OFFICE OF HAWAIIAN AFFAIRS
Legislative Testimony

SB2304 SD2
RELATING TO CRIME
House Committee on Judiciary

March 20, 2012 2:00 p.m. Room 325

The Office of Hawaiian Affairs (OHA) **SUPPORTS** SB2304 SD2, which would implement changes to eyewitness identification procedures.

While drafting OHA's 2010 report, "The Disparate Treatment of Native Hawaiians in the Criminal Justice System," OHA also partially funded the Hawai`i Innocence Project. This project is part of a national effort to free innocent persons who have been wrongly convicted. Alvin Jardine, the first success story from the Hawai`i Innocence Project, is an OHA beneficiary. Unfortunately, Mr. Jardine was imprisoned in part based on evidence from a faulty eyewitness.

To prevent wrongfully convicted innocents like Mr. Jardine from having to suffer, it is imperative to implement this improved eyewitness procedure. Simply put, this bill is about justice. This bill will help prevent the conviction and imprisonment of innocent persons.

Therefore, The OHA Administration will recommend that the OHA Board of Trustees urge the committee to PASS SB2304 SD2. Mahalo for the opportunity to testify on this important measure.

Testimony of the Office of the Public Defender, State of Hawaii,
to the House Committee on Judiciary

March 20, 2012

S.B. No. 2304 SD2: RELATING TO THE RIGHTS OF THE ACCUSED

Chair Keith-Agaran and Members of the Committee:

We are in support of S.B. No. 2304 SD2 which seeks to reform the procedures under which eyewitnesses to crimes are asked to identify the perpetrators. Studies have shown that current procedures used by law enforcement authorities, including those used by the Honolulu Police Department, are in need of reform to reduce the chances of erroneous eyewitness identifications.

In the recent U.S. Supreme Court case of Perry v. New Hampshire, 132 S. Ct. 716 (January 11, 2012), the majority opinion quoted the case of United States v. Wade, 388 U.S. 218 (1967), in setting forth the dangers involved in police-arranged eyewitness identification procedures:

> "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."

388 U.S. at 228.

Moreover, Justice Sotomayor, in her dissenting opinion in Perry, boldly wrote:

> The empirical evidence demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country. Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification. Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy . . . .

132 S. Ct. at 738-39.

Thus, it is clear that the United States Supreme Court recognizes the danger that is inherent in eyewitness identification. Law enforcement officials, however, are resistant to change and cling to long-held, disproved beliefs that the procedures being used to identify criminal suspects remain accurate. Legislation is therefore necessary to reform police department procedures to improve the accuracy and reliability of eyewitness identifications.

Thank for the opportunity to comment on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY

CITY AND COUNTY OF HONOLULU

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THE HONORABLE GILBER S.C. KEITH-AGARAN, CHAIR
SENATE COMMITTEE ON JUDICIARY
Twenty-sixth State Legislature
Regular Session of 2012
State of Hawai`i

March 20, 2012

RE: S.B. 2304, S.D. 2; RELATING TO RIGHTS OF THE ACCUSED.

Chair Keith-Agaran, Vice Chair Rhoads and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney, City and County of Honolulu, submits the following testimony in opposition to Senate Bill 2304, Senate Draft 2.

While the Department agrees that Hawai'i's law enforcement agencies should maintain high standards and protocol for eyewitness identifications, it is also our understanding that they already do so. Moreover, it is our understanding that their protocol is based on local caselaw and evidentiary requirements, as well as on national law enforcement developments and discourse; thus, this protocol is constantly evolving. To codify a specific list of procedures would be overly restrictive, discount the value of assessing a "totality of circumstances," and detract from the flexibility needed for law enforcement to adjust to unique circumstances in each case.

Recent caselaw stresses that courts (and juries) must carefully consider the totality of circumstances in any case, before drawing conclusions regarding any eyewitness identification. State v. Mason (App., Feb 24, 2012) Insofar as S.B. 2304, S.D. 2, proposes to codify a "checklist" of procedures for eyewitness identifications, it also creates an implication that if any of the checklist items are missing, then the eyewitness identification is somehow substandard or unreliable. Current caselaw on this subject does not endorse a checklist-approach.

It is our understanding that Hawai'i's police officers are continuously trained to conduct eyewitness identifications in accordance with the latest developments in local caselaw, and are thus aware of what our courts and juries deem (in)appropriate or (un)reliable evidence. This gives them the guidance and flexibility to adjust procedures, and act appropriately under the broad spectrum of cirucmstances that they encounter from day to day.

When a case goes to trial, there are numerous legal safeguards and procedures to protect a defendant's rights, and juries are made well-aware that eyewitness identifications are not determinative. In fact, juries are repeatedly told to consider all of the facts and circumstances of the case--including the potential biases and room for human error--by both the prosecution and defense. Their review cannot be based on a simple checklist of "do's and don't's," but is rather a careful examination of all evidence put forth by all parties, as a "totality of circumstances."

Moreover, our courts have ample discretion to suppress an eyewitness identification if it is "impermissably or unnecessarily suggestive"; this also requires a judge to carefully consider the totality of the circumstances, as clearly illustrated in last month's ICA decision. Id. As a further safeguard measure, there are at at least three major Hawai'i Supreme Court cases--with one more currently pending--regarding the appropriateness of specific jury instructions regarding eyewitness identifications.

If the Legislature were to codify and impose a specific list of procedures for conducting eyewitness identifications, the natural tendency for the public--and for juries--would be to consider the "checklist" rather than a true consideration of the totality of circumstances. To keep the focus on a totality of circumstances, eyewitness identification procedures must be allowed to develop administratively, based on well-established and still-evolving caselaw developed by our courts and juries.

For all of the reasons noted above, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes S.B. 2304, S.D. 2. Thank for you the opportunity to testify on this matter.

POLICE DEPARTMENT

CITY AND COUNTY OF HONOLULU

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OUR REFERENCE RC-NTK

March 20, 2012

The Honorable Gilbert S. C. Keith-Agaran, Chair
and Members
Committee on Judiciary
House of Representative
State Capitol
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran and Members:

Subject: Senate Bill No. 2304, S.D. 2, Relating to Rights of the Accused

I am Richard C. Robinson, Major of the Criminal Investigation Division of the Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department opposes the passage of Senate Bill No. 2304, S. D. 2, Relating to Rights of the Accused. The Honolulu Police Department adheres to nearly all of the recommendations of the National Institute of Justice for eyewitness evidence. Currently, the Honolulu Police Department is working with the Department of the Prosecuting Attorney to thoroughly evaluate the feasibility of implementing blind sequential lineups in this jurisdiction.

We believe that the determination of the validity of any evidence is best handled by the Judiciary. Further, the Judiciary is able to more quickly adapt to changes in court procedures and/or rules of evidence that may result from the judicial findings of higher courts.

The Honolulu Police Department urges you to oppose Senate Bill No. 2304, S. D. 2, Relating to Rights of the Accused.

Thank you for the opportunity to testify.

Sincerely,

for

RICHARD C. ROBINSON, Major
Criminal Investigation Division

APPROVED:

for

LOUIS M. KEALOHA
Chief of Police

Serving and Protecting With Aloha

William P. Kenoi
Mayor

Harry S. Kubojiri
Police Chief

Paul K. Ferreira
Deputy Police Chief

County of Hawai`i

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March 19, 2012

Representative Gilbert S.C. Keith-Agaran
Chairperson and Committee Members
Committee Judiciary
415 South Beretania Street, Room 325
Honolulu, Hawai`i 96813

Re: Senate Bill 2304 Relating to the Rights of the Accused

Dear Representative Keith-Agaran:

The Hawai`i Police Department opposes passage of Senate Bill 2304, relating to the Rights of the Accused. The intent of the appropriation is to require new eyewitness identification procedures.

Our Department is opposed to this measure as it places certain restrictive burdens upon our department with its limited Human Resources. Although we do comply with most of the Bill's requirements as set to, we would be hard pressed to ensure that the officer showing a photo lineup to the witness, is unaware as to which person is suspected as being the perpetrator. Our department's limited size is such that our Detectives have to assist each other in some way in most of our investigations. This assistance means needing to share information on a consistent basis amongst our limited investigative staff. This measure would also require an additional officer to testify in the judicial process, and given the current state of our economy, leaving our department with one less officer available to service the public.

Further, the Bill as written seeks to infer that, any time one of the procedures is not followed, the identification is immediately flawed regardless of the individual facts and circumstances connected to each and every particular investigation. Indeed, one of the basic tenets in our Justice System is that all the attendant facts and circumstances are taken into account. This legislation would further serve to undermine the Trial Court's discretion in the area of Jury instruction in that it basically requires the Judge to issue instructions relative to if the line-up was "Flawed" if not adhered to in a strict manner. The crafting of Jury instructions has always remained within the purview of the Judicial system and this legislation could serve to undermine that process.

We fully believe that the positive identification process is best left to the "Trier of the Facts" (Judge or Jury) during the judicial adjudication of the case which is also subject to Defense Counsel scrutiny and objection.

For these reasons, we strongly oppose this legislation. Thank you for allowing the Hawai`i Police Department to provide comments relating to Senate Bill 2304.

Sincerely,

Harry S. Kubojiri

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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN OPPOSITION TO SENATE BILL 2304

A BILL FOR AN ACT RELATING TO RIGHTS OF THE ACCUSED

COMMITTEE ON JUDICIARY
Rep. Gilbert S.C. Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair

Tuesday, March 20, 2012, 2:00 PM
State Capitol, Conference Room 325

Representatives Keith-Agaran, Rhoads, and Members of the Committees:

The Hawaii County Office of the Prosecuting Attorney opposes Senate Bill 2304 with Amendments.

