the dialogue between witnesses and police, and the photos themselves (or photographs of a live lineup), serves as much to protect the police from false claims of influencing a witness as it does to preserve the integrity of the evidence. Thorough documentation has the power to put an identification beyond reproach.

A critical component of appropriate documentation is recording an eyewitness's statement of confidence (or self-assessment of certainty) immediately after an identification.

Scientists have shown that a number of procedures within the system actually contribute to misidentifications. Complete documentation allows any suggestiveness in the procedure to be considered by judges and juries in deciding how to weigh the evidence and, when reliable procedures are used, it strengthens the evidentiary value of an identification.

A critical component of appropriate documentation is recording an eyewitness's statement of confidence (or self-assessment of certainty) immediately after an identification. This guards against the confidence malleability problem — when an eyewitness's confidence that she has identified the culprit fluctuates as a result of factors that occur after the identification. To document a witness's confidence, the witness is asked her level of certainty that the person being identified is the true perpetrator *prior to receiving any feedback from authorities or other witnesses*. The witness's confidence level should be recorded in her own words in order to allow judges and juries to evaluate eyewitness testimony in an informed manner.

Studies have shown that information provided to an eyewitness after an identification can influence the witness's level of confidence, and thus skew a juror's assessment of the accuracy of the identification. For example, if an eyewitness makes an identification of a suspect, and that same witness later learns that the person identified also has a criminal record, the witness's confidence level may become artificially inflated.

Confirmatory feedback oftentimes occurs without the knowledge or intent of investigators in the case or even the eyewitness, and if a confidence statement is not taken directly after the identification, the window of opportunity for protecting the integrity of the identification evidence as an indicator of accuracy is lost.

DOUBLE-BLIND ADMINISTRATION

The "double-blind" rule applies the scientific method to lineups, and is rooted in a general strategy for ensuring the objectivity of data collection and interpretation. The purpose of keeping the administrator "blind" as to which person in the lineup is the suspect is to prevent the administrator from unintentionally influencing the results through inadvertent cueing of the witness toward the suspect. A double-blind protocol also eliminates the problem of interpreting ambiguous witness comments and other behaviors through the lens of the theory that the suspect in a lineup is guilty.

Double-blind protocols are familiar to many in the context of pharmaceutical studies to test a new drug. Not only is the patient unaware of whether she received the drug or the placebo, but the doctor who examines the patient during the study is also "blind" to this fact. If the tester knew that the patient had taken the placebo, the tester might unknowingly skew the examination as a result.[21] Double-blind

protocols are standard practice in such contexts not because we distrust the integrity of the medical and scientific professionals involved, but because we understand the risk of natural human psychological factors that can undermine objectivity. We control for such factors because there is much at stake.

Similarly, if a lineup administrator knows which member of the lineup is the suspect, she might unintentionally influence the identification through verbal or non-verbal cues. A cue can be a statement to the witness or even an administrator's posture or facial expression. Verbal and non-verbal cues are examples of suggestive procedures that can suggest to the witness where a suspect is in the lineup.

Verbal and non-verbal cues can also influence or inflate the certainty of the witness. Given that eyewitness confidence is weighed heavily in the legal system, and given that it has been shown to be highly malleable and particularly susceptible to feedback, it is important to design lineup procedures that eliminate the risk of over-inflating confidence through unintentional suggestion.

> The "double-blind" rule applies the scientific method to lineups, and is rooted in a general strategy for ensuring the objectivity of data collection and interpretation.

SEQUENTIAL PRESENTATION

Relative judgment theory also serves as the basis for the sequential presentation recommendation. Traditionally, eyewitnesses are shown a lineup or photo array in which the lineup members are presented as a group. This type of presentation actually encourages an eyewitness to "comparison shop" or to judge the lineup members against each other through a process of elimination.

On the other hand, sequential presentation, first articulated by researchers in the 1980s, is a process where the witness is shown the lineup members one by one and asked to decide if the lineup member presented is the perpetrator. By forcing witnesses to consider the lineup members individually, sequential presentation favors a direct and independent assessment of whether each lineup member matches a witness's actual memory of the perpetrator.

Researchers have shown that the sequential presentation, if implemented in tandem with the double-blind procedure, results in fewer false identifications.[22] It is important to note that if the administrator is not "blind," however, the sequential procedure can actually produce higher rates of false identifications, as witnesses may be more susceptible to unintentional feedback from the administrator when considering one lineup member at a time.

While eyewitnesses have been shown to make fewer choices when viewing a sequential lineup, the research suggests that this is due, in part, to fewer guesses on the part of eyewitnesses with a weak memory of the culprit.[23] A comparison of the accurate and mistaken identifications also suggests that a sequential presentation yields a higher probability that a suspect, if identified using this procedure, is in fact the culprit.[24] In short, the sequential lineup creates a higher threshold for identification by reducing the influence of the tendency to make relative judgments. As a result, the evidentiary value of identifications gained through sequential lineups is much higher, at the cost of some identifications based on weaker witness memory or witness guesses.

Taking this research into the field has shown a generally positive effect. In a pilot project on the sequential procedures in Hennepin County, Minnesota, (Minneapolis) for example, eyewitnesses picked few fillers. Such a low rate of known errors confirmed the value of sequential procedures for officials in that jurisdiction.[25] In addition, New Jersey implemented sequential procedures statewide in 2000. A pilot project conducted by the Chicago Police Department in 2006, however, raised concerns that sequential double-blind lineups were less accurate than conventional methods.[26] Nonetheless, the Chicago study was criticized as having design problems that undermined the study's ability to yield reliable comparisons.[27] Researchers are currently pairing with other jurisdictions to add to the credible literature on the topic. While some questions have been raised about the value of sequential presentation, on balance, most experts believe that it has proven to be superior in both experimental research and in the field.

BENEFITS & COSTS

Investing in a fair and accurate criminal justice system

The benefits of improved eyewitness identification procedures are perhaps best conceived of in terms of the avoided costs. When an eyewitness mistakenly identifies the wrong individual, the costs to public safety are great. Scarce resources in the criminal justice system are misdirected toward investigating and perhaps even trying an innocent person, and not toward convicting and jailing criminals.

"The cost to society of inaccurate eyewitness identifications is twofold," notes psychologist Rod Lindsay of Queens University in Kingston, Ontario. "It's a double error. Not only are you convicting the innocent — or at least putting them through the process of having to get out of the situation — but the guilty are still out there doing the crimes."[28]

A pointed reminder of the costs of misidentification is the case of Clarence Harrison. Wrongfully convicted of a brutal rape in Decatur, Georgia, Clarence Harrison spent nearly 18 years in prison before DNA testing proved his innocence — and showed the eyewitness evidence in his case to be false. After the exoneration, the District Attorney relayed that while the victim was upset by the DNA results, "she is more upset that this means the person who raped her is yet to be identified."

When there are stronger identifications, the benefits to law enforcement and prosecutors, as well as to public safety, are increased, and we can be more confident that the right person is being prosecuted for the crime. In fact, with improved identification procedures, those in law enforcement can ensure that the quality of evidence they are collecting from eyewitnesses is higher than before. Prosecutors are also able to convey to jurors the steps taken to ensure accuracy, placing their evidence on a firm, scientific foundation. And when identifications are better, prosecutions are stronger, and convictions are more solid. By avoiding wrongful convictions, we also avoid the costs of needlessly and unjustly imprisoning an innocent person, as well as the costs of restitution and, in some cases, expensive civil judgments against local governments.

BENEFITS TO INNOCENT SUSPECTS

There can be no question that the conviction of the innocent is a profound injustice. By better protecting the innocent from wrongful conviction, we spare people the devastating ordeal of unjust incarceration that tears apart the families of innocent people and deprives them of their most fundamental liberties. To do justice to our respect for liberty, it is incumbent upon us to do all we can to enhance the accuracy of the criminal justice system.

