



**Mayor's Office of Criminal Justice
New York City Council
Committees on Public Safety and Courts and Legal Services
September 23, 2016**

Good morning, Chairs Gibson and Lancman and members of the Committees on Public Safety and Courts and Legal Services. My name is Elizabeth Glazer and I am the Director of the Mayor's Office of Criminal Justice ("MOCJ"). Thank you for the opportunity to testify today.

Wrongful convictions are a critical matter of fairness and something that is important to every New Yorker. Wrongful convictions not only irrevocably damage the lives of those convicted, but also permit the perpetrators of a crime to go unpunished. This both compromises public safety and erodes trust in the justice system. New York City has worked to ensure that policies related to custodial interrogations and eyewitness identification are developed with a key emphasis on ensuring fairness and maximizing reliability. I want to discuss today one example of this work.

NYPD videotapes the interviews of every defendant arrested for index felony offenses and attempts, commonly referred to as the "7 major felonies." These offenses include murder, rape, robbery, burglary, assault, grand larceny, and grand larceny auto. There are some exceptions, for example, when a defendant requests a lawyer or refuses to be videotaped. In addition, Detective Zone Captains are given latitude to record certain misdemeanor arrests based on the circumstances – this occurs most often with misdemeanor sex crimes. In addition, arrests by uniformed patrol for gun offenses, are enhanced by the local detective squad and are recorded.

Currently, the New York City Police Department has 82 rooms equipped with video recording software. Each detective squad assigned to a precinct has a room equipped with this software. All Special Victim Squads are equipped as well. Since 2011, the Department has recorded in over 5,000 custodial interrogations. It has been the NYPD's experience that recording not only aids those who are innocent, but also bolsters the work performed by officers by preventing disputes about how an officer conducted him/herself while also increasing transparency as to what was said and done during an interrogation.

While we are confident in our current policies and procedures, we understand that just one conviction of an innocent person is one too many. We are always willing to work with our partners in the Council as well as with concerned stakeholders to ensure the fair administration of these procedures. Thank you for the opportunity to testify here today. I would be happy to answer any questions.

**STATEMENT OF
ROBERT K. BOYCE, CHIEF OF DETECTIVES &
LAWRENCE BYRNE, DEPUTY COMMISSIONER, LEGAL MATTERS
NEW YORK CITY POLICE DEPARTMENT**

**BEFORE THE NEW YORK CITY COUNCIL PUBLIC SAFETY COMMITTEE &
COURTS AND LEGAL SERVICES COMMITTEE
CITY HALL, COUNCIL CHAMBERS
FRIDAY, SEPTEMBER 23, 2016**

Good morning Chairs Gibson and Lancman and members of the Council. On behalf of Police Commissioner James P. O'Neill, we are pleased to submit this statement regarding the New York City Police Department's (NYPD) investigative policies and procedures as it relates to safeguarding against wrongful convictions.

At the outset, it is critical to note that the issues of fairness in our justice system and the possibility of wrongful convictions are things that are important to every member of the law enforcement community. Wrongful convictions not only irrevocably damage the lives of those convicted, but also permit the perpetrators of a crime to go unpunished – which compromises public safety as well as trust in the justice system. Consequently, our policies related to custodial interrogations and eyewitness identification were developed with a key emphasis on ensuring fairness and maximizing reliability.

These policies were derived from recommendations by the Municipal Police Training Council, the District Attorneys Association of the State of New York's Best Practices, as well as from the NYPD's Legal Bureau and the Detective Bureau Training Unit. Upon entry into the Department's Detective Bureau, new investigators and supervisors attend a two-week training program entitled "Criminal Investigators Course," where identification procedures are taught by the Legal Bureau. Each member of the Detective Bureau also receives an additional 8 hours of in-service training on these subjects each year.

It is the NYPD's policy that all arrests effected by NYPD detective squads for index felony offenses and attempts, commonly referred to as the "7 major felonies," are subject to video recorded interrogations. These offenses include murder, rape, robbery, burglary, assault, grand larceny, and grand larceny auto. Moreover, our Detective Zone Captains are given latitude to record certain misdemeanor arrests based on the totality of circumstances – this occurs most often with misdemeanor sex crimes. In addition, in order to bolster prosecutions, arrests effected by uniformed patrol for gun offenses are enhanced by the local detective squad and are recorded.

Currently, the New York City Police Department has 82 rooms equipped with video recording software. Each detective squad that is assigned to a precinct has a room equipped with this software. All Special Victim Squads are equipped as well.

NYPD policy mandates that the recording system is activated before the subject enters the interrogation room, that the interrogation is recorded in its entirety, and the recording ends only after the interrogation is concluded, and all parties have exited the interrogation room. A detective squad supervisor is required to be present while personnel conduct a recorded interrogation. Each recording is logged internally and a copy of the video is disseminated to the relevant District Attorney's office.

If information is learned during a custodial interrogation that would shift a non-qualifying crime to a qualifying crime for recording, the Department's policy is to begin the recording without delay. If an investigator suspects that a non-custodial interview may become a custodial interrogation, they are directed to begin the recording process without delay.

Of course every policy has exceptions. The common exceptions in our policy are when the subject of the recording either requests an attorney, invokes their right to silence, or requests to not be recorded. In addition, there are exceptions when there is an equipment failure or the subject is interrogated at a location not furnished with recording equipment, such as a hospital. When a recorded interrogation has begun and then is ceased for any of these reasons, investigators are mandated to notify their supervisors and document the occurrence in their case folder.

Since 2011, the Department has recorded in excess of 5,000 custodial interrogations. It has been our experience that recording not only aids those who are innocent, but also bolsters the work performed by our officers by preventing disputes about how an officer conducted him/herself while also increasing transparency as to what was said and done during an interrogation.

Regarding photo arrays and prior arrest photo viewings, the Department's policy makes significant efforts to ensure fair and reliable eyewitness identifications. In administering these procedures, detectives develop suspects based on descriptions provided by witness interviews, the recovery of physical, video, and forensic evidence, as well as other investigatory techniques. Prior to a photo array or viewing, the witness is instructed that the perpetrator may or may not be present. In each of these processes, the Department also utilizes non-suspect fillers that match the witness' description of the perpetrator to ensure that the suspect does not stand out. All statements made by the viewing witness during a photo array are documented by the administering detective. With respect to a prior arrest photo viewing, the Department's photo image management system will record the time spent on each photo, any annotations made, and whether identification is made. The system will generate a summary report that is delivered to the relevant District Attorney's office.

Generally, live line ups are conducted after the witness views a photo array and identifies a suspect. Similar to photo arrays and viewings, prior to the administration of a live lineup, the witness will be instructed that the perpetrator may not be present. Additionally, non-suspect fillers that closely match the perpetrator description are utilized. All verbal statements made by the witness during a live lineup are documented by a detective.

While we are confident in our current policies and procedures, we understand that just one conviction of an innocent person is one too many. We are always willing to collaborate with our partners in the Council as well as with concerned stakeholders to ensure the fair administration of these procedures.

Thank you for the opportunity to submit this statement today.



DETECTIVE GUIDE

Section: Investigations

Procedure No: 502-20

VIDEO / AUDIO RECORDING OF CUSTODIAL INTERROGATIONS REGARDING DESIGNATED FELONY ASSAULT OFFENSES, SEX OFFENSES AND HOMICIDE OFFENSES

DATE ISSUED:

02-04-15

DATE EFFECTIVE:

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SCOPE

The 7th, 48th, 67th, 107th and 122nd Detective Squads are currently participating in the video / audio recording of custodial interrogations pilot project and will comply with this procedure when conducting custodial interrogations of subjects for designated felony assault offenses.

During 2013, the majority of Detective Squads in all five Detective Boroughs and all Special Victims Detective Squads will comply with this procedure when conducting custodial interrogations of subjects for designated felony assault offenses and designated sex offenses and designated homicide offenses. Subsequent Chief of Detectives Memos will designate the specific Detective Squads that will comply with this procedure and will also designate the specific offenses for which custodial interrogations of subjects will be video / audio recorded.

DEFINITIONS

SUBJECT – A person who is sixteen years of age or older who will undergo a custodial interrogation regarding a designated felony assault offense, designated sex offense or designated homicide offense.

INTERROGATION ROOM – Designated room containing NYPD authorized video / audio recording equipment that will be used by an investigator to conduct a custodial interrogation of a subject regarding a designated felony assault offense, designated sex offense or designated homicide offense.

COMPLETION OF CUSTODIAL INTERROGATION – The custodial interrogation of a subject regarding a designated felony assault offense, designated sex offense or designated homicide offense is considered completed when:

No further custodial interrogation will occur; and,
The subject exits the Interrogation Room.

DESIGNATED FELONY ASSAULT OFFENSE – See Appendix “A.”

DESIGNATED SEX OFFENSE – See Appendix “A.”

DESIGNATED HOMICIDE OFFENSE – See Appendix “A.”

PROCEDURE

When an investigator, assigned to a designated Detective Squad / Unit equipped with video / audio recording equipment, conducts a custodial interrogation of a subject regarding a designated felony assault offense, designated sex offense or designated homicide offense, the following procedure will be complied with:

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- INVESTIGATOR**
1. Immediately notify:
 - a. Assigned Detective Squad / Unit Supervisor or, if applicable, covering Detective Bureau Supervisor
 - b. Zone Commanding Officer or, if applicable, Detective Bureau Duty Captain
 - c. Chief of Detectives Wheel investigator
 - (1) Obtain a "Video / Audio Recording Interrogation" log number.

**ZONE
COMMANDING
OFFICER/
DETECTIVE
BUREAU DUTY
CAPTAIN**

2. When necessary, notify Operations Unit, provide specific information regarding the involved language(s) and dialect(s), indicate the required type of translator service (i.e., speaking, reading, writing), and request the immediate response of one or more NYPD interpreters / translators.
3. Ensure the assigned Detective Squad / Unit Supervisor or, if applicable, the covering Detective Bureau Supervisor, is present at the involved Detective Squad / Unit and supervises the investigation until completion of the custodial interrogation.

**ASSIGNED
DETECTIVE
SQUAD / UNIT
SUPERVISOR/
COVERING
DETECTIVE
BUREAU
SUPERVISOR**

4. Ensure a Primary Interrogating Investigator and an Equipment Monitoring Investigator is designated.
5. Remain at the involved Detective Squad / Unit and supervise the investigation until the completion of the custodial interrogation.
6. Prior to permitting a member of the service to enter the Interrogation Room, ensure all electronic devices, including mobile phones, have been removed.
 - a. When possible, ensure all electronic devices, including mobile phones, have been removed from the subject.
7. Prior to the video / audio recording equipment being activated, ensure:
 - a. The Pan Tilt Zoom (PTZ) camera is positioned to capture the subject's shoulders and head
 - b. The "In Use" light located on the exterior of the Interrogation Room is activated.
8. If there are legal, technical, investigative or other problems or questions, notify the Zone Commanding Officer or, if applicable, Detective Bureau Duty Captain.

**ZONE
COMMANDING
OFFICER/
DETECTIVE
BUREAU DUTY
CAPTAIN**

9. If there are legal problems or questions, notify the Legal Bureau in the following manner:
 - a. Monday through Friday from 0800 hours to 2230 hours, telephone the Legal Bureau and speak with a supervising attorney
 - b. All other times, telephone the Operations Division and speak with a supervisor.
10. If there are technical problems or questions, telephone the Information Technology Bureau Help Desk and speak with a supervisor.

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PRIMARY INTERROGATING INVESTIGATOR

11. After the video / audio recording equipment has been activated and is properly functioning, have the subject escorted into the Interrogation Room.
12. Do not permit the deactivation of the video / audio recording equipment until the custodial interrogation is completed even if there is no conversation occurring or the Interrogation Room becomes vacant.
13. After the subject enters the Interrogation Room and prior to starting the custodial interrogation:
 - a. Read **MIRANDA WARNING (PD244-149)** to the subject
 - b. Obtain from the subject a knowing, intelligent and voluntary waiver of the right to remain silent and the right to counsel
 - (1) **DO NOT** utilize deception, deceit, trickery, etc., to obtain a waiver of the right to remain silent or right to counsel.
14. Do not inform subject that he / she is being recorded unless asked whether the interrogation is being recorded.
 - a. If the subject asks if he / she is being recorded, inform the subject that the questioning is being recorded.
15. Have the video / audio recording equipment deactivated if requested to do so by the subject.
 - a. If the video / audio recording equipment is deactivated, continue the custodial interrogation unless the subject unequivocally invokes the right to remain silent or right to counsel.
16. If an attorney is present to visit the subject, escort them from the Interrogation Room to an appropriate area and do **not** deactivate the video / audio recording equipment even though the Interrogation Room is vacant.
 - a. Do not allow the attorney and subject to remain in the Interrogation Room. However, if due to unanticipated circumstances, an attorney and subject must remain in the Interrogation Room, immediately deactivate the video / audio recording equipment.
17. Have the video / audio recording equipment deactivated if requested to do so by the subject's attorney.

EQUIPMENT MONITORING INVESTIGATOR

18. Activate the video / audio recording equipment and ensure it is properly functioning and recording prior to the subject being escorted into the Interrogation Room.
19. When subject enters the room and is seated, ensure the PTZ camera is positioned so as to capture the subject's shoulders and head.
20. Monitor the video / audio recording equipment until the completion of the custodial interrogation and ensure it is properly functioning.
21. If video / audio recording equipment does not initially properly function or if it subsequently malfunctions, notify:
 - a. Primary Interrogating Investigator and investigators conducting the custodial interrogation

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EQUIPMENT MONITORING INVESTIGATOR (continued)

- b. Assigned Detective Squad / Unit Supervisor / Covering Detective Bureau Supervisor
- c. Zone Commanding Officer / Detective Bureau Duty Captain
- d. Chief of Detectives Wheel investigator.
- 22. Utilize the video / audio recording equipment to observe and listen to the custodial interrogation until it is completed.
- 23. Utilize the video / audio recording equipment to create an "Annotation Log" and document the following information:
 - a. Time the subject:
 - (1) Enters or leaves the interrogation room
 - (2) Is provided food, beverage, cigarette, rest, access to toilet facility, etc.
 - (3) Makes a noteworthy statement.
 - b. Time a member of the service enters or leaves the interrogation room
 - c. If applicable, time the subject's attorney enters or leaves the interrogation room and the attorney's name
 - d. Time subject requests the video / audio recording equipment be deactivated
 - e. Time subject's attorney requests the video / audio recording equipment be deactivated and the attorney's name
 - f. Time the video / audio recording equipment is deactivated and the reason for the deactivation
 - g. Time of any noteworthy occurrence and a description of the occurrence
 - h. If applicable, time any irregularity or problem occurs involving the video / audio recording equipment and a description of the irregularity or problem.
- 24. Do not deactivate the video / audio recording equipment until the completion of the custodial interrogation unless:
 - a. Requested by primary investigating officer
 - b. Directed by a supervisor.

INTERROGATING INVESTIGATOR(S)

- 25. If prior to the start of the custodial interrogation the video / audio recording equipment malfunctions and can not be repaired and activated within a reasonable period of time, commence the custodial interrogation.
 - a. If the malfunction is repaired after the custodial interrogation has commenced, ensure the video / audio recording equipment is activated by the Equipment Monitoring Investigator.
- 26. If during the custodial interrogation, the video / audio recording equipment malfunctions, continue the custodial interrogation.
 - a. If the malfunction is repaired, ensure the video / audio recording equipment is activated by the Equipment Monitoring Investigator.
- 27. Conduct the custodial interrogation either alone or with one or more additional investigator(s).

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NOTE

Interrogating investigator(s) will utilize lawful interrogation techniques during the custodial interrogation. During a lengthy custodial interrogation or when otherwise appropriate, subjects will be provided food, beverages, cigarettes, rest, access to toilet facility, etc. When necessary and appropriate, interrogating investigators may utilize lawful deception, deceit, trickery, etc.

Interrogating investigator(s) will act in a professional manner when conducting the custodial interrogation. However, when necessary, offensive and discourteous language may be used during a custodial interrogation for the purpose of facilitating communication or obtaining information.