Senate Bill 2340 would attempt to establish procedures for eyewitness identification of persons in live lineups and photo lineups who are suspected of perpetrating an offense. However, our courts should govern in this area. There is eyewitnesses identification case law that has evolved over the years recognizing the eyewitness research used by the proponents. When the Legislature ventures into enacting bills telling the courts what they must do, how they must assess the misidentification claims, and how judges must instruct juries, there is a "separation of power" policy argument against such bills directing the courts and executive branches what to do.

The bill would force courts to suppress the valid identification of a defendant if a legislatively mandated checklist is not followed. Additionally, this process of telling the courts what the jury instruction should be as well as how a line-up process should be evaluated to be presumptively considered "suggestive", violates the functions given to the legislature and courts. The courts evaluating the defendant's specific claim of unnecessarily suggestive identification are in the best position to assess the specific facts of the case. Suppressing identification evidence that is useful, but perhaps, suggestive in the investigative process is inappropriate when the law is clear that the courts only suppresses evidence that is "unnecessarily" suggestive, which is a question of fact.

Although the current Amendment from the Standing Committee Report is helpful in that it clarifies that participants in a live lineup, "shall be out of view of the eyewitness prior to, as well as at the beginning of, the identification procedure", this checklist approach has inherent

problems as it takes the discretion away from the judge to determine "suggestiveness" of the process from the "totality of the circumstances". The Judiciary's Jury Instructions Committee considered jury instructions that would in effect say that "eye witness" testimony must be given less weight. This was rejected, reasoning the trial judges had safeguards already in place to remedy any "suggestive" eyewitness identification. It is our firm position that the courts should govern in the area of jury instruction.

Our state law does not allow Judges to comment on the evidence and this bill would require them to do just that. The jury instructions already address any suggestiveness of the eyewitness identification procedure and the court has the ability to address any issues of tainted evidence.

Insofar as S.B. 2304, S.D. 1 proposes to codify a "checklist" of procedures for eyewitness identifications, it seems to create an implied presumption that if any of the checklist items are missing, then the relevant eyewitness identification is somehow substandard or unreliable. Current case law on this subject does not endorse a checklist-approach, but rather looks to a "totality of the circumstances," considering all evidence and arguments presented by both parties.

In addition to the wealth of case law that provides guidelines on what would constitute (in)appropriate or (un)reliable eyewitness identification--under a wide variety of circumstances--there is also well-established and evolving case law regarding legal safeguards and procedures to protect a defendant's rights in the courtroom, and to ensure juries are aware that eyewitness identifications are not determinative. During trial, juries are repeatedly told to consider all of the facts and circumstances of the case, as well as the potential biases and human error. Moreover, there are at least three Hawai'i Supreme Court cases--with one more currently pending--regarding specific jury instructions to be considered by the jury during deliberation. Finally, our courts have ample discretion to suppress an eyewitness identification if it is "impermissibly or unnecessarily suggestive"; as clearly illustrated in last week's decision by the Intermediate Court of Appeals, in State v. Mason (App., Feb 24, 2012), this decision also requires a judge to carefully consider the totality of the circumstances.

If the Legislature were to codify and impose a specific list of procedures directing law enforcement how to conduct eyewitness identifications, the natural tendency for the public--and for juries--would be to consider the "checklist" more so than the totality of circumstances. As such, we respectfully request that this Committee avoid sending the wrong message; allow law enforcement the discretion and flexibility to adjust to each situation as it arises; and allow Hawai'i's courts and juries to continue focusing on the totality of circumstances for each individual case, under the guidance of existing case law, rules and statutes.

For these reasons the Hawaii County Office of the Prosecuting Attorney opposes SB 2304.

Thank you for the opportunity to testify on this matter.

Committee:	Committee on Judiciary
Hearing Date/Time:	Tuesday, March 20, 2012, 2:00 p.m.
Place:	Conference Room 325
Re:	*Testimony of the ACLU of Hawaii in Support of S.B. 2304, SD2, Relating to Rights of the Accused*

Dear Chair Keith-Agaran and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in support of S.B. 2304, SD2.

The two most common causes of wrongful conviction are mistaken eyewitness identification and false confessions. Modern DNA evidence has proven that innocent people are sent to prison for crimes they did not commit far more often than we think.

S.B. 2304, SD2, would improve Hawaii's eyewitness identification procedures using scientific standards. Improving these procedures will simultaneously decrease the rate of wrongful conviction and increase our ability to convict those who are truly guilty.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 45 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie Temple
Staff Attorney

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COMMITTEE ON JUDICIARY
Rep. Gil Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair
Tuesday, March 20, 2012
2:00 p.m.
Room 325

STRONG SUPPORT - SB 2304 SD2 - EYEWITNESS IDENTIFICATION

Aloha Chair Keith-Agaran, Vice Chair Rhoads and Members of the Committee!

My name is Kat Brady and I am the Coordinator Community Alliance on Prisons, a community initiative promoting smart justice policies for more than a decade. This testimony is respectfully offered always mindful that 6,000 Hawai`i individuals are living behind bars, including 1,800 men who are serving their sentences abroad, thousands of miles from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

SB 2304 SD2 establishes procedures for eyewitness identification of persons in live lineups and photo lineups who are suspected of perpetrating an offense.

Community Alliance on Prisons is in STRONG SUPPORT of this measure. Misidentification is a phenomenon that stops at no state border. Research and practice demonstrate that the mind is not a video camera.

In past testimony, law enforcement has testified that blind administration is impracticable in small law enforcement agencies that they are manpower-strapped. To solve this, police agencies across the country have implemented what is called the folder shuffle system, which effectively blinds the administrator.

The information described below was informed by *"Eyewitness Identification Procedure Recommendations"* http://www.innocenceproject.org/docs/2011/IP_Folder.pdf put forth by Wisconsin's Avery Task Force as well as existing research on the folder shuffle.

The "Folder System" was devised to address concerns surrounding limited resources while allowing for blind administration. Should the investigating officer of a particular case be the only law enforcement personnel available to conduct a photo lineup, the following instructions are recommended:

1. Use one suspect photograph that resembles the description of the perpetrator provided by the witness, five filler photographs that match the description but do not cause the suspect photograph to unduly stand out, and ten folders [four of the folders will not contain any photos and will serve as 'dummy folders'].

2. Affix one filler photo to Folder #1 and number the folder.

3. The individual administering the lineup should place the suspect photograph and the other four filler photographs into Folders #2-6 and shuffle the photographs so that he is unaware of which folder the suspect is in, and then number the remaining folders, including Folders #7-10, which will remain empty. [This is done so that the witness does not know when he has seen the last photo].

4. The administrator should provide instructions to the witness. The witness should be informed that the perpetrator may or may not be contained in the photos he is about to see and that the administrator does not know which folder contains the suspect.

5. Without looking at the photo in the folder, the administrator is to hand each folder to the witness individually. Each time the witness has viewed a folder, the witness should indicate whether or not this is the person the witness saw and the degree of confidence in this identification, and return the photo to the administrator. The order of the photos should be preserved, in a facedown position, in order to document in Step 6.

6. The administrator should then document and record the results of the procedure. This should include: the date, time and location of the lineup procedure; the name of the administrator; the names of all of the individuals present during the lineup; the number of photos shown; copies of the photographs themselves; the order in which the folders were presented; the sources of all of the photos that were used; a statement of confidence in the witness's own words as to the certainty of his identification, taken immediately upon reaction to viewing; and any additional information the administrator deems pertinent to the procedure.

Some police agencies have even gone so far as to produce their own trainings on eyewitness protocols. Here is a link to the Wellesley PD (Massachusetts) training video on the folder shuffle method: http://blip.tv/newenglandinnocence/folder-shuffle-technique-3982434.

Some police agencies have even gone so far as to produce their own trainings on eyewitness protocols. Here is a link to the Wellesley PD (Massachusetts) training video on the folder shuffle method: http://blip.tv/newenglandinnocence/folder-shuffle-technique-3982434)

Community Alliance on Prisons has been working with the National Innocence Project on this important justice issue and they have offered to train our law enforcement agencies AT NO EXPENSE to Hawai`i agencies.

The American Judicature Society's study http://www.ajs.org/wc/pdfs/EWID_PrintFriendly.pdf on the blind-sequential method was the first rigorous, robust scientific study in the field of the blind-sequential procedure. It was conducted in four (4) jurisdictions across the nation. It demonstrated the superiority of the blind-sequential procedure over the blind-simultaneous procedure.

There was NO LOSS in correct identifications using the blind-sequential procedure and a 50% REDUCTION IN INCORRECT IDENTIFICATIONS.

In the interest of justice, we hope that Police Departments on all islands support reforming the eyewitness identification process.

The information below was provided by the National Innocence Project.

To date, of the 289 DNA exonerations across the nation; 75% attributable to misidentification. This is the most prevalent cause of wrongful conviction.

- Misidentifications lead police away from the real perpetrator and an innocent person becomes focus of investigation and may be convicted.
- It harms public safety when the real perpetrator is at large in a position to commit additional crimes.
- In the nation's 289 DNA cases the real perpetrator was identified in 120 cases.
- While the innocent languished behind bars, the real perpetrators went on to commit more than 60 sex assaults and 20 murders*.