"LEGAL SAFEGUARDS"

The U.S. Supreme Court has identified five criteria for evaluating the accuracy of eyewitness evidence — "opportunity of witness to view criminal at time of crime, witness' degree of attention, accuracy of witness' prior description of the criminal, level of certainty demonstrated by witness at the confrontation, and length of time between the crime and the confrontation" *(Neil v. Biggers, 1972)*. Unfortunately, although a witness's level of certainty or confidence in her identification is one of the most powerful factors judges and juries consider when assessing eyewitness accuracy, a witness's high level of confidence in an identification does not necessarily mean that the identification is more accurate. In fact, oftentimes the opposite is true.

A number of other procedural protections in place in the legal system to assist in protecting against inaccurate eyewitness evidence have also proven to be starkly inadequate. At last count, more than 75 percent of the nearly 200 wrongfully convicted individuals later exonerated by DNA evidence were convicted on the basis of one or more eyewitness identifications, all with the benefits of legal safeguards to protect against inaccurate identification testimony, such as motions to suppress, cross examination of eyewitnesses and the (limited) admissibility of expert testimony on eyewitness error. Thus, without improvement to the actual quality of the identification procedures themselves, the ability of the legal system to screen out unreliable eyewitness testimony is in grave doubt.

COSTS OF IMPROVED LINEUP PROCEDURES

Reforming eyewitness identification procedures would incur relatively nominal monetary costs or expenditure of departmental time and resources. For example, instructing an eyewitness prior to the lineup, which has been shown to dramatically increase protections for innocent suspects, requires very little training and can be read from a script — it is simply a matter of a change in process. While more careful documentation of identification procedures may seem burdensome, the use of audio or video recording devices can make preservation of the record much easier at nominal cost.

> "The costs of changing procedures are minimal when compared with the benefits. The costs are really a matter of some extra training for our officers. The benefits are stronger, more accurate eyewitness IDs that ultimately make it easier for police and prosecutors to do our jobs."
>
> **John Laux**
> Chief of Police, Bloomington, Minnesota

While some costs may be incurred from implementing a "double-blind" procedure in terms of personnel, alternatives to using an additional officer to administer the lineup can be implemented by using alternative presentation methods that achieve the same result. For example, computer programs that can generate a photo array, and present it to a witness in random order, are increasingly available. Other "low-tech" options include a "folder method," in which the lineup administrator places photos in folders that are shuffled and presented to a witness such that the administrator cannot see the photos while the witness is studying them.[29]

When weighed against the tremendous costs to the taxpayer in terms of lawsuits and compensation to the wrongfully convicted, as well as the very real costs in terms of human lives, the minimal procedural costs associated with these procedures are negligible. Ultimately, the benefits of implementation far outweigh the costs.

PROFILES OF INJUSTICE

Evidence of a broken criminal justice system

Calvin Johnson's Story

Wrongfully convicted at age 25, Calvin Johnson received a life sentence for the rape of a Georgia woman. Four different women identified him. Exonerated in 1999, he walked out of prison a 41-year old man. The true rapist has never been found.

On March 9, 1983, an African-American man entered the apartment of a 30-year old white woman through an unlocked door while she was sleeping in College Park, Georgia. The assailant tightened a belt around her neck until she passed out and then raped her. The victim told police that the attacker turned on the light and that she was able to get a good look at him. Two days earlier, a second woman in College Park had been raped in a remarkably similar manner. College Park straddles the county line between suburban Clayton County and Atlanta's Fulton County. The March 9 attack occurred in Clayton County, and the March 7 rape occurred in Fulton.

THE INVESTIGATION AND EYEWITNESSES

Authorities soon focused on 25-year-old Calvin C. Johnson, Jr., a college graduate recently released from prison for a 1981 burglary. He had readily confessed and pled guilty to the burglary of a College Park man's apartment, and served 20 months. While in jail on that charge, however, police came to suspect Johnson of a sexual assault that occurred the same night of the burglary.

While Johnson was in jail, one of the detectives who worked the burglary went to his cell with a

young white woman. He said they wanted to talk to him about other crimes in the neighborhood, but Johnson refused, telling him he didn't know about any other crimes.

Shortly thereafter, Johnson was charged with the 1981 rape—based on the young woman's identification of *his voice* during the brief jailhouse exchange with the detective. All the rape-related charges were dismissed, however, due to what the prosecutor later characterized as problems with the investigation.

Johnson's lawyer later learned that the victim, who had been forced to have oral sex during the attack, stated several times that her assailant was uncircumcised, a fact that clearly ruled out Johnson. When the College Park rapes occurred two years later, however, suspicions lingered, and Johnson quickly became the target of the investigation.

An all-white jury took 45 minutes to find Johnson guilty. On the day of his conviction, he told the judge, "As God is my witness, you've got the wrong man."

The same detective from the 1981 cases presented photo arrays, which included Johnson's picture, to both rape victims. The Clayton County victim picked Johnson, but the Fulton County victim picked out another man.

The investigators also showed the photo line-up to two other women who experienced incidents that may have been related to the rapes, as the incidents occurred in the same vicinity and around the same time period. One witness picked Johnson's photo as the man she discovered in her living room when she came out of the shower. The other witness identified his photo as the man who tried to enter her apartment.

The photo of Johnson used in the line-up was from his 1981 arrest, showing him clean-shaven. The perpetrator had been described as clean-shaven, or perhaps having some stubble. At the time of the attacks, however, Johnson had a full beard and moustache — a fact his boss and other witnesses corroborated.

Based on the photo line-ups, police arrested Johnson for rape on March 14, 1983. A search of his home turned up no physical evidence linking him to the crime, but prosecutors later claimed that a jacket of his was similar to one described by one of the victims.

Two days after the arrest, detectives arranged a live line-up that included Johnson. This time, with Johnson's lawyer present, the Clayton rape victim did not pick Johnson, but identified a "filler" instead. The two other women who had picked out his photo also failed to pick him out of the live line-up (one identified a filler and the other picked no one). The Fulton rape victim, however, did identify Johnson at the live line-up, though she had failed to identify him from the photo array.

One of the few pieces of physical evidence in the case was a pubic hair found on the Clayton rape victim's sheets. After comparing it with numerous hairs plucked from all over Johnson's body, the state's own forensic experts determined that the hair did not match Johnson. Prosecutors ordered another set of hairs collected from Johnson, but the results were the same—no match.

THE TRIALS

Johnson went to trial for the Clayton County rape on November 2, 1983. Both rape victims identified him in court as their assailant, despite their inconsistent line-up performance.

The two other women who identified Johnson's photo but failed to pick him out of the live line-up also identified him in court as the man from their encounters. As the Fulton rape victim left the witness stand, she lunged at Johnson and cursed him in front of the jury.

Johnson's lawyer presented the testimony of four witnesses who supported his alibi. In addition to the inconsistencies in the photo and live line-up identifications, the defense highlighted the discrepancy between descriptions of a clean-shaven assailant and evidence that proved Johnson had a full beard at the time of the crimes.

The defense also called a state crime lab expert, who testified that the pubic hair found on the victim's bed could not have been Johnson's. The prosecutor argued that the hair must have gotten on the sheet at a public laundry.

After a three-day trial, an all-white jury took 45 minutes to find Johnson guilty. On the day of his

conviction, he told the judge, "As God is my witness, you've got the wrong man." Johnson received a sentence of life plus 15 years.

The following year, Johnson was brought to trial for the rape of the woman in Fulton County. This time, after hearing the same evidence from the same witnesses (plus his conviction for the Clayton County rape), a racially mixed jury unanimously acquitted him. Authorities had virtually no doubt that the same assailant committed both rapes, but the Fulton County acquittal had no effect on Johnson's life sentence.

During those 16 years, Johnson had several opportunities for parole, but the board rejected parole each time because he refused to formally admit guilt and participate in a sex offender program.

THE EXONERATION

With the help of James Bonner, an attorney at the Prisoner Legal Counseling Project at the University of Georgia Law School, Johnson located the evidence from his trial, including a semen sample, though no state law at the time required that the biological evidence be preserved.

According to the prosecutor, when the trial judge retired, a court clerk threw out many old evidence boxes, but someone had pulled Johnson's evidence out of the trash bin and placed it back in storage. In 1994, Johnson wrote to the Innocence Project, and they agreed to take his case.

