INNOCENCE PROJECT
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TESTIMONY OF
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BEFORE MEMBERS OF THE VERMONT SENATE & HOUSE JUDICIARY COMMITTEES
RE: EYEWITNESS IDENTIFICATION & RECORDING OF INTERROGATIONS
JANUARY 15, 2013

Members of the Vermont Senate & House Judiciary Committees:

On behalf of the Innocence Project, we greatly appreciate the opportunity to testify before you today. Indeed, Vermont has shown great leadership in the area of wrongful conviction. During the course of one legislative session in 2007, Vermont passed a post-conviction DNA testing law and a statute providing compensation to its wrongfully convicted, aspects of which we offer to your counterparts in other states seeking a fair and equitable framework. Today, we are before you to seek simple changes to Vermont police practice that will prevent wrongful convictions from ever taking place.

To date, there have been 312 DNA exonerations across the nation. In 153 of these DNA exoneration cases, the process of exonerating the innocent also led to the identification of the true perpetrators of these heinous crimes, who committed more than 70 rapes and 30 murders - of which we are aware - while the innocent spent time behind bars for their crimes.

We regard each exoneration as an opportunity to identify how the system fell short and promote factually-supported policies and procedures that make the system more reliable and accurate. The two proposals for your consideration address two of the leading causes of wrongful conviction – eyewitness misidentification and false confessions.

Eyewitness Misidentification

At least one mistaken eyewitness identification was a contributing factor in a full 73% of cases of wrongful conviction proven through DNA testing. The problem of misidentifications is not unique to certain geographic regions, but afflicts all law enforcement agencies nationwide, regardless of size or location. While horrible harm is done to innocent people who are wrongfully convicted due to an eyewitness misidentification, they are not the only ones who suffer. Public safety is greatly diminished, as misidentifications cause the police to focus their investigation on an innocent person, leading them away from the real perpetrator, who is then free to commit further crimes. Furthermore, in the rare instances when the police return their focus on the actual 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 beneficiary is the actual perpetrator.

The good news is that over the past 30 years, a large body of peer-reviewed research and practice has been developed, demonstrating how simple, inexpensive reforms to eyewitness identification procedures can greatly reduce the rate of identification error, particularly by minimizing the inadvertent misleading influences present in traditional procedures.

In the wake of leadership from the National Institute of Justice at the U.S. Department of Justice[1], the American Bar Association[2], the Police Executive Research Forum[3], the International Association of Chiefs of Police[4], states across the nation have taken significant steps toward eyewitness identification reform. In the past few years alone, the Georgia[5], North Carolina[6], California[7], Connecticut[8], and Ohio[9] legislatures passed legislation to advance reform, and many other states are currently considering similar legislation.

Misidentification is the Largest Contributor to Wrongful Convictions

Of all the causes of wrongful conviction, the most prevalent is mistaken eyewitness identification. In fact, in many wrongful convictions, it was not just one, but multiple eyewitnesses who mistakenly identified an innocent person:

- Luis Diaz, a Florida cook who was married with three children at the time of his arrest, was convicted of a string of sexual assaults and served 25 years in Florida prisons. He had been misidentified by ***eight*** witnesses.
- Kirk Bloodsworth, a former United States Marine, was convicted of having raped and murdered a little girl in Baltimore County, Maryland based on the mistaken identification of ***five*** eyewitnesses. Prior to his exoneration, Mr. Bloodsworth had been sentenced to death.
- Brandon Moon, an Army veteran and college student who was released in 2005 from the Texas prison system after serving 17 years for a rape that DNA proved he did not commit, was misidentified by ***five*** witnesses.
- Dennis Maher, a Massachusetts man, and who is here today, served 19 years for a series of rapes, having been misidentified by ***three*** different victims.
- Stephen Phillips, a Texas man, was exonerated of a string of sexual assaults after serving 25 years in prison. In the 11 crimes for which Phillips was wrongfully convicted, there were at least 60 victims. At least ***ten*** of those victims erroneously identified Phillips as the perpetrator. Mr. Phillips was exonerated in 2008.

