

INNOCENCE PROJECT

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To: Members of the Connecticut Judiciary Committee
From: Ezekiel Edwards, Staff Attorney/Mayer Brown Eyewitness Fellow
Re: Support for Eyewitness Identification Reforms (SB 1240)

I submit this written testimony to express the Innocence Project's **support for eyewitness identification reforms** (SB 1240). The written testimony is supplemented with additional support materials included in the accompanying packet.

The Innocence Project was established in 1992 at the Benjamin N. Cardozo School of Law in New York City to exonerate the innocent through post-conviction DNA testing. Since its introduction, forensic DNA testing has proven the innocence of 198 people who had been wrongly convicted of serious crimes.

The Innocence Project regards each exoneration as a learning opportunity, a chance to review where the system failed and identify factually-supported policies and procedures to minimize the possibility that such errors will impair justice again in the future.

EYEWITNESS IDENTIFICATION REFORMS

Mistaken eyewitness identification is the single greatest cause of wrongful conviction, contributing to 75% of the 198 wrongful convictions proven through DNA testing – including Mr. James Tillman's case. Simply put, nobody benefits from a misidentification.

The police are led away from the real perpetrator and instead focus their investigation on an innocent person; even if the police re-focus their case on the real perpetrator, the eyewitness who had previously identified an innocent person is "burned" and thus of no use to the prosecutor; the witness – often a victim – must grapple with having wrongfully accused someone; and the public remains at the mercy of the real perpetrator, who is left at liberty to commit further crime. In fact, **the only person who benefits from a false identification is the real perpetrator of a crime.**

The DNA exonerations, combined with three decades of social science research, have demonstrated that the standard lineup procedures empirically increase the chance of a misidentification. Traditional eyewitness procedures can also reinforce or inflate witness's confidence in their wrong choices despite their initial hesitance.

In 1999, the Department of Justice undertook the problem of misidentification, forming the "Technical Working Group for Eyewitness Evidence," composed of membership from the

scientific, legal and criminal justice communities, which sought to identify best practices supported by rigorous social science research. The group recommended a number of areas for study and examination, including:

- The use of a ‘blind administrator,’ namely an individual who does not know the identity of the suspect, to prevent intentional or inadvertent cues to the witness;
- showing line-up members one at a time (sequentially) versus showing members all at the same time (simultaneously);
- the proper composition of lineup fillers;
- providing instructions to the eyewitness, including the directive that the suspect may or may not be in the lineup;
- obtaining a confidence statement at the close of the procedure; and
- recording the entire procedure from start to finish.

Senate Bill 1240 would require Connecticut’s law enforcement community to adopt most of these scientifically proven best practices – thus improving how eyewitness identifications are conducted in the state.

Eyewitness Identification Reforms Are Good Law Enforcement

Scientific research has consistently shown that test subjects are influenced by the expectations of those who perform the tests. The idea that test administrators’ expectations are communicated either openly or indirectly to test subjects, who then modify their behavior in response, has been corroborated by over forty years of general social science research.¹

A prominent meta-analysis conducted at Harvard University, which combined the findings of 345 previous studies, **concluded that in the absence of a blind administrator, individuals typically tailor their responses to meet the expectations of the administrator.**²

Integral to any scientific inquiry, blind administrators are employed in a range of research, from clinical trials in medical and pharmaceutical research to social psychology experiments. Blind administrators are important for eyewitness identification procedures, as eyewitness memories are easily manipulated by outside influences.

In traditional (non-blind) identification procedures, the administrator knows who the suspect is and may inadvertently transmit this knowledge to the eyewitness. Specifically, a non-blind administrator may provide subtle influences that:

¹ e.g. Adair, J. G., & Epstein, J. S. (1968). Verbal cues in the mediation of experimenter bias. *Psychological Reports*, 22, 1045–1053; Aronson, E., Ellsworth, P. C., Carlsmith, J. M., & Gonzales, M. H. (1990). On the avoidance of bias. *Methods of Research in Social Psychology* (2nd ed., pp. 292–314). New York: McGraw-Hill.