AFTER THE COMPLETION OF CUSTODIAL INTERROGATION

EQUIPMENT MONITORING INVESTIGATOR

28. Export the video / audio DRCI file from the hard drive of the video / audio recording equipment to one new, unused, blank NYPD issued DVD that will be designated "original image" DVD.
29. Retain the "original image" DVD even if there are irregularities, malfunctions, deletions, damage, etc., regarding the video / audio recording equipment or the "original image" DVD.
30. Complete all captions on the "original image" "New York City Police Department Video Interrogation" DVD label using a permanent felt-tip marker.
31. Package the "original image" DVD in a NYPD issued DVD hard plastic container.
32. Complete all captions on the **MEDIA SLEEVE LABEL FOR VIDEO / AUDIO RECORDED INTERROGATIONS (PD321-102)** and affix label to the DVD hard plastic container.
33. Export the video / audio DRCI file from the hard drive of the video / audio recording equipment to three new, unused, blank NYPD issued "New York City Police Department Video Interrogation" DVDs that will be designated "working copy" DVDs.
 - a. Do not export the video / audio from the "original image" DVD to the three "working copy" DVDs.
34. Complete all captions on each "working copy" "New York City Police Department Video Interrogation" DVD label using a permanent felt-tip marker and ensure an "X" is entered in the "Copy" caption.
35. Package each "working copy" DVD in a separate NYPD issued paper "DVD sleeve" to prevent damage to the DVD.
36. Complete all captions on the **MEDIA SLEEVE LABEL FOR VIDEO / AUDIO RECORDED INTERROGATIONS** and affix label to the NYPD issued paper "DVD sleeve."
37. Print out paper copy of the "Annotation Log."
38. Deliver to the Primary Interrogating Investigator the following:
 - a. "Original image" DVD
 - b. Three "working copy" DVDs
 - c. Paper copy of the "Annotation Log."

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PRIMARY INTERROGATING INVESTIGATOR

39. Prepare a "Video / Audio Interrogation Conducted" DD-5 in the Enterprise Case Management System (ECMS) and include the following information:
 - a. "Video / Audio Recording Interrogation" log number
 - b. Time subject arrived at the stationhouse
 - c. If applicable, name, address and telephone number of subject's attorney
 - d. If applicable, time any irregularity or problem occurs involving the video / audio recording equipment and a description of the irregularity or problem.
40. Scan or fax the paper copy of the "Annotation Log" into ECMS as an attachment to the "Video / Audio Interrogation Conducted" DD-5.
41. Complete the appropriate captions on a NYPD Plastic Security Envelope.
42. Place the hard plastic container containing the "original image" DVD into the NYPD Plastic Security Envelope and seal the Plastic Security Envelope.
43. Prepare a **PROPERTY CLERK INVOICE (PD521-141)** and voucher the "original image" DVD.
44. Store the vouchered "original image" DVD in accordance with existing Department procedures.
45. Enter the required information in the appropriate captions on two **DETECTIVE BUREAU "WORKING COPY" DVD TRANSMITTAL REPORTS (PD550-140)**.
46. Confer with Assigned Detective Squad / Unit Supervisor / Covering Detective Bureau Supervisor and obtain authorization to deliver a "working copy" DVD to:
 - a. Designated Assistant District Attorney (ADA) assigned to the involved District Attorney's Office (DAO)
 - b. Chief of Detectives Wheel investigator.

ASSIGNED DETECTIVE SQUAD / UNIT SUPERVISOR/ COVERING DETECTIVE BUREAU SUPERVISOR

47. Enter the required information in the appropriate captions and sign the two **DETECTIVE BUREAU "WORKING COPY" DVD TRANSMITTAL REPORTS**.

PRIMARY INTERROGATING INVESTIGATOR

48. Ensure a "working copy" DVD and a **DETECTIVE BUREAU "WORKING COPY" DVD TRANSMITTAL REPORT** is delivered to:
 - a. Chief of Detectives Wheel investigator
 - b. Designated ADA assigned to the involved DAO.

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**PRIMARY
INTERROGATING
INVESTIGATOR
(continued)**

49. Ensure a completed and signed **DETECTIVE BUREAU “WORKING COPY” DVD TRANSMITTAL REPORTS** is obtained from the Chief of Detectives Wheel investigator and designated ADA assigned to the involved DAO after the “working copy” DVD has been delivered thereto.
50. Store in the related paper case folder the following:
 - a. One “working copy” DVD
 - b. Paper copy of the “Annotation Log”
 - c. Two completed and signed **DETECTIVE BUREAU “WORKING COPY” DVD TRANSMITTAL REPORTS**.

**DETECTIVE
SQUAD/UNIT
COMMANDER**

51. Ensure a “working copy” DVD and a **DETECTIVE BUREAU “WORKING COPY” DVD TRANSMITTAL REPORT** is delivered to:
 - a. Chief of Detectives Wheel investigator
 - b. Designated ADA assigned to the involved DAO.
52. Email the results of each video / audio recorded custodial interrogation to the Chief of Detectives Wheel and members of the Custodial Interrogation Video / Audio Recording Program Working Group.

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APPENDIX "A"

PL Article 120: Designated Felony Assault Offense – A completed or attempted:

1. Assault 1st Degree (Penal Law 120.10)
2. Assault 2nd Degree (Penal Law 120.05)
3. Gang Assault 1st Degree (Penal Law 120.07)
4. Gang Assault 2nd Degree (Penal Law 120.06)
5. Aggravated Assault Upon a Police Officer or Peace Officer (Penal Law 120.11)
6. Assault on a Peace Officer, Police Officer, Fireman, or Emergency Medical Services Professional (Penal Law 120.08).

PL Article 130: Designated Sex Offense – A completed or attempted:

1. Rape 1st Degree (Penal Law 130.35)
2. Rape 2nd Degree (Penal Law 130.30)
3. Rape 3rd Degree (Penal Law 130.25)
4. Criminal Sexual Act 1st Degree (Penal Law 130.50)
5. Criminal Sexual Act 2nd Degree (Penal Law 130.45)
6. Criminal Sexual Act 3rd Degree (Penal Law 130.40)
7. Aggravated Sexual Abuse 1st Degree (Penal Law 130.70)
8. Aggravated Sexual Abuse 2nd Degree (Penal Law 130.67)
9. Aggravated Sexual Abuse 3rd Degree (Penal Law 130.66)
10. Aggravated Sexual Abuse 4th Degree (Penal Law 130.65-a)
11. Sexual Abuse 1st Degree (Penal Law 130.65)
12. Persistent Sexual Abuse (Penal Law 130.53)
13. Course of Sexual Conduct against a Child 1st Degree (Penal Law 130.75)
14. Course of Sexual Conduct against a Child 2nd Degree (Penal Law 130.80).

PL Article 125: Designated Homicide Offense – A completed or attempted:

1. Aggravated Murder (Penal Law 125.26)
2. Murder 1st Degree (Penal Law 125.27)
3. Murder 2nd Degree (Penal Law 125.25)
4. Aggravated Manslaughter 1st Degree (Penal Law 125.22)
5. Aggravated Manslaughter 2nd Degree (Penal Law 125.21)
6. Manslaughter 1st Degree (Penal Law 125.20)
7. Manslaughter 2nd Degree (Penal Law 125.15).



CONVICTION INTEGRITY UNIT

City Council Hearing on Wrongful Convictions and Conviction Integrity Units – September 23, 2016

Mission Statement

Within the first few months of taking Office, District Attorney Clark created the Conviction Integrity Unit. The unit, which is dedicated to improving the quality and integrity of prosecutions throughout Bronx County, has two important functions. First, it reviews post-judgment claims of actual innocence and wrongful conviction in our most serious cases. The review is generally fact-based and extra-judicial. When appropriate, the unit thoroughly reinvestigates a case. In select cases where there has been a comprehensive reinvestigation, the unit, in conjunction with some of the most experienced and skilled Assistants throughout the Office, will make a recommendation to the District Attorney as to whether the conviction should stand.

Second, the purview of the Conviction Integrity Unit extends forward to policy and best professional practices. The Conviction Integrity Unit reviews cases in which the Office has identified an error (even those under the legal standard of harmless error), and attempts to determine what caused the error in a particular case. Further, the unit assesses whether there are discernable patterns in errors or types of errors. In this regard, the unit endeavors to understand the environmental, procedural, supervisory, systemic, or other circumstances that contributed to the outcome. Additionally, the unit works closely with Executive Staff, Trial Division Supervisors, and the Legal Training Unit, and the Best Practices Committee of the new Professional Responsibility Bureau, to help implement and follow best practices in the current investigation and prosecution of cases, and to ensure compliance with all legal and ethical obligations. The unit also participates in a variety of training programs within the Office, and meets with representatives of other prosecuting offices, along with innocence organizations and members of the defense bar, to discuss ways to improve the accuracy and quality of convictions.

Staffing and Independence

The Conviction Integrity Unit has a potent full-time staff, including three seasoned attorneys. The chief of the unit is a career prosecutor with more than 28 years of litigation experience at the Manhattan District Attorney's Office. The other two lawyers have a combined total of 40 years of experience representing indigent clients as criminal defense attorneys through organizations like the Legal Aid Society, the Office of the Appellate Defender, and Neighborhood Defender Service of Harlem. Both have worked extensively on exoneration and actual innocence cases. The unit has available to it Detective Investigators and Detectives from the NYPD DA Squad and is in the process of hiring a full-time Detective Investigator who will work exclusively for the unit.

The Conviction Integrity Unit reports directly to the Deputy General Counsel to the District Attorney, Julian O'Connor. In this regard, the unit operates independently from the other investigation and litigation bureaus in the Office. In addition, because all three lawyers come to the unit from outside of the Bronx District Attorney's Office, they are able to conduct their investigations and reviews without pre-existing loyalties or bias.

Flexibility – Casting a Broad Net

The Conviction Integrity Unit accepts cases for review from a wide variety of sources, including:

1. Individual defendants who claim they are innocent;
2. Innocence organizations;
3. The defense bar;
4. State and federal prosecutors;
5. An internal audit following a finding of errors or misconduct by law enforcement, the court, or counsel;
6. Under a directive by the Office's general counsel;
7. The police;
8. The Courts;
9. Press reports.

The unit strives to be inclusive and will consider reviewing a case so long as the following criteria are met:

1. The conviction was secured by the Bronx County District Attorney;
2. The conviction was for a serious, violent felony crime;
3. The defendant is alive;
4. The defendant claims either that:
 - a) he is actually innocent of the crime and any related offense (factual innocence); or
 - b) there was a serious error that significantly undermines confidence in correctness of the conviction;
5. The defendant identifies concrete evidence supporting his claim that can be investigated and verified.

Furthermore, to ensure that the unit is able to review the greatest number of cases, the following factors will *not* automatically disqualify a case from consideration:

1. The defendant pleaded guilty;
2. The defendant did not maintain his innocence from the start;
3. The facts supporting the defendant's claim were known to him or could have been discovered by him or by his attorney with due diligence at an earlier point;
4. The defendant is no longer incarcerated, although cases involving incarcerated defendants will be given priority;
5. The defendant is not willing to be interviewed by the unit or to waive attorney/client privilege;
6. The defendant has previously applied for review by the unit.

While these factors will not preclude review, they will, however, be taken into account and weighed against the strength of the evidence supporting the defendant's claim and the totality of circumstances.

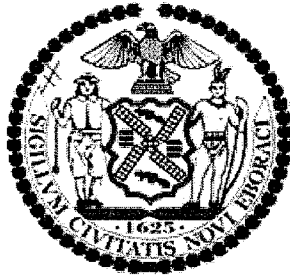
Standard Applied to Recommend Vacatur

The Conviction Integrity Unit will recommend that the District Attorney agree to vacate the conviction when: a) the totality of the evidence establishes clearly and convincingly that the defendant is actually innocent; or b) one or more serious errors significantly undermine confidence in correctness of the conviction; or c) the totality of circumstances lead inexorably to the conclusion that the conviction was wrongful and the interests of justice are best served by vacating the judgment.

Transparency

When a defendant has applied for the Conviction Integrity Unit to review his case, the unit will notify him or his lawyer in writing and in a timely manner about the status of his case, when a decision on the case has been reached, and the action taken. In addition, the unit will produce a yearly report outlining the number of applications that were submitted, the number of cases which resulted in a full re-investigation and review, the number of cases in which the District Attorney agreed to: a) vacate the conviction; b) dismiss the charges; c) retry the case; or d) stand by the conviction.

Since the creation of the unit in April 2016, the Conviction Integrity Unit has handled a total of 43 cases. In one case, the unit conducted a robust re-investigation and recommended that the District Attorney agree to vacate a murder conviction. Additionally, the unit reviewed and declined to conduct a further re-investigation in 20 cases. Currently, the unit is comprehensively re-investigating at least 5 cases. As to the remaining cases, we are still gathering materials and assessing whether a full-scale investigation is warranted.



Kenneth P. Thompson
District Attorney

**Oversight – Examination of Wrongful Conviction and
Conviction Integrity Units**

City Council Hearing

Committee on Courts and Legal Services and
Committee on Public Safety

September 23, 2016

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TESTIMONY GIVEN BY ASSISTANT DISTRICT ATTORNEY MARK HALE
NEW YORK CITY COUNCIL OVERSIGHT HEARING—CONVICTION REVIEW UNITS
FRIDAY, SEPTEMBER 23, 2016
10:00 AM

Good morning. My name is Mark Hale, an Assistant District Attorney in the Brooklyn District Attorney's Office and I currently serve as Chief Brooklyn's Conviction Review Unit. I thank the Committee on Courts and Legal Services and the Committee on Public Safety for giving the Brooklyn District Attorney's Office the opportunity to submit the following testimony regarding wrongful convictions and Brooklyn's Conviction Review Unit (CRU).

Brooklyn's Conviction Review Unit has emerged as a model for the country and has been recognized by the National Registry of Exonerations as one of three similar internal units responsible for three-quarters of the exonerations nationwide. Last year, the Brooklyn District Attorney's Office hosted an unprecedented wrongful convictions summit at which District Attorneys and criminal justice organizations from all over the country—including Georgia, Illinois, Texas, California and Arizona – came to discuss best practices regarding the implementation of review units and ways to prevent wrongful convictions in the future.

Since 2014, reinvestigations have led Brooklyn's CRU, to join in support of a defendant's motion to vacate a conviction judgment or support, in the interest of justice, the dismissal of charges in 21 cases of wrongful convictions. The Unit conducts fair and thorough investigations of possible wrongful convictions in homicide and non-homicide cases, including robbery and arson cases. Cases involving actual innocence are our priority; however, we understand that systematic flaws can erode a defendant's due process rights and taint a conviction or the underlying investigation. Therefore, the Unit examines cases of serious due process violation as well. At present, the Unit has accepted over 150 cases for full review and has made a determination in 72.

Previously a small unit of only two Assistant District Attorneys, Brooklyn's Conviction Review Unit is now one of the largest prosecutor-led units in the country. A staff of nine veteran prosecutors and three investigators do the labor-intensive work of reviewing cases that are often decades old and require out-of-state travel to locate past victims and witnesses.

The success of Brooklyn's Conviction Review Unit is driven by a change of ethos, a change in the prosecutorial culture that is not focused on preserving a guilty verdict, but rather on doing justice. This requires a commitment of significant resources to ensure that the Conviction Review Unit is a permanent component of our office, as this and similar units help to restore confidence in the criminal justice system and advance the goal of public safety.

Brooklyn's Conviction Review Unit stands out for its level of cooperation between reviewing prosecutors and defense attorneys as well as its hybrid model of review. In reviewing cases of possible wrongful convictions we have replaced the traditional adversarial relationship between prosecution and defense with a joint search for the truth. Both parties enter into a Mutual Cooperation Agreement that allows both sides to share information without fear that the information will be exploited by either. Further, our Unit uses both an internal and external review process whereby an Independent Review Panel (IRP), comprised of three seasoned attorneys with no fiduciary relationship to the District Attorney's Office, does an independent

review of each case following a report by the CRU. The IRP reviews the investigative findings of the Unit and often does further fact-finding before making an independent recommendation to the District Attorney. The District Attorney makes the final decision based on both the CRU and IRP reports.

Our investigations have revealed that many varying factors contributed to the wrongful convictions cleared by the Unit, including, ineffective assistance of defense counsel, false confessions, unreliable witnesses, faulty scientific evidence, and failures in police investigations and prosecutorial disclosures.

With a top down commitment to ensuring that wrongful convictions do not occur, the Brooklyn District Attorney's Office is committed to training all of our prosecutors regarding lessons learned from past miscarriages of justice and ensuring that a thorough review of each case is done by a supervisor before proceeding to trial. Our prosecutors are reminded of the immense level of responsibility they have to do justice at all times and understand that the wrongful conviction of an innocent person not only does enormous damage to that individual, but also severely undermines the integrity of our criminal justice system.

Conviction Review Units play an essential role in a prosecutor's office and furthers our duty to do justice. With the Council's support, we will continue to build a robust Unit that works in the pursuit of justice for all in Brooklyn.

**Testimony of Chief William Brooks, President of Massachusetts Police Chiefs Association
New York City Council Committee on Public Safety Jointly with the Committee on Courts
& Legal Services Oversight Hearing- Wrongful Convictions**

My name is Chief William Brooks and I am the Chief of the Norwood Police Department in Massachusetts, outside of Boston. I am currently President of the Massachusetts Police Chiefs Association and also serve on the executive board of the International Association of Chiefs of Police.

Massachusetts has required recording of custodial interrogations since 2004 and there is also statewide adoption of eyewitness identification best practices. These reforms have been successfully implemented in large agencies like the Boston Police Department and in small agencies like Norwood.