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[1] Eyewitness Evidence, A Guide For Law Enforcement, United States Department of Justice (Oct. 1999).
[2] *See* ACHIEVING JUSTICE: FREEING THE INNOCENT AND CONVICTING THE GUILTY at 23-45 (Paul Giannelli et. al. eds., 2006).
[3] *See* JAMES M. CRONIN ET. AL., PROMOTING EFFECTIVE HOMICIDE INVESTIGATIONS at 35-60 (2007).
[4] *See* Int'l Ass'n of Chiefs of Police, Training Key #600.
[5] H.R. 352, 2007 Leg. (Ga. 2007).
[6] H.B. 1625, 2007 Leg. (N.C. 2007).
[7] S.B. 756, 2007 Leg. (Cal. 2007).
[8] H.B. 5501, 2012 Leg. (Ct 2012).
[9] S.B. 77, 2010 Leg (Oh 2010).

Mistaken Eyewitness Identifications Also Harm Victims

Jennifer Thompson, whom you will hear from today, and Penny Beernstein were each crime victims who identified the wrong person as their assailants, and even after DNA proved the innocence of those men, continued to believe in their guilt – until DNA also identified the real perpetrator. It was difficult for them to accept, not to mention horrifying for them to learn, that their memories of the actual perpetrator were wrong and that their mistakes sent innocent people to prison. Yet as a result of their experiences, Ms. Thompson and Ms. Beernstein are now strong advocates for the eyewitness identification reform procedures being rapidly adopted in jurisdictions around the country.

Every time a witness makes a misidentification, the entire system suffers. Erroneous eyewitness identifications harm crime victims, 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 scientifically-supported eyewitness identification procedures be uniformly applied across this state and, indeed, the nation.

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

From DNA exonerations we have learned that the standard non-blind lineup procedures provide many opportunities for the lineup administrator to inadvertently cause a witness to select the suspect even when the witness is unsure that this is the person from the crime scene. In other words, traditional procedures increase identifications made as a result of witnesses guessing as opposed to actual recognition. Traditional eyewitness identification protocol (if there is any protocol at all) also often reinforces a witness's wrong choice through confirming feedback that ultimately increases their confidence in that pick, regardless of initial hesitance, in addition to contaminating the witness's memory of the actual event. Indeed, social science research has consistently confirmed not only the fallibility of eyewitness identifications but also the unwitting tainting of witness memory through many standard eyewitness identification procedures.

A decade ago, the Department of Justice (DOJ) addressed the problem of misidentification in a technical working group, which sought to identify best practices supported by rigorous social science research. The National Institute of Justice, the research arm of the DOJ, formed the "Technical Working Group for Eyewitness Evidence," composed of membership from the scientific, legal and criminal justice communities, which recommended a series of protocols in a report and an attendant training manual.[10]

Since its publication, a number of bar associations, police groups, and state commissions have conducted more comprehensive consideration of these reforms. The American Bar Association's House of Delegates adopted Resolution 111C in 2004, a statement of Best Practices for Promoting Accuracy of

[10] Technical Working Group for Eyewitness Evidence. (1999) *Eyewitness evidence: A Guide for Law Enforcement.* Washington, DC. United States Department of Justice, Office of Justice Programs; and Technical Working Group for Eyewitness Evidence. (2003) *Eyewitness evidence: A Trainer's Manual for Law Enforcement.* Washington, DC. United States Department of Justice, Office of Justice Programs.

Eyewitness Identification Procedures, which delineated general guidelines for administering lineups and photo arrays. In a report of the American Bar Association's Criminal Justice Section's Innocence Committee to Ensure the Integrity of the Criminal Process, the ABA resolved that federal, state and local governments should be urged to adopt a series of principles consistent with those contained in its resolution, incorporating scientific advances in research that has been developed over time.

In 2006, the International Association of Chiefs of Police (IACP) published a "Training Key on Eyewitness Identification," which concludes that "of all investigative procedures employed by police in criminal cases, probably none is less reliable than the eyewitness identification. Erroneous identifications create more injustice and cause more suffering to innocent persons than perhaps any other aspect of police work. Proper precautions must be followed by officers if they are to use eyewitness identifications effectively and accurately." The IACP Training Key endorses a number of key reforms, including blind administration, sequential presentation recording the procedure, instructing the witness and obtaining a confidence statement. Then in 2010, the IACP issued a Model Policy on the same, embracing the core reforms that will ensure the reliability of eyewitness evidence. And just last month, the IACP announced the publication of its groundbreaking report, "Building a Systemic Approach to Prevent Wrongful Convictions," which grew out of a national summit co-sponsored by the IACP and the DOJ. The report calls for the adoption of the very reforms you will find in SB 184.

