

EYEWITNESS IDENTIFICATION PROCEDURES IN GEORGIA: YEARS, DOLLARS, AND WHAT CAN BE DONE

I. THE PROBLEM: WRONGFUL CONVICTIONS BASED ON MISTAKEN EYEWITNESS IDENTIFICATION

One hundred and eleven years¹ and \$2.7 million.² That is the cost for the conviction of seven men in Georgia for crimes that they did not commit.³ Each of these men was convicted primarily on the basis of eyewitness identification.⁴ Each of these men has subsequently been exonerated through exculpatory DNA evidence.⁵

This Comment will discuss wrongful convictions based on mistaken eyewitness identification and reforms that should be

1. See Mike Morris, *DNA Frees Man in '79 Rape: Group Helps Make Case; Another Man Jailed after Evidence Revisited*, ATLANTA J. CONST., Dec. 12, 2007, at A1, available at http://www.ga-innocenceproject.org/Articles/Article_86.htm [hereinafter Morris, *John White Profile*]; The Innocence Project, Robert Clark Profile, <http://www.innocenceproject.org/Content/71.php> (last visited Mar. 17, 2008); The Innocence Project, Douglas Echols Profile, <http://www.innocenceproject.org/Content/91.php> (last visited Mar. 17, 2008); The Innocence Project, Clarence Harrison Profile, <http://www.innocenceproject.org/Content/173.php> (last visited Mar. 17, 2008); The Innocence Project, Calvin Johnson Profile, <http://www.innocenceproject.org/Content/186.php> (last visited Mar. 17, 2008); The Innocence Project, Scott Samuel Profile, <http://www.innocenceproject.org/Content/259.php> (last visited Mar. 17, 2008); The Innocence Project, Willie Williams Profile, <http://www.innocenceproject.org/Content/367.php> (last visited Mar. 17, 2008).

2. See Morris, *John White Profile*, *supra* note 1, at A1; The Innocence Project, Robert Clark Profile, *supra* note 1; The Innocence Project, Douglas Echols Profile, *supra* note 1; The Innocence Project, Clarence Harrison Profile, *supra* note 1; The Innocence Project, Calvin Johnson Profile, *supra* note 1; The Innocence Project, Scott Samuel Profile, *supra* note 1; The Innocence Project, Willie Williams Profile, *supra* note 1.

3. *See id.*

4. *Id.*

5. *Id.*

instituted in Georgia to fix that problem. It will initially explore some of the implications of the issue in Georgia, and then provide some background on the science behind eyewitness identification. In that context, the best practices in eyewitness identification, which evolved out of hearings held by the General Assembly in the fall of 2007, will be compared to current eyewitness identification practices in Georgia. Recommendations for changes to existing practices in Georgia will be made, along with the likely costs and benefits of doing so. Finally, results from other jurisdictions that have already implemented some of the eyewitness identification best practices will be discussed.

A. Misidentification Is the Leading Factor in Wrongful Convictions

“[M]isidentification [is] the leading factor in the wrongful conviction of those who have been exonerated nationally by DNA evidence.”⁶ Approximately 75% of convicted individuals who have later been exonerated through DNA evidence were convicted based on eyewitness identification.⁷ Although perhaps previously unknown to the general public and even the general legal community, the relationship between eyewitness identification and wrongful conviction has been studied by social scientists since 1932.⁸ The United States Supreme Court

6. Letter from Justice I. Beverly Lake, Chief Justice, N.C. Supreme Court, Roy Cooper, N.C. Attorney Gen., and Robin Pendergraft, Dir., N.C. State Bureau of Investigation, to Scott Perry, Dir., N.C. Dep’t of Criminal Justice, Julia Lohman, Dir., N.C. Dep’t of Justice Sheriffs’ Training & Standards, Donna Maynard, Executive Dir., N.C. Sheriffs’ Ass’n, Charles Wilkins, Executive Dir., N.C. Ass’n of Chiefs of Police, Sheriff Jim Pendergraph, President, N.C. Sheriffs’ Ass’n, Chief Frank Palombo, President, N.C. Ass’n of Chiefs of Police, Chief Gregg Jarvies, N.C. Police Executives Ass’n, all N.C. Police Chiefs, and all N.C. Sheriffs (Oct. 6, 2003) (on file with the John Marshall Law Journal).

7. The Innocence Project, *Understand the Causes: Eyewitness Misidentification*, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Mar. 17, 2008).

8. Gary L. Wells, *Eyewitness Identification Evidence: Science and Reform*, *CHAMPION*, 12, 14, Apr. 29, 2005, [hereinafter *Wells, Eyewitness Identification Evidence*] (citing EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* xiii (Yale U. Press 1932), available at http://library.albany.edu/preservation/brittle_bks/Borchard_

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has recognized the problem as far back as 1967.⁹

The Georgia Assembly recently attempted to address the issue of eyewitness identification. House Bill 308, legislation which would have mandated specific procedures for law enforcement agencies to follow while conducting live and photo lineups, was introduced in the 2007 legislative session.¹⁰ Ultimately, the Bill was tabled in favor of a resolution to further study the issue of eyewitness identification in Georgia.¹¹ To that end, the House Study Committee on Eyewitness Identification Procedures held several hearings in the fall of 2007.¹² The hearings featured national experts on eyewitness identification and key stakeholders in Georgia as well as individuals who have been personally affected by the issue, either because they were the victim or were wrongfully convicted in a crime involving eyewitness identification.¹³ As a

Convicting/preface.pdf).

9. Richard S. Schmechel, Timothy P. O'Toole, Catharine Easterly & Elizabeth F. Loftus, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS. J. 177, 195 (2006) (citing *U.S. v. Wade*, 388 U.S. 218, 228 (1967)).

10. See State of Georgia 2008 Composite Status Sheet, H.R. 308, Feb. 8, 2007 (Feb. 20, 2008).

11. See H.R. Res. 352, Gen. Assem. (Ga. 2007); Telephone Interview with Rep. Stephanie Stuckey Benfield, House District No. 85 (August, 2007).

12. Jonathon Springston, *State House Committee Approves Eyewitness ID Reforms*, ATLANTA PROGRESSIVE NEWS, Feb. 9, 2008, <http://www.atlantaprogressivenews.com/news/0291.html>. See Interview with Rep. Stephanie Stuckey Benfield, *supra* note 11.

13. Interview with Rep. Stephanie Stuckey Benfield, *supra* note 11 (speakers included Aimee Maxwell, Dir., Ga. Innocence Project, Calvin Johnson, Ga. Exoneree & Board Member, Ga. Innocence Project, Shareef Cousin, La. Exoneree & Ga. Resident, Chris Mumma, Executive Dir., N.C. Ctr. on Actual Innocence, Dale Mann, Dir., Ga. Pub. Safety Training Ctr., Louis M. Dekmar, Chief of Police, LaGrange, Ga., Mike Jolley, Sheriff, Harris County, Ga. & President, Ga. Sheriffs' Ass'n, Butch Beach, Ga. Pub. Safety Training Ctr., Ken Patenaude, Captain, Northampton, Mass. Police Dep't, Paul Carroll, Sgt. (retired), Chicago Police Dep't, Jennifer Thompson, victim in case involving wrongful identification, Barry Scheck, DNA Expert Attorney & Co-Director, The Innocence Project, Dr. Gary Wells, Professor of Psychology, Iowa State University, Dr. Roy Malpass, Professor of Psychology at University of Tex. at El Paso, Gwen Keyes Fleming, DeKalb County Dist. Attorney, Ron Jayson, Former DeKalb County Magistrate.)

