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Psychology and the Law/Mental Health Law: PROTECTING THE INNOCENT/CONVICING THE GUILTY: HENNEPIN COUNTY'S PILOT PROJECT IN BLIND SEQUENTIAL EYEWITNESS IDENTIFICATION

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SUMMARY:

... She then picked the suspect out of a series of photos. ... Eyewitness identification of a perpetrator, whether known or unknown to the witness, is one of the most frequently used types of evidence in the criminal justice system. ... If the perpetrator is absent, because the suspect in the lineup is actually an innocent person, the use of a cautionary instruction thus lessens the chance of a mistaken eyewitness identification. ... According to researchers, an eyewitness is more likely to use an "absolute judgment" rather than relative judgment process in a sequential lineup and is therefore less likely to make a false identification. ... Without the adoption of blind administration, for instance, the eyewitness may be more susceptible to a lineup administrator's cues during a sequential presentation because, with only one photo being shown at a time, the administrator knows exactly which photo is being viewed by the eyewitness at any given moment. ... Leading up to the implementation of improvements in eyewitness identification procedures, a series of reports had been published about the existence of race discrimination in the New Jersey criminal justice system. ...

TEXT:

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I. Introduction

In 1984, Jennifer Thompson Cannino was a twenty-two-year-old college student living in North Carolina when a man broke into her apartment one night and raped her at knifepoint. n1 Cannino gave police a detailed description of her attacker for a composite sketch. She then picked the suspect out of a series of photos. She later said, "I knew this was the man. I was completely confident. I was sure." n2 Later, Jennifer picked the same suspect out of a live lineup. n3 In court, she testified against him and he was convicted. His name was Ronald Cotton. n4 Jennifer recalled: "It was the happiest day of my life because I could begin to put it all behind me." n5

In 1987, Cannino's case had to be re-tried because an appellate court overturned the original conviction. n6 But Cotton was convicted again and sentenced to life in prison. n7

In 1995, eleven years after the rape, Cannino learned that Cotton was not the man who raped her. Instead, it was Bobby Poole, who was serving life in prison for a series of rapes and who bragged to fellow inmates that

he had committed the rape for which Cotton was imprisoned. n8 DNA evidence confirmed that Poole, not Cotton, was Cannino 's rapist. n9 Poole pleaded guilty to Cannino's rape and Cotton was released from prison after serving eleven years. n10

Since his exoneration, Cannino has become friends with Ronald Cotton, the man whom she mistakenly identified. "Although he is now moving on with his own life," she writes, "I live with constant anguish that my profound mistake cost him so dearly." n11 Cannino has also become a vocal advocate for reforms [*3] that would prevent the same miscarriage of justice that Cotton suffered. In particular, she has spoken out in support of improving eyewitness identification procedures in order to reduce the possibility of future mistaken identifications. n12

Prosecutors are not merely zealous advocates. Our job is not simply to win cases and secure convictions. We have an ethical and legal obligation to be "ministers of justice." n13 Our overriding duty is to see that justice prevails for everyone. n14 To fulfill this duty, we have a responsibility to promote a fair process, to apply the law consistently and equally, to protect the rights of innocent people, and to make sure we are prosecuting and convicting only those people who are guilty of committing crimes. No one is served when an innocent person is wrongfully convicted while the actual criminal remains free to commit additional crimes.

To ensure that justice is being done, it is important for prosecutors, police, and everyone in the criminal justice system to continually evaluate what we are doing and to make improvements whenever they are warranted and feasible. In recent years, it has become clear that mistaken eyewitness testimony has been a key factor in dozens of wrongful convictions nationwide. n15 In addition, there is a growing body of psychological research demonstrating that several simple changes in lineup procedures can dramatically reduce the chance of mistaken identifications. n16 As a result, eyewitness identification procedures represent an area of the criminal justice process that is now ripe for reform.

Eyewitness identification of a perpetrator, whether known or unknown to the witness, is one of the most frequently used types of evidence in the criminal justice system. n17 The victim of a crime recognizes a face in a photographic lineup, and later identifies the culprit from the witness stand during the trial. When the perpetrator leaves no biological or other forensic evidence at the scene of the crime, a conviction may rest largely on eyewitness identification. The jury relies, appropriately, on the direct [*4] evidence offered by a witness or a victim who identifies the defendant as the same person he or she observed commit the crime charged.

It has long been recognized, however, that, in certain cases, fallible human memory has led to mistaken identifications of the perpetrators of crimes. As early as 1932, Yale Law Professor Edwin Borchard examined wrongful convictions in his work, *Convicting the Innocent: Errors of Criminal Justice*. n18 Borchard determined that, in the majority of the wrongful convictions he reviewed, eyewitness evidence played a crucial role in convicting the innocent. n19

The advent of deoxyribose nucleic acid (DNA) typing has provided a powerful new tool in reducing the impact of mistaken eyewitness identifications. In cases where the perpetrator has left behind biological evidence, such as blood, semen, or saliva, the accuracy and precision of DNA evidence offers virtually absolute proof of identification, and thus may allow the criminal justice system to determine the guilt or innocence of a defendant with near certainty. n20

Since 1989, DNA evidence has been used to exonerate more than 120 individuals who, like Ronald Cotton, were wrongfully convicted. n21 Of those, approximately 75% were originally convicted based on eyewitness identification, in some cases by more than one eyewitness. n22 In one report, eyewitness experts studied the first forty cases in which DNA evidence was used to exonerate an innocent individual. n23 In thirty-six of these cases - fully 90% - eyewitness misidentification played a role in the convictions. n24 With the help of DNA-facilitated exonerations, researchers have now determined that the single leading cause of wrongful conviction is mistaken eyewitness identification. n25

While the DNA exoneration cases have grabbed the attention [*5] of the public, DNA evidence is not always available, or material, in establishing innocence or guilt. Proof of a defendant's innocence through DNA is only possible in cases where the perpetrator has left behind sufficient biological material at the scene of the crime. In the majority of crimes committed, there is no biological evidence left behind. n26 In such cases, a mistaken eyewitness identification may never be realized and corrected.