The Innocence Project arranged to have the remaining evidence sent to Dr. Edward Blake, the nation's foremost forensic DNA expert. Dr. Blake reported that the DNA testing positively excluded Johnson as the source of the semen collected in the rape kit.

Testing of the pubic hair recovered from the victim's sheet also excluded Johnson as the source of the hair, showing a match with the DNA from the rape kit.

On June 15, 1999, the state vacated Johnson's conviction, and Clayton County District Attorney Robert Keller, who had prosecuted the case 16 years earlier, agreed to drop all charges. The true perpetrator has never been found.

In 2000, the Georgia legislature awarded Johnson $500,000 compensation for his wrongful imprisonment.

John Willis' Story

Misidentified by 11 different eyewitnesses for a pattern of crimes involving robbery and rape, John Willis spent over eight years in prison before missing forensic evidence was uncovered that conclusively exonerated him.

Between December 1989 and September 1990, a man the media dubbed the "beauty shop rapist" terrorized the Chatham neighborhood on Chicago's south side.

In the first of a string of remarkably similar and unusual crimes, a man entered a beauty salon brandishing a pistol. He ordered the women in the shop to a back room, forced the women to undress, and robbed them of money and jewelry.

Four crimes of this pattern occurred in beauty shops, and in two of these incidents, on May 2 and September 7, 1990, the man sexually assaulted a female victim. A fifth crime following the pattern of the beauty shop incidents occurred in a store.

THE INVESTIGATION AND EYEWITNESSES

With the help of multiple victim eyewitnesses, police produced and widely distributed a composite sketch.

On September 14, 1990, police arrested John Willis based on an anonymous tip. Though Willis, then 42, had a job cleaning up at a tavern, he had a criminal record of theft and was a self-described "career tire thief and gambler." Willis had no record of violent crime, however, and consistently and emphatically maintained his innocence.

Both of the victims of the sexual assaults identified Willis in photographic lineups as their attacker, as did most of the other witnesses from the salons. A total of 11 eyewitnesses identified Willis as the perpetrator.

THE TRIALS

In 1992, Willis was tried separately for the two crimes that included rapes. In the first case, while no fingerprints or other physical evidence tied Willis to the crime, physical evidence had been col-

lected from the crime scene, including the perpetrator's semen.

The state's forensic analyst from the Chicago Crime Lab, Pamela Fish, testified that her analysis of semen from the crime scene was "inconclusive" — the tests could neither exclude Willis, nor identify him as the source of the semen. In the absence of conclusive forensic testimony, the jury relied entirely on multiple eyewitnesses who had picked Willis out of a lineup, including the rape victim. On February 13, 1992, a jury found Willis guilty, and he was sentenced to 45 years in prison.

While Willis was being held without bond awaiting trial, the string of rapes and robberies continued in Chatham, all following the same unusual pattern.

In April 1992, Chicago Police arrested Dennis McGruder for a string of five rapes and robberies that occurred between November 11, 1991 and March 21, 1992. McGruder pleaded guilty to five crimes that followed the identical pattern of the crimes for which Willis was arrested, including the rape for which he was convicted. One occurred in a beauty salon and four others in taverns.

> Both of the victims of the sexual assaults identified Willis in photographic lineups as their attacker, as did most of the other witnesses from the salons. A total of 11 eyewitnesses identified Willis as the perpetrator.

In November 1993, Willis went to trial for the second rape, after McGruder was jailed for the latter five crimes. A jury again convicted Willis on the basis of identification testimony of the rape victim and other eyewitnesses, along with evidence of the previous rape conviction. Though McGruder had been charged with a string of remarkably similar crimes in the same neighborhood since Willis' arrest, Willis' jury never heard about McGruder.

In an effort to bolster the defense of mistaken identity, Willis' lawyers tried to introduce McGruder's photo into evidence (Willis and McGruder bear a substantial resemblance in their facial features, though Willis is several inches taller than McGruder and noticeably heavier). The prosecution successfully argued to the judge that the McGruder crimes were irrelevant to the case at hand.

At one point during this second trial, Willis became so upset that he tried to blurt out to the jury that the police had someone else in custody for these crimes, waiving a newspaper clipping about the McGruder case in the air. The judge quickly silenced him.

At his sentencing hearing, eyewitnesses from the remaining three crimes with which Willis was charged testified against him. After he was sentenced to an additional 100 years, prosecutors dropped the remaining cases.

In 1997, Cook County Public Defender Greg O'Reilly, the office's leading forensic expert, was brought onto the case to help pursue DNA testing under a new post-conviction DNA statute. When Willis petitioned the court for testing, Assistant State's Attorney Earl Grinbarg, who prosecuted the Willis cases, declared, "John Willis absolutely, positively is the rapist." Nonetheless, Judge Thomas Fitzgerald ordered DNA testing. When O'Reilly sought access to the evidence, he was told that it was all unaccounted for.

An investigation established that Grinbarg had checked the evidence out of the Chicago police evidence room and had not returned the evidence that was not presented as an exhibit at trial, including the biological evidence. The missing evidence—some twenty pieces from three different locations—included swabs taken from the rape victims and a semen-stained toilet paper wrapper, any of which could have been tested for DNA.

Frustrated by the disappearance of the key physical evidence that would allow DNA testing, O'Reilly sought Fish's lab notes. He had been skeptical of her court testimony about inconclusive results and wondered why further testing had not been conducted.

Fish's notes contained evidence of Willis' innocence: they indicated that the blood type of the semen donor of the crime scene evidence was type A, different from Willis' type B. Willis could not have been the source of the crime scene semen.

THE EXONERATION

In September 1998, Willis' lawyers were preparing to appeal based on suppression of the

blood-type exclusion and official misconduct. For 6 months, no biological evidence could be located. Nonetheless, a microscopic slide was eventually discovered in the prosecutor's manila folder among the Willis case files. The slide contained a tiny amount of semen from the first rape for which Willis was convicted.

DNA testing excluded John Willis—and identified Dennis McGruder as the true perpetrator. McGruder was by that time serving a 40 year sentence for the five armed robberies and sexual assaults that occurred after Willis' arrest.

Willis was released on February 24, 1999. He had lost eight and a half years in prison.

At a March 15, 1999 hearing, prosecutors formally dropped all charges against Willis. Thomas Fitzgerald, presiding judge of the criminal division of the Cook County Circuit Court, told Willis, "I wish to God it hadn't happened to you. I hope you can get back on track. And I hope you can live a life that gives you some personal satisfaction and happiness."

The City of Chicago and Cook County settled Willis' civil suit out of court for $2.5 million. He also received $100,000 from the State of Illinois.

Larry Fuller's Story

Larry Fuller spent over 18 years in prison, after being wrongfully convicted of aggravated rape as the result of an erroneous identification — despite the fact that he had a full beard at the time of the identification, which stood in stark contrast to the witness's memory of the perpetrator. Fuller was excluded as the rapist through advanced DNA testing methods, and Governor Rick Perry granted him a full pardon in January 2007.

On the morning of April 26, 1981, a 37-year-old woman was attacked in her apartment in Dallas, Texas by a black man wielding a knife. He cut her several times, raped her, and then ran away. The victim was taken to the hospital, and a rape kit was collected. The attack occurred 45 minutes before sunrise, and the victim testified that it was dark in the room, although she was able to ascertain that the attacker was a black male "somewhere in his twenties" and that she had never seen him before. She also reported that she did not remember any facial hair on the attacker.

THE INVESTIGATION AND EYEWITNESS

At the time of the April rape, Fuller was a decorated Vietnam War veteran raising two young children with his girlfriend while pursuing an education. While he had served three years for robbery after his return from Vietnam, Fuller had no record of sex crimes.

Nonetheless, investigators had obtained Fuller's photograph while investigating an incident that occurred three months earlier. In this previous incident, on the morning of January 19, 1981, another woman had been similarly raped, just a few buildings down from the victim of the April rape.

Fuller was stopped by police after the earlier attack because he matched the victim's description, but when his photograph was placed in a photo array, the victim positively stated that the photo array did not contain her attacker. Another man, Larry James Johnson, later confessed to the January crime and was arrested and prosecuted.