result of the hearings, the chair of the study committee, Representative Stephanie Stuckey Benfield (D-District 85) introduced House Bill 997 and House Resolution 1071.¹⁴ In contrast to House Bill 308, House Bill 997 does not call for specific reforms.¹⁵ Instead, it would require the Georgia Peace Officer Standards and Training Council to establish procedures for conducting lineups and work with the state Prosecuting Attorneys' Council to develop a program to train law enforcement officials on those procedures.¹⁶ House Resolution 1071 would require Georgia law enforcement agencies to develop their eyewitness identification procedures in conformity with recommendations that were made during the fall 2007 hearings.¹⁷ Although the House Judiciary (Non-Civil) Committee favorably reported the Bill and the resolution out of committee,¹⁸ the House Rules Committee failed to vote on either of the measures in time for them to have any realistic chance of passing during the 2007-2008 legislative session.¹⁹

B. DNA Evidence: The Tip of the Iceberg

The Innocence Project, an organization devoted to helping those who have been wrongly convicted, has cleared 214 men nationwide through the use of DNA evidence,²⁰ including the seven men in Georgia previously mentioned.²¹ Unfortunately, DNA evidence that could be determinative of guilt or innocence is only available in a limited number of cases, with some estimates at 10 to 20% of all serious felony cases.²² Assuming

14. See H.R. 997, 149th Gen. Assem. (Ga. 2008); H.R. Res. 1071, 149th Gen. Assem. (Ga. 2008); Springston, *State House Committee Approves Eyewitness ID Reforms*, *supra* note 12.

15. Compare Ga. H.R. 997 with Ga. H.R. 308.

16. See Ga. H.R. 997; Springston, *State House Committee Approves Eyewitness ID Reforms*, *supra* note 12.

17. Ga. H.R. Res. 1071; Springston, *State House Committee Approves Eyewitness ID Reforms*, *supra* note 12.

18. Springston, *State House Committee Approves Eyewitness ID Reforms*, *supra* note 12.

19. See State of Georgia 2008 Composite Status Sheet, Ga. H.R. 997, Mar. 12, 2008 (Mar. 14, 2008); State of Georgia 2008 Composite Status Sheet, Ga. H.R. Res. 1071, Mar. 12, 2008 (Mar. 14, 2008); Ben Smith, 1,240 Bills and Resolutions Dead for Session, *ATLANTA J. CONST.*, Mar. 13, 2008, available at http://www.ajc.com/metro/content/metro/stories/2008/03/12/deadbill_0313.html.

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DNA evidence is available in as many as 20% of all serious felony convictions and the same ratio of wrongful convictions exists in cases without DNA evidence, then the 214 people that have been exonerated potentially represent just one-fifth of all wrongfully convicted persons. That means there could be more than 800 people nationwide, including twenty-eight in Georgia, that are presently incarcerated for crimes they did not commit. Based on the finding that approximately 75% of the national DNA exonerees were convicted primarily due to eyewitness identification,²³ there could be as many as twenty-one people in Georgia wrongly convicted because of mistaken eyewitness identification. Admittedly, these projections are based on approximations of a small sample size. However, even if the projections are somewhat simplified, they indicate that other innocent people are incarcerated in Georgia based on eyewitness misidentification.

Another inference that could be drawn is that every time the wrong person goes to jail, the actual perpetrator remains free.²⁴ That means there have been potentially 800 crimes committed nationwide, including an estimated twenty-eight in Georgia, where the actual perpetrator may still be a threat to society. Although it is possible that the actual perpetrator may have been convicted for subsequent crimes, their sentence would not

20. The Innocence Project, *The Innocence Project*, <http://www.innocenceproject.org> (last visited Mar. 17, 2008).

21. The Innocence Project, *News and Information: GA Overview*, <http://www.innocenceproject.org/news/state.php?state=GA> (last visited Mar. 17, 2008).

22. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 116 (2008) (citing *Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 221 (2002) (statement of Prof. Barry Scheck, Co-Dir. of the Innocence Project) (“The vast majority (probably 80%) of felony cases do not involve biological evidence that can be subjected to DNA testing.”); Nina Martin, *Innocence Lost*, S.F. MAG., Nov. 2004, at 78, 105 (noting that “only about 10% of criminal cases have any biological evidence--blood, semen, skin--to test”).

23. The Innocence Project, *supra* note 7.

24. See *General Overview: Hearings Before the H. Eyewitness Identification Procedures Study Comm.*, 2007 Ga. Gen. Assem., (Ga. Sept. 17, 2007) (testimony of Christine C. Mumma, Executive Dir., N.C. Center on Actual Innocence), available at <http://media.legis.ga.gov/hav/07study/eyewitnessid91707.wmv>, 1:16:35 [hereinafter *Mumma Testimony*].

account for prior criminal history. As such, their sentence would probably be shorter than what the perpetrator deserves, and allow them to walk the streets without repaying their true debt to society.

C. Cost of Reimbursing the Wrongfully Convicted

Georgia has already spent approximately \$2.7 million reimbursing those who have been wrongfully convicted.²⁵ That figure may change soon as legislators are considering awarding \$1.2 million to Pete Williams, who served almost twenty-two years in prison for a rape that he did not commit.²⁶ The legislature has previously granted compensation of \$1 million for a man who was wrongfully imprisoned for seventeen years,²⁷ and \$1.2 million for a man who was wrongfully imprisoned for twenty-four years.²⁸ Since Mr. Williams falls between those two men in terms of the number of years spent in prison, an award of \$1.2 million seems reasonable. Compensation may also be given to the latest exoneree, Mr. John White, who spent approximately thirteen years in prison after he was wrongfully convicted of raping a seventy-four year old woman.²⁹

It should be noted that future compensation for wrongful convictions is not guaranteed because Georgia's legislature decides compensation on a case-by-case basis rather than through a statutory scheme.³⁰ Indeed, the legislature has declined to compensate two other men in Georgia whose exonerations are still opposed by prosecutors in their jurisdiction.³¹

As mentioned, DNA evidence only exists in a small

25. See sources cited, *supra* note 2.

26. Springston, *State House Committee Approves Eyewitness ID Reforms*, *supra* note 12.

27. Carlos Campos & Bill Torpy, *Men Freed by DNA Wait for Compensation*, ATLANTA J. CONST., Jan. 27, 2007, at B1, available at http://www.ga-innocenceproject.org/Articles/Article_67.htm.

28. Carlos Campos, *Man Wrongly Jailed to Get \$1.2 Million from State*, ATLANTA J. CONST., May 25, 2007, at D6, available at http://www.ga-innocenceproject.org/Articles/Article_78.htm.

29. Morris, *supra* note 1, at A1.

30. Campos & Torpy, *supra* note 27, at B1.

31. *Id.*

percentage of all cases.³² Future technological developments, for example, a highly accurate lie detector test, could have an impact similar to that of DNA evidence for the exoneration of those who have been wrongfully convicted. If such a development occurs, there would probably be an additional wave of exonerations and additional efforts to secure compensation.

II. EYEWITNESS IDENTIFICATION SCIENCE AND RESEARCH

A. *The Mind Is Not a Video Camera*

In order to gain a better understanding of some of the problems with eyewitness identifications, it is necessary to explore the science behind memory as applied to lineups. Human memory does not work like a video camera.³³ The memory can only accurately perceive and record a small amount of what one witnesses.³⁴ Not only is memory hindered in its ability to record data, the act of remembering is not as simple as selecting the metaphorical tape of the desired memory and hitting “play.” Instead, the act of remembering is reconstructive,³⁵ like “putting puzzle pieces together.”³⁶ This means that memory can change due to exposure to new information after the remembered event.³⁷ Imagine that during an interrogation or through some other process, the witness is

32. Garrett, *supra* note 22 (citing *Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the S. Comm. on the Judiciary*, *supra* note 22, at 221 (statement of Prof. Barry Scheck, Co-Dir. of the Innocence Project); Martin, *supra* note 22, at 105).