Not only do these best practices prevent wrongful convictions, they also help law enforcement obtain the best evidence possible. Recording custodial interrogations removes any doubt about what occurred during the interview. Officers can spend less time in court because there are fewer motions to suppress confessions and statements.

Videotaping allows officers to focus on the interview instead of taking notes and to review the tape for details that they might have missed. It also protects officers against allegations of misconduct. When I first went to a training course on eyewitness identification years ago, I was skeptical about change. However, the evidence-based procedures make a lot of sense.

Over the past few years I've traveled across the country training law enforcement in different states on evidence-based procedures with the Innocence Project. Partially as a result of this work, I was asked to join the National Academy of Sciences committee that examined eyewitness identification research.

A few years ago, the Innocence Project sponsored a training that I led for the New York City Police Department, which I am happy to do again. Training is the only real cost associated the eyewitness identification reform, and the Innocence Project offers it free-of-charge. If the NYPD would like any assistance or guidance with policy or implementation I could help connect them with departments in Massachusetts. Both recording of interrogations and eyewitness identification reforms have been successful in Massachusetts and these practices could benefit criminal investigations in New York.

Testimony of Shabaku Shakur, Wrongfully Convicted New Yorker
New York City Council Committee on Public Safety Jointly with the Committee on Courts
& Legal Services Oversight Hearing- Wrongful Convictions
September 23, 2016

My name is Shabaku Shakur and I spent 27 years in prison for crimes that I did not commit. In 1989 I was convicted of a double murder based on the evidence collected by Detective Louis Scarcella.

Detective Scarcella said that I confessed to the crime during my interrogation, which was a lie. However, there was no recording of the interview to prove that I was telling the truth. Despite the testimony of my then-girlfriend, now wife, and her friend that I was in Jamaica, Queens at the time of the crime and could not have done it, I was still convicted.

What happened to me was a tragedy, but it was an avoidable tragedy. If Detective Scarcella had been required to record the interrogation, it would have proved that I never confessed to the crime. We now know that Detective Scarcella was a bad cop. At least 10 of the New Yorkers he helped to convict were innocent and their convictions have been overturned.

But we cannot just blame what happened on one bad apple. The entire system failed us, and the city should make sure this does not happen again. One way to do this is to require the New York City Police Department to record interrogations. That way there will be no doubt about what was said during the interviews.

I was finally exonerated last year and have dedicated myself to helping the wrongfully convicted. Today I work as a paralegal for Ron Kuby, my attorney who helped me get justice. I will keep telling my story to protect innocent New Yorkers from suffering like I did.

**Testimony of Saul Kassin, Distinguished Professor of Psychology at the John Jay College of Criminal Justice
New York City Council Committee on Public Safety Jointly with the Committee on Courts & Legal Services Oversight Hearing- Wrongful Convictions
September 23, 2016**

My name is Saul Kassin; I am Distinguished Professor of Psychology at the John Jay College of Criminal Justice. There is an extensive scientific literature on false confessions. This work is summarized in an official White Paper that I coauthored and in several APA amicus briefs. False confessions are a problem everywhere in the world and throughout history. Found in 30% of DNA exonerations—shockingly, over 60% in homicides.

NYC is no exception. There is an historic and continuing problem illustrated by a number of high- and low-profile cases—these are the tip of the iceberg.

- George Whitmore (1964) – 26-hour interrogation yielded a detailed 61-page false confession to the “Career girl” murders. The case was so egregious the U.S. Supreme Court cited in *Miranda v. Arizona* (1966).
- Central Park Five (1989) – 25 years later, in Manhattan. Defendants in custody but off camera 14-30 hours. Four of the resulting confessions were videotaped.
- Malthe Thomsen (2014) – 25 years later again, a young Danish man interrogated off camera “confessed” to molesting young children. Evidence failed to confirm; charges were dropped. He is now suing the city.

These cases have in common – exquisitely detailed confessions elicited in interrogations that were not recorded. Research shows that 95% of proven false confessions contained crime facts that were spot on accurate *and not in the public domain*. The typical false confession also contains a story, often a statement of motivation, an apology, expression of remorse, a hand-drawn map, or physical re-enactment. For these reasons, judges and juries cannot tell if a confession is true or false without seeing the whole process.

A wave of reform has swept the U.S. Now 22 states + DC *require* that interrogations be recorded start to finish; hundreds of state and local police nationwide do the same. In an historic policy shift, starting in 2014, FBI is now *required* record all interrogations. In 2015, even China announced a national policy to record interrogations. Hundreds of interviews all over the country have shown unanimous law enforcement support for recording—including in big cities.

In 2012, NY State Justice Task Force was emphatic: “*Task Force ultimately determined that electronic recording of interrogations was simply too critical to identifying false confessions and preventing wrongful convictions to recommend as a voluntary, rather than mandatory, reform.*” Yet nothing has changed—as seen in the high-profile Pedro Hernandez case being re-tried after a hung jury at this moment.

New York City is behind the curve in the wave of reform. It’s time to get past lip service, so-called “pilot programs,” and excuses. There is no evidence whatsoever of any drawbacks, only advantages. It’s time to do justice once and for all.

Thank you for your time and attention to these important matters that affect your constituents.

My name is Dr. Jennifer Dysart and I am an Associate Professor of Psychology at John Jay College of Criminal Justice and I have been conducting research on eyewitness identification for nearly 20 years.

I am here today to speak with you about the role of *mistaken* eyewitness identification in wrongful convictions and how the implementation of simple procedural changes can significantly reduce the likelihood of false identifications and subsequent wrongful convictions.

Eyewitness misidentification is *the* leading contributing factor to wrongful conviction in the United States, with nearly three quarters of all DNA exonerations involving eyewitnesses.

Over the last 40 years, scientists in this field have investigated the many causes of mistaken identification and this research has culminated in a series of best practices for law enforcement that have been endorsed by many leadership groups within law enforcement community, as discussed by other speakers.

Today, I will address two critical reforms that are universally endorsed by scientists: double-blind administration, and the obtaining of a witness's confidence statement immediately after an identification decision has been made.

The most critical best practice is double-blind administration – when the people conducting the identification procedure – either a photo array or a live lineup – do not know which individual in the procedure is the suspect. This best practice eliminates any possibility that the administrator influenced the witness – consciously or otherwise – on their selection.

Double-blind administration is standard practice in other fields, including medicine and pharmaceutical research, because it helps ensure the integrity of the results and subsequent outcome. In those fields, double-blind testing is not done because we don't trust doctors and nurses – it is done because they are human and human decision making is affected by biases and pre-conceived beliefs.

If we eliminate the expectations of the lineup administrator by keeping them "blind" to the identity of the suspect, we increase the integrity of the outcome and the probative value of the identification evidence.

A second critical best practice is the recording of a witness's level of confidence immediately after he or she has made an identification decision. The reason why this is so important is that decades of scientific research have shown that a witness's level confidence can easily be influenced so that by the time they testify at trial, nearly all witnesses are absolutely certain.

This is critical because triers of fact rely heavily on witness confidence to help them decide if the witness was *accurate*. But if all witnesses – at trial – are absolutely certain, how can triers of fact use this information to help to distinguish between mistaken and accurate decisions? If all witnesses are confident, won't they all appear accurate?

At this juncture, we must learn from the DNA exonerations. In many of these cases, eyewitnesses initially expressed some doubt in their choice. But as time went on, they became more certain and triers of fact ultimately could not distinguish fact from fiction.

In addition to double-blind administration and recording of confidence, there are other important best practices for the collection and preservation of eyewitness evidence. I make myself available to this committee for questions regarding any and all of these recommendations.

Thank you.



**Testimony of Barry Scheck, Co-Founder, Innocence Project
New York City Council Committee on Public Safety Jointly with the Committee on Courts
& Legal Services Oversight Hearing- Wrongful Convictions
September 23, 2016**

My name is Barry Scheck and I am the co-founder of the Innocence Project, a national organization based in New York City that helps to exonerate the wrongfully convicted with DNA evidence and to promote policies that prevent and address wrongful convictions. The National Registry of Exoneration, which tracks both DNA and non-DNA exonerations, reports that 150 innocent people in New York City have had their wrongful convictions overturned since 1989; 18 of these cases involved a false confession and 57 involved eyewitness misidentification.

Fortunately law enforcement can mitigate these factors by recording custodial interrogations and using eyewitness identification best practices. The Innocence Project promotes adoption of these reforms throughout the country. Today 21 states and Washington, DC require recording of custodial interrogations and 18 states have adopted eyewitness identification reforms.

Over the past 10 years we've pushed for these practices to be uniformly adopted throughout New York State and by the New York City Police Department. At the state level we came closest to enacting reform last year with Senate Bill 5875/Assembly Bill 8157 which requires every law enforcement agency to use some evidence-based lineup practices and to record custodial interrogations for serious crimes. The Senate passed the legislation in June 2015, but unfortunately it did not move forward. We know that there is broad support for the proposal but we haven't been able to get it passed.

As we await action at the state level, New York City cannot afford to wait for reform any longer. Not only are wrongful convictions impacting innocent New Yorkers and their families, they are costing taxpayers millions of dollars. New York City Comptroller Scott Stringer reported that last year 4 of the top 9 settlements paid out by the city involved wrongful convictions for a total of nearly \$30 million.¹ That's why we are grateful that the New York City Council is having this hearing today so that we can better understand if and how the New York City Police Department is implementing reforms.

Recording Interrogations

Electronically recording custodial interrogations provides an irrefutable account of what happened during a suspect interview. It deters coercive interrogation tactics that can lead to a false confession, and also protects law enforcement from frivolous claims of misconduct.

In 2012, the NYPD launched a pilot program for electronic recording of interrogations, but it's unclear how the practice is currently being implemented. To ensure a uniform practice, there needs to be a written policy that the NYPD videotapes interrogations from the beginning to end of the interview, at minimum for suspects of serious crimes. We are not sure at this point if the NYPD requires or only recommends recording interrogations for suspects of certain crimes, which crime categories are recorded and when the tape is turned on and off. It would also be

¹ New York City Comptroller Scott Stringer. Claims Report Fiscal Year 2015. Page 33.
https://comptroller.nyc.gov/wp-content/uploads/documents/Claims_Report_FY_2015.pdf

INNOCENCE PROJECT



helpful to understand what recording equipment is currently in place and what else is needed to ensure that custodial interrogations for at least serious crimes are recorded.

Eyewitness Identification

There are a set of eyewitness identification best practices that have been endorsed by the National Academy of Sciences, the Major Cities Chiefs Association, the American Bar Association and many others to reduce the risk of misidentification.

1. Blind or blinded administration of the lineup, meaning that the person conducting the lineup does not know the suspect's identity, which prevents suggestiveness.
2. Instructions to the eyewitness that the perpetrator may or may not be present.
3. Use of non-suspect fillers that generally match the witness's description of the perpetrator and do not make the suspect noticeably stand out.
4. Eliciting a statement of confidence from the eyewitness immediately after an identification is made.

Our understanding is that the NYPD typically conducts two identification procedures for eyewitnesses. First the eyewitness looks through photographs in the Photo Image Management System (PIMS). If the eyewitness makes an identification, he then views a live lineup with the same individual present in both.

This is problematic because research has shown that multiple identification procedures featuring the same person more than once increase false identification rates and decrease accuracy. It also creates a commitment effect, meaning that the witness's identification may be based on the memory of the earlier procedure rather than the memory of the actual event. It's also unclear whether the NYPD is using blind administration of lineups, which is the most important practice for protecting the integrity of the identification procedure.

I want to thank Chairwoman Vanessa L. Gibson and Chairman Rory I. Lancman for holding this hearing. We hope we can work with the NYPD to uniformly implement recording interrogations and eyewitness identification best practices through the adoption of written policies and training, which would set a tremendous example for the rest of New York State and the entire country.

**Testimony of Sharrone Salaam, Mother of Yusef Salaam, Central Park Five
New York City Council Committee on Public Safety Jointly with the Committee on Courts
& Legal Services Oversight Hearing- Wrongful Convictions
September 23, 2016**

My name is Sharrone Salaam, and my son Yusef Salaam is one of the Central Park Five. Many of you have probably heard his story. Yusef was one of five teenagers convicted of raping a jogger in Central Park in 1989.

It is hard to have a child go to prison under any circumstances. But imagine being the mother of a 15-year-old convicted of the most notorious crime in America—a crime he didn't commit. Yusef spent five and a half years in prison, and it left scars on him and our family that will never go away. The stigma of this crime stayed with us even after he was released.

In 2002, DNA evidence finally proved that Yusef was innocent and the real perpetrator was Matias Reyes. But this news was mostly swept under the rug and it wasn't until the Central Park Five movie came out that people learned the real story.

I believe that things could have been different if police had recorded the interrogations of the young men from start to finish. Police videotaped their confessions, but the judge and jury didn't see the circumstances that led up to the confessions. They didn't see that the boys were interrogated for 12 to 36 hours without food or water. They didn't see that the officers yelled and abused them, and made them think that the only way to escape the situation was to admit to the crime. They didn't hear the boys give details that did not fit the crime.

Videotaping the full interrogations would have shown that the boys were coerced and afraid. Maybe officers would not have used these tactics if they knew they were being videotaped. Maybe Matias Reyes would have been caught and he would not have gone on to rape other women, and eventually kill one of his victims.

The NYPD should consistently recording interrogations for serious crimes from beginning to end so they have the most accurate evidence possible. We need to make sure that no one else has to endure what my son and the other Central Park Five families went through.

Testimony of Alan Newton, Wrongfully Convicted New Yorker
New York City Council Committee on Public Safety Jointly with the Committee on Courts
& Legal Services Oversight Hearing- Wrongful Convictions
September 23, 2016

My name is Alan Newton and in 1985 I was wrongfully convicted of a rape, robbery and assault in the Bronx. I spent 21 years in prison for a crime that I did not commit based on the victim misidentifying me as the perpetrator.

There were many things that were wrong with the way that police conducted the eyewitness identification procedures in my case. First, investigators went to the hospital while the victim was still recovering from surgery and showed her nearly 200 photographs over two days until she selected my picture. Then police picked up the victim from the hospital and brought her in to view a live lineup where she picked me again. Finally, at my trial she made an in-court identification. It sounds very convincing to a jury when a victim points to the defendant in court and says, "He is the person who committed the crime." I was convicted despite my fiancé and her daughter corroborating that I went with them to see the Ghostbusters movie in Brooklyn that night.

I first requested DNA testing on the rape kit in my case in 1994, but the police claimed that it was lost. Finally, in 2005, with the help of the Innocence Project the rape kit was located and testing proved that I was innocent.

Exoneration was just the first step in rebuilding my life. I had to readjust to a world that I had been away from for two decades. This meant rebuilding relationships with family and friends, supporting myself financially, and trying to recover from the trauma of losing my prime years in prison.

I've tried to make something positive come from my experiences. Since my release, I completed my bachelor's degree and co-founded an organization called A.F.T.E.R., Advocates for Freedom, Transformation, and Exoneree Rights, Inc., which provides services and a support network for exonerees. I've also worked at CUNY's Black Male Initiative, which focuses on increasing graduation rates of men of color. Finally, I speak about my case in the hope of preventing wrongful convictions in the future.

Today we know a lot more about the science behind eyewitness memory. There are proven techniques that can reduce the risk of misidentification. The New York City Police Department should make these practices their official policy to protect the innocent and make the criminal justice system more reliable.

JUSTICE 4 THE WRONGFUYLLY INCARCERATED

Sharonne Salaam
1309 Fifth Avenue
New York, NY
646-685-4521
September 23, 2016

City Council Hearing In Support Of Videotaped Confessions

I am Sharonne Salaam, and my son Yusef Salaam was one of the Central Park Five. Many of you have probably heard of his story. Yusef was one of the boys convicted of raping a white jogger, in Central Park 1989.

Can you imagine your 15-year-old son arrested, going on trial, and convicted of the most notorious crime in America. Raping a white woman. Many full-page ads calling for return of the death penalty emerged and the death threats soon followed for my family. I hope none of you ever experience how hard it is to have a child go to prison under any circumstances, especially for something he did not do.

All but one of the five boys was sentenced to 10 years in jail. The oldest just 16 years old got the grand total 15 years and served 13 years. Yusef spent 7 years in jail. Three years on parole and as a sexual predator on Megan's Law. Yes, he served 10 years. During this time all of my children and I were also in a kind of jail. We received death threats and feared for our lives daily. After Yusef's release from jail, the stigma and the post traumatic stress continues to this day. This is not the type of

experience you easily forget. Since the convictions were over turned some people talk about how the boys are still guilty. When will we, they be innocent?

This was the case that would not die. The Central Park Five. The movie came out and people could experience what the really happened that night. An in 2002, Matias Reyes confessed he was the rapist. His confession began a chain of events leading to DNA evidence that finally proved that Yusef and the others were innocent. Matias Reyes was the real rapist. But this news was mostly swept under the rug.

