REEVALUATING LINEUPS:

WHY WITNESSES MAKE MISTAKES

AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION

AN INNOCENCE PROJECT REPORT

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EXECUTIVE SUMMARY

Eyewitness identification is among the most prevalent and persuasive evidence used in courtrooms. Eyewitness testimony that directly implicates the defendant is compelling evidence in any trial, but it is not error-proof. Jurors may not realize that confident, trustworthy witnesses can be mistaken. A single witness's identification can be enough to obtain a conviction.

Eyewitness identification also plays a key role in shaping investigations. In the immediate aftermath of a crime, an erroneous identification can derail police investigations by putting focus on an innocent person while the actual perpetrator is still on the streets. Once a witness identifies the suspect to police, whether or not that person actually committed the crime, investigators may stop looking for other suspects.

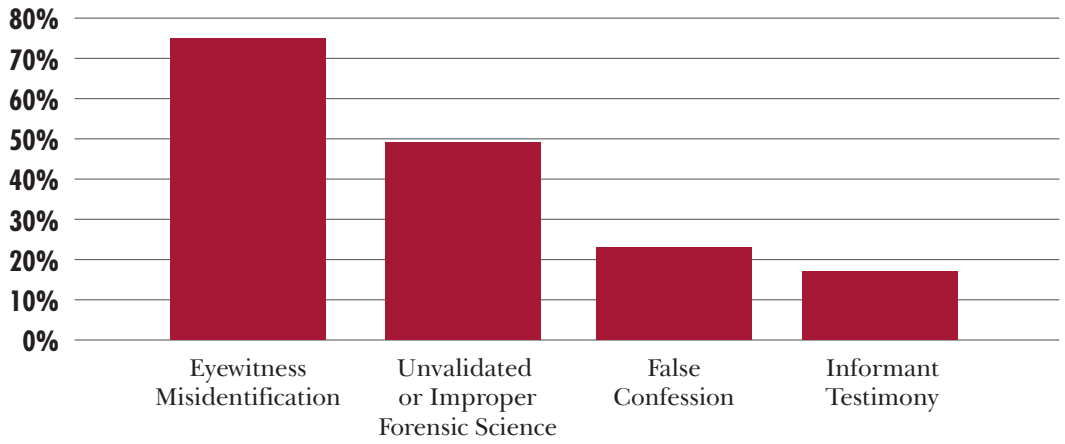
Over 175 people have been wrongfully convicted based, in part, on eyewitness misidentification and later proven innocent through DNA testing. The total number of wrongful convictions involving eyewitness misidentifications exceeds this figure, given the widespread use of eyewitness testimony and the limited number of cases in which DNA evidence is available for post-conviction testing. Experts estimate that physical evidence that can be subjected to DNA testing exists in just 5-10% of all criminal cases.[1] Even among that small fraction of cases, many will never have the benefit of DNA testing because the evidence has been lost or destroyed. DNA exonerations don't just show a piece of the problem – they are a microcosm of the criminal justice system.

Decades of empirical, peer-reviewed social science research reaffirms what DNA exonerations have proven to be true: human memory is fallible.[2] Memory is not fixed, it can be influenced and altered. After the crime and throughout the criminal investigation, the witness attempts to piece together what happened. His memory is evidence and must be handled as carefully as the crime scene itself to avoid forever altering it.

The Innocence Project identifies the common causes of wrongful convictions across DNA exoneration cases and has found eyewitness misidentification to be the leading cause. Innocence Project research shows:

- Over 230 people, serving an average of 12 years in prison, have been exonerated through DNA testing in the United States, and 75% of those wrongful convictions (179 individual cases as of this writing) involved eyewitness misidentification.
- In 38% of the misidentification cases, multiple eyewitnesses misidentified the same innocent person.
- Over 250 witnesses misidentified innocent suspects.
- Fifty-three percent of the misidentification cases, where race is known, involved cross-racial misidentifications.

Eyewitness misidentification as the leading cause of wrongful conviction compared to other causes
(based on the first 239 DNA exonerations)



- In 50% of the misidentification cases, eyewitness testimony was the central evidence used against the defendant (without other corroborating evidence like confessions, forensic science or informant testimony).
- In 36% of the misidentification cases, the real perpetrator was identified through DNA evidence.
- In at least 48% of the misidentification cases where a real perpetrator was later identified through DNA testing, that perpetrator went on to commit (and was convicted of) additional violent crimes (rape, murder, attempted murder, etc.), after an innocent person was serving time in prison for his previous crime.

Many of these misidentifications could have been prevented, many wrongful convictions averted, and many additional crimes avoided if police had used more reliable lineup procedures. In recognition of this, procedural reforms have been developed by leading eyewitness psychologists and successfully implemented by criminal justice professionals. These reforms have a strong scientific foundation and have been embraced by leading national justice organizations including the National Institute of Justice and the American Bar Association.[3] They include:

- Double-blind presentation: photos or lineup members should be presented by an administrator who does not know who the suspect is.

- Lineup composition: "Fillers" (the non-suspects included in a lineup) should resemble the eyewitness's description of the perpetrator and the suspect should not stand out. Also, a lineup should not contain more than one suspect.
- Witness instructions: The person viewing a lineup should be told that the perpetrator may not be in the lineup and that the investigation will continue regardless of whether an identification is made.
- Confidence statements: At the time of the identification, the eyewitness should provide a statement in her own words indicating her level of confidence in the identification.
- Recording: Identification procedures should be videotaped.
- Sequential presentation (optional): Lineup members are presented one-by-one (by a "blind" administrator) instead of side by side.

Several states, cities and towns have already adopted the reforms and found them to be cost-effective and easily implemented. The benefits are extensive and include reinforcing the integrity of reliable identifications as well as reducing the rate of misidentifications.

"It's incumbent on us that we establish procedures that make them [police lineups] more reliable, that law enforcement can count on. If you identify the wrong person, you're leaving a criminal out there free and you're potentially convicting an innocent person."

North Carolina State Rep. Deborah Ross,
The Herald-Sun, *April 30, 2007*

Despite positive feedback from police departments where the reforms have been implemented and mounting evidence of the reforms' effectiveness, the majority of jurisdictions have maintained the status quo. There are no consistent standards for identification procedures from state to state or even from one police department to the next. In fact, many police departments do not have written procedures for conducting identifications, so there is often inconsistency even within individual police departments. Now is the time for change. Misidentifications benefit no one: not the innocent defendants who face incarceration for crimes they didn't commit, not the victims who are denied justice, not the police officers working to catch the real perpetrator, and not the public whose safety is jeopardized when real perpetrators remain at large.

This report provides a historical overview of how eyewitness misidentification came to be recognized as a leading cause of wrongful conviction, it examines the shortcomings of traditional eyewitness identification procedures, and it describes how simple improvements to procedures can alleviate the problem, with examples of cities and states across the country that have successfully implemented procedural reforms.

HISTORY AND OVERVIEW OF EYEWITNESS MISIDENTIFICATION

On December 19, 1974, thousands of viewers watched a woman being mugged on a New York City television newscast. In a 13-second video clip, viewers saw a man grab a woman's purse, knock her down and then run face forward toward the camera. After the clip, viewers were shown a lineup of six men who resembled the attacker and a phone number to call to identify which lineup member (if any) was the real perpetrator. Answering the phones were psychology professor Robert Buckhout and his students, who recorded the results as part of a staged psychological study on eyewitness identification.

"People tend to think of the ability to recognize a face as a natural ability. But a criminal situation is totally different than what people generally experience."

Professor Gary Wells: The Innocence Project in Print, *Winter 2008*

Buckhout published the devastating results under the title, "Nearly 2,000 Witnesses Can Be Wrong:" He concluded that only 14% of viewers made a correct positive identification, about the same amount that would have gotten it right by simply guessing.[4] In terms of the sheer number of eyewitnesses involved, the experiment was groundbreaking. But, in fact, the results were nothing new. Hundreds of witnesses in scores of other eyewitness identification experiments had been getting it wrong for decades.

Hugo Munsterberg, a German-American psychologist, first wrote about the fallibility of witness memory a century ago in "On the Witness Stand." Munsterberg described a fight staged in a criminology classroom in order to test the students' ability to recall the event. One student shouted an accusation at another who then retaliated. The professor tried to intervene, and a gun went off. At that moment, the professor explained the experiment and asked all the students to write an exact account of what happened.

Mistakes were found in every account of the incident, and witnesses were just as likely to get the important details wrong as they were to get them right. Munsterberg reported: "Words were put into the mouths of men who had been silent spectators during the whole short episode; actions were attributed to the chief participants of which not the slightest trace existed; and essential parts of the tragic-comedy were completely eliminated from the memory of a number of witnesses."[5]

Psychological research over the past century has consistently shown a high error rate in eyewitness identifications. In 1932, Yale Law Professor Edwin Borchard cited eyewitness misidentification as the leading cause of wrongful convictions

in his book, "Convicting the Innocent."[6] Sixty years later, DNA exoneration cases proved that Borchard and the psychologists were right.

DNA Exonerations Further Reveal the Prevalence of Eyewitness Misidentification

DNA exonerations supported what scientists and academics had been saying for decades. The cases represented a new, compelling data subset to support existing research about eyewitness identification. After all, these weren't subjects in scientific experiments; they were people with firsthand experience of injustice.