Two days after the April attack, police included Larry Fuller's picture in a photo array presented to the victim of the April attack. The victim failed to conclusively identify Fuller as her attacker, however, telling investigators Fuller "looks a lot like the guy" but she could not identify him. The investigating officer then issued a report recommending that the investigation be suspended because the victim "was unsure of the suspect at this time."

Five days after the first photo lineup, on May 3, 1981, police showed the victim a second photo array, this time with a more recent picture of Fuller, taken the same day. *Fuller's was the only photograph included in both photo arrays.*

This time, the victim positively identified Fuller, though she was confused by the fact that Fuller had a heavy and distinct beard. She had stated previously that she did not remember any facial hair on the attacker.

The victim later stated, "I looked at it, and I knew that was the face; but I couldn't figure out why there was facial hair because I didn't remember the facial hair . . . I looked at the picture again and I put my finger over the part, the hair, and then I could identify him."

THE TRIAL

At trial, the prosecution relied on the eyewitness identification, stating that the victim "never wavered" in her identification, and the victim testified that she was certain Fuller was her attacker.

In addition, the prosecution introduced complex expert testimony on serological testing of semen from the rape kit collected from the victim. Though technology at the time did not allow for advanced DNA testing, the Southwestern Institute of Forensic Sciences did perform more basic tests on the semen evidence. A forensic serologist testified that Fuller could have been the source of the semen based on this testing, but it was inconclusive. The prosecution incorrectly argued that the semen evidence was consistent with Fuller's to the exclusion of 80 percent of the population — a major exaggeration of the evidentiary value of the testing.

The defense called Fuller's girlfriend, who testified Fuller was at their house at the time of the attack. Despite his alibi, on August 25, 1981, Fuller was convicted of aggravated rape after only 35 minutes of jury deliberation. He received a sentence of 50 years in prison on September 10, 1981.

THE EXONERATION

Fuller wrote the Innocence Project in the mid 1990s, and they agreed to help him pursue more advanced DNA testing of the physical evidence. Meanwhile, in 1999, after having served 18 years of his sentence, Fuller was released on parole, but was sent back to prison in 2005 for a parole violation.

In November 2000, the Innocence Project located the biological evidence at Southwestern Institute of Forensic Sciences and requested that the Dallas County District Attorney's Office consent to post-conviction DNA testing. In March 2001, the Office refused, noting that the Texas legislature was considering a new DNA statute, and they wanted to wait for the statutory criteria.

In August 2001, the Innocence Project again requested testing under Texas' new post-conviction DNA statute, but the state opposed testing. However, after a hearing in judicial court, the judge ordered that DNA testing be conducted by the Department of Public Safety (DPS).

Unfortunately, DPS was unable to obtain the profile of the male DNA on the vaginal slide, and in November 2004, the Innocence Project renewed its request to the District Attorney's Office for more-developed DNA testing using another method. On April 14, 2006, the District Attorney's Office agreed, and the Court ordered Y-STR testing at Orchid Cellmark, a private laboratory.

Having waited a quarter of a century, Fuller received unassailable proof of his innocence — Y-STR testing conclusively excluded him as the source of the semen.

At a hearing on October 31, 2006 in the 203rd Judicial District Court in Dallas, Judge Lana McDaniel released Fuller. Although not involved in the original case, the judge said she felt sick to her stomach over the time he spent in prison for a crime he did not commit.

On January 25, 2007, Fuller received a full pardon from Texas Governor Rick Perry. He was the tenth person from Dallas County to be exonerated by DNA evidence in the last five years.

SNAPSHOTS OF SUCCESS

If it works in these states and jurisdictions, why not the rest of the country?

NEW JERSEY

The first state in the nation to officially adopt the National Institute of Justice recommendations issued in 1999 *(Eyewitness Evidence: A Guide for Law Enforcement)*, New Jersey provides an example of the successful implementation of reform protocols and their pragmatic effectiveness. While most law enforcement agencies or departments are controlled locally, the Attorney General of New Jersey was able to mandate changes in procedure across the entire state due to the unique supervisory authority of the Attorney General in that state. Since April 2001, New Jersey has conducted double-blind, sequential lineups. In addition, police officers issue cautionary instructions, ensure that lineups are constructed effectively with an adequate number of appropriate

fillers, and document the identification procedures, including the witness's statement of certainty.

On July 31, 2006, the New Jersey Supreme Court, noting the importance of a complete record of an identification procedure in ensuring the reliability of eyewitness evidence presented to a jury, made complete documentation of the identification procedure a condition of admissibility of out-of-court identifications.[30] According to the opinion, "[G]iven the importance of ensuring the accuracy and integrity of out-of-court identifications, we will exercise our rulemaking authority to require . . . that the police record, to the extent feasible, the dialogue between witnesses and police during an identification procedure." The decision was unanimous.

NORTH CAROLINA

In November 2002, Justice I. Beverly Lake created the North Carolina Actual Innocence Commission to study and recommend potential strategies for lessening the incidence of wrongful convictions. The Commission issued recommendations for eyewitness identification in October 2003 and endorsed changes in procedures such as the delivery of cautionary instructions, documentation of a witness's confidence in the identification without any feedback given by the administrator, effective use of fillers (a minimum of eight photos in photo identification procedures and a minimum of six individuals in live identification procedures), and sequential double-blind presentation.[31]

While the Commission has no official authority over law enforcement agencies in the state, the Commission members include the North Carolina attorney general, district attorneys, police chiefs, Supreme Court Justices, and others. A number of North Carolina's law enforcement agencies are increasingly implementing the Commission's eyewitness recommendations to date.

WISCONSIN

After studying the problem of mistaken identifications, the Training and Standards Bureau of the Wisconsin Department of Justice, working with the University of Wisconsin Law School's Frank J. Remington Center, developed a comprehensive set of eyewitness identification guidelines for law enforcement, which were adopted and distributed to law enforcement throughout the state in March 2005.[32] The guidelines — which include cautionary instructions to eyewitnesses, assessments of confidence immediately after identifications, proper selection of fillers, and double-blind, sequential presentation of lineups — represent a model for implementation of the "best practices" in eyewitness identification.

Legislation passed in November 2005 requires each law enforcement agency in the state to adopt policies or guidelines on eyewitness identification procedures. Though the model policy developed by the Attorney General is not mandatory, the Wisconsin Department of Justice has developed a training program to educate law enforcement across the state on the need for changes in procedure to lessen the risk of misidentification. Some departments have adopted the model policy, and more are likely to follow. To date, the program has trained over 800 investigators on the new procedures. Training on these procedures has also been incorporated into the curriculum for new investigators.[33]

MINNESOTA

Beginning in 2003, Hennepin County Attorney Amy Klobuchar spearheaded an effort to implement a sequential, double-blind pilot program in four police departments in the state, including Minneapolis. A follow-up study analyzing the pilot found that the pilot project was relatively easy to implement, with projects up and running in the smaller counties in two weeks, and in the larger counties in under a month. The reforms incurred minimal costs, no perceived drop in suspect identifications, and a reduction in filler identifications.[34] The study showed increased protections against misidentification, practical benefits for investigators, and a higher quality of eyewitness evidence. As a result of the pilot, the Hennepin County Attorney urged adoption of the reform protocol county-wide.