I believe that things would have been different if police had followed the law regarding the interrogation of under aged juveniles without a parent present or parental consent. I also believe that recording interrogations from start to finish would elevate a lot of wrongful convictions. The police worked 12 hours to 3 days to get all 5 of the boys ready to be videotaped. None was given food or water. 4 of the boys did make coerced videotaped confessions.

Videotaping interrogations from beginning to end would allow judge and jury to see the circumstances that led up to the confessions. They would see officers yell, abuse of suspects and making them think that the only way to escape the situation was to admit to the crime. Videotaping the full interrogations would have shown in my case boys were coerced and afraid.

Videotaping confessions would aid police and protect them from accusations of mistreatment and coercion of confession when untrue. Maybe officers would not use tactics that lead to false confessions if they know they were being videotaped. Maybe Matias Reyes would have been caught and he wouldn't have gone on to rape other women, and eventually kill one of his victims.

The NYPD should consistently record interrogations of serious crimes from beginning to end so they have the most accurate evidence possible.

We need to make sure that no one else has to endure what my son and I, and the other Central Park Five families went through.



**BROOKLYN
DEFENDER
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TESTIMONY OF:

Yung-Mi Lee – Supervising Attorney, Criminal Defense Practice

BROOKLYN DEFENDER SERVICES

**Presented before
The New York City Council Committee on Courts and Legal Services
And
Committee on Public Safety
Hearing on
Wrongful Convictions: Using Evidence-Based Procedures and Technology
to Keep Innocent People Out of Jail**

September 23, 2015

My name is Yung-Mi Lee. I am a Supervising Attorney in the Criminal Defense Practice at Brooklyn Defender Services (BDS). I have practiced as a criminal defense attorney in New York and New Jersey for over 22 years. I currently represent misdemeanor and felony clients in Brooklyn criminal and Supreme Court.

BDS provides innovative, multi-disciplinary, and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, for over 40,000 clients in Brooklyn every year. We thank the City Council Committee on Courts and Legal Services and the Committee on Public Safety for the opportunity to testify about wrongful convictions in New York City.

More than a dozen people prosecuted in Kings County have been exonerated in recent years.¹ Common factors in the wrongful convictions of these innocent men include unreliable witness identifications, false confessions, and prosecutor's withholding of evidence from the defense.

Evidence-based procedures and technology can play a critical role in protecting against false confessions and mistaken or improper eyewitness identifications. The electronic recording of interrogations, from beginning to end, is the single best reform available to prevent wrongful convictions caused by false confessions. Complete recording improves the credibility and reliability of authentic confessions, while protecting the rights of innocent suspects.² In addition, the Innocence Project endorses a range of procedural reforms to improve the accuracy of eyewitness identification. These reforms have been recognized by police, prosecutorial and judicial experience, as well as national justice organizations, including the National Institute of Justice and the American Bar Association. The benefits of double-blind identification procedures, for example, are corroborated by over 30 years of peer-reviewed comprehensive research.³

As the Innocence Project notes, numerous states have implemented evidence-based practices as standard procedure to prevent wrongful convictions. There is no doubt that New York City should join these jurisdictions. That being said, some bar associations, including the New York State Association of Criminal Defense Lawyers, among others, have expressed significant concerns about the Statement and Identification Integrity Act introduced over the last few years before the NYS legislature.⁴ One major concern that defense attorneys have with the proposed legislation is that the bills do not reform harmful and outdated discovery procedures. *It is no surprise that the majority of states that have enacted double-blind interrogations and/or mandatory recorded interrogations are also states that have modern discovery statutes.*

As defenders who practice every day in Brooklyn courtrooms, BDS recognizes the impact that improved ID procedures and complete recordings of interrogations could have in our cases. **But that evidence is only useful to us if the discovery attendant to those practices is turned over by the prosecutors.** Under current state law, prosecutors are not required to disclose critical evidence against our clients until the eve of trial. This requires us to advise the vast majority of clients on plea agreements without the benefit of full discovery, or, in the rare cases that do proceed to trial, to sift through thousands of pages of evidence

¹ See, e.g., Colleen Wright, "Another Exoneration in Brooklyn Brings Total Since Last Year to 14," N.Y. TIMES, Aug. 4, 2015, available at <http://www.nytimes.com/2015/08/05/nyregion/another-exoneration-in-brooklyn-brings-total-since-last-year-to-14.html>.

² Innocence Project, "False Confessions and Admissions," available at <http://www.innocenceproject.org/causes/false-confessions-admissions/>.

³ Innocence Project, "Eyewitness Identification Reform," available at <http://www.innocenceproject.org/eyewitness-identification-reform/>.

⁴ See *Testimony of the New York State Association of Criminal Defense Lawyers before the New York City Council Committee on Public Safety* re: Res. No. 979 (April 6, 2016).

like witness interviews, or phone or social media records mere hours before selecting a jury.

Mr. R, a BDS client, was charged with the attempted murder of two people. His arrest and prosecution for the case were based on a single eyewitness identification. In this case, the prosecutor chose not to turn over discovery for over a year, until the Friday before trial. The discovery turned over included reports of a photo array which included our client's picture. The two shooting victims viewed the photo array. The first did not choose our client as the shooter. The second offered only an equivocal identification, saying he thought our client might have been the shooter. The discovery package also revealed that our client was not a suspect at the time of the photo array. His photo had been randomly inserted into the array. The day after the equivocal photo identification, the police conducted a line up and the second witness identified our client. Furthermore, the discovery package revealed critical ballistics evidence that showed that the same gun had been used in another shooting involving different people, not our client. This necessitated additional investigation and discovery and required pushing out the trial date again at the last date. Mr. R may have benefited from evidence-based identification procedures. Indeed, he never would have been implicated in the case but for the improper photo array. But a double-blind eyewitness identification procedure would not have ameliorated that initial taint. The only way that defense attorneys can challenge improper or illegal actions that occur at any stage of the case is when we have complete discovery. If Mr. R had not proceeded to trial, and simply taken a plea because he was tired of sitting on Rikers Island for more than year, none of this information would have come to light.

Additionally, while the Brooklyn DA's office has more recently been turning over videotapes of interrogations, we remain concerned about the police interaction prior to the video interrogations. We have had plenty of cases where oral statements have been taken from our clients and then because the "cat's out of the bag" the police or prosecutors begin videotaping the confession. Oftentimes, our clients have already been in custody for a lengthy time and are not even aware that their arrest may have been illegal. What is most critical in a false confession case is the events that lead up to the confession and in order for defense attorneys to properly litigate the legality of these confessions, we must have complete and early discovery.

Justice requires that prosecutors turn over all of the evidence in the case to the defense as early as possible and automatically. **If City Council is truly committed to preventing wrongful convictions, you must work with defenders and other community groups to publicly push prosecutors to provide full disclosure in all cases and call upon the state legislature to pass comprehensive discovery reform.**

Recommendations

The solution to New York's discovery issues is already available. The New York State Bar Association (NYSBA) brought together a diverse committee of judges, law professors and

lawyers to examine the statute and propose changes. Their 2015 report⁵ provides a model for reform that should be adopted by the state legislature to bring New York's discovery requirements in line with the rest of the nation.

City Council should pass Res. 430-2014 (King), a resolution calling on the New York State Legislature to pass and the Governor to sign, legislation to amend the Criminal Procedure Law Article 240 and replace it with a law mandating early, open, and automatic pre-trial discovery. Passage of the resolution would send a strong message to the legislature of the urgency of reform.

City Council should also work with the Mayor's Office of Criminal Justice and local prosecutors to encourage those in boroughs with outdated and draconian policies to turn over discovery in its entirety as soon as they obtain it. Justice demands nothing less.

Conclusion

There is no doubt that misidentifications and forced confessions impact New York City residents. The hundreds of people who have been wrongfully convicted can attest to that. But reform on these issues must proceed in tandem with discovery reform. Evidence-based procedures and technology are only useful to defendants if their attorneys receive this information early on and completely. We look forward to working with City Council to determine how we can ensure justice in our communities by reforming current discovery policies across the five boroughs and throughout the state.

⁵ New York State Bar Association, *Report of the Task Force on Discovery* (2015), available at <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54572>.

My name is Lonnie Soury. And along with my wrongfully convicted colleagues, Derrick Hamilton, Shabaka Shakur, Kevin Smith and Sundhe Moses, we are co-founders of Families the Wrongfully convicted.

Thank you for inviting us to provide testimony at today's hearing. It is important to have the city council and members like yourselves commit to stopping wrongful convictions

The men I stand with and others incarcerated whose families are here today represent hundreds of years of wrongful imprisonment. Some have been released after decades in prison, while most others remain tragically inside.

Wrongful convictions do not happen by mistake, they happen because police and prosecutors coerce false confessions, misidentify suspects, hide evidence or otherwise engage in unethical practices. It will only stop when those responsible are held accountable, by establishing disciplinary procedures for those who engage in practices like those by notorious Brooklyn detective Louis Scarcella. And by judges who allow tainted evidence to go before jury after jury after jury, and then refuse to reopen cases when strong evidence of innocence is presented to them

When we refer to someone as being wrongfully convicted, it usually means they have spent decades behind bars, and along with their tragic circumstances, their families and our communities have also become victims. Wrongful convictions affect us all, for every man and woman inside, the perpetrators remain free in our city to commit other crimes, and they do.

In the past few years, New York City has paid out approximately \$100 million to settle wrongful conviction claims.

In New York, 7 real perpetrators have been identified in wrongful conviction cases proven by DNA evidence and went on to commit 11 additional crimes, including 3

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rapes, 6 murders and 2 other violent crimes

Of the nation's 344 DNA exonerations, 148 actual perpetrators were identified and went on to commit 77 sexual assaults, 34 murders and 35 other violent crimes

- 52% of New York's DNA exonerations involved eyewitness misidentification.

- 48% of New York's DNA exonerations involved a false confession.

Wrongful convictions are in the news. Every day we read about another man or woman emerging from prison after decades inside. We listen to Serial or The Making of a Murderer, and we shake our heads, and ask what is being done to stop wrongful convictions. In whose interests is it to keep innocent men imprisoned? At a cost of lost lives and tens of millions in taxpayers settlements.

What is being done to stop the Louis Scarcellas of the city? What is the judiciary doing to stop them? What is the police department doing to stop wrongful convictions? What are the Five District Attorneys doing to stop them? and What is Mayor De Blasio and Governor Cuomo doing? I am sorry to day, very little!

The New York State Court of Appeals to much fanfare, even established a Wrongful Conviction Panel that spent a year, held public hearings and made scores of recommendations, none of which was adopted by any city or state agency.

In fact, historically, it has been in the District Attorneys offices where wrongful conviction reform goes to die. One does not get ahead by freeing the innocent. And as most District Attorneys seek higher office, ambition has had a bad habit of getting in the way of justice.

No better example than Manhattan DA Cyrus Vance, whose campaign promise was to establish a conviction review panel. Once in is office he has done just the opposite. In actions that could not be more cynical, he has established a faux conviction integrity unit that has done anything but review serious cases of innocence. You cannot even get any information from the effort, as he claims the records are under seal? And he has installed one of the leading wrongful conviction deniers, Ben

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Rosenberg as his chief counsel. Shameless. This man seems to get perverse pleasure out of fighting to keep wrongful convictions in place as he has tried to do in the cases of Marty Tankleff and most recently Johnny Hincapie.

Ken Thompson, Brooklyn DA, should be commended for his efforts. His Conviction Integrity Unit is functional and has helped clear the convictions of a number of people, including Derrick Hamilton, but the majority of cases languish in his offices for either political reasons or staffing issues. They have admitted to us there are 500 cases pending for review at the Brooklyn DA's Conviction Integrity Unit.

Families of the Wrongfully Convicted co-founders, Sundhe Moses who served 18 years and Kevin Smith, 27 years, have had their cases languish at the review panel for years with no finality, and Thompson denied Shabaka Shakur's case, only to be overturned by a New York Supreme Court Justice. We are heartened by some actions by the new DA in the Bronx, Darcel Clark, but are shocked by the 25 year history of DA Richard Brown in Queens, whose office is a den of injustice with many cases of wrongful convictions to his credit, and herculean efforts to prevent convictions from being overturned. How does this man sleep at night?

We have also asked Mayor De Blasio and former NYPD Commissioner Bratton to help stop wrongful convictions by immediately recording all interrogations to prevent false confessions, and conduct "double blind" live police lineups and photo arrays, to prevent witness misidentification. Both New Jersey and Connecticut and 20 other states mandate these nationally recognized best practices. The Mayor's office has never responded to our letters, press conferences and formal requests. NYPD has met with us and assured us that they are at least recording interrogations, but we have no evidence that this is actually happening, and no reason to believe that it is mandatory or part of the policy and procedures of the department.

It is our sad conclusion that these men and women, their families and friends and the victims of wrongful convictions, just don't count. They are not a constituency that elected officials feel they need they must be responsive to. I mean who really

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cares about men and woman who are innocent and have spent their lives in prison?

We are calling on the city council and the state legislature to establish independent conviction integrity review procedures based upon collaboration among defendants, attorneys and prosecutors with complete transparency. We support increased funding for Brooklyn DA Thompson's office so they can begin to deal with the 500 cases they have pending and the 75 cases with Louis Scarcella's name on them. And we support more funds to help Darcel Clark establish a wrongful conviction unit.

NYPD must immediately implement two reforms that have been proven to reduce mistaken eyewitness identifications and false confessions. First, all investigatory and post-arrest lineups conducted by the NYPD must be "double blind." That is, neither the officers conducting the line-up, nor the witness, know the identity or location in the line-up of the actual suspect. This eliminates the possibility of investigating officers—deliberately or unconsciously—improperly suggesting the identity of the suspect to the witness. Second, all suspect "interviews" and interrogations must be videotaped from the beginning of the encounter until the end. This reform will ensure that improper police techniques will be exposed and proper techniques will guarantee the confession's admissibility.

New York City, long a leader in criminal justice reform, has lagged badly with respect to these reforms. According to data from the Innocence Project, twenty-two states, including New Jersey and Connecticut, record interrogations either through law or court action. Approximately one thousand other jurisdictions do so voluntarily. Fifteen states require blind administration of lineups. Both practices are endorsed by the International Association of Chiefs of Police, the Major City Chiefs Conference, and the American Bar Association.

Only then will we begin to deal with this scourge.

Kevin Smith

Kevin Smith was paroled in 2012 after 27 years in prison for a crime he did not commit. He awaits his case review by the Brooklyn District Attorney. He was recently informed that an important file allegedly revealing wrongdoing by Louis Scarcella was destroyed.

On October 15, 1987, Kevin Smith was convicted of murder based solely on the testimony of a single witness whose credibility was dubious at best. Although Smith did not know the witness, at trial the witness stated that he knew Smith prior to the crime. However, during the initial police interview on the night of the crime, the witness did not provide the name(s) of any suspect(s).

During the trial the witness refused to testify. Detectives went to the witness's house, kicked his door in, and took him out in handcuffs. The witness was brought before the trial judge where he stated under oath that he did not witness the shooting and therefore, could not identify Smith as the perpetrator; the witness also swore that he did not see Smith at the scene of the crime. After the witness gave this sworn statement exonerating Smith, the trial judge released Smith on his own recognizance.

The case was adjourned for five days and Smith's trial counsel had informed him that the case would be dismissed on that day. Unfortunately, upon leaving the judge's chambers, the witness was immediately arrested on a felony complaint of the prosecutor's office for perjury. The witness was held in the 81st precinct against his will for five days. The witness was not allowed to see to his mother, friends, or a lawyer. The witness was also denied a phone call. The witness was told by an ADA that if he took back what he told the judge, he would be able to get out of jail. After being threatened and pressured, the witness recanted his testimony to the judge and told the jury that he did witness the crime and that Smith was involved. Smith's lawyer had informed him that the reason assistant district attorney pursued the case was because of fabricated and falsified evidence of detective Louis Scarcella, who stated that Smith was involved in the crime.

Detective Scarcella was one of the lead detectives in the case. He falsely reported that his codefendant implicated himself and made a statement that Smith had something to do with the murder. Scarcella further lied on the witness stand. Smith and Divine have secured affidavits from several people familiar with or present at the time of the murder, who attest that they did not commit the murder.

Smith spent 27 years in prison for a crime he did not commit. Since his release from prison in December 2012, he has been a positive force in the community: he has been ordained as a New York State Chaplain, he has worked on numerous campaigns for politicians, and he has been sharing his life experience with at-risk youth so that they don't end up like him. He lives at 98 First Place, Apartment 3, Brooklyn, NY 11231.

Sundhe Moses

Sundhe Moses was paroled in 2013. He has waited patiently for Brooklyn District Attorney Thompson's Conviction Integrity Unit to rule on his case. They have all the evidence they need to overturn his conviction, but they have hesitated from making a decision.