The first post-conviction DNA exoneration occurred in 1989, but it would be years before post-conviction DNA testing was widely available. In 1992, the Innocence Project, founded by Barry Scheck and Peter Neufeld, began representing prisoners who could be proven innocent through DNA testing. The demand for representation was enormous, and with the help of law students from the Benjamin N. Cardozo School of Law, the Innocence Project set out to fill the need. By the end of 1995, 28 people had been exonerated through DNA testing.

The growing, undeniable evidence of wrongful convictions spurred a new wave of criminal justice research. In 1996, U.S. Attorney General Janet Reno commissioned a National Institute of Justice (NIJ) research report, "Convicted by Juries, Exonerated by Science," to analyze the causes of the 28 cases of wrongful conviction.[7] The only contributing cause common to all cases was eyewitness misidentification. Clearly, the witnesses in all the cases had been wrong.

Today, the data subset has multiplied, and evidence from over 175 cases shows that eyewitnesses get it wrong. But why do eyewitnesses get it wrong? And what can be done about it?

Why Eyewitnesses Get It Wrong

To understand the factors affecting eyewitness identification, it helps to use the example of a particular crime and its investigation. Larry Fuller's case exemplifies a range of factors that can compromise eyewitness identification. Fuller was wrongfully convicted of a Dallas rape based, in part, on eyewitness misidentification.

Case example: Larry Fuller
Sentence Served: 19.5 years
Conviction: Aggravated rape

In April 1981, a woman woke up at 6 a.m. to find a man with a knife on her bed. It was 45 minutes before sunrise on a foggy day, and the only light in the room (other than any light from outside before dawn) came from a digital alarm clock. She tried to grab the knife away from the assailant, but he cut her on the hand, the neck and the back and then raped her. He got up and asked the victim if she had any money and when she said no, he fled. The entire incident lasted only a matter of minutes.

The victim initially told police that she could not provide a description of the perpetrator because of the limited lighting. However, two days after the rape, police showed the victim six photos at her home. Fuller's photo was among the six she was shown. The victim said that he "looks a lot like the guy," but could not positively identify him. The investigating police officer issued a report recommending that the investigation be

"suspended," noting that the victim "was unsure of the suspect at this time." The investigation continued, however, and police remained focused on Fuller.

A police officer went to Fuller's house and took three Polaroid photographs of him so that the victim could see a recent photo of Fuller. He then went to the victim's home to show her a second photo array. Fuller's photo was the only one that was repeated in the second photo array.

The Polaroid, taken exactly one week after the attack, showed Fuller with a heavy distinct beard. The victim became alarmed that Fuller had a full beard, since she had said her attacker did not have facial hair. Placing her fingers over the bottom part of the photo, to block half of Fuller's face, she then positively identified him, and he was arrested. In August 1981, Fuller had a two-day trial – in which the prosecution said the victim had "never wavered" in identifying him. After deliberating for 35 minutes, the jury convicted him.

"All those years ago, (a Burlington detective) was doing his job by the book – but when I asked him if I did OK and he told me yes, then I subconsciously tried to pick the same person out of the physical lineup. The standard way eyewitness evidence was collected had failed me, and because of that, I'd failed, too."

Jennifer Thompson-Cannino, a North Carolina rape victim who misidentified Ronald Cotton as her attacker. Cotton was exonerated by DNA testing in 1995.
Picking Cotton, *St. Martin's Press, 2009*

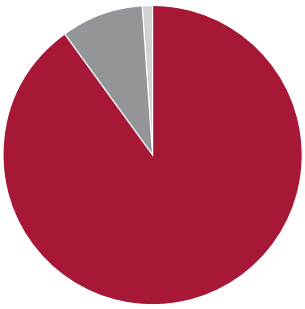
Because of how the crime occurred, this identification was compromised before the investigation even began. The lack of light in the room prevented the victim from getting a clear view of the assailant. The perpetrator had a knife. Studies have shown that the presence of a weapon increases stress levels and decreases the likelihood of a reliable identification.[8]

Research also shows that people are less able to recognize faces of a different race than their own due to a phenomenon known as "own-race bias."[9] In this case, the victim was Caucasian and the perpetrator was African-American. In 53% of wrongful convictions cases involving eyewitness misidentification (that were later overturned through DNA testing), the witness and the perpetrator were of different races. These cases strongly suggest that people of color are more likely to be wrongfully convicted based on cross-racial misidentification than Caucasians. Cross-racial misidentifications in the DNA exoneration cases involve an African-American or Latino defendant 99% of the time, and a Caucasian defendant only 1% of the time.

All of these factors – the limited lighting, the presence of a weapon, the cross-race identification – are "event-related variables." While the criminal justice system should take these factors into account, and must educate jurors about the scientific research surrounding them, they are not factors that law enforcement can control.

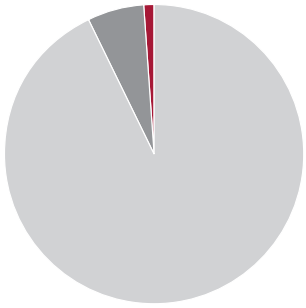
It's still possible that a witness might be able to recognize an assailant in spite of these event-related variables and make a correct identification. However, in this case, law enforcement further compromised the identification with its single-minded pursuit of Fuller.

Race of the defendant, of those known, in cross-racial misidentifications
(based on 78 defendants in cross-racial misidentification cases in the first 239 DNA exonerations)



90% African-American
9% Latino
1% Caucasian

Race of the eyewitness, of those known, in cross-racial misidentifications
(based on 78 eyewitnesses in cross-racial misidentification cases in the first 239 DNA exonerations)



92% Caucasian
6% Latino
1% Other

In cases with multiple eyewitnesses, only the witness of a different race was counted. There were no known cases in which eyewitnesses of multiple different races misidentified the same innocent defendant.

Factors involving law enforcement's interactions with the witness, including the lineup procedures and any questions, suggestions and inferences that are made are "procedure-based variables."[10] From the moment an eyewitness interacts with the criminal justice system, her memory (which is a form of evidence), is at risk, even from the well-intentioned questions of law enforcement officers. Research shows that memory is not like a video recorder. We neither record events exactly as we see them, nor recall them like a tape being replayed. Instead, each new bit of information helps to construct the memory, which can be manipulated and transformed with even the most subtle cues. Once altered, the original memory cannot be restored.[11]

Because the victim viewed Larry Fuller's photo in the first photo array, she was already familiar with his face when she saw it again in the second photo array. Regardless of the fact that Fuller had a full beard, she recognized him, and therefore identified him as the perpetrator. These procedure-based variables interfered with her original memory by suggesting that Fuller was the perpetrator. Rather than helping to uncover her original memory, police supplanted it with a new one.

Although the event-based problems could not have been prevented, the procedure-based problems could have. Sections four and five of this report will explore how police can improve lineup procedures to avoid these types of problems and reduce the rate of misidentifications. But first, a closer examination of the problems.

PROBLEMS WITH TRADITIONAL EYEWITNESS IDENTIFICATION PROCEDURES

The Innocence Project identifies common problems across DNA exoneration cases and has consistently found that eyewitness misidentification contributes to more wrongful convictions later overturned through DNA testing than any other cause. Specific complications with eyewitness identification can be tracked through the individual DNA exoneration cases as well. While complications caused by event-related variables (low lighting, disguised perpetrators, etc.) contribute to misidentifications, the Innocence Project's focus is on procedure-related variables, which can be improved through law enforcement practices.

"What happened to me was horrible and it caused me a lot of pain, but it's tiny compared to what he went through. I was allowed to move on, but he woke up every morning in that prison."

Ann Meng, Virginia rape victim who misidentified Julius Ruffin as her attacker. Ruffin was exonerated through DNA testing in 2003: O, The Oprah Magazine, *October 2007*

1. Composition of the lineup may be suggestive

A lineup is either a photo array or a physical lineup, which most often consists of five or six members. In a proper lineup, only one of the lineup members will be the police suspect, and the others will be "fillers." These fillers may come from a nearby jail, they may be other police officers in plain clothes, or, in some cases, they may be civilians. If a filler is selected from a lineup that person will not be prosecuted. In a balanced lineup, all the fillers will resemble the witness's description of the suspect and the suspect will not stand out in any suggestive way. If the lineup composition unfairly suggests a particular choice – for example, the suspect towers head and shoulders above the fillers or is the only one with facial hair or is the only one wearing a hat – the witness is more likely to be influenced in making a selection.

In DNA exoneration cases, examples of suggestive lineups resulting in wrongful convictions include: a photo array in which the suspect's photo was the only one in color, a photo array in which the suspect and only one other man were shirtless (and the perpetrator had been described as shirtless), and a physical lineup in which the suspect was the only one wearing an orange prison jumpsuit. Any detail that identifies the lineup member as the police suspect (like the orange jumpsuit), or as more closely matching the description of the perpetrator, will be an obvious cue to the witness to pick that person out.

