

INNOCENCE PROJECT

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Attachment Com. File

TESTIMONY OF STEPHEN SALOOM, POLICY DIRECTOR

BEFORE THE CONNECTICUT JOINT JUDICIARY COMMITTEE

RE: RAISED BILL 5832

March 20, 2008

Chairman McDonald, Chairman Lawlor, and Members of the Judiciary Committee,

My name is Stephen Saloom and I am the policy director at the Innocence Project, affiliated with Cardozo School of Law at Yeshiva University in New York City. Thank you for allowing me to testify today in support of R.B. 5832.

To date, there have been 214 wrongful convictions proven by DNA evidence in the United States. At least one mistaken eyewitness identification contributed to the wrongful conviction in a full 75% of those cases. The harm done by an eyewitness misidentification, however, is by no means limited to the wrongfully convicted. When an eyewitness misidentifies someone, police are also led away from the real perpetrator, and instead focus their investigation on an innocent person. What's more, if the police do again focus their case on the real perpetrator, the eyewitness who had previously identified an innocent person is "burned," and thus of far less use in the criminal prosecution. Simply put, nobody – not the police, prosecutors, judge, jury, or indeed, the public at large – benefits from a misidentification. The only person who benefits is the real perpetrator of a crime.

The good news is that over the past 30 years, a large body of peer-reviewed research and practice has been developed, showing us how simple reforms to the eyewitness identification

process can greatly reduce the likelihood of a misidentification. In the wake of leadership from the National Institute of Justice at the U.S. Department of Justice¹, The American Bar Association², The Police Executive Research Forum³, and others, states across the nation have taken significant steps toward eyewitness identification reform. Last year alone, the Georgia⁴, North Carolina⁵, California⁶, West Virginia⁷, and Vermont⁸ legislatures passed legislation to advance reform. Enactment of R.B. 5832 would ensure that Connecticut's eyewitness identification procedures foster eyewitness identifications that are as accurate as possible.

Misidentification is the Largest Contributor to Wrongful Convictions Proven by DNA Evidence

The Innocence Project seeks to turn the tragedy of wrongful convictions proven by DNA evidence into opportunities by examining the underlying cases to determine how, despite a person's innocence, the police, prosecution, jury and judge found him guilty of a serious crime he did not commit. Of all of the causes of wrongful conviction we have identified, mistaken eyewitness identification has proven the most prevalent. In fact, in many wrongful convictions, it was not just one but multiple eyewitnesses who mistakenly identified an innocent person.

Brandon Moon, for example, an Army veteran and college student who was released in 2005 from the Texas prison system after serving 17 years for a rape that DNA proved he did not commit, was misidentified by *five* witnesses. Dennis Maher, who served nineteen years for a

¹ Eyewitness Evidence, A Guide For Law Enforcement, United States Department of Justice (Oct. 1999).

² See ACHIEVING JUSTICE: FREEING THE INNOCENT AND CONVICTING THE GUILTY at 23-45 (Paul Giannelli et. al. eds., 2006).

³ See JAMES M. CRONIN ET. AL., PROMOTING EFFECTIVE HOMICIDE INVESTIGATIONS at 35-60 (2007).

⁴ H.R. 352, 2007 Leg. (Ga. 2007).

⁵ H.B. 1625, 2007 Leg. (N.C. 2007).

⁶ S.B. 756, 2007 Leg. (Cal. 2007).

⁷ S.B. 82, 2007 Leg. (W.Va. 2007).

⁸ S.B. 6, 2007 Leg. (Vt. 2007).

series of rapes in Massachusetts, was misidentified by three different victims. Connecticut, of course, is not immune to this problem; this committee is well aware that James Tillman, the only individual in Connecticut whose wrongful conviction was proven through DNA testing, was himself the victim of a mistaken identification.

Even before the exoneration of Mr. Tillman, Connecticut's Supreme Court acknowledged the fallibility of eyewitness evidence in *Connecticut v. Ledbetter*,⁹ strongly encouraging police and prosecutor mitigation of the inherent risk of identification procedures. It is our understanding that as a result of the *Ledbetter* decision, the Connecticut Chief State's Attorney's Law Enforcement Council recommended instructing police officers to provide eyewitnesses with specific instructions, to record eyewitness statements made at the time of identification, and to document and preserve as much of the procedure as possible.

The Connecticut law enforcement community is to be commended for taking these important steps toward improving the accuracy of eyewitness identifications in Connecticut. Given the proven potential of reform, however, it would be entirely appropriate for the Connecticut Legislature to require that – in the interests of justice and the public safety generally – eyewitness reforms become standard procedure.