33. David M. Shofi, Comment, *The New York Courts’ Lack of Direction and Discretion Regarding the Admissibility of Expert Identification Testimony*, 4 PACE L. REV. 1101, 1104 (1994).

34. Schmechel, O’Toole, Easterly & Loftus, *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, *supra* note 9, at 195.

35. *Id.* (citing KARL HABERLANDT, HUMAN MEMORY: EXPLORATION AND APPLICATION 4 (Allyn & Bacon 1999)).

36. Schmechel, O’Toole, Easterly & Loftus, *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, *supra* note 9, at 195.

37. *Id.*

exposed to slightly different information about an event.³⁸ The next time the witness has to recall that event, the new information could become spliced together with the earlier information, thereby producing a new, different memory.³⁹ Each interrogation or step in which the witness is asked to reproduce the memory increases the risk of altering the memory.⁴⁰

B. Relative Judgment

The phenomenon of relative judgment demonstrates how the lineup is prone to the fallibility of memory. Relative judgment describes the tendency of the eyewitness to compare one lineup member to another and pick the one that looks most like their memory of the perpetrator.⁴¹ In laymen's terms, relative judgment could be called process of elimination.⁴² In other words, the eyewitness looks at all the suspects and methodically eliminates those suspects that least resemble their memory of the actual perpetrator until there is only one suspect left.⁴³ This is an effective strategy in lineups where the actual perpetrator is present, but in lineups without the actual perpetrator, there is a high risk that the person who most closely resembles the perpetrator will be selected by the eyewitness.⁴⁴ Hopefully, other evidence found by diligent law enforcement officers would exculpate that person.⁴⁵ Unfortunately, without any exculpatory evidence, that person may be wrongfully convicted

38. *Id.*

39. *Id.*

40. *Id.*

41. Wells, *Eyewitness Identification Evidence*, *supra* note 8, at 14.

42. *Implementing Reform: Law Enforcement's Perspective: Hearings Before the H. Eyewitness Identification Procedures Study Comm.*, 149th Gen. Assem., (Ga. Oct. 1, 2007) (testimony of Captain Ken Patenaude, Northampton, MA Police Dep't), available at <http://media.legis.ga.gov/hav/07study/eyewitnessid10107.wmv>, 1:50:10 [hereinafter *Patenaude Testimony*].

43. *See id.*

44. *Id.*

45. *See Implementing Reform: Law Enforcement's Perspective: Hearings Before the H. Eyewitness Identification Procedures Study Comm.*, 2007 Ga. Gen. Assem., (Ga. Oct. 1, 2007) (testimony of Louis M. Dekmar, Chief of Police, LaGrange, GA), available at http://media.legis.ga.gov/hav/07study/eye_witnessid10107.wmv, 40:50.

because they happened to look more like the eyewitness's memory of the actual perpetrator than anyone else in the lineup.

C. *False Confidence*

Another phenomenon that demonstrates one of the weaknesses of relying too heavily on eyewitness identifications is false confidence. Juries tend to view a high degree of witness confidence as proof-positive of the accuracy of the witness's identification.⁴⁶ Not surprisingly, confident witnesses are more likely to be accurate than non-confident witnesses.⁴⁷ However, many confident witnesses are inaccurate, and many non-confident witnesses are accurate.⁴⁸

Another problem with placing too much credence in the confidence of the eyewitness is that confidence could sometimes be affected by post-identification feedback.⁴⁹ In one experiment, 352 participants all identified the wrong suspect in a lineup.⁵⁰ After the identification, one group of participants was informed that they identified the actual suspect while the other group was given no feedback.⁵¹ When asked how confident they were that the person they identified was the actual perpetrator, only 15% of the group that did not receive any feedback said that they were highly confident of their selection.⁵² On the other hand, 50% of the group that had been given feedback said that they were highly confident.⁵³ The group that had been given feedback also denied that being told they had correctly identified the suspect after the identification

46. Wells, *Eyewitness Identification Evidence*, *supra* note 8, at 15.

47. Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 621 (2006) [hereinafter Wells, *Systemic Reforms*].

48. *Id.*

49. Wells, *Eyewitness Identification Evidence*, *supra* note 8, at 17 (citing Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 363-67 (1998), available at http://www.psychology.iastate.edu/~glwells/Wells_articles_pdf/Good,_You_Indetified_the_Suspect.pdf). See *Patenaude Testimony*, *supra* note 42, at 2:09:00.

50. Wells, *Eyewitness Identification Evidence*, *supra* note 8, at 17.

51. *Id.*

52. *Id.*

53. *Id.*

had any influence on them.⁵⁴ Yet, there were no other factors that could explain the disparity in the confidence between the groups.⁵⁵

One real-life example demonstrates how post-identification feedback can inflate the confidence of the eyewitness. In 1984, Jennifer Thompson, then a college student living in North Carolina, was raped.⁵⁶ Mrs. Thompson initially picked Ronald Cotton out of a photo lineup.⁵⁷ She was told by an administrator, "We thought this might be the one."⁵⁸ She subsequently identified Ronald Cotton in a live lineup.⁵⁹ After this identification, she was told she had "picked the same guy."⁶⁰ Although those statements to Mrs. Thompson were natural and well-intentioned, they confirmed Mrs. Thompson's belief that Ronald Cotton was the rapist.⁶¹ She was so confident that, when she later saw Ronald Cotton in the same courtroom with the man who actually raped her, she was still convinced that Ronald Cotton was her rapist.⁶² Even after DNA evidence finally convinced Mrs. Thompson that another man raped her, she saw her rapist's face as Ronald Cotton's.⁶³

III. EYEWITNESS IDENTIFICATION BEST PRACTICES

Dr. Gary Wells, a professor of psychology at Iowa State University and national eyewitness identification expert,⁶⁴ has compared memory evidence to trace evidence.⁶⁵ Trace evidence is physical evidence (e.g. semen, fibers, fingerprints) left at the crime scene which can help law enforcement identify the actual perpetrator.⁶⁶ Obviously, one's memory is not physical, but the idea is the same: the perpetrator has left a trace

54. *Id.*

55. *Id.*

56. *Frontline: What Jennifer Saw* (PBS television broadcast, Feb. 25, 1997), available at <http://www.pbs.org/wgbh/pages/frontline/shows/dna/etc/script.html>.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

behind in the mind of the eyewitness which provides a clue as to the identity of the perpetrator.⁶⁷ Law enforcement agencies recognize the fragile nature of physical trace evidence and have developed detailed procedures on how to capture and store it.⁶⁸ Eyewitness memory, which is similarly fragile, should receive the same treatment.⁶⁹ Recognizing that faulty eyewitness identification has contributed to the wrongful convictions of the majority of those who have been exonerated by DNA evidence,⁷⁰ experts like Dr. Wells and others in the legal and scientific communities have developed some of the following best practices for conducting lineups.

A. *Double-blind Lineup Administration*

The most important reform that can be made to the eyewitness identification process is the implementation of double-blind lineups.⁷¹ In a double-blind lineup, the administrator of the lineup does not know which lineup member is the actual suspect.⁷² The double-blind methodology is borrowed from medical and social science.⁷³ During a medical study, the test subject is given either the actual drug being tested or a placebo.⁷⁴ Both the test subject and the administrator are “blind” because they do not know whether the test subject has

64. Ga. H. Eyewitness Identification Procedures Study Comm., Revised Agenda (2007) (unpublished, on file with the John Marshall Law Journal).