Case Example: Antonio Beaver
Sentence Served: 10 years
Conviction: First-degree robbery

In 1996, a woman in St. Louis was attacked with a screwdriver by a man who stole her purse and car. She described her attacker as a clean-shaven African-American man wearing a baseball cap. She said the man was about 5' 10" and had a gap between his teeth. About a week after the crime, a detective arrested Antonio Beaver because he thought Beaver resembled the composite sketch. Beaver appeared in a physical lineup with three other men. Beaver and only one other man were wearing baseball caps and Beaver was the only one who had a gap in his teeth. The victim identified Beaver. In 1997 he was convicted and sentenced to 18 years in prison. Years later, DNA testing was conducted on bloodspots left inside the car by the perpetrator. The biological evidence didn't match Beaver, and he was exonerated in 2007.

Since Beaver was placed in a lineup with only three other men, the odds that he would be chosen were already high. The fact that only two of the lineup members wore caps further increased the likelihood that he would be chosen. Finally, the gap in his teeth plus the presence of the cap made it almost certain that he would be chosen.

"I thought surely I would've been cleared when they said the guy was 5'8" because I've never been 5'8" in my life. I've always been tall as I can remember; I stand 6'4".

James Waller, exonerated through DNA testing after 10 years in prison and 13 years on parole: Innocence Project interview, Fall 2007.

2. Cues from the lineup administrator may influence the identification

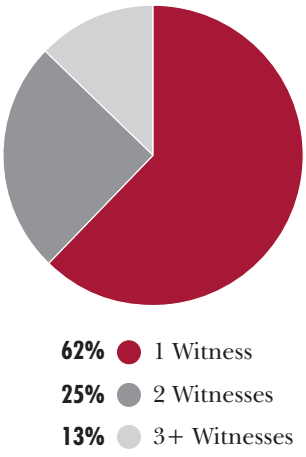
In most criminal investigations, the officer who administers the lineup has already established rapport with the eyewitness, has followed the case closely and most likely has already begun to develop some ideas about who the culprit might be. The witness, who has a strong interest in seeing justice done and in making the right decision, may look to the officer for guidance or affirmation. Likewise, the administrator will naturally feel empathy for the witness, who is often also the victim, and may consciously or unconsciously provide cues to assist them. Examples include something as direct as a leading question or suggestion, like "Take another look at number four," to seemingly innocuous body language cues.

It's often difficult to determine after the fact if the lineup administrator has influenced the eyewitness's identification either intentionally or unintentionally. However, in some wrongful convictions cases it was clearly a factor. For example, if the lineup itself appears to be fair and unbiased, yet multiple eyewitnesses are all identifying the same innocent person as the suspect, then witnesses may be responding to cues given by the lineup administrator. Wrongful convictions have resulted from as many as 10 witnesses misidentifying the same innocent defendant. Any kind of coaching or feedback to the witness, even by well-intentioned officers, could compromise the reliability of the identification.

Case Example: Thomas McGowan
Sentence Served: 23 years
Conviction: Burglary of a habitation, aggravated sexual assault

A rape victim in Dallas was shown a photo array. After looking at the photo of Thomas McGowan, she placed it aside, indicating that she thought it was her assailant. The detective assigned to the case then told her, "You have to be sure, yes or no." The crime victim recalled the detective's instructions as follows: "He said if I was going to say it was somebody, if I was going to say it was that picture, I had to be sure. He said I couldn't think it was him. He said I had to make a positive ID. I had to say yes or no." After hearing the officer's instructions, the victim said the man in the photo was "definitely" the man who attacked her. McGowan was proven innocent through DNA testing in 2008.

Number of witnesses misidentifying the same innocent defendant
(based on 175 eyewitness misidentification cases in the first 239 DNA exonerations)



The victim's identification of McGowan was the central evidence against him. By pushing the witness into certainty, the officer administering the lineup also apparently confirmed that she was selecting the suspect. Had the victim paused on one of the filler, or non-suspect, photographs it is unlikely the detective would have been so forceful in asking the victim to be certain. In fact, there is no reason why the victim should have to be 100% certain in her identification. The investigation should continue regardless.

3. Witnesses may misunderstand the role of the identification procedure in the investigative process

Most people have never had to participate in an eyewitness identification procedure. So for most eyewitnesses, it's a new, and probably stressful, experience. Everyone involved wants the same outcome – apprehension of the guilty party and elimination of any innocent suspects. However, witnesses will not have enough experience with the criminal justice system to understand how to make the most accurate identification. The witness may fear that failing to identify the suspect will mean the end of the investigation or that the perpetrator will go free and commit additional crimes. The stakes are high.

The witness may, rightfully, assume that the police have identified a suspect and may hope to be able to identify that suspect. Yet, identifying the suspect is not the witness's task; instead, it is to identify the perpetrator. Therefore, the witness should focus on comparing his memory to each individual represented.

Research shows that eyewitnesses tend to identify the person who, they believe, looks most like the perpetrator compared to the other members

of the lineup. Researchers have termed the phenomenon "relative judgment."[12] Like a multiple choice test without an option for "none of the above," witnesses might not understand that not selecting anyone is still a viable choice. When witnesses are told that they don't have to make a selection and that the investigation will continue regardless, they are less likely to fall back on choosing the person who looks most like the perpetrator relative to the other members of the lineup.

4. Witnesses' confidence in the identification is susceptible to suggestion and subject to change

Studies have shown a surprising lack of correlation between the confidence of the witness and the accuracy of his identification.[13] In wrongful convictions overturned by post-conviction DNA testing, witnesses have testified that they were "100% positive" of the identification, saying that they "would never forget that face" – despite having identified the wrong person. How does this happen? The answer may lie in the information the witness receives after the identification.

The lineup administrator may have affirmed the identification – "Yes, that's who we thought it was." Subtle affirmations from the administrator such as a nod or saying, "Okay, good," can also bolster a witness's confidence. Studies have shown that witness's confidence increases with positive feedback, even if the witness later denies that the feedback had any effect on her level of certainty.[14] This increased confidence can even alter the witness's accounting of events or her recollection of the identification procedure itself. She may remember being certain of the identification, when, in fact, the record of the identification procedure will show that she was hesitant and uncertain.[15]

Perhaps the witness learned that her co-witness also identified the same person or that the person she identified had a prior criminal record. The witness may also have been given more than one opportunity to identify the suspect; for example, in both a photo array and a physical lineup. With each identification or new bit of information, the witness becomes more and more confident in the identification, probably without even realizing it. By the time of the trial, the witness takes the stand and provides very convincing testimony that a jury will often not question.

Case Example: Ronald Cotton
Sentence Served: 10.5 years
Conviction: Rape, Burglary

Ronald Cotton was misidentified in both a photo array and a physical lineup by a rape victim in North Carolina. After the photo array, investigators told the victim, "You did great." She was invited back to view a physical lineup in which the only lineup member who had also been in the photo array was Cotton. She identified him a second time. The detective told her, "We thought that might be the guy. It's the same person you picked from the photos." The victim, Jennifer Thompson-Cannino, testified at two trials about her absolute certainty that Cotton was her assailant – even after being presented with a person at the second trial who it was later discovered was the real perpetrator. Cotton was sentenced to life plus 54 years and spent over 10 years in prison before his exoneration through DNA testing in 1995.

Thompson-Cannino has since become an advocate for eyewitness identification reform. In 2009, she and Cotton published a book about their experience, "Picking Cotton." In the book, she recalls how her false sense of confidence

increased over time. "Ron was the only person who had been in both the photo and the physical lineups, making his face more recognizable to me. And then the police told me that I had identified the same person in the physical lineup whose photo I had selected, so by the time I went into court, everything added up for me: I was defiantly confident that Ronald Cotton was the one."[16]

Real Perpetrators later identified through DNA testing in eyewitness misidentification cases

(based on 64 of 179 eyewitness misidentification cases where the real perpetrator was later identified through DNA testing)

Real Perpetrator identified through DNA testing = 36%

Real Perpetrator committed additional violent crimes (and was convicted) after an innocent person was wrongfully convicted of the previous crime = 48% *(of those known)*

5. Beyond lineups: how eyewitness misidentifications happen in show-ups and composites

The lineup is the most common type of identification procedure, but other types of procedures do exist, and these may also result in misidentifications.

Show-ups

A "show-up" is a procedure in which the eyewitness is presented with a single suspect to see if he will identify this person as the perpetrator of the crime. A show-up can be useful to law enforcement when a suspect matching the description of the perpetrator is spotted in the vicinity of the crime. In common practice, show-ups take place within two hours of the crime. Show-ups are not an ideal procedure because they are inherently suggestive. The witness views one person who she can ascertain immediately is the suspect. This person is often surrounded by law enforcement and could be in handcuffs. An innocent person in this situation is more likely to be misidentified than in a traditional lineup, and this risk is even greater if the innocent person is wearing similar clothing as the perpetrator.[17]

Case Example: Eduardo Velasquez
Sentence Served: 12.5 years
Conviction: Aggravated rape, assault and battery with a dangerous weapon, indecent assault and battery

Law enforcement officers saw Eduardo Velasquez on the street in Chicopee, Massachusetts, and thought that he resembled the description of an assailant wanted in connection with a sexual assault that had occurred that same night. The officers asked him if he would go with them for an identification procedure, and he consented.