This is what occurred in the case of Shaun Deckinga. In 1993, after a series of bank robberies in northeastern Minnesota, an anonymous tip led police to Deckinga. n27 At trial, the State introduced no biological evidence, but three bank tellers identified Deckinga. n28 Despite evidence that another bank robbery was committed after Deckinga's arrest by a person with his same general appearance, Deckinga was convicted. n29 After the trial, jurors told the media that the tellers' identification of Deckinga and their certainty about the

identification were major factors in securing the conviction. n30

The real bank robber struck yet again after Deckinga's conviction. n31 The airing of the robber's picture on the news led to the arrest of Jerry Clepper, who confessed to robbing five banks, including those for which Deckinga had been convicted. n32 Deckinga was released from prison after Clepper's confession. n33

The Deckinga case illustrates the relatively rare occurrence of an exoneration based on non-DNA evidence. DNA is a marvelous tool, and has corrected many terrible errors made by the criminal justice system due to mistaken identifications. It cannot, however, be the only fail-safe. Cases like the Deckinga case, where DNA cannot catch our mistakes, illustrate the need to take a step back and work on methods to avoid mistaken identifications in the first instance.

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II. The Psychology of Misidentification

A. The History of Eyewitness Science

The scientific debate over eyewitness evidence began as early as 1908, when Harvard Psychology Professor Hugo Munsterberg published *On the Witness Stand*. n34 In his book, Munsterberg challenged the reliability of eyewitness testimony, but offered little in the way of a solution. n35

It was not until the late 1970s that eyewitness scientists began to analyze seriously the reasons for the lack of accuracy in some eyewitness identifications and to develop possible solutions. n36 Because many of the eyewitness scientists began their research before the use of DNA evidence in criminal trials, it came as little surprise to the scientists when DNA exonerations revealed that eyewitness misidentifications had played a major role in wrongful convictions. In fact, DNA exonerations afforded scientists a national platform to promote their research findings and created legitimacy for their studies within the criminal justice system. n37

Eyewitness scientists advanced the theory, not that all eyewitness evidence is unreliable, but rather that eyewitness evidence could be made more reliable with research-based improvements in methods of gathering the evidence. n38 In their research, scientists observed that there are certain variables within the control of the criminal justice system and certain variables outside its control. n39 These scientists theorized that both types of variables affect the accuracy of eyewitness identifications, but only the variables under the control of the criminal justice system could be mended. n40 Based on this idea, eyewitness scientists have advocated a partnership with the criminal justice system to identify those variables that will improve eyewitness identification and to encourage changes in the way lineups are conducted. n41

[*7] Scientists have long argued that by reforming the techniques we use to obtain eyewitness identifications, we are able to reduce the number of false identifications that occur. n42 Of the 1000 publications on eyewitness evidence written in the past twenty-six years, many are specifically aimed at the lineup procedures used within the criminal justice system. n43 Before the late 1990s, however, there were no definitive guidelines on a national level for conducting lineups and photospreads. n44 Each attempt was beset with practical problems in implementation. n45 In 1998, eyewitness scientists, with a mandate from the American Psychology/Law Society and the American Psychological Association, published a best practices guideline for conducting lineups and photospreads for witnesses to crimes. n46 This guideline, referred to as *The Wells White Paper*, examined the prevalence of mistaken identifications in wrongful convictions and set forth recommendations for reducing the risk of eyewitness misidentification. n47

The federal government has also joined in the study of mistaken identification. In 1995, three years before the publication of *The Wells White Paper*, the National Institute of Justice, the research arm of the U.S. Department of Justice, reviewed the cases of individuals who had been exonerated with DNA evidence and published a report on its findings. n48 Concluding that eyewitness misidentification played a major role in securing a conviction in 80% of the cases, then-U.S. Attorney General Janet Reno formed a working group to address the problem of eyewitness misidentification. n49

In 1999, the National Institute of Justice published a report to "explore the development of improved procedures for the collection and preservation of eyewitness evidence within the criminal justice system." n50 The report officially recognized that by using the principles of science, eyewitness identification evidence [*8] could be improved and made more reliable. n51 The report set forth general recommendations to improve eyewitness identification evidence collection. n52

B. Solutions - Five Procedures to Minimize Eyewitness Misidentification

On the basis of the clinical studies, eyewitness researchers have coalesced around several specific improvements

to increase the accuracy of eyewitness identifications. They include:

- . the use of double-blind lineup administration;
- . the documentation of the witness's statement of certainty at the time of identification;
- . the effective use of fillers;
- . the use of a cautionary instruction that the perpetrator might not be present in the lineup; and
- . the sequential presentation of the lineup photographs. n53

1. Double-Blind Administration

One change advocated by eyewitness scientists is the double-blind administration of photographic lineups, where the individual administering the photographic lineup has no knowledge of the identity of the actual suspect and the eyewitness is told this fact. The root of this recommendation is the potential for suggestive procedures in lineup presentations. Suggestive procedures are those behaviors that are under the control of the lineup administrator and are likely to influence the eyewitness with regard to the identification. n54 An example of a suggestive procedure is one that indicates to the eyewitness, with unintentional or intentional verbal or physical cues, that the suspect is in the lineup and may even indicate which individual is the suspect. n55

Scientific research indicates that suggestive procedures can have an impact both on the accuracy of the identification and on the witness's confidence in that identification. n56 With respect to accuracy, researchers have determined that suggestive procedures, [*9] including inadvertent cues by the lineup administrator, are a factor in increasing the likelihood of false identifications. n57

With respect to witness confidence, eyewitness scientists have found that witnesses are subject to "confidence malleability," meaning that feedback by the administrator affects the level of confidence an eyewitness has in an identification. n58 Post-identification feedback may include nodding or statements such as "that's who we thought did it," on the one hand, or "are you sure you got a good look at the other photos?" on the other hand. Depending on the feedback received, eyewitnesses may become more or less confident about the identification they have made. n59 If the eyewitness picks the suspected culprit and receives positive feedback from the lineup administrator, the witness is more likely to feel confident about the selection. n60 Ultimately, any influence on an eyewitness, whether intentional or unintentional, affects eyewitness certainty in identifying a perpetrator. n61