Efforts to address misidentification have also taken place on the state level. In April 2001, New Jersey became the first state in the nation to officially adopt the NIJ recommendations when the Attorney General issued *Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*, mandating implementation of the recommendations – in addition to requiring that lineups be administered blind and presented sequentially – by all law enforcement agencies statewide. In May 2005, the Criminal Justice Standards Division of the North Carolina Department of Justice endorsed recommendations set forth in the North Carolina Actual Innocence Commission's report, *Recommendations for Eyewitness Identification*, which included "blind" and "sequential" lineups.[11] In September 2005, the Wisconsin Attorney General's Office followed New Jersey's lead and issued a similar set of policies for statewide use, *Model Policy and Procedure for Eyewitness Identification*, which also mandated the "blind-sequential" reform package.[12] In 2006, the California Commission on the Fair Administration of Justice, comprised of key criminal justice stakeholders from across the state of California, embraced a set of reforms in its Report and Recommendations Regarding Eye Witness Identification Procedures.[13] In 2007, the North Carolina legislature mandated the "blind-sequential" reform package when it passed HB 1625, perhaps the most comprehensive piece of eyewitness identification reform legislation to date. In 2012, the Connecticut legislature adopted the same.

[11] North Carolina Department of Justice, Criminal Justice Standards Division. *Recommendations for Eyewitness Identification*, May 19, 2005.
[12] State of Wisconsin, Office of the Attorney General. *Model Policy and Procedure for EyewitnessIdentification*, 2005.
[13] Please see http://ccfaj.org/documents/reports/eyewitness/official/eyewitnessidrep.pdf.

Scientific Support for Eyewitness Reform

The large body of scientific research that supported these groundbreaking guidelines devised by NIJ's working group nearly a decade ago has only been bolstered by a significant amount of additional peer-reviewed studies on every aspect of these reforms. Simply put, today there is solid research and experiential support for all of these reforms.

Blind Administration

We strongly support a statewide requirement that identification procedures be conducted double-blind, ensuring that the lineup administrator does not know which photograph or live lineup member being viewed by the eyewitness is the suspect. Over forty years of general social science research has demonstrated that test administrators' expectations are communicated either openly or indirectly to test subjects, who then modify their behavior in response.[14] 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.[15]

Eyewitnesses themselves may seek clues from an identification procedure administrator. A recent experiment examining 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."[16] The only way to avoid the influence of the administrator's expectations on the eyewitness is through the use of a blind administrator.

Advocating for the use of a blind administrator does not call into question the integrity of law enforcement; rather it acknowledges a fundamental principle of properly conducted experiments – that a person administering an experiment (or an eyewitness identification) should not have any predisposition about what the subject's response should be – and applies it to the eyewitness procedure. 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.

Some worry that double-blind administration is not feasible, potentially too expensive or resource-heavy, but this has not proven true in the field and, moreover, need not be the case. First, both large and small police departments that have progressed to using double-blind lineups, including those in New Jersey, North Carolina, Northampton, Denver, Dallas, Minneapolis- St. Paul, most of Wisconsin, etc., are doing so routinely without complaint, problems, or prohibitive expenses. The experience of these departments should quell concerns about the practicality of conducting blind lineups.

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[14] 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.

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

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

Second, jurisdictions that have been concerned about expending any additional manpower have implemented an alternative form of blind administration in which they "blind" the non-blind administrator. This can be done using a "folder shuffle method," as used in Wisconsin and Minnesota, as well as through the use of laptop computers, as employed in Charlotte, NC.[17] This option is contained in the proposal before you. Implementing blind administration carries the pricetag of ten manila folders, so those jurisdictions with limited manpower, unable to use a second administrator to perform an identification procedure, will not experience fiscal strains.

Instructing the Eyewitness

In addition to blind lineups, "cautionary instructions," or what we also call "witness warnings," are a key component of reform aimed at reducing the rate of mistaken identifications. Indeed, studies have demonstrated the dramatic decrease in mistaken identifications when witnesses understand that they are not required to identify someone at a lineup. *See* Nancy Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. and Hum. Behav. 283 (1997) (finding a reduction in misidentifications when the culprit was not present from 78% to 33%, while still resulting in 87% identification of the culprit when the culprit was present).