OTHER STATES

In 2003, the Illinois legislature passed legislation mandating cautionary instructions, as well as documentation and lineup composition requirements. In addition, a number of individual jurisdictions throughout the country have adopted reforms at the local level. These jurisdictions include the Boston Police Department and other departments in Suffolk County (in coordination with the Suffolk County District Attorney), Northampton, Massachusetts, Virginia Beach, Virginia and Santa Clara, California, among others.[35]

VOICES OF SUPPORT

"I did see many flaws in witnesses who felt like they were trying to be people pleasers, felt they had to select someone. Now people are actually comparing the one photo in front of them to what's in their mind, not going through process of elimination."[36]

Joy Rikala
Chief of Police
Minnetonka Police Department
Governing Magazine, May 2006

"It is axiomatic that eyewitness identification evidence is often crucial in identifying perpetrators and exonerating the innocent. However, recent cases, in which DNA evidence has been utilized to exonerate individuals convicted almost exclusively on the basis of eyewitness identifications, demonstrate that this evidence is not fool-proof . . . While it is clear that current eyewitness identification procedures fully comport with federal and state constitutional requirements, the adoption of these Guidelines will enhance the accuracy and reliability of eyewitness identifications and will strengthen prosecutions in cases that rely heavily, or solely, on eyewitness evidence."[37]

John J. Farmer, Jr.
New Jersey Attorney General
Memorandum, April 18, 2001

"Every time you see something coming along that makes your job a little harder, you kind of cringe a little. It's going to take extra time and personnel, but if it's going to make a case a little more solid or if it's going to eliminate a bad identification or a situation where an officer may try to influence an identification, then it's beneficial."[38]

John E. Miliano
Chief of Police, Linden, New Jersey
New York Times, July 21, 2001

"If you don't do this, you risk having good convictions and good identifications thrown out."[39]

David Angel
Deputy District Attorney
Santa Clara County, California
Pittsburgh Post-Gazette, May 9, 2005

"We hadn't changed the way we do eyewitness procedures in decades . . . DNA [exonerations] obviously have shown us that we have to change."[40]

Ken Patenaude
Detective Lieutenant
Northampton, MA Police Department
Pittsburgh Post-Gazette, May 9, 2005

"The psychology behind these procedures is to have witnesses focus on their actual memory of the incident and the suspect. We want to eliminate any kind of extraneous influence or bias in the identification process."[41]

Robert Olson
Chief of Police, Minneapolis, Minnesota
November 3, 2003

"I will never forget the day I learned about the DNA results. I was standing in my kitchen when the detective and the district attorney visited. They were good and decent people who were trying to do their jobs — as I had done mine, as anyone would try to do the right thing. They told me: "Ronald Cotton didn't rape you. It was Bobby Poole." The man I was so sure I had never seen in my life was the man who was inches from my throat, who raped me, who hurt me, who took my spirit away, who robbed me of my soul. And the man I had identified so emphatically on so many occasions was absolutely innocent . . . If anything good can come out of what Ronald Cotton suffered because of my limitations as a human being, let it be an awareness of the fact that eyewitnesses can and do make mistakes."[42]

Jennifer Thompson
Victim/Activist for Eyewitness Identification Reform
New York Times, June 18, 2000

"God forbid that we would put an innocent person in jail because of a less than confident eyewitness. And then we would be allowing a guilty person to go out and commit more crimes."[43]

William Mullen
Chief Deputy Sheriff of Allegheny County and
Former Assistant Chief of Police, Pittsburgh, PA
Associated Press, May 9, 2005

QUESTIONS & ANSWERS

Why change our existing protocol, which has worked for years?

Given the firm scientific basis for recommending the protocol, it is worth comparing these justifications with the current standard protocol. The standard way of conducting lineups today is not rooted in careful science. Rather, it was developed as an *ad hoc* procedure created and embraced in the law enforcement community because of its intuitive plausibility. Nothing more recommends or justifies it than tradition.

Nonetheless, eyewitness memory science has established that many factors related to eyewitness memory that seem intuitive and obvious are not necessarily true. For example, a witness's confidence in an identification is not a reliable predictor of accuracy. This is counter-intuitive, but the lack of a close correlation has been very well documented. Traditional methods need to be updated and procedures modernized to catch up with our modern understanding of eyewitness memory issues.

While no one can deny that many guilty people have been convicted based on evidence obtained with the traditional protocol, we have witnessed far too many innocent people convicted based on incorrect eyewitness testimony and later exonerated by DNA testing. The result — investigations led off course and prematurely ended, allowing predators to go uninvestigated and unpunished. It is incumbent upon us to live up to our commitment to public safety and base our procedures on the best science, not tradition.

Why haven't we heard of the research or improved procedures before?

It is not surprising that many people in law enforcement are unfamiliar with this scientific research. Police officers typically do not read technical peer reviewed academic journals (who could blame them?) or attend conferences about experimental psychology. Increasingly, however, opportunities have been created to foster a dialog, and many law enforcement agencies have modernized procedures based on the science. Only in recent years, upon the dawning of the age of DNA, have people begun to appreciate the problem of mistaken eyewitness identification, leading people in all aspects of the criminal justice system to look more carefully at ways of enhancing accuracy and putting higher quality evidence into the courtroom.

Isn't the blind administration component an insult to the integrity and professionalism of detectives?

Requiring a neutral administrator is NOT about challenging the integrity or professionalism of law enforcement personnel. Structuring procedures to generate the best quality of evidence is what professionalism demands. The issues addressed here have nothing to do with suggestions of misconduct. Rather, they address certain realities about normal human psychology and the possibility of the *inadvertent* cuing of a witness. All manner of verbal and nonverbal human behaviors may have the *unintended* effect of influencing a witness. Using a neutral administrator eliminates this possibility and ensures the best quality of evidence.

Just as in double-blind clinical drug trials, we are not assuming doctors and medical researchers are nefarious and dishonest; requiring neutral administrators is simply good practice — especially with such important matters as liberty and public safety on the line.

The courts don't seem to have any problems with the standard procedures, so why change?

The courts have increasingly begun to recognize that many of our traditional assumptions about eyewitness memory are wrong (such as the link between certainty and accuracy). Exonerations have made clear the need for change (and the terrible human costs of persisting with traditional practices), and developments in eyewitness memory science have identified ways of enhancing accuracy through more carefully designed procedures. Because the state of the science is now very solid, courts have often been more willing to allow challenges to existing protocols. Rather than picking apart in-court identifications that follow from flawed procedures, it is in the best interest of all parties to implement best practices that guarantee the best quality of evidence at the outset, on the front end of the process. Some courts have already ordered new procedures on that basis.

Why should we care about experiments with "staged crimes" and "mock witnesses"?

Experimental psychologists carefully design their experiments to isolate certain phenomena so that they may be better observed and understood in ways that

'real world' observation does not allow. These methods are the only way to fully control the different variables and track their changes under different conditions. In actual cases, for example, we cannot otherwise be completely certain whether an identified suspect is, in fact, the perpetrator the way we can in experiments.

While the experiments have created a solid basis for the various elements of the protocol, we know from real world applications (statewide in New Jersey, as well as in many other individual jurisdictions) that the system is practical and pragmatically workable. There is already a track record of real world success.

Is the protocol practically feasible, especially for some smaller departments?

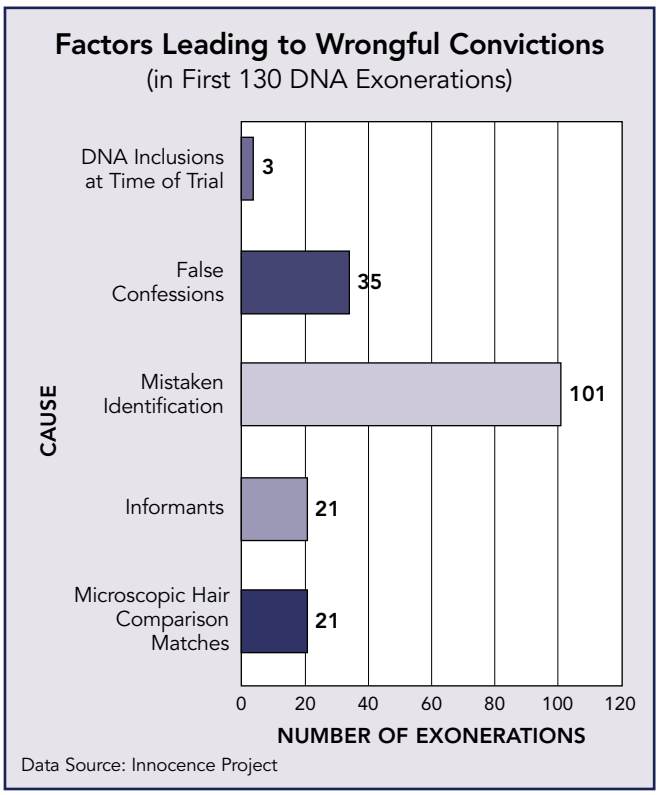
Experience in other jurisdictions across the country shows that the protocol is practical and workable. The protocol is sensitive to the potential problem of finding a neutral administrator, and provides for alternatives that accomplish the same goals.