**These numbers represent convictions and only represent the tip of the iceberg of crimes actually committed since: (1) DNA that is probative of guilt or innocence is only available in less than 10% of all criminal cases; (2) we have only located the real perpetrator in under 50% of the DNA cases; (3) we haven't begun to scratch the surface when it comes to revealing DNA exonerations; and (4) the crime data cited only includes convictions and not all crimes actually committed.*

Eyewitness identification reforms have been embraced around country (NJ, NC, OH, CT, VA, TX) and in large cities like Minneapolis, MN; Winston-Salem, NC and Boston, MA. Even small towns like Northampton, MA that have implemented the reforms have reported favorably on their ability to improve the quality of their eyewitness identifications because they have led to less defense challenges, have strengthened prosecutions, and have reduced the likelihood of convicting the innocent.

A number of software companies have begun to develop technologically advanced software for law enforcement agencies that allow for computer-based identification procedures. In addition to assuring blind administration through laptop technology, some of these companies have also ensured that their programs incorporate many of the reforms that are endorsed or urged by the National Institute of Justice and the American Bar Association, including the provision of witness instructions and confidence statements; the proper generation of fillers based on the witness's description; and the recordation of the procedure from start to finish.

Police departments in Charlotte and Winston-Salem, North Carolina have already begun to use one such application, and other law enforcement agencies are exploring the option in an attempt to streamline their procedures, while ensuring that safeguards to the innocent are in place.

Since the National Innocence Project has generously offered to train our law enforcement agencies at no expense to Hawai`i and this testimony provides two training video links, resources and a link to the American Judicature Society's study, we see no reason for Hawai`i's law enforcement agencies to object to using best practices to reform their eyewitness identifications.

Community Alliance on Prisons thanks the committee for hearing this important bill and urges its passage that will further the quality of justice in Hawai`i nei.

Mahalo for this opportunity to provide our research on this vital justice issue.

INNOCENCE PROJECT
Benjamin N. Cardozo School of Law, Yeshiva University

TESTIMONY OF REBECCA BROWN, SENIOR POLICY ADVOCATE FOR STATE AFFAIRS, INNOCENCE PROJECT

BEFORE THE HAWAII HOUSE COMMITTEE ON JUDICIARY

RE: IN SUPPORT OF SB 2304 RELATING TO EYEWITNESS IDENTIFICATION

MARCH 20, 2012

On behalf of the Innocence Project, thank you for allowing me to submit today before the Hawaii House Committee on Judiciary.

Since its U.S. introduction, forensic DNA testing has proven the innocence of 289 people who had been wrongly convicted of serious crimes. With the certainty of innocence that DNA provides, we can also be certain that something(s) went wrong in the process which led fact finders to believe beyond a reasonable doubt that the exonerated person was, in fact, guilty of the crime.

The Innocence Project was founded in 1992 at the Benjamin N. Cardozo School of Law to exonerate the innocent through post-conviction DNA testing. We regard each DNA exoneration as an opportunity to review where the system fell short and identify factually-supported policies and procedures to minimize the possibility that such errors will impair justice again in the future. The recommendations that we make are grounded in robust social science findings and practitioner experience, all aimed at improving the reliability of the criminal justice system.

At least one mistaken eyewitness identification contributed to the wrongful conviction in a full 75% of cases of wrongful conviction proven through DNA testing. But it is not just the wrongfully convicted

who suffer when an eyewitness misidentifies an innocent person as the perpetrator of a crime. 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 not of 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.

Mistaken Eyewitness Identifications Harm Crime Victims

Jennifer Thompson and Penny Beernstein are two victims who have demanded eyewitness identification reform after having each, in their own separate cases, identified an innocent person as the person who had in fact raped them. Their experiences are a testament to the fallibility of human memory, and how susceptible to influence our memories are. For even after - in these two separate cases in different states - DNA proved the innocence of those men, these women continued to believe that these innocents were the real perpetrators – until, finally, DNA also identified the real perpetrators.

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 reform referred to as "blind-sequential," a procedure being rapidly adopted in jurisdictions around the country.

Victims are not the only witnesses proven to – despite their best efforts – misidentify perpetrators. Every time a witness makes a misidentification, the entire system suffers. And this is certainly an outcome that

no one – except for the real perpetrator – desires. 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, imperative that eyewitness identification procedures be improved.

Eyewitness Protocols Should be Grounded in Best Practices & Social Science Research

From DNA exonerations we've learned that the standard lineup procedures provide many opportunities to inadvertently cause a witness to pick a person he or she is not sure is the person they recall from the crime scene. Traditional eyewitness ID protocol, by virtue of its failure to heed the lessons of eyewitness ID research, also creates a situation ripe for a misidentification. What's more, confirmatory feedback from the officer administering the lineup often reinforces a witness's wrong choice in a manner that ultimately increases their confidence in that pick, despite their initial hesitance. The good news is that the same social science research over the past three decades that has consistently confirmed the fallibility of eyewitness identifications as well as the unwitting contamination of witness recall through many standard eyewitness identification procedures, can also provide remedies for this urgent problem.

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 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.

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

The guidelines devised by the working group nearly a decade ago were groundbreaking. 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 SB 2304. The testimony that follows describes the research findings that prove the value of these reforms.

Blind Administration

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]

The eyewitnesses themselves may seek clues from 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."[3]

Advocating for the use of a blind administrator does not call into question the integrity of law

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[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.

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

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 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.

Proper Composition of the Lineup

Suspect photographs should be selected that do not bring unreasonable attention to him. 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, 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.[4]

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

[4] 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 lineup administrator for feedback during the identification procedure. The Department of Justice's "Guide for Law Enforcement" recommended the following recommendations regarding instructions to the eyewitness:

1. Instruct each witness without other persons present.
2. Describe the mug book to the witness only as a "collection of photographs."
3. Instruct the witness that the person who committed the crime may or may not be present in the mug book.
4. Consider suggesting to the witness to think back to the event and his/her frame of mind at the time.
5. Instruct the witness to select a photograph if he/she can and to state how he/she knows the person if he/she can.
6. Assure the witness that regardless of whether he/she makes an identification, the police will continue to investigate the case.
7. 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.

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. 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.[5] 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.

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.[6] Typically, these changes to witness memory occur after the administrator provides some form of feedback, either confirming or

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[5] 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).

[6] 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.*

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.[7]

Sequential Presentation of Lineup Members

When combined with a blind administrator[8], the sequential presentation of photographs or live lineup members has been shown to significantly increase the overall accuracy of eyewitness identifications. In order to reduce the prevalence of false identifications, academic research has pointed to the importance of a sequential presentation.

Presenting photographs or lineup members sequentially, as opposed to simultaneously, deters the eyewitness from making a "relative judgment," i.e. selecting from among the photographs or lineup members the person who most resembles her memory of the perpetrator. When photo array or live lineup members are presented sequentially, the eyewitness is more likely to assess the resemblance of each person against her memory of the perpetrator, and is less likely to simply make a relative judgment across all members of the identification procedure.[9]

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[7] Wells & Bradfield (1998).
[8] When blind administration is impracticable, the traditional simultaneous presentation of photographs should be used.
[9] Wells et al. (1998). Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads. *Law and Human Behavior,* 22, 605–08.

Testing Best Practices Under Real Life Conditions: Status of National Field Studies

The empirical evidence supporting these reforms is uncontested,[10] but since opponents of reform often cited a lack of support for the value of these modifications under real life conditions, our office partnered with the American Judicature Society to demonstrate their superiority in the field. These field experiments, which were undertaken in Austin, San Diego, Charlotte & Tucson, utilized laptop computers which – in order to compose lineups – accessed either arrest or DMV photo repositories. The preliminary results support what we have always stated was true: the sequential presentation of line-ups is superior to the traditional, simultaneous display in reducing incorrect identifications without any reduction in suspect identifications.

Lineup Protocols Should be Grounded in Best Practices & Social Science Research

From DNA exonerations we've learned that the traditional lineup procedures provide many opportunities to inadvertently cause a witness to misidentify an innocent person as the perpetrator of crime. Traditional eyewitness identification methods also often reinforce a witness's wrong choice, resulting in even

[10] The Illinois Report, aka the Mecklenberg Study and the Chicago Report, is frequently cited by opponents of reform in this area. However, upon closer examination, it does acknowledge that mistaken eyewitness identification is a serious problem that needs to be studied and addressed and further and ongoing study of the problem must take place as our understanding of the problem evolves. The Report also acknowledges the benefits of blind administration, appropriate fillers, instructions to witnesses viewing the line-up and the taking of a confidence statement. The Report's sole discrepancy between itself and consensus in the scientific and law enforcement community has been concerning the benefits of sequential viewing. It should be noted that the Report has been the subject to significant and sustained criticism from the research community about its fundamentally flawed protocols, most notably in a blue ribbon report by the nation's top field scholars (Schacter, D., et. al. (2007). Policy Reform: Studying Eyewitness Investigations in the Field. Law and Human Behavior). Indeed, the Attorney General of Wisconsin and the Vermont Task Force created by statute have both acknowledged the superiority of sequential viewing. The Wisconsin Attorney General concluded in response to the publication of the Illinois Report: "Scientific research demonstrates that sequential procedures reduce misidentifications, and the results of the Chicago program do not suggest otherwise. Response to Chicago Report on Eyewitness Identification Procedures, State of Wisconsin, Office of Attorney General, Wisconsin Department of Justice Bureau of Training and Standards For Criminal Justice (7/21/06) at p. 3.(emphasis added).The Vermont Task Force Report concluded: "...the Committee recommends that where at all possible, law enforcement agencies should employ sequential photo lineups with a blind administrator". Report of the Vermont Eyewitness Identification and Custodial Interrogation Study Committee (12/14/07) at p. 8 (emphasis added).

stronger witness confidence in an identification that was incorrect. **Social science research over the past three decades has consistently confirmed the fallibility of eyewitness identifications as well as the unwitting contamination of witness recall through many standard eyewitness identification procedures. This same research has also identified simple changes in eyewitness identification procedures that can greatly reduce the possibility of misidentification.**

Responding to the proliferation of research in this area, police and prosecutors from across the country have begun to rethink traditional eyewitness identification procedures and promulgated updated policies for use by their law enforcement officials. In April 2001, New Jersey became the first state in the nation to officially adopt best practices related to eyewitness identification protocols when the Attorney General issued Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures, mandating the requirement that lineups be administered by blind administrators – by all law enforcement agencies statewide. Attorneys General in New Jersey and Wisconsin have gone so far as to promulgate best practices for use in their respective states. The states of Virginia and Texas recently issued statewide model policies that also embrace best practices.