By way of illustration, in one laboratory experiment, some eyewitnesses were given positive feedback after identifying a suspect. n62 Following the lineup, eyewitnesses were asked about factors relating to certainty, including their opportunity to view the suspect, attention to the event itself, and time taken to make the identification. n63 The eyewitnesses who were given positive feedback were found to be more confident in all factors relating to making the identification. n64 For example, they believed they had a better opportunity to view the suspect, paid more attention to the event itself, and took less time to make the identification. n65 Thus, feedback can dramatically affect the certainty with which an eyewitness makes an identification. n66

The witness's confidence level, whether justified or unjustified, plays a significant role in the potential prosecution of the [*10] individual picked out of the lineup. Researchers have long understood that the eyewitness's level of confidence does not correlate to the accuracy of the identification. n67 In fact, the evidence has indicated that, even with a false identification, there can be a corollary high rate of certainty on the part of the eyewitness. n68 Eyewitnesses tend to convince themselves that the identification they have made is accurate, though it may not be. n69 Nonetheless, studies conducted on the issue reveal that jurors rely on eyewitness confidence as an indicator of accuracy. n70 Researchers also have found that jurors tend to place less emphasis on other factors that affect eyewitness accuracy. n71 Given that jurors strongly rely on eyewitness confidence, it is important for the criminal justice system to avoid influencing eyewitness certainty. n72

Because of the potential for suggestion and its impact on accuracy and confidence, scientists recommend the use of a blind administrator when conducting a photographic lineup. n73 A blind administrator is unaware of the identity of the suspect or even whether the suspect is present in the lineup. n74 Under these circumstances, the administrator is less likely to give intentional or unintentional cues to the eyewitness and the witness's certainty is less likely to be affected. n75 In addition, the eyewitness should be instructed that the administrator does not know the identity of the suspect; hence the term "double-blind." n76 With this caution, it is believed

that the eyewitness is less likely to look to the administrator for cues about whom to identify. n77 Double-blind administration can also help to minimize the occurrence of post-identification feedback, whether positive or negative, and its concomitant effect on the confidence level of an eyewitness. n78

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2. Witness Statement of Certainty

To minimize the distorting effect of confidence malleability, researchers further recommend that an eyewitness's statement of certainty be summarized by the investigator at the time of identification. n79 Researchers have found that confirming feedback, whether from an investigator or another witness, can overinflate the confidence level of the eyewitness, while playing no role in ensuring the accuracy of the identification made. n80 However, researchers contend that eyewitness confidence assessed at the time of the identification and absent any external influence can be useful in evaluating eyewitness identification accuracy. n81 Noting an eyewitness statement of certainty at the time of identification, when practiced in conjunction with double-blind administration, ensures that the fact finder in an eventual prosecution is able to judge the confidence of the eyewitness as it existed at the time of identification. n82

3. Effective Use of Fillers

A third recommendation for improvement in lineup administration to prevent false identifications is the effective use of fillers, or non-suspects used to fill out the lineup. Researchers have found that, while viewing a lineup, an eyewitness employs a relative judgment process. n83 If the perpetrator is absent from the lineup, the eyewitness will tend to select the person that, relative to the other fillers, most closely resembles his or her memory of the perpetrator. n84 Consequently, the lineup becomes a process of elimination. n85

Studies have demonstrated that mistaken identifications can occur because an innocent individual resembles the witness's memory of the perpetrator more than the other members of the lineup do. n86 Because of the resemblance, eyewitnesses are more likely to select the innocent individual using the relative judgment [*12] process. n87 When the police have caught the correct individual and included that person in the lineup, the relative judgment process does not skew the results. n88 By contrast, if an innocent person becomes the suspect and closely resembles the true perpetrator, the eyewitness is more likely to choose that innocent individual than to decide that no one in the lineup is the perpetrator. n89

Researchers recommend that, in assembling the lineup, the fillers used should resemble the description given by eyewitnesses at least as much as the suspect does. n90 If the suspected culprit does not match the eyewitness's description, then some of the fillers should be similar to the suspect and others similar to the description of the suspect given by the eyewitness. n91 The most important goal of this recommendation is that the suspect should not stand out relative to the fillers. n92 Through the effective use of fillers, investigators can combat the tendency of the relative judgment process to result in false identifications.

4. Cautionary Instruction

Prior to the presentation of lineup photographs, scientists recommend that the eyewitness be given a cautionary instruction that the perpetrator may or may not be included in the photo array. n93 Central to this recommendation is the relative judgment process, by which the eyewitness tends to compare those individuals present in the lineup and identify the one who most closely resembles the perpetrator. n94

The benefit of the cautionary instruction was demonstrated in an experiment using target-present and target-absent lineups. Rather than a cautionary instruction, witnesses were given a biased instruction, suggesting that the perpetrator was in the lineup. n95 With the biased instruction, the test subjects were more willing to choose an individual - any individual - from the lineup, rather [*13] than make no choice at all. n96 Where the target was, in fact, present in the lineup, this unsurprisingly resulted in more correct choices. n97 In the target-absent lineups, however, the biased instruction resulted in more false identifications. n98 This same result was found at significant levels with merely the subtle bias of omitting an option to reject the lineup, without an express statement that the perpetrator was present. n99