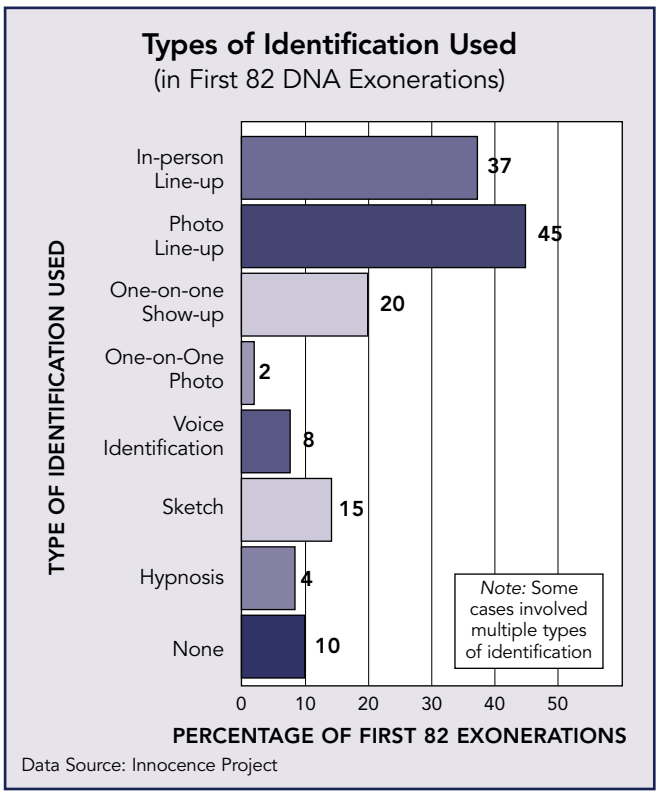
STATISTICS

The Innocence Project found that mistaken eyewitness identifications were the leading cause of the first 130 DNA exonerations, accounting for 101 of the total. A subsequent study by the Innocence Project found that over 75 percent of the now nearly 200 post-conviction DNA exonerations in the U.S. involve mistaken eyewitness identification testimony, making it the leading cause of these wrongful convictions.

In addition, the Center on Wrongful Convictions at Northwestern University School of Law also studied the cases of 86 defendants who had been sentenced to death but legally exonerated based on strong claims of actual innocence, finding that eyewitness testimony played a role in the convictions of 54 percent of the death-sentenced defendants. Eyewitness testimony was the only evidence used against 38 percent of the defendants.

The Innocence Project also found that photo lineups were the most oft-used identification method in the first 82 DNA exonerations. Investigators used a photo lineup in 45 percent of the cases.





A MODEL POLICY

AN ACT CONCERNING EYEWITNESS IDENTIFICATION PROCEDURES

WHEREAS the goal of a police investigation is to accurately identify and apprehend the true perpetrators of crimes; and

WHEREAS eyewitness error is the leading cause of mistaken convictions; and

WHEREAS cases of mistaken conviction in [insert jurisdiction] owing to eyewitness misidentification have resulted in the actual perpetrators remaining free to commit more crimes; and

WHEREAS scientific studies of eyewitness memory have demonstrated that eyewitness evidence is, like trace physical evidence, susceptible to contamination if not handled properly; and

WHEREAS well-intentioned witnesses and authorities acting in good faith may sometimes inadvertently undermine the accuracy of an identification procedure unless appropriate safeguards are in place; and

WHEREAS extensive scientific research has shown that modified methods of conducting identification procedures greatly enhance accuracy;

We hereby enact the following

EYEWITNESS ACCURACY ENHANCEMENT ACT:

Section 1: Definitions. For purposes of this section the following definitions apply:

1) Photo Lineup: a selected group of photographs of persons presented to an eyewitness to a crime, containing a single suspect and several fillers, for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator.
2) Live Lineup: A selected group of persons presented to an eyewitness to a crime containing a suspect and several fillers for the purpose of determining whether the eyewitness is able to identify the suspect as the perpetrator.
3) Suspect: A person under investigation for participation in a crime.
4) Filler: A person, not a suspect in the crime under investigation, not known to the witness, who is made part of a live lineup; or a photograph of a person, not a suspect in the crime under investigation, not known to the witness, made part of a photo lineup and presented to a witness.
5) Neutral Blind Administrator: A person who conducts photo or live lineup procedures while unaware of which person in the lineup is the suspect and which are fillers.

Section 2: Development and Dissemination of Eyewitness Identification Protocol. Prior to [insert date] the [insert jurisdiction] Attorney General shall consult with law enforcement and scientific experts in eyewitness memory to develop, adopt, and disseminate to all law enforcement jurisdictions in the state comprehensive, written policies and procedures and associated training materials for [insert jurisdiction] law enforcement agencies regarding photo and live lineup eyewitness identification procedures that implement the requirements set forth in section 3 of this act.

Section 3: Requirements for Photo and Live Line-up Identification Procedures.
For any offense alleged to have been committed on or after [insert date], all photo and live lineup identification procedures conducted by law enforcement officers shall be administered pursuant to the procedures developed by the Attorney General described in section 2 of this act and consistent with the requirements in this section.

A. Witness Instructions. Prior to presenting a live lineup or photo array identification procedure, the lineup administrator shall instruct the witness that:

1) The procedure is intended to identify guilty parties as well as to clear innocent suspects from suspicion;
2) The witness should not guess or conclude that the perpetrator is among the persons in the lineup;
3) The witness should not feel compelled to make an identification because the perpetrator may or may not be among those shown;
4) The person administering the lineup may not be aware of which person in the lineup is the suspect;
5) Individuals depicted in lineup photos may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change;
6) The police will continue to investigate the incident whether or not the witness identifies someone.

B. Documentation of Identification Procedures.

1) All photo and live lineup identification procedures conducted in connection with a criminal investigation shall be documented, regardless of whether an identification is made, made a part of the case record, and provided to the prosecuting authority in the event any prosecution related to the crime being investigated occurs. The documentation shall include:
    a. The time, date, location and identities of all persons present;
    b. A form listing the instructions enumerated in section A. of this act signed by the witness to confirm understanding of the instructions prior to administration of the identification procedure;
    c. A photograph of any live lineup as presented to a witness; or all photographs used in any photo lineup preserved in their original condition;
    d. The order of presentation of photographs or individuals.
2) All comments and exchanges during an identification procedure shall be electronically recorded with audio or audio/video recording equipment whenever possible. When it is not feasible to electronically record the identification procedure, comments and exchanges among persons present during an identification procedure shall be documented in writing, and an explanation of why electronic recording was not feasible shall be included in the record. The documentation, whether electronic or written, shall include all witness comments, using the witness's own words, regarding the persons or photos in the lineup and all questions and commentary by the lineup administrator and any other persons present during the identification procedure.
3) If the witness makes an identification as a result of a photo or live lineup, the lineup administrator shall immediately ask the witness to state in his or her own words how confident he or she is that

the person identified is the perpetrator, and make the witness's words part of the record prior to any commentary or feedback from the lineup administrator or any other persons present.

4) If no electronic recording of the identification procedure is made, the witness shall review and sign the written record of the identification procedure, including all comments regarding the persons or photos presented, and any statements regarding an identification and degree of certainty, prior to any feedback or communication of information from the administrator or others involved in the investigation regarding the identification procedure.