² Rosenthal, R., & Rubin, D. B. (1978). Interpersonal expectancy effects: The first 345 studies. *Behavioral and Brain Sciences*, 3, 377-386.

- Lead the eyewitness towards a suspect;
- Steer the eyewitness away from non-suspect (filler) members; and/or
- Provide post-identification feedback to the eyewitness, which influences the eyewitness's confidence in his selection, thereby affecting his testimony at trial.

The eyewitnesses themselves may seek clues from the administrator of the identification procedure. A recent experiment that sought to examine the decision-making processes of eyewitness test subjects concluded that “witnesses were more likely to make decisions consistent with lineup administrator expectations when the level of contact between the administrator and the witness was high than when it was low.”³

Eyewitness identification administrators' power of influence is similarly documented in a number of other studies.⁴ In fact, the damage of a non-blind administrator does not necessarily contain itself to one eyewitness; one study indicates that information gleaned from one eyewitness by the administrator during an identification procedure also affects the identification choice of the second eyewitness if the same administrator conducts both identification procedures.⁵

Iowa State University Psychology Professor Gary Wells, a leading authority on eyewitness identification and the Director of Social Sciences at the Institute of Forensic Science and Public Policy in Greensboro, North Carolina provides another example of how non-blind administration can negatively impact an investigation. If, for instance, an eyewitness viewing a photo array or live lineup states that “number three is...well it looks like number three,” the identification procedure's administrator has discretion to decide whether a positive identification was actually made.

Understandably, this discretion, according to Wells, tends to favor a selection of the police suspect when the administrator is not blind – even if the police suspect is not the actual perpetrator of the crime.⁶

Advocating for the use of a blind administrator does not call into question the integrity of law enforcement; rather it acknowledges a commonly-held precept in the scientific community and applies it to the eyewitness procedure.

³ Haw, R. M. & Fisher, R. P. (2004). Effects of administrator-witness contact on eyewitness identification accuracy. *Journal of Applied Psychology, 89*, 1106-1112.

⁴ e.g. Garrioch, L., & Brimacombe, C. A. E. (2001). Lineup administrators' expectations: Their impact on eyewitness confidence. *Law and Human Behavior, 25*, 299-315.; Phillips, M. R., McAuliff, B. D., Bull Kovera, M., & Cutler, B. L. (1999). Double-blind photoarray administration as a safeguard against investigator bias. *Journal of Applied Psychology, 84*, 940-951.

⁵ Bradfield-Douglass, A., Smith, C., & Fraser-Thill, R. (2005). A problem with double-blind photospread procedures: photospread administrators use one eyewitness's confidence to influence the identification behavior of a second eyewitness. *Law and Human Behavior, 29*, 543-562.

⁶ Wells, G.L. (2006) An important note on field studies of eyewitness identification from lineups: Filler identifications are 'Conditional Proxy Measures.' Available at http://www.psychology.iastate.edu/faculty/gwells/Filler_identifications_as_conditional_proxy_measures.pdf

Proper Composition of the Lineup

Senate Bill 1240 requires that the lineup fillers generally fit the description of the perpetrator and in such a way that the suspect does not unduly stand out. Research has shown that non-suspect photographs and/or live lineup members (fillers) should be selected based on their *resemblance to the description provided by the witness*.

When the innocent person is the only person to fit the description provided by the eyewitness, the confidence level of the eyewitness in his selection of the innocent person is greater than when other photo array or lineup members also fit the eyewitness's description. Therefore, when photo array or live lineup members are selected that match the eyewitness's description, high rates of accurate identifications can be maintained while reducing false identifications characterized by an inflated sense of confidence.⁷

Instructions to the Eyewitness

"Instructions" are a series of statements issued by the lineup administrator to the eyewitness that deter the eyewitness from feeling compelled to make a selection. They also prevent the eyewitness from looking to the lineup administrator for feedback during the identification procedure. Senate Bill 1240 requires that the police provide the witness with the instructions prior to the identification procedure, including:

- The person who committed the crime may or may not be present; and
- the witness should not feel compelled to make an identification.