Scientists have demonstrated that eyewitnesses are just as likely to correctly identify a culprit from a lineup when the witness is warned that the culprit may not be present as compared to times when the witness is not so warned. n100 By instructing the eyewitness that the perpetrator may or may not be present, however, both the tendency for the eyewitness to use the relative judgment process and the likelihood of a false identification is reduced. n101 Giving a cautionary instruction, in effect, legitimizes a "no choice" selection for the eyewitness who might otherwise select the individual who most closely resembles the perpetrator. n102 If the perpetrator is absent, because the suspect in the lineup is actually an innocent person, the use of a cautionary instruction

thus lessens the chance of a mistaken eyewitness identification. n103

5. Sequential Presentation

The final suggested improvement is the sequential presentation of lineup photospreads. Traditionally, lineups are conducted simultaneously. n104 That is, the eyewitness views the suspect and the fillers all at once and attempts to identify the perpetrator. n105 According to researchers, however, the relative judgment process often causes eyewitnesses to use a process of elimination when evaluating a simultaneous lineup. n106 The witness examines the six photographs and chooses that which most closely resembles the perpetrator. When the real perpetrator is absent [*14] from the lineup, false identifications result. n107

In a sequential presentation, the eyewitness is shown one individual at a time instead of all the photographs at once. n108 According to researchers, an eyewitness is more likely to use an "absolute judgment" rather than relative judgment process in a sequential lineup and is therefore less likely to make a false identification. n109 The sequential presentation prevents the eyewitness from performing a process of elimination, because no two photographs can be viewed together to judge which is relatively more like the perpetrator. n110 Using the absolute judgment process, the eyewitness must compare his or her memory of the perpetrator independently to each individual in the lineup. n111

One study evaluating the use of sequential versus simultaneous presentation found that, when the perpetrator was present in the lineup, using the sequential lineup procedure did not significantly reduce the correct identification rate compared to the simultaneous procedure. n112 When the perpetrator was absent from the lineup, the sequential presentation method caused the rate of misidentification of 17%, whereas the rate of misidentification for the simultaneous method was 43%, resulting in a difference of 26%. n113 Research thus has demonstrated that the use of a sequential lineup may reduce the likelihood of false identification without impairing accurate identifications. n114

Researchers believe that the benefit in reduced misidentifications from the use of a sequential lineup presentation is only realized if the other changes are also employed. n115 In other words, each improvement in the identification process could be adopted independently, but the addition of the sequential presentation recommendation, though very important to reduce the number of false identifications, is only useful if the other changes are adopted as well. n116 Without the adoption of blind administration, for instance, the eyewitness may be more [*15] susceptible to a lineup administrator's cues during a sequential presentation because, with only one photo being shown at a time, the administrator knows exactly which photo is being viewed by the eyewitness at any given moment. n117

III. Movement Toward Change

During the last five years, the increased awareness of the problem of misidentification, combined with the growing knowledge of improved techniques, has led to a slow move toward making these advancements across the country. New Jersey was the first - and thus far the only - state to adopt mandatory guidelines regarding eyewitness lineups. n118

Leading up to the implementation of improvements in eyewitness identification procedures, a series of reports had been published about the existence of race discrimination in the New Jersey criminal justice system. n119 In the midst of that discussion, the New Jersey Supreme Court decided *New Jersey v. Cromedy*. n120 In *Cromedy*, a white female college student had been raped by an African-American man. n121 Approximately eight months after the attack, the student saw the defendant while walking across the street from him and identified him as her attacker. n122 At trial, the prosecution relied on the victim's identification of the defendant, and no corroborating forensic evidence was offered. n123

On appeal, the New Jersey Supreme Court held that the jury should have been instructed on cross-racial identification evidence, because of the fallibility of such identifications and the lack of corroborating evidence to support the victim's identification of *Cromedy*. n124 The supreme court reversed *Cromedy's* conviction and remanded the case for a new trial. n125 Before retrial, however, a [*16] DNA test of the biological evidence collected in the crime exonerated the defendant. n126

In the aftermath of *Cromedy*, New Jersey Attorney General John Farmer was faced with a criminal justice system that lacked credibility. n127 One of his deputies was aware of the work done by psychologists on eyewitness misidentification, n128 and the attorney general's office invited eyewitness scientist Professor Gary Wells to discuss the topic with New Jersey prosecutors and law enforcement personnel. n129 Though reception to the idea of change was lukewarm, Attorney General Farmer developed guidelines for conducting lineups that went beyond the National Institute of Justice suggested techniques. n130 Due to the unique authority of the attorney general in that state, Farmer was able to implement mandatory guidelines applicable to all prosecutors

and law enforcement throughout the state. n131 Thus, in 2001, New Jersey became the first state to uniformly put into practice improved guidelines for conducting lineup procedures. n132

Following New Jersey's lead, several states have taken steps to explore the implementation of the new protocols in their own jurisdictions. Illinois Governor George H. Ryan's Commission on Capital Punishment, appointed to determine what reforms, if any, would ensure the justness and accuracy of that state's capital punishment system, recommended in 2002 that eyewitness identification reforms be adopted. n133 The North Carolina Actual Innocence Commission developed recommendations in 2003 for that state's law enforcement that include a detailed protocol for conducting eyewitness lineups. n134 Just this year, the Avery Task Force published similar recommendations for Wisconsin law enforcement, n135 and, directed by the Virginia General Assembly, [*17] the Virginia State Crime Commission made recommendations to improve the procedures for conducting lineups in the Commonwealth of Virginia. n136

IV. Hennepin County Pilot Project

Although mistaken eyewitness identifications have not been a notable problem in Minnesota, there has nonetheless been growing concern about the wrongful convictions uncovered elsewhere in the nation, as well as growing awareness of what psychological research says about the limits of traditional lineup procedures.