They drove Velasquez to a convent, where the victim had fled after the assault. Velasquez stood on the porch while an officer shone a flashlight on his face. The victim viewed him through the curtained glass and screened front doors of the convent standing behind two police officers and peering between their shoulders. The victim was 10 to 12 feet from him. She made a tentative identification, but after hearing his voice and inspecting his gloves, which were passed to her through the door, she said she was sure. Velasquez was exonerated through DNA testing in 2001.

In this case, the victim's view of Velasquez was highly obscured by the light source, the distance, the curtains and the screened doors. Moreover, in a traditional lineup with a selection of lineup members, there is the possibility that the witness will make a mistake by choosing a non-suspect "filler." This selection process allows law enforcement to better test the witness's memory. But in a "show-up," any selection the witness makes will be considered by law enforcement as a correct identification since there are no other lineup members to rule out.

Composites

Composite sketches, or more recently, computerized composite-production systems, are commonly used. These systems take the witness's description of the perpetrator's individual facial features to generate an image of the perpetrator's face. Composites are used when a suspect has yet to be identified, and they are often poor likenesses of the perpetrator. People remember faces holistically – not broken up into individual features.[18] The composite image breaks the features down and then, like puzzle pieces, puts them back together again.

The problem with composites goes beyond poor representation. Studies have shown that the act of creating a composite actually diminishes the witness's ability to later identify the perpetrator from a lineup. Having the composite face freshly in her mind, the witness is more likely to select a person that resembles the composite, rather than her original memory.[19]

Case example: Kirk Bloodsworth
Sentence Served: 8 years, two on death row
Conviction: First-degree murder, sexual assault, rape

In 1993, Kirk Bloodsworth became the first person to be exonerated through DNA testing who had served time on death row. Bloodsworth became a suspect in the 1984 rape and murder of a nine-year-old Maryland girl when an anonymous tipster called police to say that Bloodsworth resembled a composite picture. Police placed his photo in a photo lineup and multiple eyewitnesses identified him. At trial, five witnesses testified that they had seen Bloodsworth with the victim. DNA evidence not only vindicated Bloodsworth but also implicated the real perpetrator, Kimberly Ruffner. Ironically, Bloodsworth looked more like the composite than Ruffner did. Bloodsworth was the only one in the photo lineup with hair that matched the composite.[20]

Witnesses unknowingly took characteristics of the composite, like hair, and morphed that into their original memory. Because Bloodsworth shared more individual characteristics of the composite sketch than the other lineup choices, witnesses selected him. Their original memory of Ruffner had become irrevocably altered.

HOW TO PREVENT MISIDENTIFICATION

In their 1996 commentary for the National Institute of Justice report, "Convicted by Juries, Exonerated by Science," Innocence Project Co-Directors Peter Neufeld and Barry Scheck explained that wrongful convictions overturned through DNA testing "represent just the tip of a very deep and disturbing iceberg of cases," since DNA testing is possible in just a fraction of cases.[21] In order to conduct DNA testing, some type of biological evidence must be available: blood, semen, hair, saliva. The types of crimes that involve DNA evidence are typically violent murders and rapes – not robberies, burglaries or other crimes. Yet, there's no reason to believe that eyewitness misidentifications don't occur in these other types of crimes as well. When post-conviction DNA testing is not an option, innocent defendants who have been wrongfully convicted may never have the chance to prove their innocence. The best way to address the problem is to reform the system so that misidentifications don't happen in the first place.

The advent of DNA exonerations renewed interest in employing psychological research to inform eyewitness identification practice. Criminal justice professionals, lawmakers and advocates turned their attention to police lineup procedures. Lineup procedures are commonly used nationwide, but practices often vary from one police department to the next. No nationwide set of legal rules of procedure exist, and in fact, many law enforcement offices do not have any written guidelines for eyewitness identification procedures.

In 1999, the National Institute of Justice published a working guide for law enforcement based on the recommendations of the "Technical Working Group for Eyewitness Evidence."[22] The group was assembled to establish recommendations for identification procedures and included psychology professors as well as chiefs of police, defense attorneys, prosecutors and others. The guide represented a major effort to unite what the psychologists had learned about memory with the practical needs of law enforcement to use eyewitness evidence as an investigative tool.

Since its publication, a number of bar associations, police groups and state commissions have conducted their own consideration of these reforms. In 2004, the American Bar Association issued its "Best Practices for Promoting Accuracy of Eyewitness Identification Procedures," and resolved that federal, state and local governments should be urged to adopt a series of principles incorporating scientific advances in research into their identification practices.[23]

In 2006, the International Association of Chiefs of Police published its "Training Key on Eyewitness Identification," which concludes that "of all investigative procedures employed by police in

criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work. Proper precautions must be followed by officers if they are to use eyewitness identifications effectively and accurately."[24]

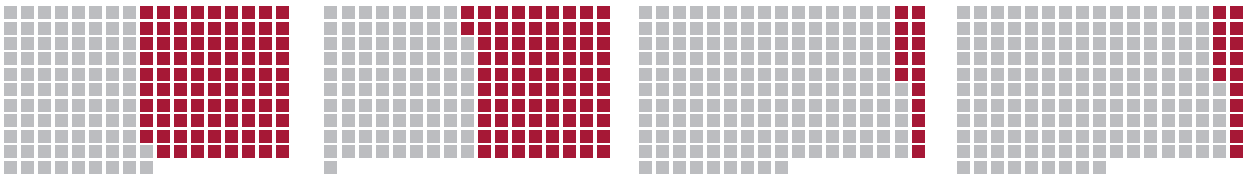
The momentum for systemic reform reached state policymakers as well, and key recommendations were adopted by jurisdictions around the nation. In 2001, New Jersey became the first state in the nation to adopt the eyewitness identification reforms endorsed by the Innocence Project. In 2005, the Wisconsin Attorney General's Office followed suit and issued a similar set of policies for statewide use. Most recently, in 2008, North Carolina enacted perhaps the most comprehensive piece of eyewitness identification reform legislation in the nation. Jurisdictions across the country, from Minneapolis, Minnesota, to Denver, Colorado, have also voluntarily implemented the recommended reforms.

These procedural reforms do not address all the possible complications with eyewitness identification, including event-related factors like limited opportunity to view the perpetrator, cross-racial identifications, the presence of a weapon, etc. For those cases, scientists specializing in eyewitness identification can be called as expert witnesses to explain to the jury what scientific research shows about the impact of event-related factors on eyewitness identifications.

The following reforms are procedure-based improvements which can be made by law enforcement to enhance identification accuracy. They are based on 30 years of comprehensive social science research as well as the recommendations of police, prosecutors, judges and national justice organizations, including the National Institute of Justice and the American Bar Association.

Eyewitness misidentification as the central cause

(based on 179 eyewitness misidentification cases in the first 239 DNA exonerations)



50%
just eyewitness misidentification

48%
with unvalidated or improper forensic science

8%
with false confession or admission

8%
with informant testimony

The percentages will not add up to 100 because more than one cause may contribute to a wrongful conviction in any given case.

1. Composition of the lineup

From its origins in mid-19th century England, the lineup was developed to be fair and to follow certain basic guidelines. As an alternative to suggestive in-court identification procedures, the identity of the suspect in lineup procedures would not be revealed to the witness. Just as in lineups today, a sufficient number of fillers were presented to the witness and assembled so that no one lineup member would stand out.[25] Since then, research has identified a number of other specific suggestions to reduce suggestibility and increase accuracy in the lineup:[26]

- There should be only one suspect included in the lineup.
- In addition to the suspected perpetrator, at least five fillers should be included in a photo array and at least four fillers should be included in a physical lineup.
- Fillers should be selected that resemble the description of the perpetrator provided by the witness, including the witness's description of significant features (i.e. face, weight, and build) and any unique or unusual features (i.e. scar, tattoo, etc). However, they must look different enough to be discernible from each other.
- If the witness previously viewed a photo array or physical lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the photo array or live lineup in which the suspect participates should be different from the fillers used in any prior identification procedures.
- In the case of a photo array, the photograph of the suspect should be contemporary, resemble his or her appearance at the time of the offense, and not unduly stand out when compared with the photos of the fillers.
- If there are multiple witnesses, the suspect should be placed in a different position in the live lineup and/or photo array for each witness. Witnesses should be segregated before, during, and after every lineup procedure and instructed not to discuss the procedure with each other.
- During an identification procedure, no writings or information concerning any previous arrest, indictment or conviction of the suspect, or any information connecting the suspect with the offense, should be visible or made known to the witness.

2. Blind administration

"Blind administration" is based on a basic tenet of scientific research: Test subjects are influenced by the expectations of those who perform the tests – or in the case of an identification procedure, witnesses are influenced by the expectation of the lineup administrator.[27] Therefore, the person conducting the lineup should not know who is a suspect and who is a filler. When the administrator doesn't know who the suspect is, she can't lead the witness towards that person or steer the witness away from the other lineup members, even subconsciously. Also, the witness can't look to the administrator for guidance or affirmation, which could taint the identification and artificially boost the witness's confidence in his selection.