Mistaken Eyewitness Identifications Harm Crime Victims

Jennifer Thompson and Penny Bernstein are two victims of serious crimes who have become advocates for eyewitness identification reform. In their separate cases, each identified an innocent person as the person who had in fact raped them. By the time of trial, each had been

⁹ *Conn. v. Ledbetter*, 275 Conn. 534 (2005).

convinced that they had identified the real perpetrator, and upon the convictions both thought that their ordeals had ended, and that justice had been done in their cases. Even when post-conviction DNA testing proved the innocence of their separate assailants, these women had trouble believing that these innocents were not the real perpetrators. In each case it was the fact that the crime scene DNA was matched to the real perpetrators that enabled them to overcome their belief, and appreciate that their memories – which still existed even after acceptance (Jennifer Thompson says that to this day when she re-lives the rape in her dreams it is the face of Ronald Cotton, the exonerated man, that she sees) – had been corrupted.

For these victims of rape, it was difficult to accept and horrifying to learn that their memories of the actual perpetrator were wrong and that because of their misidentifications, innocent people were sent to prison. Yet they turned that horror into a demand for reform. As a result of their experiences, Thompson and Beernstein are now strong advocates for the eyewitness identification reforms being adopted in jurisdictions around the country.

Victims are not the only witnesses proven to – despite their best efforts – misidentify perpetrators. Research demonstrates that memories and eyewitness identifications are far more fallible than we realize. This only underscores the need for eyewitness identification procedures demonstrated to minimize the possibility of misidentifications while maintaining the ability to properly identify perpetrators, as this reform package does. For every time a witness makes a misidentification, the entire system suffers. This is an outcome that no one wants – except for those who actually committed the crimes.

As noted earlier, erroneous eyewitness identifications unintentionally distract police and prosecutors' attention from the true culprit, mislead witnesses, undercut their credibility, and

force innocent people to defend their innocence and possibly go to prison for crimes they did not commit. It is therefore in the interests of both justice and safety that eyewitness identification reforms be enacted.

Eyewitness Protocols Should be Grounded in Best Practices & Social Science Research, Not Simply Traditional Practice

Traditional eyewitness identification protocol, by virtue of its failure to heed the lessons of eyewitness identification research, maintains a situation ripe for perpetuating eyewitness misidentifications. What's more, confirmatory feedback from the officer administering the lineup (who typically knows which lineup member is considered by police to be the suspect) often reinforces those misidentifications, thus increasing the eyewitness's confidence in that pick, despite what is often initial equivocation, and can have strong effects on the witnesses' reports of a range of factors, from overall certainty to clarity of memory.

The good news is that the same social science research over the past three decades that has consistently confirmed the fallibility of eyewitness identifications, and the unwitting contamination of witness recall through many standard eyewitness identification procedures, can also provide remedies for this urgent problem.

In 1999, the National Institute of Justice (NIJ) at the U.S. Department of Justice undertook the problem of misidentification, forming the "Technical Working Group for Eyewitness Evidence," composed of broad and expert membership from the scientific, legal and criminal justice communities. This Working Group sought to identify best eyewitness identification practices supported by rigorous social science research. It was nearly ten years

ago that the group unanimously supported a number of practices:

- Properly identifying lineup “fillers” (i.e. lineup members other than the suspect);
- 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.¹⁰

It also 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; and
- Showing line-up members one at a time (sequentially) versus showing members all at the same time (simultaneously).¹¹

Since Their Publication, Department of Justice Guidelines Bolstered by Scientific Support

The guidelines devised by the Working Group nearly a decade ago pointed all interested parties in the direction of needed reforms, which are those embodied in R.B. 5832. What’s more, the large body of scientific research that supported these reforms at the time has only been bolstered by a significant amount of further peer-reviewed study on every aspect of these reforms. Simply put, today there is solid research and experiential support for all of these reforms, nearly all of which are included in R.B. 5832. I have provided the Committee with a Resource Guide that cites many of the major studies that demonstrate the scientific basis of support for these reforms. The testimony that follows summarily describes those research findings.

1. Blind Administration

The idea that test administrators’ expectations are communicated either openly or

¹⁰ Eyewitness Evidence, A Guide For Law Enforcement, supra at note 1.