In 2001 the Hennepin County Attorney's Office initiated a DNA review project to identify and examine criminal convictions prior to 1991, when DNA analysis of evidence became common, to determine whether DNA testing could possibly exonerate any of the defendants. The review focuses on murder, attempted murder and sexual assault cases. While the review is ongoing, to date it has uncovered no cases where DNA testing would provide critical new evidence. This may be due, in part, to Minnesota statutes that liberally allow judicial postconviction review of DNA and other evidence on a defendant's petition. n137

In neighboring Ramsey County, County Attorney Susan Gaertner's review of DNA cases resulted in only one exoneration for a rape conviction. n138 In that case, the victim identified David Sutherlin from a photograph as her attacker. n139 In court, the victim testified that Sutherlin "resembled" the man who raped her, but did not conclusively identify him as the rapist. n140 Nevertheless, based on the victim's identification, Sutherlin was convicted and sentenced to forty-three months for the rape. n141 In 2002, a DNA test was conducted on biological evidence collected from the victim, and the test determined that Sutherlin could not have been the rapist. n142 The evidence matched another individual, who also [*18] fit the description given by the victim. n143 Unfortunately, because the statute of limitations had run, the actual culprit could not be charged in the case, and Sutherlin remained incarcerated for an unrelated double homicide. n144

One "close call" in a Hennepin County rape case also sounded a warning bell that traditional lineup procedures could result in a mistaken identification. In October 2000 a young woman was raped in her suburban Minneapolis apartment by a man wearing a Halloween mask. n145 Because the mask came off briefly during the attack, the victim was able to give the police a good description of her assailant. n146 Police soon located a suspect and the victim positively identified him in a traditional photo lineup. n147 The suspect was then charged. n148

Because there were some inconsistencies in the evidence, police continued their investigation. n149 They eventually located another man who closely resembled the description of the suspect and who lived in the same apartment complex as the victim. n150 His palm print also matched one found at the crime scene. n151 Charges were dismissed against the initial suspect who the victim identified from the lineup and the new suspect, Richard Luers, was charged. n152 DNA evidence ultimately tied Luers to two other unsolved rapes, as well as the October 2000 assault. n153 He was convicted of all three crimes and sentenced to a lengthy prison term. n154

This real-life example from Hennepin County is a pointed reminder that when the wrong individual is identified in a lineup, not only does an innocent person get wrongly accused, but the real criminal gets to remain free. This is a serious concern for police and prosecutors. When there are stronger eyewitness identifications, the right person is more likely to be arrested and [*19] convicted for the crime.

In the interest of justice, the Hennepin County Attorney's Office decided in 2003 that it was time to improve eyewitness identifications by adopting a new lineup protocol that would minimize the risk of mistaken identifications and would be workable for local police. n155

With a total population of more than 1.1 million residents, Hennepin County includes Minneapolis and several dozen suburban communities. The initial participating agencies were from Minneapolis (approximate population 380,000) and three suburban communities - two larger (Bloomington, approximate population 86,000, and Minnetonka, approximate population 52,000), and one smaller (New Hope, approximate

population 21,000).

In the fall of 2003, the Hennepin County Attorney's Office and the four police agencies designed the new lineup protocol. Prosecutors reviewed a number of academic publications and U.S. Department of Justice technical working papers on eyewitness identification procedures. Prosecutors also consulted with a leading researcher, Professor Gary Wells of Iowa State University, and with several other jurisdictions around the country that were contemplating similar programs.

A. The Protocol

The new Hennepin County protocol includes all five procedures discussed in this article: the effective use of fillers, the cautionary instruction, the documentation of confidence statements, the use of double-blind administration, and sequential presentation. n156 Of these, the first three were already in place prior to the pilot study. n157 Specifically, investigators were instructed as follows:

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. Use existing Minnesota Repository of Arrest Photos parameters. These defaults include the use of photographs depicting suspects of a similar age, skin color, complexion, hair style, build, backdrop, glasses, and the consistent use of color or black and white suspect photos.

. Use no less than six photographs.

. Preserve a copy of the photos in the order in which they were displayed. One way is to preserve the traditional simultaneous six-photo display.

. Interview witnesses in private, separate from other witnesses.

. Do not tell the witness that the suspect is in a group of photos. The witness should be told the suspect "may or may not" be in the group of photos.

. Tell the witness that the displaying officer does not know whether the suspect is in the group of photos.

. Any officer knowing which photo is of the suspect should be out of the view of the witnesses during the display. But a knowledgeable officer may be available for consultation during the display and to provide support after the display process is finished.

. The photos should be shown one at a time with the other photos face down, or otherwise out of sight during the display of another photo.

. The witness may look at the photos more than once, but all the photos should be shown in the same order each time. The witness may take as long as he or she needs to look at the photos, but may not pull the photos out of order.

. If a witness identifies a photo before looking at all of the photos, the rest of the display should be shown and the witness asked to identify or eliminate the rest of the photos. The officer should not encourage the witness to focus on a particular photo.

. After the display, the investigator showing the photos should create a report describing how many times the witness looked through the photos, how quickly an identification was made, the level of certainty expressed by the witness, any other comments made by the witness during the display and any other relevant [*21] observations.

. After the display, the investigator should ask the witness to describe the level of certainty associated with any identification (or lack of identification) including the qualifying conditions about the photo (longer hair, older, heavier, etc.). Numerical certainty (percentages) should be avoided but a statement of why the photo looks like the suspect is encouraged.

. Exceptions:

o Do not use sequential identification with children age twelve or younger.

o The blind examination requirement may be abandoned if necessary. For example, the display may take place at 3:00 a.m. and no uninformed officer is available or everyone in your department knows the suspect. Reports should include why sequential identifications are not possible. n158

After drafting the protocol, which was approved by the respective chiefs of police following a number of policy discussions, our office conducted one training session in each of the smaller jurisdictions and three trainings in Minneapolis. In all, the County Attorney's Office instructed just under 100 investigators in the implementation of the protocol. In November 2003, the new protocol was put into use.

It is important to acknowledge that the new lineup protocol does not affect every criminal case. In fact, eyewitness identification is not a major issue in most criminal cases. n159 But they can be especially crucial in serious violent crimes, such as rapes and robberies, with suspects who may be complete strangers.

It is also important to note that the focus of this new protocol is on photo lineups. n160 Although they are popular in the movies and on television shows, live in-person lineups are rare in real life as a practical matter because it is very difficult and time-consuming to assemble six similar-looking individuals.

In Hennepin County, photo lineups are created using the [*22] Hennepin Repository of Arrest Photos (HennRAP) system. HennRAP is a central database of arrest and booking photos submitted by law enforcement agencies in the county and administered by the Hennepin County Sheriff's Office. Using HennRAP, a police agency is able to search arrest and booking photos from a variety of law enforcement agencies to create an appropriate "six pack" of photos for a lineup with a witness. The officer can quickly construct a lineup of suspects based on relevant demographic and descriptive characteristics such as gender, age, skin color, height, weight, eyes, hair, complexion, scars, marks, or tattoos.