65. Barry C. Scheck, Symposium, *Reforming Eyewitness Identification: Convicting the Guilty, Protecting the Innocent*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 233, 235 (2006).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. The Innocence Project, *supra* note 7.

71. Wells, *Eyewitness Identification Evidence*, *supra* note 8, at 18.

72. Wells, *Systemic Reforms*, *supra* note 47, at 629 (citing Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photo spreads*, 22 LAW & HUM. BEHAV. 603, 605 (1998)).

73. *Id.* (citing Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 118 (2002)).

74. *Id.*

been given the actual drug or the placebo.⁷⁵ Since both parties are “blind,” the experiment is considered “double-blind.”⁷⁶

There are several benefits to the double-blind lineup. It reduces the rate of error without reducing the number of correct identifications.⁷⁷ It also prevents the administrator from unintentionally influencing the subject.⁷⁸ Conversely, since the witness is instructed before the lineup that the administrator does not know who the actual suspect is, the witness will not be tempted to “read” the administrator for clues as to the actual suspect’s position in the lineup.⁷⁹ Double-blind administration also counters the problem of false confidence because after the identification is made the administrator will not be able to let the witness know if they identified the actual suspect.⁸⁰ Any statement the witness makes about their confidence in their identification will be unbiased and can be checked later in the event of a trial.⁸¹

It should be stressed that the advocacy of the double-blind lineup is not an indictment on the integrity of the law enforcement agencies administering lineups.⁸² Rather, it is a precaution against the possibility that an administrator with good intentions can inadvertently “leak” information to the eyewitness, either through verbal or nonverbal cues.⁸³ For example, if the administrator placed the suspect in position three, and the eyewitness uttered words to indicate that they were considering lineup member one or two, the administrator might innocently remind the eyewitness to study all the

75. *Id.*

76. *Id.*

77. Barry C. Scheck, Professor of Law and Dir., Innocence Project at the Benjamin N. Cardozo School of Law, Barry Scheck Lectures on Wrongful Convictions (Oct. 3, 2005), in 54 *DRAKE L. REV.* 597, 606 (2006).

78. *Patenaude Testimony*, *supra* note 42, at 2:05:30; Wells, *Systemic Reforms*, *supra* note 47, at 629.

79. Wells, *Systemic Reforms*, *supra* note 47, at 630. See *Mumma Testimony*, *supra* note 24, at 1:22:25.

80. Schmechel, O’Toole, Easterly & Loftus, *supra* note 9, at 202.

81. Wells, *Eyewitness Identification Evidence*, *supra* note 8, at 18.

82. Wells, *Systemic Reforms*, *supra* note 47, at 629. See *Mumma Testimony*, *supra* note 24, at 1:22:00.

83. Wells, *Systemic Reforms*, *supra* note 47, at 629 (citing ROBERT ROSENTHAL, *EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH* (Irvington 1976)).

photos.⁸⁴ Body language, such as “smiling, frowning, and leaning” can also be difficult for the administrator to control.⁸⁵ Many experienced investigators probably could control these tendencies. However, with a double-blind administrator, the risk of any sort of inadvertent influence is nil.

Some opponents of the double-blind procedure have argued that it is not feasible for smaller departments to conduct double-blind lineups due to a lack of personnel or other resources.⁸⁶ That is a valid concern in Georgia where many of the smaller departments must ask for assistance from a larger neighboring agency or state agency when they need to conduct a lineup.⁸⁷ Despite that challenge, resourceful and effective double-blind lineup administration is possible. Agencies may be able to train other non-law enforcement personnel to assist in the administration of the lineup.⁸⁸ Technological tools, such as computer software, could make it possible to conduct the lineup without requiring the presence of an administrator.⁸⁹ Even a lack of technology should not prevent an agency from implementing double-blind lineups or their equivalent.⁹⁰ In a simple, almost costless double-blind procedure, the administrator places photos of the suspect and the fillers in different envelopes, shuffles the envelopes randomly, numbers them, and passes them to the witness.⁹¹ The witness is then able to study the different photos without the administrator knowing at any time which particular photo the witness is viewing.⁹²

84. Wells, *Systemic Reforms*, *supra* note 47, at 630. See Patenaude *Testimony*, *supra* note 42, at 2:05:45.

85. Wells, *Systemic Reforms*, *supra* note 47, at 630.

86. See Mumma *Testimony*, *supra* note 24, at 1:22:45.

87. See *General Overview: Hearings Before the H. Eyewitness Identification Procedures Study Comm.*, 149th Ga. Gen. Assem., (Ga. Sept. 17, 2007) (testimony of Aimee Maxwell, Dir., Ga. Innocence Project), available at <http://media.legis.ga.gov/hav/07study/eyewitnessid91707.wmv>, 19:55 [hereinafter *Maxwell Testimony*].

88. Mumma *Testimony*, *supra* note 24, at 1:48:20.

89. *Id.*

90. See *id.* at 1:22:45.

91. *Id.* at 1:49:20.

92. *Id.*

B. Instructions to the Eyewitness

Providing instructions to the witness is another best practice that could be implemented to avoid faulty eyewitness identifications. The following are some instructions that could be considered:

The actual offender might not be in the lineup. A simple reform is to instruct the witness that the actual offender might not be in the lineup.⁹³ This instruction takes the pressure off the witness, who may understandably feel compelled, perhaps out of a desire to help the police do their jobs or to aid the victim, to make an identification.⁹⁴ This instruction reduces the rate of error when the actual offender is not present in the lineup without substantially reducing the chance that the actual offender will not be identified when they are present.⁹⁵

The administrator does not know who the suspect is.⁹⁶ This instruction prevents the witness from trying to read the administrator for clues as to the placement of the actual suspect in the lineup.⁹⁷

The investigation will continue even if you do not identify the suspect.⁹⁸ This takes the pressure off any witness who might be concerned that the victim will never get their day in court if witness does not make an identification.⁹⁹

The administrator may not give you any feedback.¹⁰⁰ This instruction lets the witness know that once they have made an identification the administrator will not be able to confirm whether they identified the actual suspect. That prevents the witness's confidence from being artificially manipulated.¹⁰¹ In

93. *Patenaude Testimony*, *supra* note 42, at 1:59:05; *Mumma Testimony*, *supra* note 24, at 1:26:25; Wells, *Systemic Reforms*, *supra* note 47, at 625.

94. Wells, *Systemic Reforms*, *supra* note 47, at 625 (citing Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 486-87 (1981)).

95. *Id.*

96. *Mumma Testimony*, *supra* note 24, at 1:25:55.

97. Wells, *Systemic Reforms*, *supra* note 47, at 630.

98. *Patenaude Testimony*, *supra* note 43, at 1:59:10; *Mumma Testimony*, *supra* note 24, at 1:26:05.

99. *Mumma Testimony*, *supra* note 24, at 1:26:05.

100. *Id.* at 1:26:40.

101. Wells, *Systemic Reforms*, *supra* note 47, at 629 (citing Bradfield, Wells & Olson, *supra* note 73, at 117).

the Jennifer Thompson case, this would have prevented the officer from telling Mrs. Thompson that she picked, “the same guy,” after she identified Ronald Cotton in the live lineup.¹⁰²

C. Lineup Composition

Regarding lineup composition, there should only be one suspect in each lineup.¹⁰³ When there is only one suspect per lineup, a witness who misidentifies a lineup member is likely to err by picking a filler rather than by picking the actual suspect.¹⁰⁴ The more suspects there are in one lineup, the greater the chance that a mistaken eyewitness will identify an actual suspect.¹⁰⁵

Another important practice for lineup composition is that the suspect should not “stand out” from the fillers in the lineup.¹⁰⁶ For example, the eyewitness describes the suspect as being a thin male with a moustache and dark hair.¹⁰⁷ Yet, all the fillers in the lineup are either clean-shaven, overweight, or have light hair.¹⁰⁸ In this situation, there is a high risk that the suspect will be identified simply because they are the only member of the lineup that matches the description given by the eyewitness.¹⁰⁹

Various circumstances can make it more difficult to achieve the “not unduly standing out” standard, which will require training.¹¹⁰ Regardless, if a non-witness can identify the suspect just from the eyewitness’s description of the offender or can pick the suspect out just by viewing the lineup, the suspect is probably “unduly standing out,”¹¹¹ and is at risk of being

102. See *Frontline: What Jennifer Saw*, *supra* note 56.

103. U.S. DEP’T OF JUSTICE, TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 29 (1999), available at <http://www.ncjrs.org/pdffiles1/nij/178240.pdf> [herein after *U.S. Dep’t of Justice Eyewitness Guidelines*].