¹¹ Ibid.

indirectly to test subjects, who then modify their behavior in response, has been corroborated by over forty years of general social science research.¹² 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.*¹³

An eyewitness identification procedure is itself a “test” of the eyewitnesses memory, and thus, in harmony with the research on test administrators generally, eyewitnesses themselves may intentionally or subconsciously be influenced by an identification procedure administrator. 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.”¹⁴

Advocating for the use of a blind or “blinded”¹⁵ administrator does not call into question the integrity of law enforcement; rather it acknowledges a fundamental principle of properly conducted experiments and applies it to the eyewitness procedure. In short, that fundamental principle is that a person administering an experiment – or eyewitness identification – should not have any predisposition about what the subject’s response should be. This eliminates the

¹² 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.

¹³ Rosenthal, R., & Rubin, D. B. (1978). Interpersonal expectancy effects: The first 345 studies. *Behavioral and Brain Sciences*, 3, 377-386.

¹⁴ Haw, R. M. & Fisher, R. P. (2004). Effects of administrator-witness contact on eyewitness identification accuracy. *Journal of Applied Psychology*, 89, 1106-1112.

¹⁵ Whereas a “blind” administrator does not in fact know who the suspect is within a lineup, a “blinded” administrator is one who knows who the suspect in the lineup is, but is prevented from knowing which person the witness is viewing at any given time during the administration of the lineup. The Innocence Project can provide the Committee with information about simple methods to “blind” an administrator.

possibility – proven to exist in the eyewitness identification process – that a witness could seek, and an administrator might inadvertently provide, cues as to the expected response.

2. *Instructing 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. Among the NIJ’s “Guide for Law Enforcement” recommendations regarding instructions to the eyewitness are:

- Instruct each witness without other persons present.
- Describe the mug book 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 mug book.
- Assure the witness that regardless of whether he/she makes an identification, the police will continue to investigate the case.
- Instruct the witness that the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification.¹⁶

Indeed, as the Connecticut Supreme Court indicated in *Ledbetter*, “the risks of failing to warn the witness that the perpetrator may or may not be present in the identification procedure, we deem it appropriate to exercise our supervisory authority to require an instruction to the jury in those cases where the identification procedure administrator fails to provide such a warning, unless no significant risk of misidentification exists.”¹⁷ Much of the court’s decision was predicated on research findings that provide uncontested support for instructions to the eyewitness. The Innocence Project would be glad to provide references to the additional studies

¹⁶*Eyewitness Evidence, A Guide For Law Enforcement*, *supra* at note 1., p. 32.

¹⁷*Ledbetter*, 275 A.2d at 316.

that demonstrate the value of such instructions.

It is also worth noting that where there is a blind, or blinded, officer administering an identification procedure, informing the witness of that fact during the instruction process keeps the witness from the observed tendency (referred to in the “blind administrator” section, above) to seek clues about whom to select from that administrator.

3. *Obtaining a Confidence Statement*

At the time of the identification, the eyewitness should provide a statement, in his own words, that articulates the level of confidence he has in the identification made.

Research has consistently shown that the eyewitness’s *degree of confidence* in his identification at trial is the single largest factor affecting whether those listening to the eyewitness believe that the identification is accurate.¹⁸ In other words, the more confidence the eyewitness exudes at trial, the more likely a juror will believe that the identification is an accurate one – regardless of the actual accuracy of that identification.

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.¹⁹

Typically, these changes to witness memory occur over time, and especially after the administrator provides some form of confirming feedback to the eyewitness after the

¹⁸ 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).

¹⁹ 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*.

identification has been made.

Confirming feedback provided to an eyewitness who has incorrectly identified an innocent person 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.²⁰

4. Proper Composition of the Lineup

Suspect photographs should be selected that do not bring unreasonable attention to that person among the others. Non-suspect photographs and/or live lineup members (fillers) should be selected based on their *resemblance to the description provided by the witness* – as opposed to their resemblance to the police suspect. Note, however, that within this requirement, the suspect should not unduly stand out from among the other fillers.

When the innocent person is the only person to fit the description provided by the eyewitness, not only does that person stand out within the lineup, but 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.²¹

5. Documenting the Identification Procedure

²⁰ Wells & Bradfield (1998).

²¹ Wells, G. L., Seelau, E. P., & Rydell, S.(1993) On the selection of distractors for eyewitness lineups. *Journal of Applied Psychology*, 78,, 835-844.