Mr. Moses was convicted of second-degree murder, four counts of assault, and two counts of weapon possession in connection with a shooting that occurred in Brownsville, Brooklyn in August 1995. He testified at trial about the brutality inflicted on him by former detective Louis Scarcella, and how he would come to confess to a crime he did not commit. No physical evidence connected Mr. Moses to this crime – the only evidence presented against him at trial was his confession and two lineup identifications.

One of the witnesses who identified Mr. Moses in a lineup, Sharron Ivory, has recanted. Mr. Ivory's affidavit states that a detective told him which photo to select out of a photo array, and this is how he knew which person to select out of the line-up. Mr. Moses' co-defendant, who was tried separately and only convicted of weapon possession, has also come forward to state that while he was involved in the shooting, Mr. Moses was not. Two additional individuals have come forward as alibi witnesses. Larry Cole, the man who originally gave Mr. Moses' name to detectives, told detectives at the time that he heard about Mr. Moses' involvement from MoDog, a.k.a. Jomo Tinsley. At the time, Mr. Tinsley told detectives he never told Larry Cole anything about Mr. Moses' involvement because he had no idea who was involved in the shooting. Mr. Tinsley states the same thing today: Larry Cole lied because he has never known anything about who was involved in the shooting.

In advance of Mr. Moses' September 2013 parole hearing, Mr. Moses' lawyers submitted a letter to the parole board requesting that the board not hold Mr. Moses' claim of innocence against him, citing the significant new evidence of his innocence. The parole board granted Mr. Moses' parole on October 13, 2013 and he was released from prison on December 4, 2013. Mr. Moses is continuing to fight to overturn his conviction.

<http://bit.ly/2deRMEB> Sundhe Moses parole letter

<http://bit.ly/2d18VvV> Legal docs

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Written Testimony of The Bronx Defenders

New York City Council

Courts & Legal Services Committee

September 23, 2016

**Wrongful Convictions: Using Evidence-Based Procedures and Technology to Keep Innocent
People Out of Jail**

Introduction

My name is Marika Meis and I am the Legal Director of the Criminal Defense Practice and the Director of the Forensic Practice Group at The Bronx Defenders. I submit these comments on behalf of The Bronx Defenders, and thank the Committee and Councilman Lancman for the opportunity to testify.

The Bronx Defenders is a community-based public defender that provides fully integrated criminal defense, civil legal services, and social services to indigent people charged with crimes in the Bronx. We serve 31,000 Bronx residents each year.

As defenders on the front lines representing clients, we see firsthand how the lack of implementing best practices in identification proceedings and the lack of recording of identification procedures and interrogations leads to a fundamental lack of fairness to those accused of crimes and an increase in the risk of wrongful convictions.

As defenders of accused individuals at the trial level, our office is in a unique position to observe and catalogue the impact of the current system where identification procedures are almost never recorded (to date we have not had a case involving a recorded identification proceeding) and the recording of interrogations is rare. This is true for interrogations despite NYPD pilot programs that began in 2010 and were expanded in 2013, that implemented the recording of interrogations for homicide, violent and sex offenses.¹ Indeed, at present, six years after these pilot programs began, our office has over 800 felony cases that have been open for more than a year (meaning they are most likely post-indictment). Yet, we only have recorded interrogations in about 15 cases, primarily homicide and sex offenses.² And in the recent past years, we have only been provided with recorded interrogations in approximately 5 to 7 other cases. Instead, what we are provided with in discovery from the District Attorney is a written statement or a video recording of a statement itself as memorialized absent the process that led to that statement.

¹ As reported on September 21, 2012

“In a speech delivered before the Carnegie Council Wednesday, New York City Police Commissioner Raymond Kelly said the city will begin video recording criminal interrogations as recommended by the New York State Justice Task Force and the Innocence Project. The NYPD joins over 800 other jurisdictions that have voluntarily adopted the policy. Under Kelly’s new proposal, New York City will become the biggest law enforcement agency in the country to undertake video recording. As an expansion of the NYPD’s 2010 pilot program, every precinct in the city will now record entire interrogations in murder, assault and sexual assault cases.”

² Of course not all of the 800 cases would qualify for recording as some are drug or DWI offenses, but the numbers are still remarkable.

The Need for Recording Interrogations

What the disclosure of these recordings has revealed is that recording interrogations is necessary for a variety of reasons. Fundamentally, absent recording, the truth and accuracy of what occurs is lost. It is humanly impossible for a person to accurately recall the details of an interrogation, even absent bad faith. That is true for our clients who are accused of crimes and questioned in these proceedings and law enforcement officers who conduct the interrogations. Police arrest and interview hundreds of suspects a year and are often called to testify about an interrogation a year or longer after the event. Police rarely take notes of interrogations so it is only memory that would control. Even the best memory cannot recall the exact content of such an event.

Absent a recording, an officer would typically testify that they had a brief conversation with our client that resulted in a memorialized written or videotaped statement ("confession"). See attached excerpt from actual hearing (homicide case Bronx County). When questioned about the details of such a conversation, the officer would respond that he did not recall or could not remember. When asked if the officer had been trained in Reid interrogation techniques³, the officer would likely respond in the negative.

³ The term "Reid Technique" is a registered trademark of the firm John E. Reid and Associates, which offers training courses in the method they have devised. The Reid Technique of Interviewing and Interrogation is a method of questioning suspects to try to assess their credibility. Supporters argue that the Reid Technique is useful in extracting information from otherwise unwilling suspects, while critics have charged the technique can elicit false confessions from innocent persons.

The recordings we have reveal an entirely different picture. Officers routinely use Reid, or Reid-like techniques. See attached excerpts from transcripts of recorded interrogations Bronx County cases. These interrogations last much longer than a few minutes and are often hours long. Our present cases have videos from 30 minutes to several hours in length.

Despite the inability of law enforcement to remember the exact details of an interrogation, the law and science of false confessions has shown that words matter, subtleties and timing are important, and only recording can deliver accuracy. As the example of Brenden Dassey from *Making A Murderer*⁴ and Adrian Thomas from the 2014 Court of Appeals case⁵ reveal, the entirety of an interrogation must be preserved. The Innocence Project has no doubt provided this Committee with valuable information on the science and processes by which false confessions are obtained and how prevalent and documented a role they play in wrongful convictions as proven by DNA exonerations. This risk is real and must be guarded against. Recording accomplishes that. Largely as a result of that work, courts in New York are now accepting identification and false confession experts.⁶ The New York State Justice Task Force

⁴ *Making a Murderer* is a 2015 Netflix Documentary about Steven Avery who was convicted of rape and attempted murder in 1985, at the age of 22, and served 18 years of a 32-year sentence before DNA testing exonerated him. Thereafter, he and his 17 year old nephew Brenden Dassey were charged in the October 31, 2005 murder of Teresa Halbach. Dassey's conviction was overturned by US Magistrate Judge William E. Duffin in Milwaukee, Wisconsin on August 12, 2016, on the basis that his confession was involuntary and unconstitutionally coerced.

⁵ People v. Thomas, 22 N.Y.3d 629 (February 20, 2014)(reversing conviction of Adrian Thomas for murdering his 4 month old son based on a recorded 9 hour confession held to be coerced for reasons that included police misrepresentations to Mr. Thomas that his son was still alive, when he was not, and that the details of what happened were necessary to save the child's life).

⁶ See People v. Bedessie, 19 N.Y.3d 147 (March 29, 2012)(false confession experts); People v

has also recommended recording interrogations. (Report available at:

<http://www.nyjusticetaskforce.com/ElectronicRecordingOfCustodialInterrogations.pdf>).

But in order to assess if a confession is false, an interrogation must be preserved. A recorded interrogation permits defense counsel to determine the need for and obtain experts such as experts in police practices or psychiatrists and psychologists. At present, when all that is recorded is the confession itself or the written statement, it is very difficult to work backwards to guess at how that confession was obtained. The Court of Appeals case permitting a false confession expert to testify (Bedessie) only allows such testimony if it is specific to the persons accused being in the class of people susceptible to making a false confession as determined by an examination of that individual. Without recorded interrogations it is nearly impossible for anyone to opine as to the nature of the questioning and whether it may have played a role in obtaining the confession. By preserving the actual interrogation, defense counsel can more meaningfully guard against false confessions and wrongful convictions by ferreting out problematic interrogations and enlisting the assistance of experts.

Recordings would also be invaluable to suppression hearings and trials. Rather than having to rely on the memory of law enforcement or those accused of a crime, a recording would permit a judge to see firsthand what occurred in an interrogation. Notably, in New York, the voluntariness of a confession may be contested at trial even where a judge denies suppression and therefore fact finders too (judges and juries) would be able to see the truth.

Santiago, 17 N.Y.3d 661 (2011)(eyewitness identification experts expanded from original decision in People v LeGrand, 8 N.Y.3d 449 (2007)).

Preserving interrogation permits fact finders to view for themselves what actually happened in the room.

The need for recording is not only to prevent wrongful convictions. Recorded interrogations also provide defense counsel with the ability to better assess the worth of case and secure a plea in a case in which a damaging statement was fairly obtained. With prompt disclosure of interrogation recordings, this could help end the delay and backlog of felony cases, which in Bronx County is a very real problem.

The Need for Identification Best Practices and Recording Identification Procedures

Implementing the best practices for identification procedures (such as blind procedures, pre-proceeding instruction and post-proceeding confidence statements) is really “no brainer” as these are the practices recommended by the police and prosecution, and they should be implemented and mandatory across the board.⁷ Sadly, despite recommendations by the New York State District Attorney’s Association and the New York State Justice Task Force, which were made in 2011 and 2012, law enforcement officers are not routinely implementing and following these practices. When questioned during suppression hearings about best practices,

⁷ See NY State Justice Task Force Recommendations for Improving Eyewitness Identifications (http://www.nyjusticetaskforce.com/2011_02_01_Report_ID_Reform.pdf) ; NY State DA's Association Best Practices Committee Recommendations (<http://www.nychiefs.org/ModelPolicies/Lineup-Procedures.pdf>); NYSBA Final Report from 2009 on Wrongful Convictions (<http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26663>); National Association of Sciences Report from 2014 ([file:///C:/Users/marikam/Downloads/NAS%20Report%20\(1\).pdf](file:///C:/Users/marikam/Downloads/NAS%20Report%20(1).pdf)).

law enforcement officers often deny knowing of them or having been trained on them. Best practices should be mandatory and the failure to follow them should have consequences.

Recording identification procedures is a valuable way to ensure best practices are being implemented. Recording will assure that identifications that are the result of a witness's actual memory -- and not tainted by system variables⁸ -- are used in the prosecution of individuals accused of crimes. But it is not just ensuring better police practices that matters. The science of eyewitness identification has also shown that identifications are often the product of relative judgment and guessing on the part of witnesses.⁹ In this regard, the process by which a witness goes through the identification proceeding is also crucially important to ensuring reliable identifications and guarding against wrongful convictions based on mis-identification. Being able to document the length of time and any comments a witness makes during an identification

⁸ The procedures employed by law enforcement tend to exacerbate the already faulty recollections of witnesses. While there are many variables that can distort retrieval of stored memory, salient factors that can be controlled include "suggestive interviewing and identification procedures conducted by law enforcement personnel." State v. Henderson, A-08 at 10 (N.J. Sept. 2008), available at <http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20%2800621142%209.PDF> [Special Masters Report]. Common are leading questions, positive feedback from police after making an identification of the target suspect, and repeated viewings of the same suspect, all techniques proven to have distortive effects on the identification process. See Matthew P. Gerrie, Maryanne Garry, and Elizabeth F. Loftus, Eyewitness Identification, in Psychology and Law 177, 199 (Brewer & Williams eds., 2005) (surveying case studies demonstrating that biased lineup instructions, such as "see if you can pick out the offender," lead to an elevated rate of choosing even in lineups where the suspect is absent); Loftus & Doyle, Eyewitness Testimony: Civil and Criminal, supra, §§ 3.04, 3.06, 3.10-11.1; John C. Brigham & Robert K. Bothwell, The Ability of Prospective Jurors to Estimate the Accuracy of eyewitness Identifications, 7 Law & Hum. Behav. 19 (1983); Elizabeth F. Loftus & Katherine E. Ketcham, "The Malleability of Eyewitness Accounts," Evaluating Witness Evidence, supra, at 159; Elizabeth F. Loftus & Edith Greene, Warning: Even Memory for Faces May Be Contagious, 4 Law & Hum. Behav. 323 (1980); Elizabeth F. Loftus, Eyewitness Testimony 150-52 (1979).

⁹ The overwhelming consensus is that memory for events witnessed is extremely malleable: memories decay, can be replaced, and can be altered at both the moments of formation and attempts to recall. Henderson, Special Masters Report at 10.

procedure is essential to this determination. Absent documentation, the truth and accuracy of what occurs in an identification proceeding is lost or distorted when either police or civilian witness later testify at a hearing or trial.¹⁰

This is also important for photographic identification proceedings even though they are not admissible in New York.¹¹ Photographic identifications, whether done by mugshot books, or electronic systems (Photo Manager or PIMS) have not typically been preserved. See excerpt from actual hearing in Bronx County (attached). Yet, valuable information is readily available in the use of electronic systems. This includes not only the description entered into a computerized system by law enforcement to generate the images viewed, but also the actual images viewed and the length of time the witness spends viewing them.¹² Only recently have we started to see the turning over by prosecutors of these images that preserve what a witness viewed and in what order and documentation of how long a witness viewed a given page. Even in these cases however, a recent hearing conducted by my office showed that it is not enough. Police witnesses do not, either deliberately or coincidentally, pay close attention to a witness viewing photographs or document witness comments or the length of time on given pages. See excerpt from hearing (attached). Without paying attention or documentation, that information is

¹⁰ For example, even a witness who might have hesitated, taken time and equivocated in a identification proceeding is likely to report an increased confidence at trial.

¹¹ People v. Caserta, 19 NY 2d 18 (1966).

¹² A recent Court of Appeals case now requires preserving. People v. Holley, 26 N.Y.3d 514 (December 17, 2015)(holding that the failure to preserve a record of a photo array shown to a witness -- regardless of the form the photos take -- gives rise to a rebuttable presumption of suggestiveness thus making clear that law enforcement must preserve electronically maintained photographs).

lost. And a civilian witness can simply testify that the length of time spent on a specific pack of photographs had no bearing on the process. Whereas, a recorded proceeding would document the truth and accuracy of what occurred. Concerns about witness safety resulting from recording identification procedures can fairly be addressed by a provision permitting an application for a protective order. In short, only preserving in recorded form what actually occurs at an identification proceeding will ensure that best practices are being followed. Similarly, only recording the identification proceeding accurately documents the important details of an identification proceeding necessary to guard against wrongful convictions and promote reliability.

Recent Proposed Legislation

As noted above, the New York State Justice Task Force has recommended recording interrogations and best practices in identification cases, as has the New York State District Attorney's Association and these recommendations were made in 2011 and early 2012. But despite this, more than four years later, the recommendations are not being routinely implemented.

The Innocence Project bill of 2015, reintroduced in 2016, is commendable but raised some concerns among the defense bar. The primary concerns as to the recording of identifications portion of that bill included: (1) the class of crimes where recording of interrogations is required is too limited; (2) suppression is not a remedy solely for failure to

comply with recording requirement; (3) there are too many "good cause" exceptions for failing to record and no legal standard for determining "good cause"; and (4) the jury instruction about the failure to record where there has been a finding of "good cause" Was not strong enough.

The primary concerns with the eyewitness identification portions of the bill included: (1) how to inform jurors about the source of photographs in photo arrays without indicating an accused's crime history; (2) discouraging the use of multiple identification procedures known to create confirmation bias; (3) the absence of a discovery provision requiring reform provisions for early discovery of identification documentation and interrogation tapes within 15-30 days of arraignment; (4) the witness veto over recording as opposed to allowing prosecutors to move for a protective order over the video; and (5) the absence of a real remedy for failure to follow best practices such as suppression or an adverse inference or permissive adverse inference instruction.

The NYS Assembly bill (A08157)¹³ is an improvement in the eyes of the defense bar because of the following aspects: (1) a clear and convincing proof standard for the "good cause" exceptions for failing to record interrogations; (5) a more strongly worded mandatory jury charge when "good cause" is found explaining that normal course is for interrogations to be recorded; and (6) the best practices for identification are included as mandatory in the bill; and (7) mandatory recording of identification procedures with a clear and convincing standard for "good cause" when recording is not done.

¹³ Available at

http://assembly.state.ny.us/leg/?default_fld=&bn=A08157&term=2015&Summary=Y&Actions=Y&Text=Y&Votes=Y

Conclusion

We applaud the City Council and the Courts & Legal Services Committee for interest in these important issues. Unfortunately, guidelines and recommendations have proven not to be enough and we believe that legislation is required. We are optimistic that legislation will eventually pass requiring recording of interrogations and identification proceedings but we urge legislators to pay careful attention to the concerns of the defense bar and to avoid compromise on a bill that will not be truly effective in obtaining reform in these areas. Any legislation must include mandates and real remedies for failure to comply. It must also be expansive and cover all offenses. While exceptions for failing to record must be considered, they cannot be so numerous as to become the norm. We look forward to working with our partners in the City Council to accomplish these important goals.