104. Wells, *Systemic Reforms*, *supra* note 47, at 623.

105. *Id.*

106. *Patenaude Testimony*, *supra* note 42, at 1:59:10; Wells, *Systemic Reforms*, *supra* note 47, at 624.

107. Wells, *Systemic Reforms*, *supra* note 47, at 624.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (citing Special Issue, Measuring Lineup Fairness, 13 APPLIED COGNITIVE PSYCHOL. (1999)).

identified regardless of whether they are the actual perpetrator.

D. Statement of the Witness's Confidence of Their Identification

After making an identification, the witness should be asked to state how confident they are that the person they identified is the actual offender.¹¹² This should be done before the witness can receive any feedback from the administrator or from some other source that could potentially influence them.¹¹³ The witness's response should be documented to preserve an unbiased record of the witness's independent recollection.¹¹⁴ The recorded statement of the witness's confidence then becomes the primary means for the jury to gauge the accuracy of the eyewitness's identification.¹¹⁵ If a witness stated that they were pretty confident at the time they made the initial identification and then stated later for the jury that they were extremely confident, the earlier statement of confidence would be available to check for the record.¹¹⁶

E. Documentation of the Eyewitness Identification Process

The eyewitness identification itself should be documented in some form, either by video, audio, or in writing.¹¹⁷ In addition to creating an unbiased record,¹¹⁸ having a record of the identification preserves the integrity of the evidence.¹¹⁹ An additional benefit of the video recording is that it would allow an experienced investigator in a double-blind lineup, in which they could not be the lineup administrator,¹²⁰ to go back and study the eyewitness's reaction as the eyewitness views each lineup member.

112. *Patenaude Testimony*, *supra* note 43, at 1:59:20; *Mumma Testimony*, *supra* note 61, at 1:25:40; Wells, *Systemic Reforms*, *supra* note 47, at 631.

113. Wells, *Systemic Reforms*, *supra* note 47, at 631.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Mumma Testimony*, *supra* note 24, at 1:26:40; *U.S. Dep't of Justice Eyewitness Guidelines*, *supra* note 103, at 33-38.

118. Wells, *Systemic Reforms*, *supra* note 47, at 631.

119. *U.S. Dep't of Justice Eyewitness Guidelines*, *supra* note 103, at 35.

120. *See* Wells, *Eyewitness Identification Evidence*, *supra* note 8, at 18.

F. More Information Needed: Sequential Lineup Method

One area of reform that has generated some controversy in scientific and legal communities is the sequential lineup method. In a sequential lineup, the lineup members are presented to the witness one-by-one with the witness having a chance to study each participant and make an identification.¹²¹ This is opposed to the traditional simultaneous lineup in which the lineup members are presented to the eyewitness all-at-once.¹²² The sequential lineup method is designed to prevent the use of relative judgment,¹²³ where the witness compares the lineup members to their memory of the perpetrator and picks the individual that most closely resembles that memory.¹²⁴ In a sequential lineup, the witness cannot be sure if the next lineup member will look even more like their memory of the perpetrator than the lineup members they have already seen.¹²⁵ It therefore encourages the use of the eyewitness's absolute judgment.¹²⁶ The eyewitness must look at each lineup member, ask, "Is this the person that I saw?" and answer either yes or no.¹²⁷

The chief advantage of the sequential lineup method is that it reduces the rate of eyewitness error.¹²⁸ The tradeoff for this reduced rate of error is that some accurate identifications may be lost,¹²⁹ especially in eyewitnesses with weaker memories.¹³⁰

121. *Id.* at 14.

122. *Id.*

123. *See* Wells, *Systemic Reforms*, *supra* note 47, at 627.

124. Wells, *Eyewitness Identification Evidence*, *supra* note 8, at 14.

125. *Id.*

126. *See* U.S. DEP'T OF JUSTICE, TECHNICAL WORKING GROUP FOR EYEWITNESS EVIDENCE, EYEWITNESS EVIDENCE: A TRAINER'S MANUAL FOR LAW ENFORCEMENT 41 (2003), available at <http://www.ncjrs.gov/nij/eyewitness/188678.pdf>.

127. Wells, *Systemic Reforms*, *supra* note 47, at 625 (citing R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556, 559 (1985)).

128. Scheck, *Lecture on Wrongful Convictions*, *supra* note 77, at 608.

129. Wells, *Systemic Reforms*, *supra* note 47, at 626 (citing Nancy M. Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 471 (2001)).

130. Wells, *Systemic Reforms*, *supra* note 47, at 628.

Furthermore, the sequential method is probably worse than the simultaneous method in a non-double-blind lineup because it presents a greater opportunity for the administrator to influence the eyewitness.¹³¹

The sequential lineup method may yet prove to be more beneficial than the traditional simultaneous method. Currently, however, the controversy surrounding its adoption takes too much attention away from the non-controversial reforms.¹³² Given the current lack of consensus on the sequential lineup method,¹³³ its use should be at the discretion of the individual law enforcement agency and not part of any mandatory reform until more conclusive data on its use is available.

IV. CURRENT USE OF BEST PRACTICES IN GEORGIA

In a 2007 survey conducted by the Georgia Innocence Project on eyewitness identification procedures used by Georgia law enforcement agencies,¹³⁴ a few of the responding law enforcement agencies, including Acworth, Garden City, Marietta, DeKalb County, Forsyth County, Roswell, Greensboro, Lilburn, Norcross, Henry County, Arcade, and Hoschton, indicated that they currently use some of the best

131. See Gary L. Wells, *Police Lineups: Data, Theory and Policy*, 7 PSYCHOL. PUB. POL'Y & L. 791, 794 (2001) (citing M. R. Phillips, B. D. McAuliffe, M. B. Kovera, & B. L. Cutler, *Double-Blind Photo Array Administration as a Safeguard Against Investigator Bias*, 84 J. APPLIED PSYCHOL. 940, 951 (1999)).

132. See *Eyewitness Identification: Scientific Studies and Best Police Practices: Hearings Before the H. Eyewitness Identification Procedures Study Comm.*, 149th Gen. Assem., (Ga. Oct. 22, 2007) (testimony of Dr. Gary Wells, Professor of Psychology, Iowa State Univ.) (no recording available) [hereinafter *Wells Testimony*].

133. *Id.*

134. See GA. INNOCENCE PROJECT, 2007 GEORGIA INNOCENCE PROJECT LAW ENFORCEMENT SURVEY pt. i, 1-6 (Nov. 2007) (unpublished survey, on file with the John Marshall Law Journal) (statistics based on 355 responses to survey sent to an estimated 493 law enforcement agencies in the state of Georgia under open records request; thirty-eight responses were not included because the cost to the Georgia Innocence Project of obtaining the data was "prohibitive" or there was a dispute about whether the response was sent) [hereinafter *Ga. Law Enforcement Survey*].