A nine-member task force in Rhode Island, which included membership from all corners of the criminal justice community, recently called for every law-enforcement agency in the state to establish a written policy for conducting eyewitness identifications consistent with the report's recommended best practices and that all law-enforcement officers be trained in these "best practices" by June of this year. The best practices recommended by the Rhode Island task force include blind administration of live and photo lineups, proper filler selection, the issuance of specific instructions, and that a confidence statement be taken immediately upon identification. According to Task Force Co-Chair Deputy Attorney Gerald

Coyne, "We all have an interest in making sure the right person is convicted."[11]

Reforms Embraced by Other Jurisdictions

These changes have proven to be successful across the country. The states of New Jersey, North Carolina, Connecticut, Ohio, large cities such as Minneapolis, MN, Winston-Salem NC, and Boston, MA (to name just a few) and small towns such as Northampton, MA have implemented these practices and have found that they have improved their quality of their eyewitness identifications, thus strengthening prosecutions and reducing the likelihood of convicting the innocent.

Courts Take Notice of Emerging Research

Taking note of the misidentification phenomenon, American courts are for the first time reconsidering their application of the traditional framework, known as the "Manson test," that is used to determine the reliability of eyewitness identifications. Most recently – and perhaps most dramatically – is the case of *State v. Henderson*,[12] presently pending before the New Jersey Supreme Court. In *Henderson*, upon its 2009 review of an appeal of a conviction based on eyewitness evidence, the New Jersey Supreme Court declared that the trial record was inadequate to "test the current validity of [New Jersey] state law standards on the admissibility of eyewitness identification" and directed that a plenary hearing be held

> To consider and decide whether the assumptions and other factors reflected in the two-part *Manson/Madison* test, as well as the five factors outlined in those cases to determine reliability, remain valid and appropriate in light of recent scientific and other evidence.[13]

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[11] Mulvaney, Katie. "R.I. General Assembly to take up report on guidelines for eyewitness evidence." Providence Journal, January 26, 2011.
[12] *State v. Henderson*, 937 A.2d 988 (N.J. Super. Ct. App. Div. 2008), *cert. granted and denied*, 195 N.J. 521 (N.J. 2008), *remanded by* No. A-8-08, 2009 WL 510409 (N.J. Feb. 26, 2009).
[13] *Henderson*, No. A-8-08, 2009 WL 510409, at *1-2.

As the Court ordered, the State of New Jersey, the defendant, along with the Innocence Project and Association of Criminal Defense Lawyers of New Jersey participated in the proceedings, which were presided over by Special Master Geoffrey Gaulkin, a retired New Jersey state appellate judge appointed by the New Jersey Supreme Court to handle the matter. Judge Gaulkin conducted the proceedings "more as a seminar than an adversarial litigation."[14] The parties submitted, and Judge Gaulkin considered, extensive scientific materials including more than 200 published scientific studies, articles and books. Judge Gaulkin presided over ten days of evidentiary hearings, at which seven expert witnesses –leading scientists in the field of eyewitness identification study – testified, and he received detailed proposed findings of fact and conclusions of law, and heard oral argument.[15] On June 18, 2010, based on his consideration of all of the information presented by the parties, Judge Gaulkin issued his report (the "Special Master's Report").

The Special Master's Report endorsed the remedy set forth by the Innocence Project in its proposed legal findings, "The Renovation of *Manson*: A Dynamic New Legal Architecture For Assessing and Regulating Eyewitness Evidence," as "wide-ranging, multifaced and highly detailed,"[16] and proposed that the current legal framework be modernized to reflect our current understanding of social science research.

Basing its reasoning on the Special Master's Report, the New Jersey Supreme Court issued a landmark decision in August, 2011 requiring major changes in the way courts are required to

[14] Special Master's Report, Ex. A.
[15] *Id.* at 3-4.
[16] *Id.* at 84.

evaluate identification evidence at trial and how they should instruct juries. The new changes, designed to reduce the likelihood of wrongful convictions by taking into account more than 30 years of scientific research on eyewitness identification and memory, require courts to greatly expand the factors that courts and juries should consider in assessing the risk of misidentification.

The court's decision requires judges to more thoroughly scrutinize the police identification procedures and many other variables that affect an eyewitness identification. The court noted that this more extensive scrutiny will require enhanced jury instructions on factors that increase the risk of misidentification. Hawaii would do well to prepare itself for enhanced judicial scrutiny in this area by implementing best practices in the eyewitness identification realm.

Over the course of thirty years of studying the issue, social scientists have determined that misidentifications are, in many instances, the result of suggestive identification procedures and have developed a set of 'best practices' that have been shown to enhance the accuracy of eyewitness identifications. These 'best practices' include: the use of a 'blind' administrator; providing a set of instructions to the eyewitness that have been shown to reduce guessing; properly composing the line-up so that filler, or non-suspect, line-up members match the description provided by the eyewitness; sequentially presenting line-up members (as opposed to showing them all at once); and obtaining a statement of relative confidence once an identification has been made, all of which are contained in the bill before you.

Across the country, jurisdictions that have implemented these reforms at first experienced resistance, but after police were provided the opportunity to learn more about them, receive training about how to properly implement them, and to participate in the formation of the specific adaptations of the reforms in their jurisdictions, there is widespread agreement that these improved eyewitness identification procedures increase the accuracy of their criminal investigations, and the effectiveness of their criminal prosecutions.

For all of the above reasons, the Legislature will be providing an important service to the people of Hawaii by passing this eyewitness identification reform legislation. In doing so, you will help enhance both justice and safety in Hawaii by ensuring that police are not misled by eyewitness misidentification into missing the real perpetrators of crime by instead focusing their investigations on innocent persons, which – as we know all too well – can lead to wrongful convictions. Simply put, Hawaii can wait no longer, and this legislation represents a reasonable, agreed-to way for the state to uniformly advance in this critically important area of wrongful conviction reform.

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STRONG SUPPORT FOR SB2304 - SD2 - PERTAINING TO THE RIGHTS OF THE ACCUSED [EYEWITNESS IDENTIFICATION REFORM]

COMMITTEE ON JUDICIARY

Rep. Gilbert Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair

Hearing Date: Tuesday, March 20, 2012
2:00 p.m., Room 325

Honorable Chair Keith-Agaran, Honorable Vice Chair Rhoads and Honorable Members of the House Judiciary Committee:

SB2304 - SD2 establishes procedures for eyewitness identification of persons in live lineups and photo lineups who are suspected of perpetrating an offense.

The Hawai`i Innocence Project strongly supports this measure and strongly requests that this committee PASS this measure.

Eyewitness misidentification is the single greatest cause of wrongful convictions nation-wide, playing a role in 75% of the 289 convictions overturned through DNA testing to date.

Advances in research have led numerous police departments to abandon outdated identification procedures that greatly increase the likelihood of a witness identifying the wrong person. The Hawai`i Innocence Project strongly urges that Hawai`i adopt this measure implementing best practices to reduce misidentification and conviction of innocent persons.

Alvin Jardine spent nearly 20 years in prison for a 1990 burglary and rape which he did not commit. Although he always maintained his innocence, Jardine was convicted in 1992 after two previous trials ended in hung juries. His convictions were finally tossed in January, 2011, after DNA tests revealed that DNA evidence from the crime scene came from an unknown man – and not Jardine.

Witness memory is fragile, and easily contaminated. Like any other crime scene evidence; identifications based on witness memory must be collected according to best practices, preserved carefully and retrieved methodically, or the memory can be contaminated. Once contaminated, the true memories are over-written, and can no longer be retrieved..

The problem with traditional police identification procedures is that witnesses are easily influenced - even unintentionally - by the officers conducting the lineup. Witnesses are naturally eager to identify the perpetrator, and the witness will unconsciously pick up on verbal and non-verbal cues from the officer administering the lineup as to which is the suspect, even when the officer consciously tries to avoid influencing the identification.

Adopting the no-cost and low-cost best practices set forth in SB2304, Hawai`i can improve the accuracy of identifications leading to criminal convictions without impairing accurate identifications.

Through decades of social science research by such leading researchers as Dr. Elizabeth Loftis, and Dr. Gary Wells, scientists now have a much better understanding of how memory and identification work. From this knowledge the best practices for identification procedures have evolved, leaving behind some of the misconceptions of the past.

Decades of strong social science research have revealed that the human mind is not like a video recorder; our memories are not recorded exactly as we see them, and the process of recalling them is not like playing back a recording.

It should be noted that while best practices call for a benchmark certainty statement at the time of the identification, a high level of certainty does not correlate with accuracy. Contrary to popular belief, a witness who is absolutely certain is no more likely to be accurate than a witness who is less certain. Rather, the benchmark is there as a guide to the investigating officers.