1 Q. Do you recall earlier testifying that he was
2 alone in the room?

3 MS. ^{PROX} [REDACTED] R: Objection.

4 The witness testified that he believed
5 that he was alone in the room earlier.

6 THE COURT: Sustained.

7 Q. When you entered the room, did the door have
8 to be opened with a key?

9 A. No.

10 Q. You said that ^{Client} [REDACTED] was not
11 handcuffed?

12 A. No.

13 Q. And in your opinion was he free to leave
14 that room?

15 A. Sure.

16 Q. At any point did he ask to leave the room?

17 A. No.

18 Q. When you entered the room, did you speak
19 with Mr. McClean?

20 A. Yes.

21 Q. What did you say?

22 A. I asked him how he was.

23 Q. Okay, did you introduce yourself?

24 A. Yes.

25 Q. Did he respond to you?

1 A. Again, I don't know what you are asking.

2 Q. When you asked him how he was, did he
3 respond?

4 A. Yeah.

5 Q. Did you have any other conversation, any
6 small talk?

7 A. We talked about the case.

8 Q. What exactly did you talk about?

9 A. I asked him what had happened, if something
10 happened.

11 Q. Okay. And did you ask him whether something
12 had happened at 306 East 171st Street, Apartment 3 K.

13 A. Yes.

14 Q. And he answered you?

15 A. Yes.

16 Q. Okay, did you tell him that people had seen
17 him in the apartment that Sunday, in the apartment
18 building?

19 A. Did I tell him?

20 Q. Yes.

21 A. No.

22 Q. And you were in the room with Detective
23 Scanlon as well, correct?

24 A. Yes.

25 Q. Just the two of you detectives and

1 Mr. McClean?

2 A. Yes.

3 Q. As far as you recall?

4 A. Yes.

5 Q. Did Detective [REDACTED] ask or tell
6 Mr. *Client* [REDACTED] that people had seen him in the apartment
7 building?

8 A. I don't know if he said that at all.
9 I don't know if he did or he didn't say
10 that.

11 I don't recall him saying that, but that
12 doesn't mean that he didn't say that.

13 Q. Did you ask Mr. *Client* [REDACTED] whether he had been
14 in the apartment that Sunday?

15 A. Did I ask him, personally?

16 Q. Right.

17 A. No. Detective Scanlon did a lot of the
18 talking at that point.

19 Q. What did Detective [REDACTED] say to
20 Mr. *Client* [REDACTED]?

21 A. Again, I don't know exactly what he said.
22 Now, verbatim I don't know.

23 Did he ask him about the investigation?

24 Yes.

25 Did he ask him questions to illicit a

1 response? Yes, he did.

2 Q. What kind of questions did he ask to illicit
3 a response?

4 A. What he was doing, what had happened and
5 that kind of thing.

6 Q. And you don't recall the specific questions?

7 A. No.

8 Q. And what kind of responses did Mr. *Client*
9 give?

10 A. *Client* Mr. [REDACTED], he gave responses that were
11 consistent with what is on the written statement and
12 then subsequently he made a written statement.

13 Q. And during this time, during the
14 conversation, at some point you gave him food from
15 McDonald's, right?

16 A. Yes.

17 Q. Was there any point between the time that
18 you entered the room, a little after five, and
19 obtaining the statement at 10:15 --

20 THE COURT: I don't think that there was
21 testimony that the detective entered the room at a
22 little after five, I don't believe so.

23 MS. MEIS: Okay.

24 Q. Well, do you recall what time you entered
25 the interview room?

1 A. That, I don't know. I don't recall.

2 Q. You arrived at the 44th Precinct a little
3 after five?

4 A. Sometime after five, I don't exactly know
5 but it was after 5:00.

6 Q. When you entered the precinct, did you go
7 straight upstairs to the detective squad?

8 A. Yeah.

9 Q. And did you enter the interview room where
10 Mr. Client [REDACTED] was seated immediately thereafter?

11 A. Not immediately thereafter.

12 Q. Well, what, if anything, did you do before
13 you entered the room?

14 A. I don't know. I might have went to the
15 bathroom. I might have washed my hands, got a drink.
16 I don't remember.

17 Q. It was a short period of time you may have
18 done a few things?

19 MS. Prox [REDACTED]: Objection.

20 THE COURT: Sustained. Rephrase.

21 Q. As far as you recall you may have used the
22 rest room?

23 A. That's a possibility, yes.

24 Q. Whatever you did, didn't take longer than
25 5-to-10 minutes?

1
2 MS. *Prox* [REDACTED] Objection.

3 THE COURT: That's a question.
4 Sustained. You have a fact not in evidence yet in
5 your question.

6 Q. How long before you entered the interview
7 room?

8 A. I don't know.

9 Q. Was it a half an hour?

10 A. I don't know.

11 Q. You have no idea?

12 A. At the risk of being incorrect ma'am I don't
13 remember what time I entered the room.

14 I didn't look at a watch. I didn't look at
15 the clock.

16 Q. You didn't fill out any kind of paperwork
17 whatsoever with the time that you entered the room?

18 A. Just the written statement.

19 Q. Did you take any notes before you made the
20 written statement?

21 A. No.

22 Q. And you are aware that the Police Department
23 have standard issued hand held tape recorders, right?

24 MS. *Prox* [REDACTED]: Objection.

25 THE COURT: Sustained.

Q. Did you use a tape recorder during your

1 conversation with Mr. *Client* [REDACTED]?

2 A. In 22 years on this Police Department, I
3 have never used a tape recorder to interview anybody.

4 Q. Were you present during the video statement?

5 A. No.

6 MS. MEIS: Can I have one minute?

7 THE COURT: Yes.

8 (Whereupon there was an off-the-record
9 discussion between defense counsel and the
10 defendant at this time.)

11 Q. When you arrived at the 44th Precinct, do
12 you have any idea how long Mr. *Client* [REDACTED] was there before
13 your arrival?

14 A. I don't know.

15 Q. Do you have any idea what time he was --

16 THE COURT: Could you, could you
17 rephrase that question.

18 Do you have any idea is a funny way to
19 ask a question.

20 MS. MEIS: Okay.

21 Q. Do you know what time Mr. *Client* [REDACTED] was
22 brought to the 44th Precinct?

23 A. No. Not an exact time, no.

24 Q. You testified earlier that you thought that
25 he was brought there by Detectives [REDACTED] and

1 [REDACTED], right?

2 A. Yes. Correct.

3 Q. Did you speak with them about how he was
4 brought to the precinct?

5 A. They went over to the scene and they picked
6 him up and brought him back, as far as to what content,
7 I don't recall.

8 Q. Is that what they told you?

9 A. I don't remember what they told me.

10 Q. Did you speak to them?

11 MS. ^{Prox} [REDACTED]: When? Objection as to
12 when.

13 Q. Did you speak to them that day?

14 A. I probably did, yeah.

15 Q. But you don't know whether you spoke to
16 them?

17 A. I don't know what you are asking me, I
18 really don't.

19 Q. Did you get a call from the 44th Precinct to
20 tell you to return, because they had Mr. ^{Ciant} [REDACTED] in
21 custody?

22 A. Did I get a call or was I made aware of it
23 sometime thereafter?

24 THE COURT: No. She is asking you
25 specifically do you recall whether you got a phone

1 call saying come back to the precinct we have
2 Mr. Client. That's the question.

3 A. I didn't get a phone call personally, no.

4 Q. So, it is just coincidence that you returned
5 and he was there?

6 A. No. We were coming back anyway.

7 Q. But, you were not specifically called in to
8 question him?

9 A. Not that I can recall, no.

10 Q. And you don't know what time detectives
11 Mullarkey and Diskin brought him to the precinct?

12 MS. Prox: Objection. Asked and
13 answered.

14 THE COURT: She can ask again. It is
15 cross-examination.

16 Do you know?

17 THE WITNESS: I don't know.

18 Q. You said that you thought that there was a
19 phone call to the squad that preceded the detectives
20 going to get him?

21 A. Again, that would be something that you
22 would ask them.

23 I wasn't present for a phone call. I wasn't
24 present when anyone said he was out, he was out, out
25 and about or that he had been seen.

1 Q. You don't know what happened before the
2 call was made, you don't even know whether a call was
3 made?

4 MS. ^{Prox}[REDACTED]: Objection.

5 THE COURT: Sustained.

6 Q. Going back to the conversation that you had
7 with Mr. ^{Client}[REDACTED] in the interview room, you said that
8 Detective [REDACTED] was doing most of the questioning,
9 right?

10 A. Yeah.

11 Q. And that he was asking questions to illicit
12 a response?

13 A. Yes.

14 Q. How long did that conversation last?

15 THE COURT: With [REDACTED] speaking to
16 the defendant?

17 MS. MEIS: Right.

18 A. I don't know. As far as written down time,
19 it was sometime after he arrived and before 21:15 when
20 I wrote him out, when I wrote the statement out.

21 Q. Did you speak with Detective Scanlon before
22 you questioned Mr. ^{Client}[REDACTED]?

23 MS. ^{Prox}[REDACTED]: Objection.

24 THE COURT: Sustained.

25 Q. Did you speak to Detective [REDACTED] on June

1 the 28th regarding this investigation before you
2 questioned Mr. ^{Client} [REDACTED]?

3 A. Again, I don't know exactly. Did we talk
4 about the investigation? Yeah.

5 Q. Were you aware that Detective [REDACTED] was
6 assigned to the investigation?

7 A. Yeah.

8 THE COURT: Asked and answered. We had
9 that already.

10 Q. Were you aware that, were you aware of what
11 information Detective [REDACTED] had learned about this
12 investigation?

13 MS. ^{Prox} [REDACTED]: Objection.

14 THE COURT: Sustained.

15 Q. Were you aware if Detective [REDACTED] had
16 spoken to the Crime Scene Unit?

17 MS. ^{Prox} [REDACTED]: Objection.

18 THE COURT: Sustained.

19 Q. Were you aware if Detective [REDACTED] had
20 spoken to Investigator [REDACTED] from the ME's Office
21 ?

22 MS. ^{Prox} [REDACTED]: Objection.

23 THE COURT: Sustained.

24 Q. In the questions that Detective [REDACTED] was
25 posing to Mr. ^{Client} [REDACTED], did he have specific information

1 about --

2 THE COURT: Who?

3 Q. About this investigation.

4 Did Detective [REDACTED] have specific
5 information about this investigation?

6 MS. ^{Prop}[REDACTED]: Objection.

7 THE COURT: Sustained.

8 Rephrase.

9 Q. Did Detective [REDACTED] ask questions that
10 included specific information about his investigation?

11 MS. STOVER: Objection.

12 THE COURT: Sustained as to the form.

13 Do you know what Scanlon said, I mean
14 he already testified that he doesn't remember what
15 he said.

16 Q. Well, he said he was asking specific
17 questions and questions to illicit a response that he
18 had asked him, for example whether -- he may have asked
19 him whether he had been in the apartment.

20 THE COURT: You can pursue the area.

21 Remember this is a Huntley Hearing.

22 MS. MEIS: Right. Huntley.

23 THE COURT: Dunaway.

24 MS. MEIS: Dunaway, yes.

25 Q. You indicated that Mr. ^{client}[REDACTED] was calm when

1 you first walked into the room, right?

2 A. He apperiod to be, yes.

3 Q. Over the course of speaking with him about
4 this incident he became emotional?

5 A. Yes.

6 Q. And that he was crying?

7 A. He cried, yes, after we -- as to exactly
8 when, when he said what had happened.

9 Q. Was he crying before you took the written
10 statement?

11 A. I believe he was, yeah. I mean as far as --
12 he cried after he said the statement orally. And then,
13 you know, I wasn't like sitting there writing. I wrote
14 after, after he had told us what had happened and then
15 I wrote out the statement.

16 Q. During the whole time from when you entered
17 the courtroom until you got the statement, did you ever
18 leave?

19 A. Did I leave the room?

20 Q. Did you leave the room?

21 A. I probably did, yeah.

22 Q. But you don't recall?

23 A. Did I leave the room? I probably did, yeah.

24 Q. Did Detective [REDACTED] ever leave the room?

25 A. He probably did too. I don't recall if he

1 was in there at one time or if I was in there at one
2 time or if we were both in there together.

3 THE COURT: What time frame are you
4 talking about?

5 MS. MEIS: Between the time -- we don't
6 know exactly from when he entered the room after
7 5:00, until he obtained the written statement at
8 10:15, did he ever leave.

9 THE COURT: So before, in other words
10 from the time he entered to before -- to the time
11 that he took the written statement?

12 MS. MEIS: Right.

13 THE COURT: Thank you.

14 And the answer is?

15 A. I wasn't in the room the whole time.

16 THE COURT: Okay.

17 Q. So, you said that Mr. *Chant* [REDACTED] was crying
18 during the oral statement, right?

19 A. Again, the end of the oral statement he
20 became emotional when he had said what happened to his
21 friend.

22 Q. Just to be clear, you entered the room,
23 right?

24 A. Yeah.

25 MS. *Prox* [REDACTED]: At what point?

1 Q. You entered the room on 6/28/2006, right?

2 THE COURT: You are talking about the
3 first time that he entered.

4 Q. The first time that you enter, we don't know
5 the time because the detective doesn't know, so I am
6 saying you first enter the room, right?

7 THE COURT: There came a time when you
8 entered the room for the first time, when your feet
9 went in there for the first time.

10 THE WITNESS: Yes.

11 THE COURT: Next question.

12 Q. Detective [REDACTED] was also present?

13 A. Yes.

14 Q. Questions were asked of Mr. *Client* [REDACTED]?

15 A. Yes, correct.

16 Q. Mostly by Detective [REDACTED]?

17 A. Correct.

18 Q. You don't recall the specific questions?

19 A. No.

20 Q. But they were questions that were designed
21 to illicit a response?

22 A. Yes.

23 Q. And they did illicit a response from
24 Mr. *Client* [REDACTED]?

25 A. Yes.

1 Q. And he gave you an oral statement?

2 A. Yeah.

3 Q. Was it a continuous flowing statement or did
4 it come in parts?

5 A. It came in parts. They usually do.

6 Q. And as parts came out, questions were
7 interspersed by Detective [REDACTED]?

8 A. Yeah.

9 Q. And how many times did you go over the whole
10 story?

11 A. I don't understand.

12 Q. Did you go over the details of his story
13 more than one time?

14 A. He told us the story. I subsequently wrote
15 it down, and then he made a video statement where he
16 told the story again.

17 Q. How long did this oral statement last?

18 A. I don't know. I don't know to be honest
19 with you, if it took two hours or an hour and a half.
20 I don't recall.

21 It was sometime before 21:15 hours, 09:15,
22 that's when I started the written statement.

23 Q. Before you started the written statement,
24 that's when you filled out the Miranda Form, identified
25 as People's 1 in Evidence?

EXCERPT FROM INTERROGATION VIDEO

DETECTIVE 1-did you see anything ? Did you see the shooter ?

CLIENT- no..when I heard it I was just like ..i aint tryna look for it, I aint tryna get hit.im tryna stay alive

DETECTIVE 2- you ever have your hair in braids?

CLIENT-huh?

DETECTIVE 1-you ever have your hair in braids or you always keep it like that ?

CLIENT-I like to keep it look because my hair be going like...receding ..like last week I had it braided ...It don't last cause I always be like (makes motion with his hands)

DETECTIVE 2- last week you had it braided ?

CLIENT-yea

DETECTIVE 2- would it surprise you if we told you that we had video ? of that block

CLIENT-no-there's a corner store there

DETECTIVE 2-theres some other video that we got..would it surprise you if I told you that you were on that video ?

CLIENT- it would

DETECTIVE 2- it would ..ok..well surprise ..youre on video

DETECTIVE 2-and from what we're looking at

CLIENT-can I see the video

DETECTIVE 2-no -that you don't see at this..you can ..eventually down the line-you will see the video ..im telling you, absolutely you cant see it..just not right this second..and in that video youre not really doing what it is that your telling us that..