In some police departments, finding an officer who is not involved in the case to conduct the lineup blind presents a special challenge. The jurisdiction may be small and there may not be any officers available who aren't familiar with the case and the suspect. For these jurisdictions, law enforcement agencies have found a way to allow the detective on the case to conduct the lineup "blinded" by using the "folder system."

The "folder system" is a simple, cost-effective way to allow for blind administration even when the only officer available is someone involved with the case.[28] Using one suspect photo, five filler photos and ten folders, the officer encloses each photograph in a separate folder (leaving four folders empty) and then shuffles the folders before giving them to the witness. The officer positions herself in such a way that she cannot see inside the folders when the witness opens them. This way, the officer can't know which lineup member the witness is viewing at any given time. The officer should also tell the witness that she doesn't know which folder contains the suspect. The four extra folders will not contain any photos and will serve as dummy folders so that the witness doesn't know which folder holds the last photo.

The folder system assumes that lineup members are viewed sequentially, rather than simultaneously. See page 21 for more information about sequential presentation. All other recommendations for lineups should be used in conjunction with sequential presentation.

"Although no criminal justice system is perfect and mistakes do occur, even with the most well-intentioned efforts of law enforcement, enacting these eyewitness identification reforms would significantly improve the quality of prosecutions in our state. The consequences of failing to do so are too grave."

Georgia State Rep. Stephanie Stuckey Benfield,
The Atlanta Journal-Constitution *January 25, 2007*

3. Witness instruction

Providing instructions to witnesses helps them understand the role of the identification procedure in the investigative process. It is also helps decrease the pressure witnesses may feel to make a selection, which has been shown to contribute to misidentifications. Paramount in protecting the innocent is the instruction that the perpetrator "may or may not be present" in the photo array, physical lineup or show-up. Studies have shown that when witnesses are warned that the perpetrator may not be present they are less likely to choose an innocent suspect.[29] Witnesses should also be assured that the investigation will continue even if they don't make a selection. Instructions can prevent witnesses from simply identifying the lineup member that looks most like the perpetrator, and they can prevent witnesses from feeling pressured to make a selection.

The instructions recommended by the Innocence Project are based on social science research and have been endorsed in whole or in part by the National Institute of Justice, the Wisconsin Department of Justice and the New Jersey Attorney General's office. These instructions should be given prior to the identification procedure in physical lineups, show-ups, or photo arrays:

- Describe the photo array to the witness only as a "collection of photographs."
- Instruct the witness that the person who committed the crime may or may not be present in the identification procedure.
- Assure the witness that regardless of whether he makes an identification, the police will continue to investigate the case.

- Instruct the witness that the procedure requires the investigator to ask the eyewitness to state, in her own words, how certain she is of any identification.
- Advise the witness that the administrator does not know who the suspect is.
- Direct the witness not to discuss the identification procedure or its results with other witnesses involved in the case and avoid contact with the media.

"It's just a reality that eyewitness identifications are made under situations of incredible duress, when people are trying to recall what someone looked like, and they can be more or less accurate. So what we're trying to do with these guidelines is to give law enforcement a way in which we think we can at least narrow the risk that a mistake will be made."

Former New Jersey Attorney General John J. Farmer: The New York Times, *July 21, 2001*

4. Confidence statements

Decades of solid empirical evidence shows that juries assume confident eyewitnesses are reliable eyewitnesses.[30] Social scientists know better. Gary Wells explains: "If you pick someone out of a lineup, you begin rehearsing that person's face. You start thinking back to the crime scene and thinking of the person you picked out of the lineup. You begin to boost your own memory without realizing it."[31] Even the process of preparing for a trial and cross-examination has been shown to enhance witness's confidence.[32] Juries hear witnesses' certainty at trial, but often don't hear about their hesitancy during the identification procedure.

A witness may say, "That looks like the guy," or "I think that's her," which is not the same as making a positive identification. Whatever the witness's exact words, the lineup administrator should ask for and document a clear statement from the witness about his or her level of confidence immediately upon identifying the suspect. Also, the witness should not be provided with any information about the selection until after the confidence statement has been documented, though even then feedback is discouraged. This simple reform is critical to giving jurors a complete understanding of the eyewitness evidence.

5. Electronic recording of the identification procedure

Identification procedures are a crucial part of any investigation, and any aspect of the procedure could be a critical issue at trial. The precise communications, both verbal and non-verbal, made by both the eyewitness and administrator are important to juror understanding of the identification's accuracy. Therefore, law enforcement must keep track of exactly what transpired.

The best way to document the procedure is by video recording. Creating an electronic record of the identification procedure aids law enforcement and prosecutors, since a fair and just identification procedure that is preserved for the record can withstand challenges raised at trial. Video records of well-implemented identification procedures, lineups and show-ups, can also be used to train other law enforcement officers. A video record can help demonstrate the proper

technique for filler selection, blind administration, the provision of instructions and other best practices.

Finally, the knowledge that these types of procedures are being recorded boosts public confidence in the criminal justice process. Simply put, creating an electronic record of eyewitness identification procedures provides everyone with the best evidence of what specifically transpired.

Ideally, the lineup or show-up will be electronically recorded using video equipment. If that's impossible, the lineup administrator should make an audio recording. If neither a video nor audio record is possible, the lineup administrator should document, in writing, the reasons why and provide a detailed written record of the identification procedure. Regardless of the type of record, the entire identification procedure should be recorded for each witness, beginning when the witness enters the identification room (or other venue) and ending when the witness has completed the procedure and left the identification room.

6. Sequential presentation (optional)

In a typical photo array or physical lineup, the lineup members are presented simultaneously – all at once. This format increases the tendency for witnesses to make a relative judgment, comparing each lineup member to the rest and ultimately choosing the one that most resembles the perpetrator. A sequential presentation – each lineup member presented one at a time – helps counter this tendency and encourages the witness to compare each individual to his own memory. When paired with a blind administrator, this reform has been proven to greatly minimize the likelihood of misidentifications.[33] When sequential presentations are conducted without a blind administrator, however, researchers caution that they may create an increased risk of misidentification.[34] A large body of peer-reviewed research – and the real-world experience of police departments nationwide – corroborate the value of blind-sequential lineups. Section five provides information about jurisdictions that have successfully implemented the sequential reform.

However, research has also shown that sequential presentations lead to fewer correct identifications.[35] The reduction in correct identifications is not nearly as significant as the reduction in incorrect identifications. Still, some are hesitant to employ sequential procedures. The Innocence Project endorses the sequential reform but has refrained from including it in the current eyewitness identification reform package so that questions surrounding sequential presentation do not stall the adoption of the other eyewitness identification reforms. Given the tremendous value of the other reforms discussed (both individually and together), the Innocence Project suggests that the reform package be considered separately from sequential presentation.

Meanwhile, in collaboration with specific jurisdictions, the Innocence Project supports field studies of sequential and simultaneous lineup procedures that use solid scientific methodology. Hopefully, the research will provide sound data and resolve questions about sequential versus simultaneous lineups. The Innocence Project can provide more information about sequential lineups, including studies, protocol, law enforcement references and other information upon request.

REFORMS AT WORK

DNA exonerations have led eyewitness identification reform into the 21st century. While concerns about misidentifications had been raised by social science researchers years earlier, lawmakers were slow to respond until DNA exonerations brought the problem to the public's awareness.

In 2001, New Jersey became the first state to officially adopt the reforms recommended by the National Institute of Justice (NIJ), including eyewitness instructions, proper lineup composition, confidence statements and documenting the identification procedure. In addition, New Jersey's Attorney General mandated the use of blind administration and sequential presentation of lineup members. This reform package, endorsed by the Innocence Project, became known as "blind-sequential." The state adopted these reforms soon after the exoneration of McKinley Cromedy, whose wrongful conviction was based almost entirely on eyewitness identification evidence.

"Of the police officers I trained, the vast majority said that they had never received formal training in eyewitness identification procedures and that their departments do not have eyewitness evidence policies."

Lieutenant Kenneth Patenaude:
Public Law, Policy, and Ethics Journal, *2006*

In 2005, the Wisconsin Attorney General's decision to recommend blind-sequential procedures came after the high-profile exoneration of a man who was wrongfully convicted based, in part, on eyewitness misidentification. The reforms are not mandatory in Wisconsin, yet hundreds of law enforcement agencies statewide have adopted them.

Several cases highlighting the criminal justice system's shortcomings motivated the state of North Carolina to adopt the reform package in 2008. The state has exonerated five people through DNA testing whose cases involved eyewitness misidentification – most recently, Dwayne Allen Dail who served 18 years of a life sentence. The North Carolina statute has been the most comprehensive to date. It mandates the blind-sequential procedure, proper filler selection, comprehensive witness instructions, confidence statements; provides for training of law enforcement officers; and offers possible legal remedies in cases where the law enforcement agency failed to comply with these policies.