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practices in their lineup procedures.¹³⁵ Unfortunately, these agencies are in the minority.

Double-blind Lineups. Of the responding agencies, only 3.9% reported having a written policy requiring that lineups be supervised or performed by a blind administrator for live lineups, and only 1.4% reported having such procedures for photo lineups.¹³⁶

Warning Instructions. Only 2% of the responding agencies for live lineups, and 5.4% for photo lineups reported having a written policy advising the eyewitness that the suspect may not be present in the lineup.¹³⁷

Confidence Statement. Of the responding agencies, only 2.5% for live lineups, and 2.8% for photo lineups reported having a written policy of requiring that the confidence level of the eyewitness be recorded upon making or not making an identification.¹³⁸

Documentation of Eyewitness Identification. Only 13% of the responding agencies for live lineups, and 2% for photo lineups reported having a written policy of recording the eyewitness identification procedures, whether by video, audio, or in writing.¹³⁹

Regardless of whether they are incorporating best practices into their procedures, only 18% of the responding law enforcement agencies indicated having any written policy on the collection of eyewitness evidence at all.¹⁴⁰ In fairness, 14.4% of the agencies that reported not having any written procedures do not conduct lineups,¹⁴¹ as some of the smaller agencies in Georgia rely on assistance from other agencies with more resources for conducting lineups.¹⁴² For those smaller agencies, that might make the need for their own written policy somewhat less important. However, even after factoring out those

135. *Id.* pt. ii, at 1-20 (agencies indicated that they have a written policy, and at least record a confidence statement from the witness or conduct double-blind lineups).

136. *Id.* pt. i, at 4.

137. *Id.*

138. *Id.*

139. *Id.* pt. i, at 3.

140. *Id.* at 1.

141. *Id.*

142. *Maxwell Testimony*, *supra* note 87, at 19:55.

agencies that do not conduct their own lineups, approximately 69.2% of the responding agencies indicated that they do not conduct their own lineups.¹⁴³

The Georgia Association of the Chiefs of Police has recognized the need for the statewide adoption of written procedures and recently called for all of its agencies that do not currently have written policy on eyewitness identification to either adopt standard procedures that it has developed or draft procedures that are similar.¹⁴⁴ This is a step in the right direction. Unfortunately, for the most part, the procedures advocated by the Georgia Association of the Chiefs of Police do not include the reforms suggested in the fall 2007 hearings conducted by the General Assembly.¹⁴⁵ More importantly, allowing the agencies to draft their own “similar” procedures¹⁴⁶ creates a loophole that can be used avoid implementing some of the recommended best practices. Agencies should have the discretion to draft their own procedures to accommodate their individual circumstances.¹⁴⁷ However, within that discretion, certain minimum requirements must be met in order to ensure that the reforms do not lose their effectiveness.

V. RECOMMENDATIONS

Every law enforcement agency in Georgia should have written procedures for conducting eyewitness identifications. Although each agency should have some discretion in drafting the procedures, law enforcement agencies may wish to consider adopting some uniform set of procedures statewide so agencies can rely on lineups conducted by other agencies with greater

143. *Ga. Law Enforcement Survey*, *supra* note 134, pt. ii, at 1-20.

144. Memorandum from D. Mike Edwards, Dir. of State Certification, Ga. Ass'n of Chiefs of Police, to Chiefs & Certification Managers of State Certified Agencies (Dec. 12, 2007) (on file with the John Marshall Law Journal).

145. *Compare* GA. ASS'N OF CHIEFS OF POLICE, SAMPLE LAW ENFORCEMENT POLICY MANUAL: INVESTIGATIVE FUNCTION 27-29 (2007), http://www.gachiefs.com/DeptResrcs_SamplePolicyManual.htm (follow “Chapter 17- Investigative Function” hyperlink) (last visited Mar. 17, 2008), *with* H.R. Res. 1071.

146. Memorandum from D. Mike Edwards, *supra* note 144.

147. *See Patenaude Testimony*, *supra* note 42, at 2:20:20.

confidence.¹⁴⁸ The procedures must incorporate certain minimum requirements. Specifically, these procedures must:

A. Require double-blind lineup administration.

Again, double-blind lineup administration is the single most important reform in the area of eyewitness identification.¹⁴⁹ As an accommodation, double-blind administration may be the preferred, not mandatory, method of conducting lineups for smaller departments only.¹⁵⁰ However, when those smaller departments are unable to conduct double-blind lineups, they should document their reasons for not being able to do so.¹⁵¹ The House Study Committee on Eyewitness Identification Procedures recommended that all law enforcement agencies in Georgia conduct double-blind lineups whenever possible.¹⁵² In contrast, the Georgia Association of the Chiefs of Police sample policy manual does not call for double-blind lineup administration.¹⁵³ Instead, it suggests that administrators in photo lineups should, “[n]ever make suggestive statements that may influence the judgment or perception of the witness,”¹⁵⁴ and in live lineups, “[s]crupulously avoid using statements, clues, casual comments or providing unnecessary or irrelevant information that in any manner may influence the witnesses’ decision-making process or perception.”¹⁵⁵ However, those guidelines do not address the chance that the administrator may *accidentally* leak information to the eyewitness.¹⁵⁶

B. Require a warning instruction be given to the eyewitness that the perpetrator may not be present in the lineup.

This recommendation was made by the House Study Committee on Eyewitness Identification Procedures,¹⁵⁷ but it is

148. See *Mumma Testimony*, *supra* note 24, at 1:30:55.

149. Wells, *Eyewitness Identification Evidence*, *supra* note 8, at 18.

150. See *Patenaude Testimony*, *supra* note 42, at 2:20:35.

151. *Id.*

152. See H.R. Res.1071.

153. GA. ASS’N OF CHIEFS OF POLICE, *supra* note 145, at 27-29.

154. *Id.* at 28.

155. *Id.* at 29.

156. See *Patenaude Testimony*, *supra* note 42, at 2:05:30 (emphasis added).

157. Ga. H.R. Res. 1071.

not included in the sample policy manual from the Georgia Chiefs of Police.¹⁵⁸

C. Address the composition of the lineup to ensure that the suspect does not unduly stand out.

The composition of the lineup was not a specifically addressed in the recommendations of the House Study Committee on Eyewitness Identification Procedures.¹⁵⁹ However, this does not mean that the Committee discouraged taking measures to ensure that the suspect in the lineup does not unduly stand out. Rather, the Committee may not have felt it was necessary to address the topic because the sample policy manual of the Georgia Chiefs of Police already provides guidelines for selecting fillers in lineups so that the suspect does not unduly stand out.¹⁶⁰

D. Require that the administrator secure a statement of the witness's confidence after an identification is made.

The sample policy manual does not require securing any sort of post-identification confidence statement,¹⁶¹ and although the House Study Committee on Eyewitness Identification Procedures recommended that any result of the lineup is documented in the witness's own words, it did not specifically recommend a statement of confidence.¹⁶²

E. Document the lineup process, either through video, audio or in writing.

The House Study Committee on Eyewitness Identification Procedures recommended that any responses made by the witness to the lineup should be documented either through video, audio, or in writing.¹⁶³ Similarly, for live lineups, the sample policy of the Georgia Chiefs of Police calls for video recording and a complete written record of the lineup.¹⁶⁴

158. GA. ASS'N OF CHIEFS OF POLICE, *supra* note 145, at 27-29.

159. *See* Ga. H.R. Res. 1071.