These instructions deter the eyewitness from feeling compelled to make a selection or seek clues or feedback from the administrator during the identification procedure about whom to pick or whether or not a selection was correct, and otherwise help minimize the likelihood of a misidentification. This "best practice" is generally accepted by law enforcement and easily administered.

Proper Composition of the Lineup

Clearly, the optimal composition of a lineup assures more accurate selections. Therefore, the Innocence Project advocates that the fillers be selected for a live and/or photo lineups based on their similarity to the witness's description rather than on their resemblance to the suspect. As found by Gary Wells, "the match-description strategy is as effective as the resemble-suspect strategy at holding down false-identification rates. In addition, our results show that the match-description strategy is much better than the resemble-suspect strategy at promoting high rates of accurate identification. These results bolster the argument that selecting distractors who resemble a suspect can be detrimental to maintaining high accurate-identification rates." Wells, G.L., Rydell, S.M. and Seelau, E.P., *On the selection of distractors for eyewitness lineups*, 78 J. of Applied Psychol. 835 (1993).

In light of this research, the match-to-description basis for selecting lineup fillers has been recommended by the National Institute of Justice in both its *Eyewitness Evidence: A Guide for Law Enforcement* and *Eyewitness Evidence: A Trainer's Manual for Law Enforcement*, the New Jersey Attorney General's *Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*, the Wisconsin Department of Justice's *Model Policy and Procedure for Eyewitness Identification*, the California Commission On The Fair Administration Of Justice's *Report And Recommendations*

[17] Based on the best practices we have advocated for some time, the Innocence Project has included attached with this submission its recommended practices for "blinding" the administrator.

Regarding Eyewitness Identification Procedures, and the American Bar Association's *Statement Of Best Practices For Promoting The Accuracy Of Eyewitness Identification Procedures*.

Consequently, non-suspect photographs and/or live lineup fillers should be selected based on their resemblance to the description provided by the witness – as opposed to their resemblance to the police suspect – yet in such a way that the suspect does not unduly stand out from the fillers.

Obtaining a Confidence Statement

A significant body of peer-reviewed research clearly indicates that post-identification feedback to the eyewitness at the time the identification is made both artificially inflates the confidence of a witness in his or her identification and also contaminates the witness's memory of the event.[18] In other words, In addition to the danger of confidence inflation and false certainty, when post-identification confirming feedback is provided to an eyewitness who has incorrectly identified an innocent person, it can produce "strong effects" on witnesses' memory, including recollection of their opportunity to view the perpetrator and their degree of attention on the perpetrator. [19] This contaminating effect of confirming feedback, therefore, confounds the efforts of courts to assess the reliability of identification evidence, since it distorts and renders untrustworthy three of the five "reliability" factors enunciated in *Neil v. Biggers*, 409 U.S. 188 (1972) (a witness's degree of certainty, opportunity to view the perpetrator at the time of the incident, and degree of attention on the perpetrator). It also makes it difficult, if not impossible, for the jury to properly assess the witness's confidence at the time of the out-of-court confrontation, leaving it only with the witness's testimonial certainty months later. No one benefits in this situation – save for the real perpetrator, who becomes that much more sheltered from ever being identified, prosecuted, and convicted.

Given the corrupting effect of confirming feedback, documenting the witness's certainty, in his or her own words, immediately at the time of the identification, is critical, particularly in light of research that has consistently shown that the eyewitness's degree of confidence in his identification at trial is the single largest factor affecting whether jurors believe that the identification is accurate.[20] The more confidence the eyewitness exudes – irrespective of accuracy –, the more likely jurors will believe that the identification is accurate.

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[18] 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. Post-identification feedback affects real eyewitnesses. *Psychological Science*, 18, 172-178 (2007).

[19] Wells, G.L., & Bradfield, A.L. (1998). "'Good, You Identified the Suspect': Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience," *Journal of Applied Psychology*, 83, 360-376.

[20] 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).