CLIENT- I was standing there ..i was looking at them

DETECTIVE 2-that's debatable ..there's some other stuff in that video too. What you need to understand is ..that we have you here for a reason.. we didn't just pick you up out of the blue and say Hey get that guy bring him in here.we're gonna practice interrogating him. You're here for a reason. You're here because theres video, there's eye witnesses, there's ear witnesses . there's people that saw you do something different than what you are telling us that you were doing

Now this is your..this the golden opportunity . if something happened on that corner ..that caused you to do that ..then that's fine ..this is your opportunity to tell us. To tell us..the story you just told us ..if

that's what we're gonna go forward with ..its not gonna help you...you're in for the long haul ..if something happened ..you were defending yourself ..maybe you felt threatened ..theres a 100 different scenerios ..now is your opportunity

Anytime after this ..its not gonna be taken seriously ..if you tell us now what happened ..we'll treat you..chances are,..you're gonna survive this. Im not telling you you're going home today .im not telling you any of that stuff but think future, think long haul as far as you going to trial as far as you as far as all this other stuff going on in your life..that stuff will probably be cut short.shorter than it would be ...the story your telling us now is not going to benefit you..understand what im saying ?

So..this is..like I told you before ..this is your golden opportunity . if something happened, you getta tell us. You gotta tell us what happened . even if it doesn't paint you in the best light. What paints you in the best light is that your sitting here and you're being truthful with us ..now you tell us the story, no matter what light it paints you in...that my friend goes a long way. The DAs office hears that, we speak to them, we speak to the courts , and we tell them what you're telling us and that goes a long way but you can't sit here and tell us that you were just standing there and you got scared and you don't know who these kids are, they got sticks and bats

CLIENT-they did have sticks and bats

DETECTIVE 2- you gotta tell us something different ..something better than that . what happened bro, come on

CLIENT-they just tried to jump my cousin

DETECTIVE 2-they tried to jump your cousin? Alright, fair enough

CLIENT- they wanted to fight so I was like, alright, go ahead. I didn't know they was going to fight

DETECTIVE 2-but they came for you guys?

CLIENT – not for us

DETECTIVE 2-no, they came for your cousin

CLIENT- one of him, they got sticks, whatever, they had a gun, knife, they had it all

DETECTIVE 2- they had everything, they had

CLIENT – they had it all..that's why... over there over there.

DETECTIVE 2- and they were looking for you, your cousin. Did your cousin say why they were looking for him?

CLIENT-shakes head no. I don't really talk to him like that, like, he's kinda like to hiClientelf but he'll tell me...these kids...[slaps hands together]

DETECTIVE 2-he had beef with these kids or something

DETECTIVE 2- alright, fair enough, fair enough. And what did you guys do in response when these guys showed up, I mean they had sticks and bats and you said there's a good chance that they...did they show you the gun?

CLIENT- no, I wasn't trying to look for them

DETECTIVE 2-you weren't trying to hang out and see if they had a gun but you assumed that they had one, or is there any particular reason why you think that they might have had one?

CLIENT-they had came before

DETECTIVE 2-they had came before and they had a gun back then? How long ago was that when they came for?

CLIENT- I don't know

DETECTIVE 2-a couple hours, a couple months, a couple weeks

CLIENT-like days

DETECTIVE 2-like a few days prior, they came back before looking for your cousin, and you said that time they had a gun. Did they show you the gun at that point?

CLIENT- he told me

DETECTIVE 2-he told you they had a gun. So you had a legitimate fear for your safety, I understand that. And what'd you guys do after that, after they showed up looking for the second time?

[long pause]

DETECTIVE 2- like I said bro, this is the point in time when you get to save yourself.

CLIENT – I was defending myself

DETECTIVE 2- You were defending yourself. And how did you defend yourself?

DETECTIVE 2- come on bro we're almost there, like I said brother there's a story behind it and this is the chance for you to tell your story. A lot of times you get people in here they don't want to tell us nothing and it doesn't help them. If you tell us your story it's gonna help you, your story will help you, definitely help you

[**CLIENT** head down on table]

DETECTIVE 2- did you or your cousin have a gun? Did you have a gun?

CLIENT- yeah

DETECTIVE 2-yeah?

CLIENT- it wasn't mine

DETECTIVE 2-it wasn't yours, alright. And what'd you do with it?...i bet you'll feel a lot better once this is behind you. And what you tell us now is gonna help put it behind you. But you gotta tell us the whole story, especially if the story you're telling us so far is matching up with what the witnesses are telling us and what the video is telling us, so you're doing pretty good, you're doing pretty good, but you gotta keep going. And you're almost there... you know you're almost there.

CLIENT- alright, I'm on camera too (???? 14.19)

DETECTIVE 2- we gotta hear from you. this is the opportunity for you to help yourself, man. It will help, it will help. Do you know what the end result of that incident was?

CLIENT- what

DETECTIVE 2- that somebody was, somebody was hit, that somebody was shot?

[**CLIENT** shaking head]

CLIENT- I didn't know, so thanks homie

DETECTIVE 2- alright, well you know they're not, they're okay, they're not dead, they're ok

DETECTIVE 1- who told you the next morning

CLIENT- it was on the news

DETECTIVE 1- on the news

DETECTIVE 2- they put everything on the news nowadays, so just because its on the news doesn't mean it's the end of the world. But just know that the person that was hit, they're not dead, which is good, very good, and they're not even uhh, they're gonna make a full 100% recovery, which is also good

CLIENT- that's great

DETECTIVE 2- so that, between that and you telling us what happened, it's gonna help you get past

CLIENT- I'm never getting out

[**CLIENT** head down]

DETECTIVE 2-that's not true, that's not true at all. Tell us you had, you know, what kind of gun was it that you had?

CLIENT- I donno

DETECTIVE 2- you don't know? Was it like a revolver?

CLIENT- I donno, it was a revolver though (15.46)

DETECTIVE 2- was it a revolver? It was a revolver You know what a revolver looks like right?

CLIENT nods

DETECTIVE 2: Where'd you find it

CLIENT- it was like by the tomb (???? 15.55)

DETECTIVE 2- the tomb? was it like in the street, in the park?

CLIENT- in the grass

DETECTIVE 2-in the grass, alright

DETECTIVE 1 – where's that gun now

CLIENT- I donno

DETECTIVE 1- where'd you throw it

CLIENT – in the water, I donno, it's gone (16.14)

DETECTIVE 1- the reason we ask is because ..didn't grab it

CLIENT- in the water, like

DETECTIVE 1- where in the water?

CLIENT- ????

DETECTIVE 2- through the Bronx River

DETECTIVE 2- tell us bro what happened, come on, these guys came looking for you, they had sticks and bats, you thought they had a gun, there's a good chance they may have had a gun, which is understandable, you guys were a little bit nervous, you guys didn't want to get shot

CLIENT- I think yall heard everything

DETECTIVE 2- tell us about when you fired a few rounds down the block. Tell us about that

CLIENT – what about it

DETECTIVE 2- tell us what happened. This is where it counts bro, this is where it's gonna help you

CLIENT- this kid was coming after me, with a big ass stick, come up the hill running, like he was gonna hit me

DETECTIVE 2 – he was charging you. K. And then what'd you do then

CLIENT- protected myself

DETECTIVE 2- ok. And how'd you do that

CLIENT- let go 4 shots

DETECTIVE 2- 4 shots. Alright.

CLIENT-omg [mumbles]

DETECTIVE 2- it is, it is

CLIENT- going in for 15 years

DETECTIVE 2- you're not gonna do 15 years

[**CLIENT** head down]

DETECTIVE 2- you're not gonna do 15 years. Granted you're gonna have to jump through some hurdles for this, brought it on you (?). It's alright. It's alright. You'll make it through, you did at the time what you felt you had to do. And that's understandable. In your situation would I have done the same thing? Probably. Probably. You didn't do anything out of the ordinary that anything else in your position wouldn't do to protect hiClientelf and his family. It happens.

DETECTIVE 1- you said they were going after your cousin? That's Donte?

CLIENT- [shakes head no] **that's my friend (18.25)**

DETECTIVE 1 – what's your cousin's name

CLIENT- Sean

DETECTIVE 1-Sean what

CLIENT- I don't know his last name, it's funny

DETECTIVE 1 – it's a funny last name or you just don't remember it

CLIENT- I don't know his last name

DETECTIVE 1- so they had an issue with Sean? Do you know what that was over?

[**CLIENT** shakes head no]

DETECTIVE 1 - where was Sean during this?

CLIENT- didn't see him

DETECTIVE 1- so he wasn't even on the block when this happened?

CLIENT- he....(mumbling – he had gotten off??-- 18.57??)

DETECTIVE 1- but you just...

CLIENT- I wasn't outside all day. I was in the crib all day, I came outside, I heard this, he was supposed to come over here, so I was just making sure my cousin wasn't out there...(19.13???)..alright ...(19.17???)

DETECTIVE 1 –how did you defend him (or how did they find him? 19.24)

CLIENT- he came more than several times

DETECTIVE 2- that's understandable

DETECTIVE 2- do you feel a little better that you got that off your chest

[**CLIENT** shakes head no]

DETECTIVE 2- no? we'll be talking to you, working with you through most of the day, you're gonna see as, as time goes by you're gonna start to feel a little better. We do this kind of stuff all the time, and for the most part the results are the same. You got that off your chest, you put that out there, and you know now we're gonna move on, we're gonna move over. Alright?

DETECTIVE 1- we're gonna step outside for a second

DETECTIVE 2- we'll leave you in here for a moments. You alright you want some water? Something to drink? Something to eat? No? we'll give you a few moments ok?

[**CLIENT** head down, crying]

DETECTIVE 1- Macho. We're almost done bu**Detective 2y.** The gun, you said it was a revolver correct, where did you... You said you threw it in the river? Whereabouts in the river?

CLIENT – I don't remember

DETECTIVE 1- what's that?

CLIENT- I don't remember

DETECTIVE 2- look up at me for a second, macho. Just for a minute, ok? Look at me for a second. Are you sure you dumped that gun in the river? Because if that gun shows up and somebody else shot somebody else with that gun, guess who they're gonna blame for it.

CLIENT – it's gone, it's gone

DETECTIVE 2- Do you understand what I'm telling you, though? Do you understand that if somebody else uses that gun

CLIENT – yes

DETECTIVE 2- you're gonna get blamed for it...and that we can't help you with. So if that gun's anywhere where we can get that gun...if that's in the bottom of the Bronx river, then that's, that's...but if that gun is in a drawer somewhere, or medicine cabinet somewhere, or somebody's pantry drawer, or wherever you got it

DETECTIVE 1 – or one of your friends

DETECTIVE 2-nobody's got that gun, nobody's ever gonna use that gun again, that gun is sitting at the bottom of the Bronx river, the fish are shooting each other with that gun, it's just floating down there.

DETECTIVE 1- alright. when did you get rid of it? That night? you don't remember what route you took to the Bronx river?

MM- no

DETECTIVE 2- lemme ask you this, going back to what we were talking about when you fired the 4 shots. Did you just point and shoot

[**CLIENT** waves hand in the air all over the place]

DETECTIVE 2- or where you aiming at anybody or you were just trying to brush em back. Did that work at all? Did they back off at that point? You weren't trying to hit nobody right?

CLIENT shakes head no

DETECTIVE 2 to **DETECTIVE 1** - anything else?

DETECTIVE 1 – no

DETECTIVE 2 – sure you don't want a bottle of water bro? a soda or something?

CLIENT – tissues

EXCERPT FROM INTERROGATION IN HOMICIDE CASE

Interrogator 1: so [Client], the problem we are having is that we all know it was accidental, whatever happened to [The child]

[03:20:00]

Client: the problem you're having is you don't think it was her, you think it was me

Interrogator 2: well it's your motive behind blaming her, because you're mad at her

Client: wow, no man, first of all

Interrogator 2: you're mad at her

Client: it's not mad

Interrogator 2: you're mad, you sat here and screamed at me that she was banging other guys, you're mad. So you have motive behind it

Client: if it wasn't—there's no motive. It's not a motive, it's—I would have did the right thing by her. I would have taken this. I came in here, before you guys even showed me anything and I was—you got to make a deal, we got to make a deal. Before I tell you anything we got to make a deal. We have to absolve her

Interrogator 2: you know what I uh

Client: what you think?

Interrogator 2: yeah, I see two parents, two loving parents with a child right? And now that child, that probably happened accidentally—we're going to agree on that right Client? Look at me.

Client: whatever it was, it wasn't intentional

Interrogator 2: but you know whether—did you ever, I mean I've been sitting here with you for two hours, did you ever hear the words coming out of my mouth that this was intentional?

Client: no but I'm telling you it wasn't

Interrogator 2: but you know I'm not, but you know what I don't see here. What happened on the 10th of December—look at me, concentrate, look at me. I

don't see any remorse from you. Hey listen, it was an accident, and I'm not sitting here saying you're a cold blooded murderer, am I?

Client: look there's plenty of remorse—

Interrogator 2: hold on, but I don't see any remorse. You're sitting here more fucking pissed off that she might have banged some guy, might have! From the word of a drug dealer, than that you left your son in the fucking woods upstate with a rose amongst coyotes, bears, fucking raccoons. You have no remorse about that.

Client: I already went through that and I'm still going through it

Interrogator 2: you already went through that? When did that happen about? What day?

Interrogator 1: about 5 minutes ago

Interrogator 2: no I mean, when did he drop the kid in the woods? 4 or 5 days ago?

Client: yeah

Interrogator 2: so you're past the remorse phase? You're ready to move on with your life?

Client: look, right is right

Interrogator 2: what do you mean right is right?

Interrogator 1: look, I think you didn't bond with the child, he was a baby

Client: I loved that child, now bonding, bonding as a parent I'm there for the child but I—

Interrogator 1: you told me, you know he wasn't smiling yet, you didn't really—

Client: wow I got to watch what I saw. You guys are literally just over [unclear] and trying to use it

Interrogator 1: —have a conversation man. We're trying to explain how a 2 month old child turned out dead in your apartment

Client: look when you talk to her, you'll hear we have shifts. You'll hear that it was morning, I was in bed. It wasn't my turn, that's all I can say.

Interrogator 2: you know what I'd like to hear from either one of you fuckers, hey did you find [The child] yet? That's what I'd like to hear from you and I haven't fucking heard it fucking yet [Client]. I haven't heard it yet. You think we

found him? Let me ask you this question, fuck that question. Do you even give a fuck if we found him?

Client: yeah

Interrogator 2: no you don't give a shit because you would have asked it fucking two hours ago.

Client: look

Interrogator 2: how about that, ask that question, "Have you found my son?"

Client: have you found my son?

Interrogator 2: do you give a shit?

Client: I give a shit

Interrogator 2: I'm not even answering that question. You don't give a shit because you would have asked two hours ago. Or "let me tell you where my son so you can go find him so the fucking coyotes don't eat him." How about that? Oh sorry I don't remember, me and her were smoking fucking crack in the hotel room and drinking fucking all night. We don't know where we left our son. Because that's exactly what the fuck happened.

Client: I know how this looks yeah

Interrogator 2: what do you mean how it looks? It's the truth!

Interrogator 1: it's not how it looks, it's how it is bro

Client: I know how it looks

Interrogator 2: what, that you started in the fucking woods in fucking upstate

Interrogator 1: that's how it is

Client: look I don't care about me, I care about her

Interrogator 1: you should say "I don't care about The child," and you can give a fuck about her

Client: look, you're just now trying to get me—

Interrogator 1: I am not getting, is there one thing—

Interrogator 2: Listen [Client]

Interrogator 1: is there one thing I said that's a lie?

Client: what me not caring about—

Interrogator 1: [some skipping at 03:24:28] did you ask?

Client: ask what? Why would I ask that?

Interrogator 1: where's my son? Did you find my son?

Client: you guys wouldn't know how to find him?

Interrogator 1: did you think somebody else might have maybe helped us find him? Do we have [The child]? Did we find [The child]? You think we're fucking idiots around here bro? do we find—do you think we found [The child]?

Client: how could you find him when you just got here?

Interrogator 1: what's going to happen when we find [The child]? What's are we going to find out about him when we bring him to a MD and they do an autopsy on him? What are they going to tell us?

[03:25:01]

Client: that he was ok, he died

Interrogator 1: he was ok, he just died. Are you fucking kidding me? A two month old baby? He was ok, he just died, that's what they're going to tell me? Who are you talking to? Bro, you think this is the first time we ever did this man?

Client: no, it's not that

Interrogator 1: you tell me what they going to do when we find [The child]? What is that doctor going to tell me when he cuts him open? What is he—look at me! Look at me! What is he going to tell me? What is he going to tell me happened to that baby? You tell me right now, be a fucking man, be a fucking man, it's your once chance. What's he going to tell me?

Client: I wasn't there

Interrogator 1: what?

Client: I wasn't there

Interrogator 1: what happened to the baby? What's he going to tell me?

Client: I didn't have him that day. I didn't have him that day

Interrogator 1: you're a fucking coward, you're full of shit. Alright, you're full of fucking shit. Ok, there's your The child. [Detective pulls out a photo] That's how you left him? That's how you left him? Is that how you left him?

Client: we had a blanket on him?

Interrogator 1: you had a blanket on him, who dropped him? You threw him on the ground?