B. Pilot Project Results

The Hennepin County Attorney's Office partnered with Professor Nancy Steblay, a research psychologist at Augsburg College in Minneapolis, to gather and analyze the data generated by the pilot project. The County Attorney's Office asked Professor Steblay whether the number and quality of identifications changed with the blind sequential lineup procedure. n161 The office also sought to answer whether departments could smoothly and effectively implement the recommended procedure. n162

The data set, compiled by Professor Steblay over the course of one year, encompassed 280 lineups conducted in 117 cases for 206 eyewitnesses in the four participating jurisdictions. n163 Investigators were asked to record a number of details regarding the type of crime, the lineup administration, and the eyewitness's response to the lineup. n164

Because lineup results had not been systematically recorded in Hennepin County prior to the implementation of the pilot project, Professor Steblay compared the Hennepin County results to results from a California field study on simultaneous lineups, n165 and data from laboratory comparisons of simultaneous versus sequential lineups. n166

[*23] The California field study on simultaneous lineups, where the actual suspect was present in the lineup, indicated that the suspect was identified 50% of the time, a filler was identified 24% of the time, and the witness failed to make a choice 26% of the time. n167 Identical results were obtained with a simultaneous presentation in the laboratory. n168 When the format was changed in the laboratory to a sequential presentation, identification of the suspect decreased to 35%, identification of a filler decreased to 19%, and "no choice" jumped to 46%. n169 Thus, with sequential presentation, witnesses were less likely to choose someone from the lineup, but greater protection was afforded for the innocent suspect, as indicated by the decreased choice of fillers. n170

As found by Professor Steblay, the Hennepin County results compared very favorably with previous studies. n171 She found that the eyewitness chose the suspect in 54% of lineups, the filler in only 8% of lineups, and made no choice in 38% of lineups. n172

Lineup Performance: Sequential Versus Simultaneous Lineup Formats n173

	Hennepin County (field)	Simultaneous (field and laboratory)	Sequential (laboratory)
Suspect ID	54%	50%	35%
Filler ID	8%	24%	19%
No choice	38%	26%	46%

Compared to the previous studies cited above, the Hennepin County protocol resulted in slightly more frequent identification of the suspect, with a "no choice" rate between those seen in the previous simultaneous and sequential studies. n174 Significantly, the rate with which the eyewitness identified the filler photographs - [*24] only 8% - was drastically lower than either the simultaneous lineup data or the laboratory results on the sequential procedure. n175 According to Dr. Steblay, this represents dramatically increased protection for

innocent suspects. n176 Thus, the Hennepin County pilot project substantially decreased the rate of false identification, yet maintained an effective rate of suspect identification. n177 The high rate at which witnesses chose the actual suspect should allay the concerns of many police that the simultaneous lineup method causes deterioration in these identifications.

Anecdotally, we also received a positive answer to our question of whether the departments could smoothly and effectively implement the blind sequential protocol. n178 The four police departments, having completed the year-long pilot project, remain committed to making these changes permanent within their jurisdictions. The investigators, who were openly skeptical at the time of the training sessions, found they were not hindered by the protocol.

The small difficulties experienced during the project had been predicted by the four police chiefs before we started. One recurring theme was the inability, at times, to find a truly "blind" officer to conduct the lineup. Even in a jurisdiction the size of Minneapolis, there are certain chronic offenders whose presence in a lineup would cause the administrator to presume they were the actual suspect, whether or not the administrator was familiar with the specific investigation. In smaller jurisdictions, it may simply be that all on-duty investigators are working the same case. For these reasons, the Hennepin County Attorney's Office has been assisting the police departments to develop a procedure to use a laptop computer, rather than a blind officer, to display the photographs to the witness. The monitor is turned away from the officer, and the photographs are scrambled, so as to maintain the proven benefits of blind administration despite the real-world constraints experienced by the departments.

One great benefit of the project, unrelated to the specific advancements, was the improved documentation of lineups required by the standardized protocol and necessary for the data collection. The memorialization of each witness's comments and [*25] other facts surrounding the lineup administration offered better information to the prosecutor, and ultimately the jurors, with which to weigh the strength of each identification.

V. Follow-up

In February 2005, the Hennepin County Attorney's Office presented Protecting the Innocent/Convicting the Guilty, a day-long conference for criminal justice professionals. The 400 members of the audience included judges, public defenders, federal officials, prosecutors from twenty-five Minnesota counties, and police and sheriffs' deputies from sixty departments across the state. Our office enlisted the support of the Hamline University School of Law, the University of Minnesota Law School, the University of St. Thomas School of Law, and William Mitchell College of Law to bring in researchers and practitioners from around the country to discuss the most recent research and findings on increasing the reliability of eyewitness identifications, as well as real-world experiences with the new procedures. The keynote speaker was Jennifer Thompson Cannino, whose misidentification of her rapist in 1984 resulted in an innocent man spending eleven years in prison. n179

As a follow-up to this conference and the success of the pilot project, the Hennepin County Attorney's Office plans to encourage voluntary adoption of the blind sequential protocol throughout the county, as well as in other jurisdictions within the state.