The reforms set forth in SB2304 - SB2 are not costly, and many are free of any cost. For example, it is now known that the risk of misidentification is sharply reduced if the police officer administering a photo or live lineup is not aware of who the suspect is.

The witness viewing a lineup should be told that the perpetrator might not be in the lineup, that the officer administering the lineup does not know which person is the suspect, and that the investigation will continue regardless of the lineup result.

No feedback should be given to the witness viewing a lineup. Further, if more than one photo array or physical lineup is done, the person suspected by the police should not be the only one whose likeness is repeated.

There is a wealth of material on implementation, from the smallest to the largest departments, because these procedural improvements have already been implemented in a wide array of large and small police departments. Where implemented, these changes have proven successful. The state of New Jersey, large cities such as Minneapolis, MN and small towns such as Northampton, MA, and others have implemented these practices and have found that they

have improved the quality of their eyewitness identifications, thus strengthening prosecutions and reducing the likelihood of convicting the innocent.

Numerous other jurisdictions, such as the states of North Carolina and Illinois, as well as Boston, Massachusetts, and other cities, are now beginning to implement these procedures. Law enforcement in these state, though initially skeptical, have come to embrace them after seeing how effective they are. I have attached some of the relevant material for your review.

Wrongful identifications hurt everyone except the actual perpetrator. When the wrong person is convicted of a crime, the victim and public are not protected, the innocent person convicted has their life, and their family's lives, irreparably damaged, the taxpayers pay dearly for the incarceration of the innocent, and the actual perpetrator is free to continue preying on innocent victims.

Thank you for receiving and considering my testimony.

Respectfully submitted,

Virginia E. Hench, Director
Hawai`i Innocence Project

ATTACHMENTS:

The Washington Post

Dallas police pioneering new photo lineup approach

http://www.washingtonpost.com/wp-dyn/content/article/2009/08/21/AR2009082100317.html

By JEFF CARLTON
The Associated Press
Friday, August 21, 2009 7:30 AM

DALLAS -- Frustrated with a string of wrongful convictions, the Dallas police department is now the nation's largest force to use sequential blind photo lineups - a widely praised technique designed to reduce mistakes made by witnesses trying to identify suspects.

Dallas is not the first department to use the pioneering method. But experts hope that by using it in the county that leads the nation in exonerating wrongly convicted inmates, Dallas will inspire other departments to follow suit. "If Dallas can do it ... then others are going to rise to the occasion," said Iowa State psychology professor Gary Wells, a national expert on police lineups.

The department switched to sequential blind lineups in April. Before that, Dallas police administered most lineups using the traditional six-pack - law-enforcement lingo for mounting six photos onto a folder and showing them to a witness or victim at the same time.

In sequential blind lineups, mug shots are shown one at a time. Detectives displaying the photos also don't know who the suspect is, which means they can't purposely or accidentally tip off witnesses.

Showing possible suspects all at once tends to make a witness compare the mug shots to one another, Wells said. But if they are shown sequentially, "witnesses have to dig deeper, compare each person to their memory and make more of an absolute decision."

"It makes witnesses more conservative, more cautious," he said.

An analysis of 26 recent studies shows that presenting mug shots sequentially instead of simultaneously produces fewer identifications but more accurate ones, Wells said. Overall, identification rates in sequential lineups are 15 percent lower than simultaneous lineups - but misidentification rates also drop by 39 percent, he said.

Dallas is taking other measures to try to cut back on misidentifications. Police try to record every lineup to make them more credible, and a lineup unit tells witnesses that police will investigate the case regardless of whether an identification is made. That's designed to reduce pressure on a witness to make an ID for fear the case will stagnate, said Dallas police Lt. David Pughes.

Dallas police also ask witnesses to express how confident they are in their identifications, Pughes said. That's to avoid what Innocence Project Co-Director Barry Scheck calls a "forced-choice response" when police, intentionally or not, nudge a witness into expressing certainty.

That's what happened to Thomas McGowan, a wrongly convicted Dallas County man released last year after nearly 23 years in prison for a rape and robbery he did not commit.

Police in the Dallas suburb of Richardson gave the victim, who was held captive by her attacker for several hours, several photos including McGowan's and the man that DNA eventually proved to be the rapist. She picked out McGowan's photo, saying she "thought" he was the attacker. Police told her she had to be certain and "couldn't just think it was him." It was then she said McGowan was "definitely" the attacker, according to court documents.

McGowan recently met his accuser, who apologized. He said he believes police should use an independent person to administer lineups. The Richardson department now has a written policy that states a preference for but doesn't require an independent lineup administrator.

"They showed me the picture of the guy, and to me the guy looked nothing like me," McGowan said. "I'm still trying to figure that one out."

Nationally, more than 75 percent of DNA exonerees who have been released since 1989 were sent to prison based on witness misidentification, according to The Innocence Project, a New York legal center specializing in overturning wrongful convictions. It's the most common element in a wrongful conviction, the center said.

Since 2001, 21 people in Dallas County have had convictions overturned after DNA proved their innocence. A majority of them were in the city of Dallas.

In May, Jerry Lee Evans, of Dallas, had his conviction overturned after spending 23 years in prison for aggravated sexual assault with a deadly weapon. The rape victim wrongly identified him as her attacker.

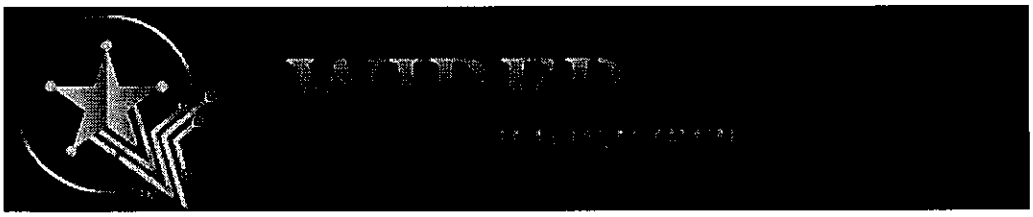
In another case, Johnnie Earl Lindsey spent more than 25 years in prison for a rape he did not commit. The victim said her attacker didn't wear a shirt. A year later, the victim picked out Lindsey - one of two shirtless men among the six photos. Lindsey, of Dallas, was released last year after DNA showed he was innocent.

Boston, Minneapolis and Denver use sequential blind lineups or some variation. New Jersey and North Carolina have mandated police do the same. Most police departments, however, continue to use the six-pack or other traditional methods.

"There's a belief that as long as what you are doing is legal, then you just keep doing it because you believe it is working for you," Wells said.

In Dallas, police were initially resistant to the new lineups because "they thought we were creating obstacles to getting bad guys off the street," Assistant Chief Ron Waldrop said.

But after about 1,200 lineups, identification rates have not changed - though it is too early tell if there's been a decline in mistaken ID rates.



Arresting the Right Person; The Role of the Police in Eyewitness Identification Reform

May 6, 2011 Featured Guest 3 Comments

By William Brooks

Most police chiefs understand that their departments should have an updated policy on eyewitness identification and that their officers, particularly their detectives, should receive training on procedures for show-ups, photo arrays and line-ups. The purpose of this article is to provide chiefs with a clear roadmap for achieving these goals.[1]

The "eureka" moment in a criminal investigation may be the phone call from the lab that the DNA is a match, or that a latent print was left by the suspect. But in cases with scant forensic evidence, it is often the identification of the suspect by an eyewitness, known among detectives as a "positive ID" or a "pick". However, a shadow has been cast over these so-called positive identifications, brought to light by the advent of DNA.

To date, 267 prisoners in 34 states, including Massachusetts, have been freed after DNA evidence proved they were convicted for crimes they did not commit. Alarmingly, 75% of these defendants were convicted after an eyewitness mistakenly identified them as the perpetrator.[2] In other words, faulty identifications by witnesses account for more wrongful convictions than all other causes combined.

Things may actually be worse than they appear. Most exonerated defendants had been serving time for homicides and sex assaults, crimes that frequently yield DNA evidence. If so many were serving time for these crimes, how many are in prison for crimes like robberies and aggravated assaults, where DNA evidence is not as common?

It gets worse. While erroneous convictions ruin the lives of innocent defendants and taint the reputation of the courts and the police, they also leave true perpetrators on the street to continue offending. The DNA that exonerated 111 of those 267 defendants identified the actual perpetrators, and those 111 were eventually convicted of committing over 80 violent crimes ***in addition*** to the ones that sent innocent people to prison. Among those 80 crimes were 20 murders and more than 50 rapes, all committed while the wrong people sat behind bars.[3]

Some factors impacting the ability of an eyewitness to identity an offender are beyond the control of the police. So-called "estimator variables" such as lighting, the amount of time a witness observes an offender, whether the offender is of a different race, and the amount of stress felt by the witness during the crime are factors over which the police have no control. However, "system variables" such as the procedures used during the showing of a photo array can have significant impact.

Although researchers have questioned the reliability of eyewitness recall for more than 100 years, the DNA exonerations that began in the late 1980's proved a basis for those reservations. So in 1999, the National Institute for Justice convened The Technical Working Group for Eyewitness Evidence, a task force of criminal justice professionals including police. The group's

report, Eyewitness Evidence: A Guide for Law Enforcement called on the police to standardize operating procedures and served as an outline for police training. Ten years later, the Boston Bar Association published Getting it Right, Improving the Accuracy and Reliability of the Criminal Justice System in Massachusetts. The report was the result of work performed by a task force of defense attorneys, prosecutors, and police officers that came to strongly support the adoption of reform in four general areas, including eyewitness identification. In the fall of 2010, the Massachusetts Major City Chiefs announced that it supported the work of the Boston Bar task force and the implementation of its recommendations.