These three states offer the broadest statewide policies, but other states have also taken action. Study committees to recommend guidelines for eyewitness identification practices have been created in Georgia, Vermont and West Virginia. West Virginia also adopted several key reforms. Georgia's study committee found a lack of statewide standards and, based on the committee's

Timeline of Eyewitness Identification Reform

1999	**The National Institute of Justice** publishes "Eyewitness Evidence: A Guide for Law Enforcement," based on the recommendations of the "Technical Working Group for Eyewitness Evidence."
2001	**New Jersey** becomes the first state in the nation to adopt comprehensive eyewitness identification reform with the "blind-sequential" reform package.
2004	**American Bar Association** issues "Best Practices for Promoting Accuracy of Eyewitness Identification Procedures."
2005	**Wisconsin** Attorney General's Office recommends use of blind-sequential identification procedures and mandates that law enforcement agencies adopt written policies on eyewitness identification.
2007	**Vermont** creates a task force to explore eyewitness identification reforms and issue recommendations. **West Virginia** mandates that law enforcement agencies follow specific policies for eyewitness identification procedures and creates a task force to study and identify additional best practices for eyewitness identification. **Maryland** mandates that all of its law enforcement agencies adopt written policies for eyewitness identification procedures that comply with National Institute of Justice standards.
2008	**North Carolina** passes the broadest eyewitness identification law to date by mandating blind-sequential policies, providing for training of law enforcement officers, and also offering possible legal remedies in cases where the law enforcement agency failed to comply with these policies. **Georgia** implements statewide training program for officers on identification procedures based on the recommendations of the Georgia study committee created in 2007. **The Commission on the Accreditation of Law Enforcement Agencies** adopts eyewitness identification standards, which require that agencies seeking accreditation create written procedures for conducting eyewitness lineup and show-up procedures.
2009	**The Dallas Police Department** announces that it will implement blind-sequential procedures. Dallas County has had more DNA exonerations than any other county in the nation and most states. Fourteen people whose wrongful convictions involved eyewitness misidentification in Dallas County have been proven innocent through DNA testing. The Dallas Police Department joins **a growing number of jurisdictions nationwide** that are voluntarily adopting blind-sequential eyewitness identification procedures.

recommendations, the state decided to implement statewide training for officers on identification procedures. (A 2007 study by the Georgia Innocence Project found that 82% of law enforcement agencies had no policies for eyewitness identification procedures.)[36] Maryland mandated that all of its law enforcement agencies adopt written policies for eyewitness identification practices that are in compliance with NIJ standards.

Smaller jurisdictions – counties, cities and towns – are also addressing eyewitness misidentification by voluntarily implementing the reforms. The Dallas Police Department announced in January 2009 that it will implement blind-sequential procedures. Fourteen people whose wrongful convictions involved eyewitness misidentification have been exonerated through DNA testing in Dallas County.

Implementing the Reforms

The in-the-field experiences of jurisdictions across the country in states such as North Carolina and New Jersey; cities like Denver and Minneapolis; and in small towns such as Northampton, Massachusetts, have shown that blind-sequential procedures can be adapted in a variety of settings – urban, suburban, small-town and rural. The experiences of these jurisdictions resolutely demonstrate the benefits and feasibility of adopting eyewitness identification reforms. Law enforcement agencies have cited a number of advantages: increased confidence in the accuracy of the identification, uniformity of procedures, consistent training program for new officers about eyewitness evidence, and ultimately, eyewitness evidence that holds up better in court.

Lieutenant Kenneth Patenaude, a former member of the NIJ's Technical Working Group for Eyewitness Evidence, trains investigators, attorneys and judges about best practices for eyewitness identification procedures. In an article titled "Police Identification Procedures: A Time for Change" Patenaude writes, "Of the police officers I trained, the vast majority said that they had never received formal training in eyewitness identification procedures and that their departments do not have eyewitness evidence policies."[37] Patenaude introduced blind-sequential procedures to his own department in Northampton, Massachusetts, and found that the investigators became more confident in the evidence and more comfortable with the procedures than they had been under the old policies.[38]

Ramsey County, Minnesota, which includes sections of the Minneapolis-St. Paul metropolitan area, implemented blind-sequential procedures in 2006 after a year-long pilot project showed that the reforms are effective. Initially, the Ramsey County officers had concerns. They feared that using an independent, or blind, administrator might delay criminal investigations, so the pilot project included an alternative "blinded" method, (such as the folder system), in which the investigator does not know which photo the witness is viewing at any given time and informs the witness of this fact. At the end of the trial year, most investigators said they preferred using a blind administrator and rarely needed the alternative method. Officers also feared that the new procedures would limit positive identifications, but they found that, in practice, the fear was unfounded.[39]

Ramsey County officials write in Police Chief magazine, "After one year, the results were clear: investigators who used this method found it not only workable but no more difficult to apply than the traditional method. There were no associated administrative difficulties or additional overtime costs. However, there was an unexpected benefit: most investigators involved in the pilot came to prefer the new method and felt more confident in the eyewitness identifications that resulted."[40]

Darrel Stephens, former Chief of the Charlotte-Mecklenburg Police Department in North Carolina, helped institute the blind-sequential reforms statewide in 2008. Stephens says, "The investigators, as they've talked about and worked on these different procedures and understood the research, have become much better detectives. They're able to come to court and say this is the procedure we used, and here's why we used it, and here are the steps that we took the eyewitness through."[41]

Towards a Nationwide Movement

Eyewitness identification reform has come a long way in the past decade, since the NIJ released its recommendations in 1999. The states, counties, cities and towns that have adopted procedural reforms have demonstrated to the nation that they can increase the accuracy of eyewitness evidence easily and at low cost. While the reforms have faced resistance from some lawmakers – an eyewitness identification reform bill has passed the California Legislature three times only to be vetoed by the Governor repeatedly, and bills in Kentucky and New Mexico that received broad, bipartisan support were not cleared after consideration two years in a row – the Innocence Project continues working closely with legislators nationwide to pass meaningful eyewitness identification reform.

The Innocence Project is also dedicated to working with police, prosecutors and judges to help them understand how eyewitness identification procedures can be made more accurate and reliable, as evidenced by scientific research and in-the-field, practical experience. Police and prosecutors can use the reforms to improve the reliability of criminal investigations, strengthen cases against the guilty and reduce misidentification of innocent people. Judges can educate juries about the risk of misidentification when procedures have not been conducted properly. In order to prevent wrongful convictions based on eyewitness misidentification, every area of the criminal justice system must work together.

Eyewitnesses provide indispensable evidence in many police investigations, leading to the apprehension and conviction of countless actual perpetrators of crime. But when they make mistakes, the consequences can be drastic. Eyewitness misidentification can set in motion a chain of irrevocable errors from the police precinct to the courtroom – deterring police officers from discovering the real perpetrator, raising criminal charges against an innocent person, and compelling the jury toward a guilty verdict. It is the criminal justice system's responsibility to help eyewitnesses make the most accurate identification possible. Eyewitnesses, law enforcement and the public at large, will benefit from identification procedures that are designed according to scientific research and conducted consistently nationwide.

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APPENDIX A

Wrongful Convictions Cases Later Overturned Through DNA Testing Which Involved Eyewitness Misidentification

NAME	STATE	CONVICTION YEAR	EXONERATION YEAR
Abdal, Habib Wahir	NY	1983	1999
Adams, Kenneth	IL	1978	1996
Alejandro, Gilbert	TX	1990	1994
Alexander, Richard	IN	1998	2001
Anderson, Marvin	VA	1982	2002
Atkins, Herman	CA	1988	2000
Avery, Steven	WI	1985	2003
Barnes, Steven	NY	1989	2009
Bauer, Chester	MT	1983	1997
Beaver, Antonio	MO	1997	2007
Bibbins, Gene	LA	1987	2003
Blair, Michael	TX	1994	2008
Bloodsworth, Kirk	MD	1985	1993
Booker, Donte L.	OH	1987	2005
Boquete, Orlando	FL	1983	2006
Bostic, Larry	FL	1989	2007
Bravo, Mark Diaz	CA	1990	1994
Briscoe, Johnny	MO	1983	2006
Brison, Dale	PA	1991	1994
Bromgard, Jimmy Ray	MT	1987	2002
Brown, Danny	OH	1982	2001
Brown, Dennis	LA	1985	2005
Bryson, David Johns	OK	1983	2003
Bullock, Ronnie	IL	1984	1994
Buntin, Harold	IN	1986	2005
Burnette, Victor	VA	1979	2009
Butler, A.B.	TX	1983	2000
Byrd, Kevin	TX	1985	1997
Cage, Dean	IL	1996	2008
Callace, Leonard	NY	1987	1992
Capozzi, Anthony	NY	1987	2007
Chalmers, Terry	NY	1987	1995