The first instruction is one of seven recommended by the Department of Justice's "Guide for Law Enforcement". The Innocence Project would be glad to provide references to the additional studies that demonstrate the value of such instructions.

Obtaining a Confidence Statement

Immediately following the lineup procedure, the eyewitness should provide a statement, in his own words, that articulates the level of confidence he has in the identification made. This is one of procedures mandated by Senate Bill 1240.

Research has consistently shown that the eyewitness's *degree of confidence* in his identification at trial is the single largest factor affecting whether observers believe that the identification is accurate.⁸ In other words, the more confidence the eyewitness exudes, the more likely a juror will believe that the identification he made is an accurate one.

⁷ Wells, G. L., Seelau, E. P., & Rydell, S. (1993) On the selection of distractors for eyewitness lineups. *Journal of Applied Psychology*, 78, 835-844.

⁸ Bradfield, A. L. & Wells, G. L. (2000). The perceived validity of eyewitness identification testimony: A test of the five Biggers criteria, *Law and Human Behavior*, 24, 581-594. and Wells, G.L., Small, M., Penrod, S., Malpass, R.S., Fulero, S.M., & Brimacombe, C.A.E. (1998). Eyewitness identification procedures: Recommendations for lineups and photospreads, *Law and Human Behavior*, 22, 603-647. (Surveys and studies show that people believe strong relation exists between eyewitness confidence and accuracy).



Yet research has also shown that a witness's confidence in his identification is malleable, and susceptible to influences and suggestion, which can be unintended and unrecognized.⁹ Typically, these changes to witness memory occur after the administrator provides some form of feedback, either confirming or disconfirming, to the eyewitness after the identification has been made.

When confirming feedback is provided to an eyewitness who has incorrectly identified an innocent person, the feedback can be dangerous. A study that examined the effects of feedback found that post-identification feedback produced "strong effects" on the witnesses' reports of a range of factors, from overall certainty to clarity of memory.¹⁰

Reforms Embraced by Other Jurisdictions

Despite scientific and stakeholder support, widespread adoption of eyewitness identification reform is just beginning to present itself. The state of New Jersey; Boston and Northampton, MA; Madison, WI; Winston Salem and Burlington, NC; Hennepin County and Ramsey County, MN (Minneapolis-St. Paul); Santa Clara County, CA; and Virginia Beach, VA have voluntarily implemented a range of recommended reforms as standard procedures. The states of North Carolina and Wisconsin promulgated guidelines and trainings, strongly encouraging local jurisdictions to incorporate suggested reforms.

States that have implemented these reforms were at first resistant, but after police were provided the opportunity to learn more about them, receive training about how to properly implement them, and given the opportunity to participate in the formation of the specific adaptations of the reforms in their jurisdictions, the result has been widespread acceptance and appreciation for the eyewitness identification procedures that increase the accuracy of their criminal investigations, and the effectiveness of their criminal prosecutions.

A dozen states – California, Connecticut, Georgia, Maryland, Massachusetts, New Mexico, New York, North Carolina, Oregon, Rhode Island, Texas, Vermont and West Virginia -- have introduced legislation this year to address mistaken eyewitness identifications.

THANK YOU AND CONTACT INFORMATION

I thank you for the opportunity to speak to you about these important issues today. We believe that implementation of eyewitness identification reforms will serve the interests of law enforcement, while promising the fair administration of justice. Should you have any additional questions about this issue, please do not hesitate to contact me at (212) 364-5349 or zedwards@innocenceproject.org.

⁹ See, e.g., Bradfield, A. L., Wells, G. L., & Olson, E. A. (2002). The damaging effect of confirming feedback on the relation between eyewitness certainty and identification accuracy. *Journal of Applied Psychology*, 87, 112-120. and Wright, D. B., & Skagerberg, E. M. (in press, due Feb/Mar 2007). Post-identification feedback affects real eyewitnesses. *Psychological Science*.

¹⁰ Wells & Bradfield (1998).