The full scope of the reform measures is too complex to fully explore here. But chiefs who have read about the issue know that the reports call for officers to read specific instructions to a witness before the witness is shown a suspect at a show-up or in a photo array. This recommendation actually facilitates the department's compliance with a Massachusetts evidence discovery rule ; requires the police to disclose what the officer said to the witness prior to an identification procedure.[4] Other procedures e that photos in an array should be shown one at a time, and that arrays should be shown by an officer who does not know ch photo is of the suspect (blind administration). It is this last recommendation that most stirs the ire of veteran detectives, it did the author's as well. But when presented during training, the concept behind the change begins to make sense and is easily implemented, even in very small agencies.

Calls for reform are coming from the Supreme Judicial Court and the Massachusetts legislature. In 2009, the SJC warned in *Commonwealth v. Silva-Santiago* that the police should adopt modern eyewitness protocols, including standardized instructions to be given to a witness. "We decline at this time to hold that the absence of any protocol or comparable warnings to the eyewitnesses requires that the identifications be found inadmissible, but we expect such protocols to be used in the future." [5] (A year later, Jesus Silva-Santiago was retried and acquitted of the murder.[6])

On Beacon Hill, a lengthy bill filed by Senator Cynthia Stone Creem would mandate specific steps for every type of eyewitness identification procedure used by the police, and would allow a judge to suppress an identification if police did not comply with the statute.[7] Most New England states have similar legislative efforts underway. Rhode Island and Connecticut have bills pending, and the Vermont legislature has tasked that state's Law Enforcement Advisory Board with promulgating best practices.

Clearly, the best course for law enforcement is to act now, on its own volition, rather than having police procedure dictated by a curative jury instruction or a legislative mandate.

There could be civil repercussions as well. According to Jack Collins, General Counsel to the Mass Chiefs of Police Association (MCOPA), if either the courts or the legislature adopt procedural requirements, as is likely to happen, "(d)epartments with an out of date policy will have a very tough time convincing a court that they were unaware of the new protocols. Similarly, if a department has a detective and he or she has not been trained in the industry's best practices, any motion for Summary Judgment based on 'Qualified Immunity' is likely to fail. If a department allows officers to conduct a photo array, line-up, show-up, or other eyewitness identification procedure and fails to be sure all such officers are properly trained, in addition to a challenge in the criminal case, a claim for negligent training is likely to result."[8]

Police chiefs who want to address the issue of eyewitness identification can do so in two steps; implement a new department policy and train officers, particularly detectives, in the new procedures. Preliminary results of a new MCOPA survey are encouraging; most chiefs responding indicate that they have issued new policies and send their detectives to training.

Department Policy

Every police department should have a written policy on eyewitness identification that incorporates recommended reform measures. A sample policy that incorporates the reform protocols is available from the author. Among other provisions, an updated policy should incorporate the following:

1. Before conducting any identification procedure, the police obtain and document a complete description of the suspect.
2. Formal instructions are given to eyewitnesses prior to all identification procedures. The witness instructions should follow the recommendations of the NIJ, specifically that the person who committed the crime may or may not be the person who has been stopped (for a show-up) or is in the lineup or photo array, that it is just as important to clear an innocent person, that individuals may not appear exactly as they did on the date of the incident, that regardless of whether or not an identification is made, the investigation will continue, and that the officer will ask the witness to state in his or her own words how certain he or she is of any identification.
3. Patrol officers and detectives carry or have immediate access to cards containing witness instructions for use during show-ups.
4. Barring unusual circumstances, photo arrays are shown by "blind" administrators – that is, officers who do not know which of the individuals in a lineup or array is the suspect.
5. The individuals in the array or lineup are presented to the witness one at a time, rather than simultaneously.
6. At the conclusion of an identification procedure where the witness has made an identification, the officer asks the witness to describe his or her level of certainty about the identification.
7. Officers are required to submit a report on every identification procedure, whether or not a subject is selected, including the instructions given, the exact words spoken by the eyewitness, and the witness' statement of certainty.
8. The department turns over to the district attorney's office documents containing the instructions given to the witness, as well as the responses of eyewitnesses and their statements of certainty.

The sample policy and the witness instruction documents that go with it are provided electronically to every officer who attends the MPI course on Eyewitness Identification. In addition to the tenets above, it also includes procedures for voice identification and guidelines for the use of mug books (paper and electronic), composites and sketches.

Training

1. All patrol officers and supervisors should receive basic training about eyewitness identification procedures to include managing witnesses, show-up procedures, blind administration and photo arrays.
2. Detectives and other officers who conduct follow-up investigations should receive advanced training in eyewitness identification to include recognition memory, cognitive interview techniques, variables affecting eyewitness recall, procedures for show-ups, photo arrays, line-ups and voice identification procedures, and issues related to composites and sketches. A one-day course, as well as some on-line training and a sample Policy & Procedure, are currently available through the Municipal Police Institute. (see www.MPItraining.com)
3. Roll call training on eyewitness identification should be provided to all sworn personnel at least annually.

The modernization of eyewitness identification policies and protocols can be easily accomplished by the police chief who wants to do so. Training and model policies are readily available. The techniques used by the police in this area have a profound effect on victims, witnesses, defendants and on society itself. We should take the opportunity to embrace reform lest it be thrust upon us. It is the right thing to do.

[1] In full disclosure: the author is an MPI instructor who conducts training courses on this topic.

[2] The Innocence Project, http://www.Innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php

[3] Ibid.

[4] Mass. R. Crim. P. 14 (viii).

[5] Comm. V. Silva-Santiago 453 Mass. 782 (2009).

[6] "Brockton Man Acquitted of Murder", Boston Globe, August 13, 2010

[7] See Senate Bill 689: "Evidence of a failure to comply with any of the provisions of this statute shall be considered by the trial courts in adjudicating motions to suppress eyewitness identification."

[8] Atty. Jack Collins, until recently the Interim Executive Director of MPI: www.MPItraining.com

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Bill Brooks is the Deputy Chief of the Wellesley, Massachusetts Police Department. During his 34-year career, he also served with the Westwood and Norwood Police Departments. While serving as a detective sergeant with the Norwood Police in 1987, Bill established the Norfolk County Police Anti-Crime (NORPAC) Task Force and has been its director ever since. NORPAC serves 15 communities in Norfolk County.Bill holds a bachelor's degree in criminal justice from Stonehill College and master's degree in criminal justice from Western New England College, and has been a police academy instructor for over twenty years. He was a co-founder of the Street Level Narcotics Investigation course and is still one of its instructors. He testified in 2009 before the Police-On-Police Shootings Task Force in New York City, a panel created by New York Governor David Patterson to study friendly fire.Bill serves on the Board of Directors of the New England Narcotics Enforcement Officers Association. Bill also currently represents the Massachusetts Chiefs of Police Association as the project manager for the Massachusetts Police ID project.Bill is a graduate of the FBI National Academy at Quantico, Virginia and in 2010 he served as the FBINAA National Conference Chair

William Brooks

*View all posts by **William Brooks***
Williams website

Currently there are "3 comments" on this Article:

1.  *Galib Bhayani* says:
May 11, 2011 at 11:39 pm

Sir, and excellent piece and highly topical. In Canada we have implemented reforms not unlike those

you describe in your piece ie. photos shown one at a time by an officer w/o any knowledge as to who the suspect is and further to this we are required to use our best evidence collection processes which would be video tape of the line up. This as you can imagine poses all sorts of challenges to those working small communities in Canada such as the Arctic and other rural regions. The Canadian Case on this issue is the Sophonow case and the inquiry following the investigation. The full details can be viewed at

http://www.gov.mb.ca/justice/publications/sophonow/recommendations/english.html

The identification is referred to as a photo pack in Canada. I find it quite humourous and dangerous when watching reality based television shows such as COPS in which the witness is brought back to identify the suspect who is seated in the rear of a police car and can barely be seen by the witness let alone make a positive identification.

Reply

2. *John S.* says:
May 18, 2011 at 7:04 pm

I am passing this along to my command staff.

Thank you

Reply

- *William Brooks* says:
May 18, 2011 at 8:03 pm

John,

I do training on this topic in Massachusetts for the Municipal Police Institute http://www.MPItraining.com.

If you're not in need of training, or get it elsewhere, I can still send you material. Let me know.

Bill

Reply

Comment on this Article:

Name

Email

Website

Submit Comment

About WiredChief....

The WiredChief website is specifically geared towards Police but we encourage anyone to take a look and leave a comment.

We have an International group of regular and guest contributers writing on a variety of topics. Many of the contributers are active or retired Law Enforcement.

e writers here are progressive and willing to try new ideas and concepts and apply them to policing. We ;ourage leaving comments or feedback so that we can engage with our fellow Officers and members of public.