Showups

Research has demonstrated that innocent suspects are at a greater risk in showups than in lineups, particularly (and not surprisingly) those who bear a resemblance to the actual perpetrator and/or are wearing similar clothing. Showups can be problematic because, as social scientists have argued, the format of an identification procedure should not directly communicate law enforcement's hypothesis of the perpetrator's identity to the eyewitness.[21] Further, an alternative format, such as a photo or live lineups, can rule out at least some incorrect identifications, while a show-up does not present the opportunity to identify any errors. Consequently, some criminal justice practitioners have concluded that the show-up procedure is inherently suggestive.[22]

Despite the intrinsic suggestiveness of the show-up procedure, there are occasions when it might be necessary for law enforcement. The show-up procedure can be useful for police officers who may lack the probable cause necessary for an arrest but believe the suspect, detained close in time and proximity to the incident, matches a general description of the perpetrator and should therefore participate in an identification procedure. While increasing the risk to innocent suspects of being mistakenly identified, the show-up can also afford protection to innocent suspects who are not identified and thus may be immediately shielded from further suspicion, excluded as potential suspects, and protected from an otherwise humiliating arrest and investigation process.

It is critical, however, given the inherent suggestiveness of the show-up identification procedure format, that any perceived benefits be balanced against the inherent risks. Therefore, several safeguards should be built into all show-up procedures to minimize the deleterious effects of its format.[23] The police should also take measures to minimize potentially damaging or prejudicial inferences that could be drawn about the suspect's guilt, including removing the suspect from the squad car, removing handcuffs before the arrival of the witness, and avoiding any words or conduct that may imply that the suspect is the perpetrator of the crime. The police should not conduct showups inclusive of more than one suspect or to more than one witness at a time. If one eyewitness makes a positive identification of the suspect, this should provide the police with sufficient probable cause to arrest the suspect, and thus each additional eyewitness should instead participate in either a photo or live line-up. Lastly, the police should document the show-up procedure (using video or audio recording if practicable), including the eyewitness's verbal reaction to the suspect presented and degree of certainty, in the eyewitness's own words, in his or her identification. We commend the authors of this legislation in crafting provisions relating to the show-up procedure.

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[21] G. Wells, G.L., Small, M. & Penrod, S. et al. (1998), *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Human Behavior, 603, 619-20.

[22] *See State v. Dubose*, 699 N.W.2d 582, 592 (Wisc. 2005)(the Wisconsin Supreme Court ruled that show-up identification evidence is inadmissible unless, on the basis of the totality of the circumstances, it was shown to be necessary).

[23] These safeguards are derived from Wisconsin's Avery Task Force's "Eyewitness Identification Procedure Recommendations," which was based upon a comprehensive review and analysis of best practices, as well as from anecdotal recommendations and other existing research.

The Experiences of Those Jurisdictions that have Adopted Reforms

These changes have proven to be successful across the country. In the states of North Carolina, Texas, and Connecticut, for instance, all jurisdictions were directed to promulgate their own policies and procedures for implementing these reforms, and, after an exhaustive review of research and practitioner experience, opted to implement the "blind-sequential" reform package. These states reported that while there was initial resistance from many about the need for and value of such reforms, after police were provided the opportunity to learn more about them, receive training about how to properly implement them, and to participate in the formation of the specific adaptations of the reforms in their jurisdictions, those initial concerns have been replaced with acceptance of and appreciation for eyewitness identification procedures that increase the accuracy of criminal investigations and the effectiveness of criminal prosecutions and, by virtue of employing the most accurate eyewitness procedures available, strengthen the persuasive and probative value of eyewitness identifications before, during and after trial.[24]

In addition to these states, large cities such as Minneapolis and St. Paul, MN and Milwaukee WI, medium-sized jurisdictions such as Santa Clara, CA, and Madison, WI, and small towns such as Norwood, MA have implemented best practices, including blind administration, and have found that they have improved their quality of their eyewitness identifications, strengthened prosecutions, and reduced the likelihood of convicting the innocent.

False "confessions" are far more prevalent than one might think.

A false confession, admission, or dream statement was found to have contributed to nearly 30% of America's 312 DNA exonerations. Electronically recording custodial interrogations from Miranda onward removes serious questions about the "confession" in question, by enabling the finder of fact to consider the most accurate presentation of the confession evidence at trial, thus narrowing the possibility of a wrongful conviction.

Ancillary Benefits of Recording Interrogations

There are a number of ancillary benefits that can be achieved through the implementation of mandatory recording. A record of the interrogation can resolve disputes about the conduct of law enforcement officers—allegations of police misconduct can be disproven. Investigators will not have to focus upon writing up a meticulous account of the statements provided by the suspect, and may instead focus his attention on small details, such as subtle changes in the narrative, which he might have otherwise missed. Having a record of good interrogation techniques can be a useful training device for police departments, particularly as cases with distinctive characteristics come to light. Overburdened courts will welcome a huge reduction in defense motions to suppress unrecorded statements and confessions as well as pretrial and trial hearings focused upon establishing what transpired during the course of an interrogation.