C. General requirements for composition and conduct of lineup identification procedures

1) During the identification procedure, the administrator shall refrain from any commentary or feedback to the witness regarding particular persons or photographs in a lineup until after the procedure is concluded and the witness certifies the record of the procedure.
2) At least five fillers shall be included in a photo lineup, in addition to the suspect, and at least four fillers shall be included in a live lineup, in addition to the suspect.
3) Only one member of a photo or live lineup shall be a suspect, and the remainder shall be fillers who are not suspects.
4) Fillers shall be selected who generally fit the witness's description of the perpetrator. When there is a limited or 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.
5) Lineup administrators shall create a consistent appearance between the suspect and fillers with respect to any unique or unusual feature such as scars or tattoos used to describe the perpetrator by artificially adding or concealing that feature in filler photographs.
6) In photo line-ups, the suspect's photo should resemble his or her appearance at the time of the offense and not unduly stand out.
7) If the eyewitness has previously viewed a photo lineup or live lineup in connection with the investigation of another person suspected of involvement in the offense, the fillers in the lineup in which the suspected perpetrator participates shall be different from the fillers used in any prior lineups.
8) Law enforcement shall seek identification of any particular suspect through photo or live lineup only once from any given witness.
9) In a photo lineup, no writings or information concerning any previous arrest, indictment, or conviction of the suspected perpetrator shall be visible or made known to the eyewitness.
10) The position of the suspect in a photo or live lineup should be changed for each new witness to view the photo lineup.
11) In a live lineup, any identifying actions, such as speech, gestures, or other movements, shall be performed by all lineup participants.
12) In a live lineup, witnesses shall not be exposed to the members of the lineup before the procedure begins.

D. Neutral Blind Administration of Photo and Live Line-ups

1) Whenever possible, the administrator of photo or live lineup identification procedures shall be someone who is not aware of which member of the lineup is the suspect in the case and which

are fillers, and no person familiar with the identity of the suspect shall be present during the identification procedure.

2) When it is not feasible to have the procedure administered by someone unaware of which person is the suspect, that reason shall be documented, and a photo lineup procedure may be conducted using an alternative method specified and approved by the Attorney General. Any alternative procedure shall be structured to achieve neutral blind administration and prevent the administrator from viewing the lineup simultaneously with the witness or knowing the order of photographs as presented to the witness during the identification procedure. Alternative methods may include the following:
    i. automated computer programs approved by the Attorney General for such use that can automatically administer the lineup identification procedure directly to a witness, and during which the administrator cannot see which photo the witness is viewing until after the procedure is completed; or, alternatively,
    ii. a procedure approved by the Attorney General in which photographs are placed in folders, randomly numbered and shuffled, and then presented to a witness such that the administrator cannot see or determine the order of photograph being presented to the witness until after the procedure is completed; or, alternatively,
    iii. other such procedures as specified by the Attorney General which achieve neutral blind administration.

Note: Due to a lack of comprehensive data from pilot studies, the above model does not include a provision regarding sequential procedure. Nonetheless, researchers are currently pairing with other jurisdictions to add to the credible literature on the topic. While some questions have been raised about the value of sequential presentation, on balance most experts believe that it has proven to be superior in both experimental research and in the field. Thus, jurisdictions may also want to consider the addition of the sequential procedure, if and only if, neutral-blind administration is employed. In that event, the following provision may be inserted in the above model:

E. Sequential Procedure.

1) Live line-up and photo array identification procedures shall be presented to witnesses using a sequential method, in which a witness is shown photographs or live lineup participants one at a time, and not simultaneously. The witness shall be asked to state for each person whether the individual shown is the perpetrator, prior to viewing the next lineup participant.
2) The administrator shall not offer any comment or feedback to the witness regarding the witness's responses.
3) If there are multiple eyewitnesses, witnesses shall be presented with the identification procedure separately, and the suspect shall be placed in a different position in the lineup for each eyewitness.
4) Under no circumstances shall a sequential presentation be used unless the procedure complies fully with neutral blind administration specified in section D.

LITERATURE

SUGGESTED READINGS

The following materials are essential reading for individuals interested in improving eyewitness identification procedures.

Klobuchar, A., N.K.M. Steblay, and H.L. Caligiuri. "Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project." Cardozo Public Law, Policy & Ethics Journal 4 (2006): 381-413. http://web.augsburg.edu/~steblay/Improving_Eyewitness_Identifications.pdf

Wells, G.L., M. Small, S.D. Penrod, R.S. Malpass, S.M. Fulero, and C.A.E. Brimacombe. "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," *Law and Human Behavior* 22 (1998): 603-647. http://www.psychology.iastate.edu/FACULTY/gwells/Wells_articles_pdf/whitepaperpdf.pdf

Wisconsin Office of the Attorney General. Training and Standards Bureau. *Model Policy and Procedures for Eyewitness Identification* (2005). http://www.doj.state.wi.us/dles/tns/eyewitness.asp

SELECTED BIBLIOGRAPHY

The following listing includes some of the key source material used in developing the content of this policy review. While by no means an exhaustive list of the sources consulted, it is intended as a convenience for those wishing to engage in further study of the topic of improved eyewitness identification procedures. Many of the entries contain hyperlinks for ease in locating an article, report or document on the web.

1. Journals and Law Reviews

Bradfield, A.L., G.L. Wells, and E.A. Olson. "The Damaging Effect of Confirming Feedback on the Relation between Eyewitness Certainty and Identification Accuracy." *Journal of Applied Psychology* 87 (2002): 112-120.

Gross, S.R., K. Jacoby, D.J. Matheson, N. Montgomery, and S. Patil. "Exonerations in the United States, 1989 Through 2003." *The Journal of Criminal Law & Criminology* 95 (2005): 523- 560. http://www.thejusticeproject.org/press/reports/pdfs/17220.pdf

Malpass, R.S. "A Policy Evaluation of Simultaneous and Sequential Lineups." *Psychology, Public Policy and Law* 12, no. 4 (2006): 394-418. http://eyewitness.utep.edu/Documents/Malpass06PolicyEvaluationOfSimultaneousAndSequentialLineups-PPPL.pdf

Penrod, S. D., and B.L. Cutler. "Witness confidence and witness accuracy: Accessing their forensic relation." *Public Policy, Psychology & Law* 1 (1995): 817-845.

Semmler, C., N. Brewer, and G.L. Wells. "Effects of Postidentification Feedback on Eyewitness Identification and Nonidentification." *Journal of Applied Psychology* 89, no. 2 (2004): 334-346. http://www.psychology.iastate.edu/faculty/gwells/Wells_articles_pdf/JEPA_Semmler_et_al.pdf

Steblay, N.M. "Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects." *Law and Human Behavior* 21, no. 3 (1997): 283-297. http://web.augsburg.edu/%7Esteblay/LineupInstructionAnalysis.pdf

Steblay, N., J. Dysart, S. Fulero, and R.C.L. Lindsay. "Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison." *Law and Human Behavior* 25, no. 5 (2001): 459-473. http://web.augsburg.edu/%7Esteblay/EyewitnessAccuracy.pdf

Turtle, J., R.C.L. Lindsay, and G.L. Wells. "Best Practice Recommendations for Eyewitness Evidence Procedures: New Ideas for the Oldest Way to Solve a Case." *The Canadian Journal of Police & Security Services* 1 (2003): 5-18. http://www.ryerson.ca/~jturtle/cjpss.html

Wells, G.L. "Applied Eyewitness-Testimony Research: System Variables and Estimator Variables." *Journal of Personality and Social Psychology* 26, no. 12 (1978): 1546-1557.

Wells, G.L. Eyewitness Identification: Systemic Reforms, *Wisconsin Law Review* 2006, no. 2 (2006): 615-643. http://www.psychology.iastate.edu/FACULTY/gwells/Wisconsin_Law_article.pdf

Wells, G.L., and A.L. Bradfield. "'Good, You Identified the Suspect': Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience." *Journal of Applied Psychology* 83 (1998): 360-376.

Wells, G.L., M. Small, S.D. Penrod, R.S. Malpass, S.M. Fulero, and C.A.E. Brimacombe. "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads," *Law and Human Behavior* 22, no. 6 (1998): 603-647. http://www.psychology.iastate.edu/FACULTY/gwells/Wells_articles_pdf/whitepaperpdf.pdf

2. Commission and Association Reports & Policies

American Bar Association. "Achieving Justice: Freeing the Innocent, Convicting the Guilty." *Report of the ABA Criminal Justice Section's Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process* (2006).