Anyone interested in more information or possibly contributing to the blog can contact Peter@WiredChief.com

Latest Tweets from Wired Chief @WiredChief

- WiredChief: RT @DailyOfficer: Breaking -At least three individuals entered the U.S. in August by air with the intent to launch attack http://t.co/O ...
- WiredChief: Supercookies, Flash cookies and zombie cookies, what u need to know - Mash http://t.co/36bBXJI
- WiredChief: We mentioned flashmobs months ago in a post. Seems to be hot topic lately. "Social media fuels megaparty" http://t.co/ptvW0nG

Latest from Bill Bongle @Community_Cop

- community_cop: Flash Mob Robbery, Violence Hits Dallas [VIDEO] http://t.co/Fc0YdLF
- community_cop: RT @GBPolice: Armadillo deployed. see our Facebook Page for details. www.facebook.com/greenbaypolice http://t.co/ttnGxXT
- community_cop: Green Bay Schools Start with a Lesson in Good Behavior - Great to see expectations described in advance: http://t.co/35Wass2

Latest tweets from Andrew Fisher @DeepBlueLight

- deepbluelight: Lashing down with rain. Looks like a soaking on the way to watch #Everton play Villa :-(
- deepbluelight: hoping @jensonbutton can get pole position today
- deepbluelight: RT @OpenEyeComms: Prolific thief & burglar complains of regular #police attention http://ht.ly/6qAMh Good work by @WMPolice

Latest Tweets from Katy England @MaineBlues

- MaineBlues: Man who led state police on high speed chase, later arrested by Biddeford PD: http://t.co/wyovpd2
- MaineBlues: http://t.co/HHGrK8b
- MaineBlues: Brewer police investigate another robbery: http://t.co/kQxoAB9

Latest Tweets from The Daily Officer @DailyOfficer

- DailyOfficer: NBC News Twitter Hacked, fake attack messages sent http://t.co/eXALzO4
- DailyOfficer: RT @WiredChief: 'Batmanning' Replacing 'Planking' As New Internet Trend « CBS Chicago http://t.co/IA8nupX
- DailyOfficer: The Daily Officer is out! http://t.co/XqAtFM3 ▸ Top stories today via @govloop @cwexlerperf @peelpolicemedia @mplasd @merseypolice

ecent Comments

- William Brooks: John,I do training on this topic in Massachusetts for the ...
- John S.: I am passing this along to my command staff.Thank you...
- Galib Bhayani: Sir, and excellent piece and highly topical. In Canada we h...
- Andrew Fisher: HI Galib. OUtsourcing refers to the police giving up certai...
- galib: Andy, interesting thoughts, I am curious about the outsourci...
- Galib: Bill, this is wonderful stuff. We have the same problems/ is...
- Katy: Very cool....
- Katy England: Galib - I think much of that will vary state by state and co...
- galib bhayani: Andy, well put, and I am with you. Leave us alone to do the ...
- galib: Excellent article, any thoughts on the other side of social ...

Featured Post

Policing in Jersey, a dedicated force looks to the future...

18 Aug 2011

By Andrew Fisher -Recently I have been working with the police in the States of Jersey (that is the island of the coast of France and not the State in USA) looking at how their communications and leadership skills can be enhanced. Working with a leading edge company, Future Vision, I have been working with the police on the streets during one of their biggest events, the Battle of Flowers. First it has to be said that the policing system of Jersey is not like any that I have witnessed before. Having said that, the professionalism and dedication of those involved ...

(No Comments)

Featured Guest

"Reaching the Average Joe"

12 May 2011

By Bill Brooks- Much has been written about the police embracing social media as a means of connecting with their community or getting their message out. In a lot of applications, this has to do with reaching people who may already be supportive of the police. For example, members of the police department, officers in nearby communities, relatives of officers, or people who just have an interest in the police. And so pieces about what the police are up to, arrests of significance, or updates on programs reach people who are already friendly towards us. The key for the future, ...

(No Comments)

Latest from the Appthority

AppThority Issue 1 ~ Epocrates RX

21 Apr 2011

By Jim Schwab – Issue 1 ~ Epocrates RX Developer: Epocrates, Inc. Size: 4+ Mb (asks for 45 Mb free to install) Cost: Free! From the Developer: Welcome to the Epocrates Rx drug reference for Android! This native application allows quick access to thousands of drug monographs, formularies, drug-drug interactions, a pill identifier tool, and more. Plus, you can easily locate your frequently accessed drugs, tools, and calculators when you select "add to favorites" or view your history from the home screen. Picture this: You get dispatched to a 911 hangup with no response on the ...

(No Comments)

Latest Social Media Post

Technology, Innovation, and the Police

8 May 2011

By Peter Olson- I recently returned from the Police Executive Research Forum, Innovations in Technology Conference in Washington DC. It was a great opportunity to see how many departments around the country are handling the rapid advances in technology that are not only making our jobs easier but also raising many questions and concerns. One topic that I enjoyed was social media. There many stories of what went wrong with employees and their personal accounts and much head shaking and sighs of disbelief. There were debates about who is going to monitor these things and how reductions in manpower are ...

(No Comments)

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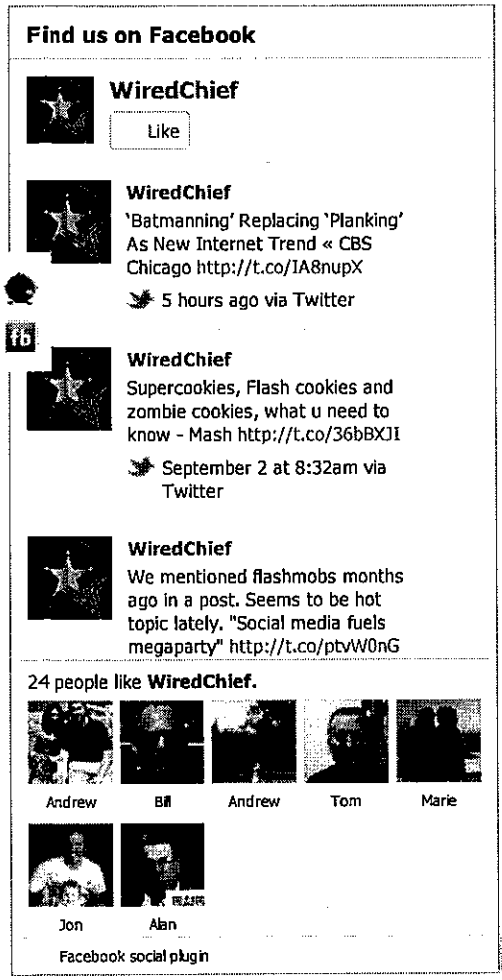

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'I Was Certain, but I Was Wrong'

New York Times OP-ED Sunday, June 18, 2000

By JENNIFER THOMPSON

In 1984 I was a 22-year-old college student with a grade point average of 4.0, and I really wanted to do something with my life. One night someone broke into my apartment, put a knife to my throat and raped me.

During my ordeal, some of my determination took an urgent new direction. I studied every single detail on the rapist's face. I looked at his hairline; I looked for scars, for tattoos, for anything that would help me identify him. When and if I survived the attack, I was going to make sure that he was put in prison and he was going to rot.

When I went to the police department later that day, I worked on a composite sketch to the very best of my ability. I looked through hundreds of noses and eyes and eyebrows and hairlines and nostrils and lips. Several days later, looking at a series of police photos, I identified my attacker. I knew this was the man. I was completely confident. I was sure.

I picked the same man in a lineup. Again, I was sure. I knew it. I had picked the right guy, and he was going to go to jail. If there was the possibility of a death sentence, I wanted him to die. I wanted to flip the switch.

When the case went to trial in 1986, I stood up on the stand, put my hand on the Bible and swore to tell the truth. Based on my testimony, Ronald Junior Cotton was sentenced to prison for life. It was the happiest day of my life because I could begin to put it all behind me.

In 1987, the case was retried because an appellate court had overturned Ronald Cotton's conviction. During a pretrial hearing, I learned that another man had supposedly claimed to be my attacker and was bragging about it in the same prison wing where Ronald Cotton was being held. This man, Bobby Poole, was brought into court, and I was asked, "Ms. Thompson, have you ever seen this man?" I answered: "I have never seen him in my life. I have no idea who he is."

Ronald Cotton was sentenced again to two life sentences. Ronald Cotton was never going to see light; he was never going to get out; he was never going to hurt another woman; he was never going to rape another woman.

In 1995, 11 years after I had first identified Ronald Cotton, I was asked to

provide a blood sample so that DNA tests could be run on evidence from the rape. I agreed because I knew that Ronald Cotton had raped me and DNA was only going to confirm that. The test would allow me to move on once and for all.

I will never forget the day I learned about the DNA results. I was standing in my kitchen when the detective and the district attorney visited. They were good and decent people who were trying to do their jobs -- as I had done mine, as anyone would try to do the right thing. They told me: "Ronald Cotton didn't rape you. It was Bobby Poole."

The man I was so sure I had never seen in my life was the man who was inches from my throat, who raped me, who hurt me, who took my spirit away, who robbed me of my soul. And the man I had identified so emphatically on so many occasions was absolutely innocent.

Ronald Cotton was released from prison after serving 11 years. Bobby Poole pleaded guilty to raping me.

Ronald Cotton and I are the same age, so I knew what he had missed during those 11 years. My life had gone on. I had gotten married. I had graduated from college. I worked. I was a parent. Ronald Cotton hadn't gotten to do any of that.

Mr. Cotton and I have now crossed the boundaries of both the terrible way we came together and our racial difference (he is black and I am white) and have become friends. Although he is now moving on with his own life, I live with constant anguish that my profound mistake cost him so dearly. I cannot begin to imagine what would have happened had my mistaken identification occurred in a capital case.

Today there is a man in Texas named Gary Graham who is about to be executed because one witness is confident that Mr. Graham is the killer she saw from 30 to 40 feet away. This woman saw the murderer for only a fraction of the time that I saw the man who raped me. Several other witnesses contradict her, but the jury that convicted Mr. Graham never heard any of the conflicting testimony.

If anything good can come out of what Ronald Cotton suffered because of my limitations as a human being, let it be an awareness of the fact that eyewitnesses can and do make mistakes. I have now had occasion to study this subject a bit, and I have come to realize that eyewitness error has been recognized as the leading cause of wrongful convictions. One witness is not enough, especially when her story is contradicted by other good people.