The single best reform available to hinder the occurrence of false confessions, the recording of interrogations, is voluntarily being embraced by police departments around the country, now estimated at

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

850 law enforcement agencies. A total of twenty states and the District of Columbia already require recording of interrogations statewide. Vermont should follow suit, taking the lead in instigating a reform whose innumerable benefits will undeniably bolster the investigations of criminal cases.

In the summer of 2004, Thomas P. Sullivan, the former U.S. Attorney for the Northern District of Illinois, whom you will also hear from today, published a report detailing police experiences with the recording of custodial interrogations. **Researchers interviewed officers in 238 law enforcement agencies which have implemented the reform in 38 states and concluded, "virtually every officer with whom we spoke, having given custodial recordings a try, was enthusiastically in favor of the practice."** (Sullivan, Thomas, "Police Experiences with Recording Custodial Interrogations." Report presented by Northwestern University School of Law's Center on Wrongful Convictions, p. 6.)

Assuring that all custodial interrogations be videotaped, or audiotaped, at minimum, in serious violent crimes will assure protections to the innocent, which in turn will allow law enforcement to focus its attention on the apprehension of the true culprit. Less than ideal interrogation procedures have contributed to or been the main factor in nearly one in five wrongful convictions of individuals later exonerated through DNA evidence. In each of these cases, the true perpetrator remained at large, able to commit additional crimes. The mandatory recording of interrogations is a reform whose time has come.

Vermont's Progress to Date

At this stage, we would like to build on the significant gains made possible by earlier efforts in Vermont and urge the Vermont legislature to consider two proposals, which would address two of the leading causes of wrongful conviction: one proposal that would simply require all local law enforcement agencies to adopt scientifically-supported best practices related to eyewitness evidence; and another law that would require the recording of custodial interrogations in serious violent crime categories, including, at minimum, murder and sexual assault.

With respect to eyewitness identification best practices, reform has begun to take hold in Vermont, thanks in large part to the great work of Richard Gauthier and the Vermont Criminal Justice Training Council. Our office, along with the New England Innocence Project, worked closely with Mr. Gauthier, and his wonderful predecessor, Jim Baker, and the training council on the development of a model policy for use in Vermont. We also helped to sponsor a "train the trainers" event, inviting a certified trainer on best practices from Massachusetts to present before law enforcement in Vermont.

We understand from Mr. Gauthier, that to date, Vermont has trained 375 officers on this excellent model policy, representing 25% of all law enforcement officers in Vermont. By the end of 2013, the Council plans to have trained 50-60% of agencies and by 2014, Mr. Gauthier intends to make eyewitness identification a mandatory component of training to uphold certification. ***That said, some agencies have been trained in best practices but still have not adopted those practices at the agency level. In other words, the Council has done all that is possible to enable training in best practices but, without a law, is unable to assure uniform adoption across the state of Vermont.***

Put simply, the requirement that a mandatory training in eyewitness identification "best practices" become a prerequisite of certification represents a huge step forward but will not assure uniform adoption of these scientifically-supported best practices at the agency level. This legislative proposal would enable the uniform application of best practices across the state of Vermont. We have drafted such a proposal, which is modeled on Vermont's Fair and Impartial Policing law, which simply takes the essential, uncontroversial, core elements of the Vermont Model Policy and ensures their adoption at the local agency level, and have submitted this proposal for this Committee's consideration.

With respect to recording of interrogations, we have proposed a law that would only require electronic recording of all homicide and sexual assault cases. For those agencies that do not possess video recording equipment, audio recording is permitted, thereby alleviating any lingering cost concerns. With those concerns in mind, however, we built a task force into the proposal to further consider implementation issues in advance of the phased-in requirement. It is our hope that, in coordination with law enforcement, we can forge a proposal that addresses concerns previously raised that such a requirement would amount to an unfunded mandate.

We remain available to all members of the legislature who seek additional information from us and look forward to working with stakeholders from all corners of the criminal justice community as these proposals move forward.

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Thank you for the opportunity to testify before you about these critically important innocence reforms.