VI. Conclusion

In the 1994 Scales decision, the Minnesota Supreme Court ordered the electronic recording of all police interrogations of people who were in custody. n180 This includes the reading of the suspect's Miranda rights, any waiver of those rights and all questioning by police. n181 At the time, Alaska was the only other state that required the taping of interrogations. n182

Because the Scales decision was primarily aimed at protecting [*26] the rights of suspects, many police officers and prosecutors were initially uneasy that this requirement would have a "chilling effect" on their investigations and interviews with suspects. n183 "But during the past [decade] it has become clear that videotaped interrogations have strengthened the ability of police and prosecutors to secure convictions against the guilty." n184 "At the same time, they have helped protect the rights of suspects [and] ensure the integrity of the criminal justice process." n185

Likewise, there is good reason to expect that new eyewitness identification procedures will help improve police investigations, strengthen prosecutions and better protect the rights of innocent people while convicting those who are guilty. The new lineup protocol will give everyone in the criminal justice process, not only police and prosecutors, but also judges and jurors, a clearer view of the truth of what the eyewitness observed. This leads to more confidence in the result, which is good for public trust and accountability in the criminal justice

system. n186

Will these changes in eyewitness identification procedures lead to perfect justice? No. But our justice system must strive for that ideal. When a person gets charged with a crime, his liberty is at stake and, in states with the death penalty, his very life may be on the line. We must always be willing to embrace the benefits of new technology and scientific research that may help us strengthen the integrity of the criminal justice process to ensure that those guilty of crimes do not remain free because an innocent person has been convicted. That means sometimes fighting against our own complacency, bureaucratic inertia, or even our own hubris that we have already done everything we can.

For prosecutors, to do justice is the highest standard we have, and there is always more we can do. That is why efforts to improve eyewitness identification procedures are so important in keeping us focused on doing more and doing better to live up to our promise as a truly just and fair society where the innocent are protected and the guilty are brought to justice.

FOOTNOTES:

n1. See Jennifer Thompson, *I Was Certain, but I Was Wrong*, N.Y. Times, June 18, 2000, 4, at 15; see also *Frontline: What Jennifer Saw* (PBS television broadcast Feb. 25, 1997), <http://www.pbs.org/wgbh/pages/frontline/shows/dna/etc/script.html>. Note that since 1984, Jennifer Thompson has married and changed her name to Jennifer Thompson Cannino.

n2. Thompson, *supra* note 1, 4, at 15.

n3. *Id.*

n4. *Id.*

n5. *Id.*

n6. *Id.*

n7. *Id.*

n8. *Id.*

n9. *Id.*

n10. *Id.*

n11. *Id.*

n12. *Id.*; Bill Moushey & Nathan Crabbe, *Witnesses' Eyes Can Ofttimes Deceive*, Pittsburgh Post-Gazette, May 8, 2005, at A1.

n13. See Minn. Rules of Prof'l Conduct R. 3.8 cmt. (1985); Nat'l Dist. Attorneys Ass'n, *National Prosecution Standards* 1.1, 1.3 (2d ed. 1991).

- n14. See Minn. Rules of Prof'l Conduct R. 3.8 cmt.
- n15. See Moushey & Crabbe, *supra* note 12.
- n16. See generally Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology, and the Law* (1995).
- n17. *Id.* at 6.
- n18. Edwin M. Borchard, *Convicting the Innocent: Errors of Criminal Justice* (1932).
- n19. *Id.* at vi.
- n20. See, e.g., Donna Lyons, *DNA: Proof Positive, State Legislatures*, June 2001, at 10, available at <http://www.ncsl.org/programs/pubs/601DNA.htm>.
- n21. Peter Neufeld & Barry Scheck, commentary in Taryn Simon et al., *The Innocents* 8 (2003).
- n22. Gary L. Wells, *Eyewitness Identification Evidence: Science and Reform*, 29 *The Champion* 12, 12 (2005).
- n23. Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 *Law & Hum. Behav.* 603, 605-08 (1998).
- n24. *Id.* at 605.
- n25. Cutler & Penrod, *supra* note 16, at 8.
- n26. Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 *Am. Psychologist* 581, 589 (2000).
- n27. Cutler & Penrod, *supra* note 16, at 3-4.
- n28. *Id.* at 4.
- n29. *Id.*
- n30. *Id.*
- n31. *Id.* at 4-5.

n32. *Id.* at 5.

n33. *Id.*

n34. Hugo Munsterberg, *On the Witness Stand* (1908).

n35. James M. Doyle, *True Witness: Cops, Courts, Science, and the Battle Against Misidentification* 20 (2005).

n36. Wells et al., *supra* note 26, at 590.

n37. Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 *Ann. Rev. Psychol.* 277, 278 (2003).

n38. Wells et al., *supra* note 23, at 605.

n39. Wells et al., *supra* note 26, at 582.

n40. *Id.*

n41. *Id.* at 587.

n42. Wells, *supra* note 22, at 12.

n43. Wells et al., *supra* note 26, at 595.

n44. Wells et al., *supra* note 23, at 609.

n45. *Id.* at 612.

n46. *Id.* at 603.

n47. *Id.* at 627.

n48. Wells et al., *supra* note 26, at 581.

n49. *Id.* at 596.

n50. Nat'l Inst. of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* iii (1999).

n51. Id. at 3.

n52. Id. at 29-38.

n53. See *infra* Part II.1-5.

n54. Cutler & Penrod, *supra* note 16, at 114.

n55. Id. at 115.

n56. Id. at 114.

n57. Id.

n58. Wells et al., *supra* note 23, at 624.

n59. Id.

n60. Id. at 628.

n61. Id. at 624.

n62. Gary L. Wells & Amy Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 *J. Applied Psychol.* 360, 363 (1998).

n63. Id.

n64. Id. at 366.

n65. Id.

n66. Id.

n67. Gary L. Wells et al., The Confidence of Eyewitnesses in Their Identifications From Lineups, 11 *Current Directions Psychol. Sci.* 151, 151 (2002).

n68. Cutler & Penrod, *supra* note 16, at 9.

n69. Id.

n70. Wells et al., supra note 23, at 620-21.

n71. Id. at 623-24 (listing factors other than confidence that may affect eyewitness accuracy, such as disguises and biases).

n72. Id. at 626-27.

n73. Id. at 627-29.

n74. Id. at 627.

n75. Id. at 627-29. Cues can include both verbal and nonverbal behaviors, such as smiling. Id. at 628.

n76. Id. at 629.

n77. Id. at 630.

n78. Wells et al., supra note 67, at 153.

n79. Id.

n80. Id.

n81. Id.

n82. Wells et al., supra note 23, at 635-36.