160. GA. ASS'N OF CHIEFS OF POLICE, *supra* note 145, at 27-28.

161. *Id.*

162. Ga. H.R. Res. 1071.

163. *Id.*

164. GA. ASS'N OF CHIEFS OF POLICE, *supra* note 145, at 29.

However, for photo lineups, the sample policy manual only requires the administrator to “[p]reserve the photo array, together with full information about the identification process, for future reference.”¹⁶⁵ While that policy may be interpreted as requiring documentation, it could and should do so more specifically, as the manual does for live lineups.¹⁶⁶

VI. BENEFITS

There are several benefits to adopting formal written procedures that include the above-discussed best practices.¹⁶⁷ Obviously, having these procedures in place lessens the possibility that an eyewitness would erroneously identify an innocent suspect.¹⁶⁸ The reduction of misidentifications allows for efficient use of limited law enforcement resources since after a misidentification those resources are likely inefficiently focused on an innocent suspect.¹⁶⁹

Another benefit of having written procedures that incorporate the suggested reforms is that it makes it easier for judges, attorneys, and jurors to evaluate any identification made since there will be a detailed record of the identification including a statement of the witness’s confidence.¹⁷⁰ Additionally, when eyewitness identifications are based on best practices, there will be less opportunity for defense attorneys to present eyewitness experts to refute those identifications because expert testimony commonly focuses on any deficiencies in the lineup process from which the identification was made.¹⁷¹ Reducing the need for expert testimony also promotes judicial economy by reducing the time and expense of trial.

The reduction of government expenditures is another indirect benefit of eyewitness identification reform. As discussed, the state of Georgia has already spent \$2.7 million reimbursing exonerees who have been wrongfully convicted on the basis of

165. *Id.* at 28.

166. *Id.* at 29.

167. Wells, *Systemic Reforms*, *supra* note 47, at 631.

168. *Id.*

169. *Id.*

170. Wells, *Systemic Reforms*, *supra* note 47, at 632.

171. *Id.*

eyewitness identification evidence.¹⁷² Since DNA evidence is only available in approximately 10% to 20% of all serious crimes,¹⁷³ that \$2.7 million represents only the tip of the proverbial iceberg. If future evidentiary techniques are developed on par with DNA in terms of their exculpatory effect, then there could be an additional wave of exonerees and calls for legislative compensation. Implementing eyewitness identification reforms now would reduce the chance of future wrongful convictions and concurrently reduce the risk of future claims for compensation by those who have been wrongfully incarcerated.

VII. COSTS

As almost every legislative mandate comes with a price tag, law enforcement agencies are understandably concerned about having to find room in their already limited budgets for the implementation of new eyewitness identification procedures. The good news is that those jurisdictions that have implemented similar reforms¹⁷⁴ have been able to do so while incurring either minimal or no expenses. New Jersey achieved the implementation of these best practices without providing any extra budget.¹⁷⁵ Similarly, none of the approximately fifty departments in North Carolina that implemented reforms¹⁷⁶ have indicated any impact on their cost as a result.¹⁷⁷

No law enforcement agency should be required to bear the burden of an unfunded mandate, no matter how small the cost. Even though other states have not indicated any significant expenses as a result of implementing reforms,¹⁷⁸ the legislature should ensure that any required funding needs are met. Any

172. See sources cited, *supra* note 2.

173. Garrett, *supra* note 22 (citing *Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the S. Comm. on the Judiciary, supra* note 22, at 221 (statement of Prof. Barry Scheck, Co-Dir. of the Innocence Project); Martin, *supra* note 22, at 105).

174. The other jurisdictions have also implemented the sequential procedure instead of the traditional simultaneous method.

175. *Wells Testimony, supra* note 132.

176. *Mumma Testimony, supra* note 24, at 1:50:20.

177. *Mumma Testimony, supra* note 24, at 1:36:55.

178. See *supra* notes 170-72 and accompanying text.

necessary expense is justified by the avoidance of future costs due to the reduced likelihood of future wrongful convictions and exonerations which can result in substantial legislative compensation,¹⁷⁹ not to mention a decrease in public confidence in the criminal justice system.

Estimates for required training on the new procedures range from two hours for police officers to four hours for detectives in one department in Northampton, Massachusetts,¹⁸⁰ to eight hours for a state training session in New Jersey where reforms were implemented in 180 days.¹⁸¹ Regarding double-blind lineup administration, although the detectives conduct most of the lineups, training the police officers on the double-blind procedures has the advantage of providing the department with a steady supply of capable blind administrators.¹⁸² If necessary, persons who have no familiarity with the process can be trained to serve as a blind administrator in as few as ten minutes.¹⁸³

VIII. FEEDBACK FROM OTHER JURISDICTIONS

Other states that have implemented similar reforms¹⁸⁴ include New Jersey, Wisconsin, and North Carolina.¹⁸⁵ On the local level, reforms have been implemented in Suffolk County,¹⁸⁶ and in Northampton, Massachusetts,¹⁸⁷ Virginia Beach, Virginia,¹⁸⁸ Santa Clara County, California,¹⁸⁹ and, to some extent, a

179. See sources cited, *supra* note 2..

180. *Patenaude Testimony*, *supra* note 42, at 2:19:05.

181. *Id.* at 2:31:30.

182. See *id.* at 2:19:20.

183. See *id.* at 2:20:00.

184. The other states have also implemented the sequential procedure to replace the traditional simultaneous method.

185. Wells, *Systemic Reforms*, *supra* note 47, at 641.

186. *Id.* at 642 (citing Suzanne Smalley, *Police Update Evidence Gathering: Suspect Identification Is Focus of Changes*, BOSTON GLOBE, July 20, 2004, at B1).

187. *Id.* (citing NORTHAMPTON POLICE DEP'T, ADMINISTRATION & OPERATIONS MANUAL: EYEWITNESS IDENTIFICATION PROCEDURE (2005), available at http://www.innocenceproject.org/docs/Northampton_MA_ID_Protocols.pdf).

188. *Id.* (citing Karin Brulliard, *Revamping Va.'s Police Lineups: New Methods Urged to Curb Mistakes*, WASH. POST, Mar. 6, 2005, at C1).

189. *Id.* (citing POLICE CHIEFS ASS'N OF SANTA CLARA COUNTY, LINE-UP

handful of agencies in Georgia.¹⁹⁰

In those reform jurisdictions, the perhaps expected negative feedback has not materialized. Four police departments in Hennepin County, Minnesota, conducted a pilot program that tested three of the reforms recommended in this Comment, double-blind administration, the warning instruction, and documentation of confidence statements.¹⁹¹ Although the program did not specifically call for either an audio or video recording of the identification process, it did require a complete written report of the process.¹⁹² Also, the pilot program called for the use of the sequential lineup,¹⁹³ which is not one of the recommendations of this Comment due to the current controversy surrounding its use.¹⁹⁴ After one year, all four police departments remained committed to the use of the procedures, and investigators who were initially skeptical of the procedures “found that they were not hindered by the [procedures].”¹⁹⁵ Similarly, over 80% of law enforcement agencies in New Jersey were able to implement double-blind testing “with no difficulties or with only minor difficulties that were easily overcome.”¹⁹⁶ Agencies in North Carolina that implemented reforms have not reported any problems as result,¹⁹⁷ and detectives or prosecuting attorneys in

PROTOCOL FOR LAW ENFORCEMENT (2002), available at http://www.innocenceproject.org/docs/Santa_Clara_Lineup_Protocols.pdf.

190. See *supra* note 135 and accompanying text.

191. Amy Klobuchar & Hilary Lindell Caligiuri, *Protecting the Innocent/Convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identification*, 32 WM. MITCHELL L. REV. 1, 19-20 (2005) (citing Memorandum from Paul Scoggin, Managing Attorney, Violent Crimes Div., Hennepin County Attorney's Office to the Investigators/Detectives, Minneapolis (Central Investigation Div.), Bloomington, Minnetonka, and New Hope Police Dep'ts on Pilot Program for the Sequential Identification Process Memorandum 1 (Oct. 27, 2003)).