American Bar Association. Criminal Justice Section. *Report to the House of Delegates: Resolution Adopting the American Bar Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures dated August 2004.* http://www.abanet.org/leadership/2004/annual/111c.doc

California Commission on the Fair Administration of Justice. *Report and Recommendations Regarding Eyewitness Identification Procedures* (April 13, 2006). http://www.ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf

Illinois Governor's Commission on Capital Punishment Report (April 15, 2002). http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html

National Institute of Justice. *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* 15 (June 1996). http://www.ojp.usdoj.gov/nij/pubs-sum/161258.htm

National Institute of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* iii (1999). http://www.ojp.usdoj.gov/nij/pubs-sum/178240.htm

New Jersey Department of Law and Public Safety. Office of the Attorney General. *Memorandum Re: Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures to all County Prosecutors, Police Chiefs, and Law Enforcement Chief Executives* (April 18, 2001). http://www.state.nj.us/lps/dcj/agguide/photoid.pdf

North Carolina Actual Innocence Commission. *Recommendations for Eyewitness Identification* (October 2003). http://www.ncids.org/News%20&%20Updates/Eyewitness%20ID.pdf

Northampton Police Department. "Eyewitness Identification Procedure." *Administration & Operations Manual* O-408: 1-9. http://www.innocenceproject.org/docs/Northampton_MA_ID_Protocols.pdf

Santa Clara County Police Chiefs' Association. Santa Clara County Line-up Protocol. http://www.innocenceproject.org/docs/Santa_Clara_eyewitness.pdf

Virginia State Crime Commission. "Mistaken Eyewitness Identification." *Report to the Governor and the General Assembly of Virginia*, House Document No. 40 (2005). http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/HD402005/$file/HD40.pdf

Wisconsin Office of the Attorney General. Training and Standards Bureau. *Model Policy and Procedures for Eyewitness Identification* (2005). http://www.doj.state.wi.us/dles/tns/eyewitness.asp

3. Field Studies

Klobuchar, A., and H.L. Caligiuri. "Protecting the Innocent/Convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identification." *William Mitchell Law Review* 32 (2005): 1-26

Klobuchar, A., N.K.M. Steblay, and H.L. Caligiuri. "Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project." *Cardozo Public Law, Policy & Ethics Journal* 4 (2006): 381-413. http://web.augsburg.edu/~steblay/Improving_Eyewitness_Identifications.pdf

Malpass, R.S. "Notes on the Illinois Pilot Program on Sequential Double-Blind Identification Procedures." *Public Interest Law Reporter* 11, no. 2 (2006): 5-47. http://eyewitness.utep.edu/Documents/Malpass06NotesOnTheIllinoisPilotProgram.pdf

Mecklenburg, S.H. *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures* (March 2006). http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.pdf

Steblay, N. "Observations on the Illinois Lineup Data" (May 3, 2006), http://web.augsburg.edu/~steblay/ObservationsOnTheIllinoisData.pdf.

Wells, G.L. "Gary L. Wells' comments on the Mecklenburg Report" (Updated May 2006), http://www.psychology.iastate.edu/FACULTY/gwells/Illinois_Project_Wells_comments.pdf.

ENDNOTES

[1] *See* Edward Connors et al., Nat'l Inst. of Justice, U.S. Dep't of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* 2, 15 (1996); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 603, 605 (1998); Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 542 (2005).

[2] *See* current DNA exoneration statistics and case profiles at The Innocence Project at the Benjamin N. Cardozo School of Law, http://www.innocenceproject.org.

[3] Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. 615, 632 (2006).

[4] Technical Working Group for Eyewitness Evidence, Nat'l Inst. of Justice, U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999), http://www.ojp.usdoj.gov/nij/pubs-sum/178240.htm.

[5] Wells, *supra* note 3, at 635.

[6] *Id*. at 623.

[7] Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 603, 618 (1998).

[8] *Id*. at 614.

[9] *Id*.

[10] *Id*. at 624.

[11] *Id*.

[12] James M. Doyle, *True Witness: Cops, Courts, Science, and the Battle Against Misidentification* 17 (2005).

[13] *Id*.

[14] Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. Personality & Soc. Psych. 1546, 1548 (1978).

[15] Wells, *supra* note 3, at 625.

[16] *Id*. *See also* Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 Law & Hum. Behav. 283, 284-85 (1997).

[17] Wells et al., *supra* note 7, at 632.

[18] *Id*. at 633.

[19] Wells, *supra* note 3, at 624.

[20] Wells et al., *supra* note 7, at 635.

[21] Wells, *supra* note 3, at 629.

[22] Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 Law & Hum. Behav. 459, 464 (2001).

[23] *Id*. at 469.

[24] Wells, *supra* note 3, at 627.

[25] Amy Klobuchar, Nancy M. Steblay & Hilary Lindell Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 Cardozo Pub. L. Pol'y & Ethics J. 381, 410 (2006).

[26] Sheri H. Mecklenburg, *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures* (March 2006), http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.pdf.

[27] *See, e.g.*, Gary L. Wells, Comments on the Mecklenburg Report (Updated May 2006), http://www.psychology.iastate.edu/FACULTY/gwells/Illinois_Project_Wells_comments.pdf; Nancy Steblay, Observations on the Illinois Lineup Data, (May 3, 2006), http://web.augsburg.edu/~steblay/ObservationsOnTheIllinoisData.pdf.

[28] *"Yes, I'm sure-That's The One!"* Memory Loss & the Brain, The Newsletter of the Memory Disorders Project at Rutgers University, Summer 2003, http://www.memorylossonline.com/eyewitness.htm.

[29] *See, e.g.*, State of Wisconsin, Office of the Attorney General, Model Policy and Procedure for Eyewitness Identification (2005) [hereinafter Wisconsin Model Policy], http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf.

[30] State v. Delgado, 188 N.J. 48, 902 A.2d 888 (2006).

[31] North Carolina Actual Innocence Commission, Recommendations for Eyewitness Identification (October 2003), http://www.ncids.org/News%20&%20Updates/Eyewitness%20ID.pdf.

[32] *See* Wisconsin Model Policy, *supra* note 29.

[33] Telephone interview with Ken Hammond, WI Dep't. of Justice Training and Standards Bureau (Jan. 26, 2007).

[34] Klobuchar, Steblay & Caligiuri, *supra* note 25, at 411.

[35] Wells, *supra* note 3, at 642.

[36] *See* Anya Sostek, *Blind Sighted: Eyewitness Identification Doesn't Always Mesh with DNA Evidence, and That's Leading Police Departments To Rethink Their Lineup Procedures*, Governing Magazine, May 2006.

[37] *See* John J. Farmer, Jr., Office of the Attorney General, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (April 18, 2001), http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.

[38] *See* Gina Kolata and Iver Peterson, *New Jersey Is Trying New Way For Witnesses to Say, 'It's Him,'* New York Times, July 21, 2001.

[39] *See* Bill Moushey and Nathan Crabbe, *Questionable Identifications Sent 2 to Jail*, Pittsburgh Post-Gazette, May 9, 2005.

[40] *Id*.

[41] *See Police and Prosecutors Team Up for Better Eyewitness IDs*, November 3, 2003, http://www.psychology.iastate.edu/FACULTY/gwells/Minnesota_new_procedures.html.

[42] *See* Jennifer Thompson, *'I Was Certain, but I Was Wrong,'* New York Times, June 18, 2000.

[43] *See Local Police Unaware of Federal Eyewitness Guidelines*, Associated Press, May 9, 2005.

The Justice Project is comprised of two nonpartisan organizations dedicated to fighting injustice and to creating a more humane and just world. The Justice Project, Inc., which lobbies for reform, and The Justice Project Education Fund, which increases public awareness of needed reforms, work together on the Campaign for Criminal Justice Reform to reaffirm America's core commitment to fairness and accuracy by designing and implementing national and state-based campaigns to advance reforms that address significant flaws in the American criminal justice system, with particular focus on the capital punishment system.

This report is made possible primarily through a grant from The Pew Charitable Trusts to The Justice Project Education Fund. The opinions expressed are those of the author(s) and do not necessarily reflect the views of the Trusts. For additional information, questions or comments, please contact our offices at (202) 638-5855, or email *info@thejusticeproject.org*.

THE JUSTICE PROJECT

1025 Vermont Avenue, NW • Third Floor • Washington, DC 20005
202 638-5855 • Fax 202 638-6056 • www.TheJusticeProject.org