n83. Wells, supra note 22, at 14.

n84. Id.

n85. Id.

n86. Id.; Wells et al., supra note 23, at 632.

n87. Wells, supra note 22, at 14.

n88. Id.

n89. Id.

n90. Id.

n91. Wells et al., *supra* note 23, at 632.

n92. Id. at 630.

n93. Id. at 615.

n94. Id. at 613.

n95. Nancy M. Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 *Law & Hum. Behav.* 283, 294 (1997).

n96. Id.

n97. Id.

n98. Id.

n99. Id. at 296.

n100. Wells et al., *supra* note 23, at 615.

n101. Id.

n102. Wells, *supra* note 22, at 14.

n103. Id.

n104. Cutler & Penrod, *supra* note 16, at 127.

n105. Id.

n106. Wells et al., *supra* note 23, at 617.

n107. *Id.*

n108. Cutler & Penrod, *supra* note 16, at 128.

n109. Wells et al., *supra* note 23, at 617.

n110. *Id.*

n111. *Id.*

n112. Wells et al., *supra* note 26, at 586.

n113. *Id.*

n114. *Id.*

n115. Wells et al., *supra* note 23, at 639-41.

n116. *Id.* at 639-40.

n117. *Id.* at 627-29, 640.

n118. See Memorandum from the Office of the Attorney Gen., Dep't of Law and Pub. Safety, State of N.J. to all County Prosecutors, Police Chiefs, and Law Enforcement Chief Executives, Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures (Apr. 18, 2001) [hereinafter State of New Jersey] (on file with author).

n119. Doyle, *supra* note 35, at 192.

n120. 727 A.2d 457 (N.J. 1999).

n121. *Id.* at 459.

n122. *Id.*

n123. *Id.* at 460.

n124. *Id.* at 467.

n125. *Id.* at 468.

n126. Ronald Smothers, DNA Tests Free Man After 6 Years; Had Been Convicted in Rape of Student, N.Y. Times, Dec. 15, 1999, at B6.

n127. Doyle, supra note 35, at 192-93.

n128. Id. at 193.

n129. Id.

n130. Id.

n131. Id.

n132. See State of New Jersey, supra note 118.

n133. State of Ill., Report of the Governor's Comm'n on Capital Punishment i, 31-40 (2002).

n134. N.C. Actual Innocence Comm'n, Recommendations for Eyewitness Identification 1-6 (2003).

n135. Avery Task Force, Eyewitness Identification Procedure Recommendations 1-8 (2005).

n136. Va. State Crime Comm'n, Mistaken Eyewitness Identification, H. 79-40, 1st session, at 1, 14-15 (2005).

n137. See *Minn. Stat. 590.01* (2004).

n138. Paul Gustafson, DNA Exonerates Man Convicted of '85 Rape, Star Trib. (Minneapolis-St. Paul), Nov. 14, 2002, at 1A.

n139. *State v. Sutherlin*, 393 N.W.2d 394, 395 (Minn. Ct. App. 1986).

n140. Id.

n141. *Id. at 397.*

n142. Gustafson, supra note 138, at 1A.

n143. Id.

n144. Id.

n145. Amy Klobuchar & Scott Knight, *New Lineup Procedures Can Reduce Eyewitness Mistakes*, *Star Trib. (Minneapolis-St. Paul)*, Jan. 12, 2005, at 11A.

n146. Id.

n147. Id.

n148. Id.

n149. Id.

n150. Id.

n151. Id.

n152. Id.

n153. Id.

n154. Id.

n155. Memorandum from Paul Scoggin, Managing Attorney, Violent Crimes Division, Hennepin County Attorney's Office to the Investigators/Detectives, Minneapolis (Central Investigation Division), Bloomington, Minnetonka, and New Hope Police Departments on Pilot Program for the Sequential Identification Process Memorandum 1 (Oct. 27, 2003) (on file with the William Mitchell Law Review).

n156. Id.

n157. Memorandum from Nancy Steblay, Augsburg College, on Hennepin County Blind-Sequential Lineup Pilot Program: Preliminary Findings (Mar. 28, 2005) (on file with the William Mitchell Law Review).

n158. See Memorandum from Paul Scoggin, *supra* note 155, at 1-3.

n159. *Police and Prosecutors Team Up for Better Eyewitness IDs*, *News & Publications (Hennepin County Attorney)*, Nov. 3, 2003, <http://www.hennepinattorney.org/news 2.asp?NRecno=179>.

n160. See generally Memorandum from Paul Scoggin, *supra* note 155.

n161. Memorandum from Steblay, *supra* note 157, at 2.

n162. *Id.*

n163. *Id.*

n164. *Id.*

n165. *Id.* at 3; Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 *Law & Hum. Behav.* 475 (2001).

n166. Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 *Law & Hum. Behav.* 459 (2001).

n167. Behrman & Davey, *supra* note 165, at 482.

n168. Steblay et al., *supra* note 166, at 463 tbl.1.

n169. *Id.*

n170. *Id.*

n171. See Memorandum from Steblay, *supra* note 157, at 4.

n172. *Id.*

n173. See *id.* at 4; Steblay et al., *supra* note 166, at 463 tbl.1.

n174. See Memorandum from Steblay, *supra* note 157, at 4.

n175. *Id.*

n176. *Id.*

n177. *Id.*

n178. See *id.* at 1.

n179. See *Local Law Enforcement Conference Looks at Preventing Wrongful Convictions*, News & Publications (Hennepin County Attorney), Feb. 10, 2005, <http://www.hennepinattorney.org/news>

2.asp?NRecno=237.

n180. *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994).

n181. *Id.*

n182. *Id.* at 591; see *Stephan v. State*, 711 P.2d 1156, 1159 (Alaska 1985).

n183. See *Scales*, 518 N.W.2d at 592 (quoting *Stephan*, 711 P.2d at 1162).

n184. See Amy Klobuchar, *Eye on Interrogations: How Videotaping Serves the Cause of Justice*, Wash. Post, June 10, 2002, at A21.

n185. *Id.*

n186. *Id.*

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