192. *Id.* at 20-21.

193. *Id.* at 19-20.

194. See *supra* notes 132-33 and accompanying text.

195. Klobuchar & Caligiuri, *supra* note 191, at 24.

196. Winn S. Collins, *Looks Can Be Deceiving: Safeguards for Eyewitness Identification*, 11 WIS. LAW. 8, 11 (2004) (citing Telephone Interview with Lori Linskey, Deputy Attorney General, N.J. Dep't of Justice (Jan. 6, 2004)).

197. *Mumma Testimony*, *supra* note 24, at 1:30:20.

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Northampton, Massachusetts have not provided the policy developers with negative feedback.¹⁹⁸

The main source of negative data on the suggested eyewitness identification reforms comes from an Illinois field study which compared identification results in a sequential double-blind lineup with identification results in the traditional non-blind simultaneous lineup.¹⁹⁹ The results of the study indicated that the non-blind simultaneous method produced more positive identifications of the actual suspect and fewer inaccurate filler identifications than the double-blind sequential method.²⁰⁰ On this basis, the report concluded that the traditional non-blind simultaneous method was superior to the sequential double-blind method.²⁰¹

The Illinois field study should not be an impediment to the suggested reforms in this Comment. First, it tested the sequential lineup method in tandem with the double-blind lineup administration.²⁰² The sequential lineup is not one of the reforms recommended in this Comment,²⁰³ or in House Resolution 1071.²⁰⁴ Therefore, the only proposed reform it could potentially discredit is the use of the double-blind lineup. To that extent, the higher rate of positive identification reported in the non-double-blind simultaneous lineups in the study may be entirely consistent with the reasoning that favors the adoption of the double-blind lineup.²⁰⁵ One of the purposes of the double-blind lineup is to prevent the administrator from intentionally or unintentionally influencing the eyewitness's

198. See *Patenaude Testimony*, *supra* note 42, at 2:27:10.

199. OFFICE OF WIS. ATTORNEY GEN., RESPONSE TO CHICAGO REPORT ON EYEWITNESS IDENTIFICATION PROCEDURES 2-3 (2006), <http://www.doj.state.wi.us/dles/tns/ILRptResponse.pdf>.

200. *Id.* (citing SHARI H. MECKLENBURG, REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES 37-42 (2006), <http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness20ID.pdf>).

201. *Id.* (citing MECKLENBURG, *supra* note 200, at 27).

202. Daniel L. Schacter, Robyn Dawes, Larry L. Jacoby, Daniel Kahneman, Richard Lempert, Henry L. Roediger, & Robert Rosenthal, *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 LAW & HUM. BEHAV. 3, 4 (2008).

203. See *supra* notes 132-33 and accompanying text.

204. H.R. Res. 1071.

205. OFFICE OF WIS. ATTORNEY GEN., *supra* note 199, at 3.

selection.²⁰⁶ In a non-double-blind scenario, if the administrator was unintentionally influencing the eyewitness, a higher rate of positive identifications would be expected.²⁰⁷ In fact, there was a higher rate of positive identifications under the non-double-blind lineups in the Illinois study.²⁰⁸ If that higher rate of positive identifications was due to the non-blind administrator's unintentional influence, that only supports the case for adopting double-blind lineups.²⁰⁹

Unfortunately, it is impossible to tell whether the higher rate of positive identifications was due to the use of (a) the simultaneous method as opposed to the sequential method or (b) non-blind administration, as opposed to double-blind administration because the study did not separately compare double-blind simultaneous lineups to double-blind sequential lineups.²¹⁰

Another concern with the study is the validity of the data upon which it draws its conclusions.²¹¹ Two of the locations reported no instances of filler identifications.²¹² This result is "surprising given that other jurisdictions consistently report an average of 20.5% filler identifications in actual lineups."²¹³

206. *Patenaude Testimony*, *supra* note 42, at 2:05:30; Wells, *Systemic Reforms*, *supra* note 47, at 629.

207. OFFICE OF WIS. ATTORNEY GEN., *supra* note 199, at 3.

208. *Id.* (citing MECKLENBURG, *supra* note 195, at 37-42).

209. Gary L. Wells, *Field Experiments on Eyewitness Identification: Towards a Better Understanding of Pitfalls and Prospects*, 32 LAW & HUM. BEHAV. 6, 7 (2008) [hereinafter Wells, *Pitfalls*].

210. OFFICE OF WIS. ATTORNEY GEN., *supra* note 199, at 3-4.

211. Wells, *Pitfalls*, *supra* note 209, at 8.

212. *Id.*

213. *Id.* (citing B.W. Behrman & S.L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475-91 (2001); B.W. Behrman & R.E. Richards, *Suspect/foil Identification in Actual Crimes and in the Laboratory: A Reality Monitoring Analysis*, 29 LAW & HUM. BEHAV. 279-301 (2005); A. SLATER, IDENTIFICATION PARADES: A SCIENTIFIC EVALUATION (Police Research Award Scheme, Police Research Group, Home Office 1994); T. Valentine, A. Pickering & S. Darling, *Characteristics of Eyewitness Identification that Predict the Outcome of Real Lineups*, 17 APPLIED COGNITIVE PSYCHOL. 969-93 (2003); D.B. Wright & A.T. McDaid, *Comparing System and Estimator Variables Using Data from Real Lineups*, 10 APPLIED COGNITIVE PSYCHOL. 75-84 (1996); D.B. Wright & E.M. Skagerberg, *Post-identification Feedback Affects Real Eyewitnesses*, 18 PSYCHOL. SCI. 172-78 (2007)).

The good news is that a planned national field study should provide additional concrete evidence regarding the validity of scientific procedures in the field.²¹⁴ In any case, it should be stressed that the other jurisdictions that have implemented reforms over the past several years have indicated only minor problems or no problems at all with the reforms,²¹⁵ and, in contrast to the Illinois field study, the pilot program in Hennepin County, Minnesota was not controversial and its results were consistent with previous research.²¹⁶

IX. CONCLUSION

Although, as with almost any type of legislative reform, there are costs involved, the costs here are minimal when compared with the actual costs already incurred as a result of wrongful convictions based on eyewitness evidence: 111 years²¹⁷ and \$2.7 million.²¹⁸

Further, the risks involved are minimal as both the double-blind procedure²¹⁹ and the warning instruction²²⁰ have been demonstrated to reduce the rate of error without substantially affecting the rate of correct identifications. In North Carolina, legislation enacting these reforms unanimously passed in both houses.²²¹ Some law enforcement agencies in Georgia have already adopted many of the reforms voluntarily and should be commended for doing so.²²²

Those that have not adopted the reforms should take this opportunity to implement them on their own accord. If they decline to do so, the state legislature should take any necessary measures to ensure the reforms are implemented. The costs for

214. *Mumma Testimony*, *supra* note 24, at 1:31:55.

215. *See supra* notes 195-98 and accompanying text.

216. Schacter, Dawes, Jacoby, Kahneman, Lempert, Roediger, & Rosenthal, *supra* note 202, at 4.

217. *See sources cited, supra* note 2.

218. *Id.*

219. Scheck, *Lecture on Wrongful Convictions*, *supra* note 77, at 606.

220. Wells, *Systemic Reforms*, *supra* note 47, at 625 (citing Malpass & Devine, *supra* note 94 at 486-87).

221. *Mumma Testimony*, *supra* note 24, at 1:31:55.

222. *Ga. Law Enforcement Survey*, *supra* note 134, pt. ii, at 1-20.

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not doing so, in terms of personal liberty and unnecessary expense to the state, are too great.

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