Last week, I traveled to Houston to beg Gov. George W. Bush and his parole board not to execute Gary Graham based on this kind of evidence. I have never before spoken out on behalf of any inmate. I stood with a group of 11 men and women who had been convicted based on mistaken eyewitness testimony, only to be exonerated later by DNA or other evidence.

With them, I urged the Texas officials to grant Gary Graham a new trial, so that the eyewitnesses who are so sure that he is innocent can at long last be

heard.

I know that there is an eyewitness who is absolutely positive she saw Gary Graham commit murder. But she cannot possibly be any more positive than I was about Ronald Cotton. What if she is dead wrong?

Jennifer Thompson is a homemaker in North Carolina and does volunteer work with abused children.

INNOCENCE PROJECT

IMPROVING EYEWITNESS IDENTIFICATION PROCEDURES

The need for eyewitness identification reform has been borne out in both reality and research. The Innocence Project has found that mistaken eyewitness identification played a role in the vast majority of the more than 150 mistaken convictions in the United States overturned by DNA evidence. Studies of eyewitness identification over the past three decades have consistently shown the fallibility of eyewitness identifications as well as the unwitting contamination of witness recall through many standard eyewitness identification procedures. (*See* Wells, Steblay, Penrod, Kassin, et al.)

Given that erroneous eyewitness identifications unintentionally distract police and prosecutors' attention from the true culprit, mislead witnesses and undercut their credibility, and force innocent people to defend their innocence and possibly even go to prison for crimes they did not commit, it is imperative that eyewitness identification procedures be improved.

The good news is that procedures proven to improve the accuracy of eyewitness identifications are readily available and have been successfully implemented. For instance, research and experience shows that "blind" administration of the lineup (where the lineup administrator is unaware of who the suspect is within the lineup) prevents subtle, unintentional cues from influencing the witness's identification. Further, providing specific instructions to witnesses, such as information about the procedure and the potential that the culprit may or may not be in the lineup, greatly reduces the potential for a false identification. Additional specific changes in lineup administration have also been proven to result in even more accurate identifications.

Where implemented, these changes have proven successful. The state of New Jersey, large cities such as Minneapolis, MN and small towns such as Northampton, MA, and others have implemented these practices and have found that they have improved the quality of their eyewitness identifications, thus strengthening prosecutions and reducing the likelihood of convicting the innocent. Numerous other jurisdictions, such as the states of North Carolina and Illinois, as well as Boston, Massachusetts, and other cities, are now beginning to implement these procedures. It is the Innocence Project's hope that with continued experience and evaluation, police departments and prosecutors around the country will agree that taking advantage of the emerging research and best practices will further enhance their ability to swiftly and surely convict offenders, and avoid being misled into pursuing others – or convicting the innocent.

In the late 1990s, the National Institute of Justice (NIJ) convened a technical working group of law enforcement and legal practitioners, together with researchers specializing in the issue, to explore the development of improved procedures for the collection and preservation of eyewitness evidence within the criminal justice system. In 1999, the NIJ group issued *Eyewitness Evidence: A Guide for Law Enforcement*, and in 2003 followed up with *Eyewitness Evidence: A Trainer's Manual for Law Enforcement*. These manuals recommend the techniques referred to in the model legislation in this packet, and will serve as an excellent

resource for any law enforcement agencies interested in improving the accuracy of eyewitness identifications.

Across the country, experience implementing these improvements has shown that if these procedures are to be successful in your jurisdiction, they must be meaningfully adopted by law enforcement. Change comes easily to no one, and thus it is important to work with the people being asked to change in order to foster it. We hope you will reach out to prosecutors and police in your community to gain their support for a version of this model legislation, find resources to educate and train their forces on the proper techniques, and credit them for making these changes.

Improving eyewitness identification procedures is not about the adversarial process or political power; it's about apprehending the guilty and protecting the innocent. In short, it's just good law enforcement.

INNOCENCE PROJECT

Improving Eyewitness Identification Procedures Is Good Law Enforcement

Mistaken eyewitness identification of an innocent person was a factor in the vast majority of the more than 150 mistaken convictions overturned by DNA evidence in the United States in the past two decades.

A growing body of research shows that the reliability of eyewitness identification can be significantly increased through subtle changes in eyewitness identification process. Decreasing erroneous eyewitness identifications helps police departments and prosecutors focus their resources on the actual perpetrator - instead of being distracted by innocent persons mistakenly identified by eyewitnesses. (This state) should adopt the changes proven to enhance eyewitness identification. It's just good law enforcement.

The Federal Government and the Nation's Legal Experts Support These Improvements

The policies and procedures in this reform legislation incorporate those recommended by the National Institute of Justice and the American Bar Association for improving eyewitness identification.

Comprehensive Research Supports These Improvements

These recommendations are supported by research, which can be found on the NIJ and ABA websites. (Go to: www.abanet.org and www.ncjrs.org; search term "eyewitness identification") Further, Gary Wells, a leading researcher on the subject, provides comprehensive eyewitness identification information on his website: (http://www.psychology.iastate.edu/faculty/gwells/homepage.htm).

Police, Prosecutor and Judicial Experience Supports Improvements

The state of New Jersey; Hennepin County (Minneapolis), Minnesota; Northampton and Boston, Massachusetts; and Santa Clara, California are just a few of the jurisdictions that have successfully implemented these reforms. Illinois is now beginning its pilot programs statewide, and police departments across North Carolina are now adopting the "sequential, blind" eyewitness identification recommendations of the North Carolina Actual Innocence Commission (an interagency task force created by the state's Republican Chief Justice).

These jurisdictions' experiences have shown that when police officers and prosecutors are properly trained and instructed in these practical improvements to eyewitness identification procedures, there is generally little to no difficulty in implementing them.

Testimony for SB2304 on 3/20/2012 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Saturday, March 17, 2012 6:25 PM

To: JUDtestimony

Cc: evernw@aol.com

Testimony for JUD 3/20/2012 2:00:00 PM SB2304

Conference room: 325
Testifier position: Support
Testifier will be present: No
Submitted by: Evern Williams
Organization: Individual
E-mail: evernw@aol.com
Submitted on: 3/17/2012

Comments:
I strongly support this bill in the name of fairness and true justice.

Testimony for SB2304 on 3/20/2012 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Saturday, March 17, 2012 7:29 PM

To: JUDtestimony

Cc: nimo1767@gmail.com

Testimony for JUD 3/20/2012 2:00:00 PM SB2304

Conference room: 325
Testifier position: Support
Testifier will be present: No
Submitted by: Robert Petricci
Organization: Individual
E-mail: nimo1767@gmail.com
Submitted on: 3/17/2012

Comments:
My name is Robert Petricci

Thank you the chance to participate in my local government.

I am testifying today in strong support of SB2304 SD2

Eyewitness ID has proved over time to be notoriously unreliable. When we take an Americans freedom and leave them with a criminal conviction it should only be when there is proof beyond a reasonable doubt. I do not believe the science supports eyewitness ID as reliably meeting that threshold.

In my opinion in our passion to see the guilty held accountable we have tilted the process so far out of balance that today we have an inexcusable number of innocent Americans in prison convicted of crimes they did not commit.

That is an affront to everything we are suppose to stand for. It's time to recognize that not only do we destroy the lives of those wrongly convicted but the guilty are not held accountable and are left in the community to hurt other people, every time this happens. In reality it benefits no one and although it may give some of us a false sense of accomplishment the truth is it hurts us all every time this happens.

testimony in support of SB 2304 SD2 - Eyewitness Identification

LC [palolo@hawaii.rr.com]

Sent: Saturday, March 17, 2012 8:25 PM

To: JUDtestimony

Ka Lei Maile Alii Hawaiian Civic Club
327 Kaimake Lp., Kailua HI 96734
Phone (808) 284-3460 · Email: palolo@hawaii.rr.com

March 17, 2012

COMMITTEE ON JUDICIARY
Rep. Gil Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair
Tuesday, March 20, 2012
2:00 p.m.
Room 325

TESTIMONY IN SUPPORT OF SB 2304 SD2 – EYEWITNESS IDENTIFICATION

Aloha Chair Keith-Agaran, Vice Chair Rhoads and Members of the Judiciary Committee,

Mahalo for this opportunity to provide testimony on this important legislation. My name is Lynette Cruz and I am the President of Ka Lei Maile Alii Hawaiian Civic Club, one of 27 civic clubs located on the island of Oahu. Our organization has 67 members in good standing, and 11 associate members. The civic clubs throughout the islands and across the United States have a membership in the thousands. Together we operate on a set of Hawaiian cultural values that have, at the core, a respect for human dignity and a strong belief in doing what is right (pono). Our club does not often offer testimony on legislative issues however, in this particular case, we wish to weigh in.

We support SB 2304 SD2 because we have seen harm done to innocent people due to decisions made about the innocence or guilt of another human being based on human error. When a witness misidentifies a suspect and there are no other ways to confirm the witness's statement, then more harm is done, first to the victim and then to the one falsely accused, and then to their families and the larger community. There must be a way to institute a process that guarantees safety to all concerned. We do not support putting someone behind bars so that the police and prosecutors can say that perpetrators have been caught and are being dealt with. We support a process that ensures real perpetrators are caught and convicted based on real evidence.

Mahalo me ka pono,

Lynette Cruz, President
Ka Lei Maile Alii Hawaiian Civic Club
327 Kaimake Lp., Kailua HI 96734
Phone (808) 284-3460
Email: palolo@hawaii.rr.com