The National Institute of Justice's *Eyewitness Evidence: A Guide for Law Enforcement* recommends that "Whenever conducting an identification procedure, the investigator shall preserve the outcome of the procedure by documenting any identification or non-identification results obtained from the witness."²² It further noted that "Preparing a complete and accurate record of the outcome of the identification procedure improves the strength and credibility of the identification or non-identification results obtained from the witness. This record can be a critical document in the investigation and any subsequent court proceedings."²³

Sequential Presentation of Lineup Members

The Innocence Project supports the sequential presentation of lineup members.²⁴ *We do not, however, recommend that this legislation seek to address that issue.*

The reason the Innocence Project recommends against legislating the "sequential" reform despite its institutional support of the practice is that this reform has been the subject of controversy, whereas the other reforms in the legislation are not. In too many instances, we have seen the controversy over sequential prevent jurisdictions from clearly examining and embracing the other eyewitness reforms. While many jurisdictions have proceeded with reform despite resistance to sequential, and some, such as North Carolina, have proceeded to legislate for sequential into practice as recently as last year, it seems wisest for Connecticut to embrace the other, generally agreed-upon reforms in this legislation, enable jurisdictions statewide to become comfortable with them, and then re-visit the question of whether or not to adopt sequential lineup

²² *Eyewitness Evidence, A Guide For Law Enforcement, supra* at note 1, p. 38

²³ *Ibid.*

²⁴ We only recommend sequential when the administrator of the eyewitness identification procedure is blind or blinded. When blind administration is impracticable, the traditional simultaneous presentation of lineup members should be used.

presentations.

Since I have raised the issue of this “controversy” over sequential, I should note for the Committee that it was largely driven by a 2006 report by the lawyer for the Chicago Police Department Superintendent, which alleged – contrary to a strong body of peer-reviewed research - to demonstrate through field studies in Illinois that sequential presentation of lineup members was actually a less accurate form of eyewitness procedure. That report was widely publicized, and was said by opponents of reform to prove that the research on this issue was wrong as proven by these Illinois field studies. Such assertions are unfounded, as esteemed field study researchers (including one Nobel Prize winner) reviewed the Illinois study and report and concluded that the research underlying the study’s conclusions had been poorly designed. In relevant part, the authors concluded that the Illinois study’s fundamental design flaw “has devastating consequences for assessing the real-world implications of this particular study.”²⁵

For reasons other than its value as a reform, the Innocence Project strongly urges the Legislature to leave this reform for future, not present, implementation in Connecticut.

The Experiences of Those Jurisdictions that have Adopted Reforms

These changes have proven to be successful across the country. The states of New Jersey and North Carolina (authorities attached), large cities such as Minneapolis/St.Paul, MN, and Madison, WI, medium sized jurisdictions such as Santa Clara, CA, and small towns such as Northampton, MA (protocol attached), have implemented these practices and have found that they have improved their quality of their eyewitness identifications, thus strengthening

²⁵ Schacter, D., et. al. (2007). Policy Reform: Studying Eyewitness Investigations in the Field. *Law and Human Behavior*. (Attached.)

prosecutions and reducing the likelihood of convicting the innocent.

In the states of North Carolina and New Jersey, for instance, all jurisdictions were directed to promulgate their own policies and procedures for implementing these reforms, and, after an exhaustive review of research and practitioner experience, opted to implement the “blind-sequential” reform package. Both states reported that, while there was initial resistance from many about the need for and value of such reforms, after police were provided the opportunity to learn more about them, receive training about how to properly implement them and the opportunity to participate in the formation of the specific adaptations of the reforms in their jurisdictions, the result has been that initial concerns have been replaced with acceptance and appreciation for the eyewitness identification procedures that increase the accuracy of their criminal investigations and the effectiveness of their criminal prosecutions – and, by virtue of employing the most accurate eyewitness procedures available, strengthen the persuasive and probative value of eyewitness identifications before, during and after trial.²⁶

We would be glad to put you in contact with persons involved with the implementation of these reforms in any of the jurisdictions that I discussed if you would like to speak with them about their experiences.

Conclusion

The strong body of peer-reviewed research, jurisdictional success, a history of legislative action, and the support of national law enforcement and legal organizations for eyewitness identification reform all commend the public safety leadership that the Connecticut Legislature

²⁶ The North Carolina initiative described above flowed from a working group led by their Chief Justice. It is worth noting, however, that the North Carolina Legislature chose to *require* the implementation of such reforms when – after the Duke Lacrosse case and other incidents – it became clear that guidelines were not enough.

can provide with passage of R.B. 5832. Adoption thereof will enhance the ability to swiftly and surely convict offenders - and avoid being misled into pursuing others, or worse, convicting the innocent – in Connecticut. Ultimately, implementation of eyewitness identification protocols identified in R.B. 5832 will serve the interests of law enforcement, promise the fair administration of justice, and enhance the public safety.

To use a phrase I learned when I worked at the Connecticut Legislature many years ago, “It’s a good bill, and it ought to pass.”

Thank you for the opportunity to testify today. I would be glad to answer any questions.