NAME	STATE	CONVICTION YEAR	EXONERATION YEAR
Charles, Clyde	LA	1982	1999
Charles, Ulysses Rodriguez	MA	1984	2001
Chatman, Charles	TX	1981	2008
Clark, Robert	GA	1982	2005
Coco, Allen	LA	1997	2006
Cole, Timothy	TX	1986	2009
Cotton, Ronald	NC	1985, 1987	1995
Cowans, Stephan	MA	1998	2004
Cromedy, McKinley	NJ	1994	1999
Crotzer, Alan	FL	1981	2006
Dabbs, Charles	NY	1984	1991
Dail, Dwayne Allen	NC	1989	2007
Davidson, Willie	VA	1981	2005
Davis, Cody	FL	2006	2007
Davis, Dewey	WV	1987	1995
Davis, Gerald	WV	1986	1995
Daye, Frederick	CA	1984	1994
Dedge, Wilton	FL	1982, 1984	2004
Diaz, Luis	FL	1980	2005
Dillon, William	FL	1981	2008
Dixon, John	NJ	1991	2001
Dominguez, Alejandro	IL	1990	2002
Doswell, Thomas	PA	1986	2005
Dotson, Gary	IL	1979	1989
Durham, Timothy	OK	1993	1997
Echols, Douglas	GA	1987	2002
Elkins, Clarence	OH	1999	2005
Erby, Lonnie	MO	1986	2003
Evans, Michael	IL	1977	2003
Fappiano, Scott	NY	1985	2006
Fears, Joseph Jr.	OH	1984	2009
Fountain, Wiley	TX	1986	2003
Fuller, Larry	TX	1981	2007
Giles, James Curtis	TX	1983	2007
Godschalk, Bruce	PA	1987	2002
Gonzalez, Hector	NY	1996	2002
Good, Donald Wayne	TX	1984	2004
Goodman, Bruce Dallas	UT	1986	2004
Gossett, Andrew	TX	2000	2007
Gray, David A.	IL	1978	1999
Gray, Paula	IL	1978	2002
Green, Anthony Michael	OH	1988	2001

NAME	STATE	CONVICTION YEAR	EXONERATION YEAR
Green, Edward	DC	1989	1990
Green, Kevin	CA	1980	1996
Gregory, William	KY	1993	2000
Harris, William	WV	1987	1995
Harrison, Clarence	GA	1987	2004
Hatchett, Nathaniel	MI	1998	2008
Hayes, Travis	LA	1998	2007
Hicks, Anthony	WI	1991	1997
Holdren, Larry	WV	1984	2000
Holland, Dana	IL	1995	2003
Honaker, Edward	VA	1985	1994
Hunt, Darryl	NC	1985	2004
Jackson, Willie	LA	1989	2006
Jean, Lesly	NC	1982	2001
Jimerson, Verneal	IL	1985	1996
Johnson, Albert	CA	1992	2002
Johnson, Arthur	MS	1993	2008
Johnson, Calvin	GA	1983	1999
Johnson, Larry	MO	1984	2002
Johnson, Richard	IL	1992	1996
Johnson, Rickie	LA	1983	2008
Jones, Joe	KS	1986	1992
Jones, Ronald	IL	1989	1999
Kotler, Kerry	NY	1982	1992
Lavernia, Carlos	TX	1985	2000
Lindsey, Johnnie	TX	1983, 1985	2009
Lyons, Marcus	IL	1988	2007
Mahan, Dale	AL	1986	1998
Mahan, Ronnie	AL	1986	1998
Maher, Dennis	MA	1984	2003
Matthews, Ryan	LA	1999	2004
Mayes, Larry	IN	1982	2001
McClendon, Robert	OH	1991	2008
McGee, Arvin	OK	1989	2002
McGowan, Thomas	TX	1985, 1986	2008
McMillan, Clark	TN	1980	2002
McSherry, Leonard	CA	1988	2001
Mercer, Michael	NY	1992	2003
Miller, Billy Wayne	TX	1984	2006
Miller, Jerry	IL	1982	2007
Miller, Neil	MA	1990	2000

NAME	STATE	CONVICTION YEAR	EXONERATION YEAR
Mitchell, Marvin	MA	1990	1997
Mitchell, Perry	SC	1984	1998
Moon, Brandon	TX	1988	2005
Moto, Vincent	PA	1987	1996
Nesmith, Willie	PA	1982	2000
Newton, Alan	NY	1985	2006
Ochoa, James	CA	2005	2006
O'Donnell, James	NY	1998	2000
Ortiz, Victor	NY	1984	1996
Pendleton, Marlon	IL	1996	2006
Phillips, Steven	TX	1982, 1983	2008
Pierce, Jeffrey	OK	1986	2001
Piszczek, Brian	OH	1991	1994
Pope, David Shawn	TX	1986	2001
Powell, Anthony	MA	1992	2004
Rachell, Ricardo	TX	2003	2009
Rainge, Willie	IL	1978	1996
Reynolds, Donald	IL	1988	1997
Robinson, Anthony	TX	1987	2000
Rodriguez, George	TX	1987	2005
Rose, Peter	CA	1995	2005
Ruffin, Julius	VA	1982	2003
Salazar, Ben	TX	1992	1997
Sarsfield, Eric	MA	1987	2000
Scott, Samuel	GA	1987	2002
Scruggs, Dwayne	IN	1986	1993
Shephard, David	NJ	1984	1995
Smith, Billy James	TX	1987	2006
Smith, Frank Lee	FL	1986	2000
Smith, Walter	OH	1986	1996
Snyder, Walter	VA	1986	1993
Sutherlin, David Brian	MN	1985	2002
Sutton, Josiah	TX	1999	2004
Taylor, Ronald Gene	TX	1995	2008
Terry, Paul	IL	1977	2003
Thomas, Victor Larue	TX	1986	2002
Thurman, Phillip Leon	VA	1985	2005
Tillman, James C.	CT	1989	2006
Toney, Steven	MO	1983	1996
Turner, Keith E.	TX	1983	2005
Velasquez, Eduardo	MA	1988	2001

NAME	STATE	CONVICTION YEAR	EXONERATION YEAR
Villasana, Armand	MO	1999	2000
Waller, James	TX	1983	2007
Waller, Patrick	TX	1992	2008
Wallis, Gregory	TX	1989	2007
Wardell, Billy	IL	1988	1997
Waters, Leo	NC	1982	2005
Webb, Mark	TX	1987	2001
Webb, Thomas	OK	1983	1996
Webb, Troy	VA	1989	1996
Webster, Bernard	MD	1983	2002
White, John Jerome	GA	1980	2007
Whitfield, Arthur Lee	VA	1982	2004
Whitley, Drew	PA	1989	2006
Williams, Dennis	IL	1978	1996
Williams, Michael Anthony	LA	1981	2005
Williams, Willie "Pete"	GA	1985	2007
Willis, Calvin	LA	1982	2003
Willis, John	IL	1992, 1993	1999
Woodall, Glen	WV	1987	1992
Woods, Anthony D.	MO	1984	2005
Wyniemko, Kenneth	MI	1994	2003
Yarris, Nicholas	PA	1982	2003
Youngblood, Larry	AZ	1985	2000

APPENDIX B

Model Legislation, 2009 State Legislative Sessions

An Act to Improve the Accuracy of Eyewitness Identifications

INNOCENCE PROJECT

Benjamin N. Cardozo School of Law, Yeshiva University

MODEL LEGISLATION, 2009 STATE LEGISLATIVE SESSIONS

AN ACT TO IMPROVE THE ACCURACY OF EYEWITNESS IDENTIFICATIONS

SECTION 1. LEGISLATIVE INTENT

The legislature finds that:

A. The goal of a police investigation is to apprehend the person or persons responsible for the commission of a crime;

B. Mistaken eyewitness identification has been shown to have contributed to the wrongful conviction in more than 75% of the nation's 239 exonerations;

C. Over the past 30 years, a large body of peer-reviewed, scientific research and practice has emerged showing that simple systemic changes in administering eyewitness identification procedures can greatly improve the accuracy of those identifications;

D. Policies and procedures to improve the accuracy of eyewitness identifications such as those recommended by the U.S. National Institute of Justice, the American Bar Association, the New Jersey Office of the Attorney General, the Wisconsin Office of the Attorney General, the California Commission on the Fair Administration of Justice, and the North Carolina Actual Innocence Commission are readily available;

E. More accurate eyewitness identifications increase the ability of police and prosecutors to convict the guilty and protect the innocent;

F. The integrity of [State's] criminal justice process is enhanced by adherence to best practices in evidence gathering; and

G. [State] will benefit from the improvement of the accuracy of eyewitness identifications.

SECTION 2: DEFINITIONS

For the purposes of this Act:

A. "Administrator" means the person conducting the photo or live lineup;

B. "Suspect" means the person believed by law enforcement to be the possible perpetrator of the crime;

C. "Blind" means the administrator does not know the identity of the suspect;

D. "Blinded" means the administrator may know who the suspect is, but does not know which lineup member is being viewed by the eyewitness;

E. "Eyewitness" means a person who observes another person at or near the scene of an offense;

F. "Filler" means either a person or a photograph of a person who is not suspected of an offense and is included in an identification procedure;

G. "Identification procedure" means a live lineup, a photo lineup, or a showup.

H. "Live lineup" means an identification procedure in which a group of persons, including the suspected perpetrator of an offense and other persons not suspected of the offense, is displayed to an eyewitness for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator;

I. "Photo lineup" means an identification procedure in which an array of photographs, including a photograph of the suspected perpetrator of an offense and additional photographs of other persons not suspected of the offense, is displayed to an eyewitness either in hard copy form or via computer for the purpose of determining whether the eyewitness identifies the suspect as the perpetrator; and

J. "Showup" means an identification procedure in which an eyewitness is presented with a single suspect for the purpose of determining whether the eyewitness identifies this individual as the perpetrator.

SECTION 3. EYEWITNESS IDENTIFICATION PROCEDURES

Any criminal justice entity conducting eyewitness identification procedures shall adopt specific procedures for conducting photo and live lineups that comply with the following requirements:

A. Prior to a photo or live lineup, law enforcement shall record as complete a description as possible of the perpetrator provided by the eyewitness, in the eyewitness's own words. This statement shall also include information regarding the conditions under which the eyewitness observed the perpetrator including location, time, distance, obstructions, lighting, weather conditions, and other impairments, including but not limited to alcohol, drugs, stress, and visual/auditory disabilities. The eyewitness shall be also be asked if he needs glasses or contact lenses and whether he was wearing them at the time of the offense. The administrator shall note whether the eyewitness was wearing glasses or contact lenses at the time of the identification procedure.

B. Unless impracticable, a blind or blinded administrator shall conduct the live or photo lineup;

C. When it is impracticable for a blind administrator to conduct the eyewitness identification procedure, the investigator shall state in writing the reason therefore;

D. The eyewitness shall be instructed, without other eyewitnesses present, prior to any live or photo lineup that:

1. The perpetrator may or may not be among the persons in the identification procedure or, in the case of a showup, may or may not be the person that is presented to the eyewitness;
2. The administrator does not know who the perpetrator is;
3. The eyewitness should not feel compelled to make an identification;
4. The investigation will continue whether or not an identification is made;

5. The procedure requires the administrator to ask the eyewitness to state, in his own words, how certain he is of any identification; and

6. The eyewitness is not to discuss the identification procedure or its results with other eyewitnesses involved in the case and should not speak with the media;

E. In a photo lineup, the photograph of the suspect shall be contemporary and shall resemble his or her appearance at the time of the offense;

F. In a photo lineup, there shall be no characteristics of the photographs themselves or the background context in which they are placed which shall make any of the photographs unduly stand out;

G. A photo or live lineup shall be composed so that the fillers generally resemble the eyewitness's description of the perpetrator, while ensuring that the suspect does not unduly stand out from the fillers;

H. In a photo or live lineup, fillers shall possess the following characteristics:

1. All fillers selected shall resemble the eyewitness's description of the perpetrator in significant features (i.e., face, weight, build, skin tone, etc.), including any unique or unusual features (i.e., scar, tattoo, etc.);

2. At least five fillers shall be included in a photo lineup, in addition to the suspect;

3. At least four fillers shall be included in a live lineup, in addition to the suspect; and

4. If the eyewitness has previously viewed a photo lineup or live lineup in connection with the identification of another person suspected of involvement in the offense, the fillers in the lineup in which the instant suspect participates shall be different from the fillers used in any prior lineups;

I. If there are multiple eyewitnesses:

1. Each eyewitness shall view photo or live lineups separately;

2. The suspect shall be placed in a different position in the live lineup and/or photo lineup for each eyewitness; and

3. The eyewitnesses shall not be permitted to communicate with each other until all identification procedures have been completed;

J. In an identification procedure, no writings or information concerning the instant or any previous arrest, indictment or conviction of the suspect shall be visible or made known to the eyewitness;

K. In a live lineup, any identifying actions, such as speech, gestures or other movements, shall be performed by all lineup participants;

L. In a live lineup, all lineup participants must be out of view of the eyewitness prior to the identification procedure;

M. When there are multiple suspects, each identification procedure shall include only one suspect;

N. Nothing shall be said to the eyewitness regarding the suspect's position in the photo or live lineup;

O. Nothing shall be said to the eyewitness that might influence the eyewitness's identification of any particular lineup member;

P. If the eyewitness makes an identification, the administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given identification procedure is the perpetrator;

Q. If the eyewitness identifies a person as the perpetrator, the eyewitness shall not be provided any information concerning such person before the administrator obtains the eyewitness's confidence statement about the selection;

R. A record of the identification procedure shall be made that includes all identification and non-identification results obtained during the identification procedures, signed by the eyewitnesses;

S. Efforts shall be made to perform a live or photo lineup instead of a showup.

1. Showups shall only be performed using a live suspect and in exigent circumstances that require the immediate display of a suspect to an eyewitness.

2. In the event of the administration of a showup procedure:

a. A full and detailed description of the perpetrator shall be provided by the eyewitness before the eyewitness observes the suspect. This statement shall also include information regarding the conditions under which the eyewitness observed the perpetrator including location, time, distance, obstructions, lighting, weather conditions, and other impairments, including but not limited to alcohol, drugs, stress, and visual/auditory disabilities. The eyewitness shall be also be asked if he needs glasses or contact lenses and whether he was wearing them at the time of the offense. The administrator shall note whether the eyewitness was wearing glasses or contact lenses at the time of the identification procedure.

b. The eyewitness shall be transported to a neutral, non-law enforcement location where the suspect is being detained for the purposes of a showup procedure.

c. Eyewitnesses shall be provided with instructions prior to the showup, including:

i. The perpetrator may or may not be among the persons in the identification procedure or, in the case of a showup, may or may not be the person that is presented to the eyewitness;

ii. The eyewitness should not feel compelled to make an identification;

iii. The investigation will continue whether or not an identification is made;

iv. The procedure requires the administrator to ask the eyewitness to state, in his own words, how certain he is of any identification; and

v. The eyewitness is not to discuss the identification procedure or its results with other eyewitnesses involved in the case and should not speak with the media;

d. Measures shall be taken by investigators at the showup, including the administrator of the showup, to reduce potentially damaging or prejudicial inferences that may be drawn by the eyewitness, including:

i. Refraining from suggesting, through statements or non-verbal conduct, that the suspect is or may be the perpetrator of the crime;

ii. Removing the suspect from a squad car; and

iii. When practicable, removing handcuffs from the suspect;

e. If there are multiple eyewitnesses, only one eyewitness at a time shall participate in the showup procedure:

i. Only one of the eyewitnesses shall be present at the location of the showup procedure;

ii. If a positive identification is made, and an arrest is justified, additional eyewitnesses shall be shown live or photo lineups; and

f. If there are multiple suspects, these suspects shall be separated and subjected to separate showup procedures.

g. If the eyewitness makes an identification, the administrator shall seek and document a clear statement from the eyewitness, at the time of the identification and in the eyewitness's own words, as to the eyewitness's confidence level that the person identified in a given identification procedure is the perpetrator.

T. Unless impracticable, a video record of the identification procedure shall be made that includes the following information:

1. All identification and non-identification results obtained during the identification procedures, signed by the eyewitnesses, including the eyewitness's confidence statements;

2. The names of all persons present at the identification procedure;

3. The date and time of the identification procedure;

4. In a photo or live lineup, any eyewitness identification(s) of (a) filler(s); and

5. In a photo or live lineup, the names of the lineup members and other relevant identifying information, and the sources of all photographs or persons used in the lineup;

U. If a video record of the lineup is impracticable, the officer conducting the lineup shall document the reason therefore, and an audio record of the identification procedure shall be made which includes the items specified in Section 3, clause T, subclauses 1-5 of this Act. The audio record shall be supplemented by all of the photographs used in a photo lineup, and photographs of all of the individuals used in a live lineup or showup; and

V. If both a video and audio record of the lineup are impracticable, the officer conducting the lineup shall document in writing the reason therefore, and a written record of the lineup shall be made which includes the items specified in Section 3, clause T, subclauses 1-5 of this Act. The written record shall be supplemented by all of the photographs used in a photo lineup, and photographs of all of the individuals used in a live lineup or showup.

SECTION 4. REMEDIES FOR NONCOMPLIANCE

For any photo or live lineup, or showup procedure that was administered after the date upon which Section 3 of this Act took effect:

A. Evidence of a failure to comply with any of the provisions of this statute shall be considered by trial courts in adjudicating motions to suppress eyewitness identification;

B. Evidence of a failure to comply with any of the provisions of this statute shall be admissible in support of claims of eyewitness misidentification as long as such evidence is otherwise admissible; and

C. When evidence of a failure to comply with any of the provisions of this statute has been presented at trial, the jury shall be instructed that it may consider credible evidence of noncompliance in determining the reliability of eyewitness identifications.

SECTION 5. TRAINING OF LAW ENFORCEMENT OFFICERS

The Department of Public Safety shall create, administer and conduct training programs for law enforcement officers and recruits regarding the methods, technical aspects and scientific findings regarding the basis of the eyewitness identification practices and procedures referenced in this Act.

SECTION 6. EFFECTIVE DATE

This Act shall take effect on [date].

THE INNOCENCE PROJECT

The Innocence Project was founded in 1992 by Barry C. Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law at Yeshiva University to assist prisoners who could be proven innocent through DNA testing. To date, over 230 people in the United States have been exonerated by DNA testing, including 17 who served time on death row. These people served an average of 12 years in prison before exoneration and release. The Innocence Project's full-time staff attorneys and Cardozo clinic students provide direct representation or critical assistance in most of these cases. The Innocence Project's groundbreaking use of DNA technology to free innocent people has provided irrefutable proof that wrongful convictions are not isolated or rare events but instead arise from systemic defects. Now an independent nonprofit organization closely affiliated with Cardozo School of Law at Yeshiva University, the Innocence Project's mission is nothing less than to free the staggering numbers of innocent people who remain incarcerated and to bring substantive reform to the system responsible for their unjust imprisonment.

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