Client: we both did

Interrogator 1: you both did

Client: and put a rose on him

Interrogator 1: what are they going to tell about him? What's the doctor going to tell me when he flips him over and he sees his face and he sees his body and they go inside him and they see what kind of injuries he sustained? What are they going to tell me? Be a fucking man right now. What are they going to tell me happened to that baby? Because either she told you what she did or you know what you did. Enough of the bullshit. You were fucking crying when you came in here. Tell me know what they're going to tell me about that baby. DO it now! Be a fucking man! A dead two month old, now motherfucker! Tell me! When they cut him open, what are they going to say? Tell me bro, that's a two month old baby, your fucking son. You left him out in the woods to fucking get eaten by fucking coyotes and we found him like that like a fucking angel. Alright, that's God leaving him that way so we find out what happened to him and one of yous is going to be fucked. What happened to that baby? Look at me! Look at me! What happened to baby? Be a fucking man, look within yourself. You don't want to be a piece of shit? Now is your moment to fucking shine. Do it. Tell me what happened to that baby. Tell me now. What happened to baby? [Client], look at me. [Client], be a fucking man. Be a man, look at this, look at me, look at me. You said you been a piece of shit for how many years? Look at me, look at me. [client, client, client], look at me, Client be a fucking man. What happened to the baby? Tell me man. Let it go. Come on, this is your chance. The doctor is going to look at him tomorrow. The baby didn't just die, something happened to the baby. Tell us, what happened to The child? If it was an accident, tell us now, what happened to the baby? They're going to tell us tomorrow, they're going to

tell us tomorrow bro. You tell me now before the doctor does. What happened to that baby? [Client], look at me. [Client], look at me

Client: [unclear at 03:28:20]

Interrogator 1: Let's go man, be a man. Tell me what happened bro. Tell me what happened bro. Let it go, come on, what happened? Do it now man before that doctor does. Be a fucking man before that doctor tells us. Do it now, it's your one fucking shot. Your one chance to climb out of being a piece of shit like you said you were all those years. Tell me now, be a fucking man and win my respect. Tell me what happened to that baby before the doctor does.

Client: it was an accident.

Interrogator 1: what happened? What was the accident? Tell me how? Tell me how man? Client, Client look at me. Look at me. Look at me. Look at me. Client, tell me how, what happened to the baby? Please, tell me now. The doctor is going to tell us tomorrow. Be the first one. What happened?

Client: you know what happened

Interrogator 1: what happened?

Client: you already know

Interrogator 1: no I don't. tell me what happened. Tell me what happened. Be a man, be a man.

Client: who does that?

Interrogator 1: be a man

Client: who does that?

Interrogator 1: how did he die? Client, now is your time, now, your one fucking shot. Tell us what happened to him. You said it was an accident? Tell me what the accident was. No more bullshit, the bullshit's over man. Be a man, we're free [or three] men in here. Be a fucking man, tell me what happened. Come on man, you know what happened to that baby. You came in here, you came in telling me you wanted to tell me what happened.

[03:30:00]

Interrogator 1: tell me, be a fucking man. Be a man bro, be a man bro

Client: who does that, who does that? Looks like a fucking ragdoll, like no one cared about him, out in the fucking woods.

Interrogator 1: you threw him in the woods bro. How'd he died? Tell us how he died. Tell us how he fucking died man. Client, enough, enough with the charade. Tell us how he died man. Let's go, give it to me man. Tell me.

Client: you already know

Interrogator 1: tell me, I need to hear it from you. I don't know

Client: it was an accident

Interrogator 1: how did it happen?

Client: it was an accident

Interrogator 1: but how did it happen bro? what kind of an accident?

Client: it was an accident

Interrogator 1: what was the accident? Tell me the accident. Tell me what the accident was man. [Client], let's go. [Client], let's go. Let's go, tell me. Tell me what happened man. You can do it. Tell me what fucking happened. Let's go. Let's go. Tell me. Tell me man. Tell me now. Tell me now bro. Tell me now. Tell me now while you can. Tell me now while you're [unintelligible at 03:31:13], I see the courage gone on your chest. Tell me now before you turn into a fucking coward.

Client: I'm not going to turn. I'll tell you just give me a second.

Interrogator 1: Tell me now, tell me now. You told me that before and you made up lies because you were scared and I know why you were scared. Tell me what happened

Client: and I was pissed

Interrogator 1: and you were pissed. Tell me what happened man.

Client: you already know

Interrogator 1: I don't know. Tell me. Tell me before the doctor does. Tell me before the doctor tells me what happened to this baby. You be a fucking man and tell me right now. Tell me what happened. [Client], look at me, be a man. Be a fucking man. What happened to the baby? Let's go. Go ahead man. What happened?

Client: it was an accident

Interrogator 1: what happened? What kind of an accident.

Client: I lied

Interrogator 1: you lied, ok then what was the accident. What was the accident? What happened? Tell me. Tell me Client, tell me now. Tell me now. Client, tell me right now. Client, tell me right now.

Client: ok

Interrogator 1: no no, right now

Client: you'll get the truth

Interrogator 1: give it to me right now, give it to me now

Client: please, I'm not going anywhere

Interrogator 1: give it to me now. Be a man, you're this fucking close. For the first time in a long fucking time you're this close to being a fucking huge man. Do it. Do it man, own it. Tell me what happened to the baby. Let's go, you can do it.

Client: will this get her off the hook?

Interrogator 1: I can't promise you nothing. Give me the story

Interrogator 2: you got to tell us what happened first bro.

Interrogator 1: Tell me what happened man.

Client: she gets off the hook

Interrogator 1: tell me what happened

Client: she gets off the hook

Interrogator 1: tell me what happened, be a man

Client: I will

Interrogator 1: tell me what happened bro

Client: if she gets off the hook

Interrogator 1: I can't promise you nothing man

Client: why?

Interrogator 2: did you do anything wrong?

Interrogator 1: you tell me what happened. Tell me what happened then I'll present it. If it looks like she had nothing to do with it, that's what people see. I can't tell you. You got to tell me what happened to his baby before the doctor does. You have to tell me.

Client: I'll tell you

Interrogator 1: You have to tell me right now, now, this second, what happened?

Client: it was an accident

Interrogator 1: what happened? What was the accident? How did it happen? Let's go, what happened? What happened to the baby? Let's go, let's go man, fucking man up. What happened to the baby? What?

Client: it just wouldn't stop crying

Interrogator 1: ok, it wouldn't stop crying, then what?

Client: it was really wailing

Interrogator 1: ok, and then what? Let's go

Client: it was a bad morning

Interrogator 1: ok, ok

Client: and I tried

Interrogator 1: ok

Client: I held him

Interrogator 1: ok

Client: I fed him

Interrogator 1: ok

Client: I held him for at least two hours

Interrogator 1: ok

Client: every time I put him down, he just kept crying

Interrogator 1: ok, and then what? Let's go, you're there. Let's go. What happened?

Client: you already know

Interrogator 1: I don't know, you have to tell me. Tell me. Tell me what happened. Let's go bro, you're this fucking close, let's go.

Client: I get it

Interrogator 1: ok

Client: I get it

Interrogator 1: I understand, we already talked and said that you would hear the crying, it drives you fucking nuts. We talked about that, I get it bro

Client: I did it

Interrogator 1: you went too far

Client: I did

Interrogator 1: ok, what happened?

Client: I didn't mean to,

Interrogator 1: I believe you

Interrogator 2: tell us what happened

Client: and it wasn't Girlfriend, it was me! It was me. It wasn't Girlfriend

Interrogator 1: how'd you make him stop crying? How'd you make him stop crying?
Let's go man

Interrogator 2: did you shake him?

Interrogator 1: let's go man, how'd you do it?

Client: I did worse than that

Interrogator 1: ok, what was worse?

Client: first, we had a sectional.

[03:35:00]

Client (cont.): I would put his head between the cushions—well he could breathe but it would muffle the crying but he was ok. It just muffled the crying and he couldn't get out of it but he just kept crying

Interrogator 1: ok

Client: so I picked him up and I tried to hold him

Interrogator 1: ok and what'd you do? Let's go man. What'd you do bro? You're there, you're there, you're there

Client: ok, I'm going to tell you

Interrogator 1: you're there, ok

Client: please, Girlfriend has to be ok, she has nothing to do with it

Interrogator 1: tell us what happened bro, tell us what happened

Client: I'm still pissed at her—

Interrogator 1: ok listen, listen to me, focus, focus, focus

Interrogator 2: how did you get the baby to stop crying?

Interrogator 1: How did you stop him from crying? Ok, you picked him, he wouldn't stop crying

Client: you already know

Interrogator 1: did you shake him?

Client: I never shook him, I never did that

Interrogator 1: I don't know what you did. I don't know what you did.

Client: never did that

Interrogator 1: what did you do to stop him from crying?

Client: I did worse

Interrogator 1: what did you do? Tell me man, come on, tell me man

Client: [says detectives name]

Interrogator 1: tell me man, you're right there, you're this close.

Client: hit me, hit me

Interrogator 1: I'm not going to hit you. Tell me what happened. Tell me what happened bro. Tell me what happened. How did you stop him from crying?

Interrogator 2: It was an accident right? How'd you get him to stop? You put his head between the cushions?

Client: yeah but that wasn't it

Interrogator 2: that didn't stop it,

Interrogator 1: ok, what did it? What did it?

Interrogator 2: Then what happened? Did you grab him by the neck?

Client: I put my hand around his mouth

Interrogator 2: you put your hand around his mouth

Interrogator 1: ok, do it to yourself, show me

Client: that didn't work, I just—it stopped for a while

Interrogator 1: ok, then what?

Client: like this for days,

Interrogator 1: ok

Client: he wouldn't stop

Interrogator 1: ok

Client: I did everything

Interrogator 1: alright

Client: I even overfed him

Interrogator 1: ok, and then what?

Client: I did it

Interrogator 1: did what?

Client: I put my hands around his throat

Interrogator 1: I can't—you put your hands around his throat?

Client: yes sir

Interrogator 1: both hands?

Client: [nods head yes]

Interrogator 1: and what you do with—

Client: at first it was one

Interrogator 1: ok

Client: and then he passed out and then he would wake up crying again. I put another bottle in his mouth. That didn't help him

Interrogator 1: ok, alright man, and then what? What?

Client: I choked him again

Interrogator 1: with one hand or two hands?

Client: one hands

Interrogator 1: one hand, alright, then what happened?

Client: then two

Interrogator 1: ok

Client: and then I went too far

Interrogator 1: ok, and what happened? Did the baby stop breathing? I mean, what happened?

Client: he stopped crying

Interrogator 1: he stopped crying

Client: then he passed out

Interrogator 1: ok

Client: and then that's when he woke up again but he had heavy breathing

Interrogator 1: ok

Interrogator 2: he couldn't breathe?

Interrogator 1: ok

Client: he wasn't breathing right

Interrogator 2: is that when Girlfriend came out?

Client: I ran to Girlfriend

Interrogator 2: you ran to Girlfriend?

Client: and I told her, yeah

Interrogator 2: what you tell us?

Client: there's something wrong with the baby?

Interrogator 1: what you tell her?

Client: I told her there's something wrong with the baby

Interrogator 1: ok, then what?

Interrogator 2: what she do?

Client: we both panicked. We both panicked. And then at first she wanted to go to the hospital and I told her no

Interrogator 1: why not?

Client: because I was afraid

Interrogator 1: ok

Interrogator 2: afraid of what you did?

Interrogator 1: afraid to get in trouble?

Client: [nods head and whispers yes]

Interrogator 1: ok that's understandable. And then what? Did you guys try and revive the baby or?

Client: I tried

Interrogator 1: what you do?

Client: I gave mouth CPR

Interrogator 1: ok

Client: I know how to do that

Interrogator 1: what did Girlfriend do?

Client: I tried pumping on his chest, back into his mouth. She did the same
Interrogator 1: ok, she did the same, you guys do anything else?
Client: he was gone

PROMISES MADE BY DETECTIVE DURING INTERROGATION

19:53

"We know what happened between you. And I know this happened on multiple occasions. Okay. And I know you want to deny it. Of course you don't want to get in trouble. But, you know... this is something that you need help with. Then, if you go before a judge and we take an approach that you need help, that will help this whole thing go smoother. Do you understand where I'm going with this?"

21:39

"Okay, I want you to think about this for a couple minutes, okay, and just wrap your head around this because you saying that you didn't do it is not going to make this go away, okay? This is very serious stuff. And I know this is embarrassing to be here for these types of allegations but I talk about this stuff all day, this is nothing new to me. And, you know, if this is something that, like I said, you need help with then this is where it starts, okay? Is you have to admit that this is what is going on with you and you have to understand that this is not okay."

28:59-32:27

"Did something happen to you when you were growing up? Did anybody bother you when you were a little kid?"

[Nnh nnh. I just grew up. I just... I don't know.]

"Was your father good to you? [Um hmm.] Was there any other men in your life?"

[My uncles, my uncle and my other cousins.]

"Okay. Were they all good to you?"

[Um hmm. Never did nothing to me.]

"No? You think back, nothing, are you sure? [Um hmm.] Because you could tell me, you know what I mean? It's nothing to be ashamed of because when you're a child you can't blame yourself for anything like that that happens to you. It's nothing that you bring on yourself, it's not your fault, when that stuff happens. And I'm just trying to find out maybe... you know... how this, how this may have gotten in your mind."

[same monologue @ 30:19]

Because... I want you to have the right attitude about this. Because like I said to you before, I'm trying to get a complete picture. Any way you look at it I want a complete picture. And if you go up in front of a judge and you're, you know, resisting the whole situation and, you know, being belligerent, it's going to affect how they treat you. And if

EXCERPT FROM RECORDED INTERROGATION IN SEX CASE

you can come forward and act apologetic, it changes the way that they're going to handle it. You know what I'm trying to say?"

[same monologue @ 31:01]

"Because I'm working with the DA's office on this, alright? And we're trying to make a decision about how to go forward, okay? And the more forthcoming you are the more that they can try and help you and figure out a way to see this through, maybe recommend therapy... um, and, adjust the charges, okay? So it's important that we talk about this and we're upfront about what happened so that this goes as smoothly as possible, okay?"

[same monologue @ 31:40]

So we're here in an open dialogue, I'm all ears, and I want to understand you, where you're coming from, and if you... you know, you made a mistake, and I'm sure you know that, that you made a mistake, and some part of you is sorry for it because I'm sure you don't want to hurt the boy, you know. Like you said, he's a good kid. There's some things going on in your head and I'm trying to understand what that is. Alright, so, you know, I'm not in a rush here, I'm just trying to find out from your point of view, you know, what was going through your mind."

mr-c

Retired Detective [REDACTED] - People - Cross

1 Manager in the Real Time Crime Van?

2 Q. You said that you took witness number 3 into the van?

3 A. Yes.

4 Q. And that you used the Photo Manager system to generate
5 a series of photos to show that witness?

6 A. Yes, correct.

7 Q. And you put information into the system to generate
8 these photographs?

9 A. I don't know if I did it directly or done by another
10 detective. But, yes, it was.

11 Q. And to your recollection, the information that you
12 input was male Hispanic, heavysset, 40's, right?

13 A. To the best of my recollection, I think that's the
14 information I input.

15 Q. My question is, does the Photo Manager system have the
16 ability to save that descriptive information that you or another
17 detective input into the system?

18 A. No, it does not.

19 Q. It's impossible to save that information?

20 MS. ^{PROX} [REDACTED]: Objection.

21 THE COURT: Overruled.

22 A. I am not a computer technician. I don't believe it
23 saved. When you request a photo line-up, you can -- it saves it
24 under your tax ID number.

25 Q. You received training in how to use the Photo Manager

1 system?

2 A. Yes.

3 Q. When you had that training, you were not informed of a
4 way to save the descriptive information you put into that system
5 to generate photographs?

6 A. The only time that we would save it is when you were
7 producing a photo array, which you would show to a witness with
8 a known perp. in it, then it's saved.

9 Q. I'm not talking about your practice --

10 MS. GUARNIERI: Objection, Your Honor. I would
11 ask that the witness be allowed to finished.

12 THE COURT: Overruled.

13 A. I don't understand your question.

14 Q. Okay. Your response that your practice by NYPD is that
15 you do not save it unless it's used for a photo array?

16 A. I didn't say my practice. I stated as far as I know it
17 was not saved.

18 Q. It's impossible to do so, as far as you know?

19 A. I have never had the need to review another person
20 viewing photos again to show the same number of photos.

21 Q. But you had a spiral notebook with you?

22 A. Yes.

23 Q. And you write these things in the spiral notebook
24 during the course of your investigation?

25 A. Yes.

1 Q. And you have written down the descriptive information
2 that you put into the Photo Manager to generate the photos,
3 right?

4 MS. ^{Prop} [REDACTED]: Objection, Your Honor.

5 THE COURT: Yes?

6 MS. ^{Prop} [REDACTED]: I'm sorry. Calls for speculation.

7 THE COURT: Overruled.

8 A. Like I said before, I don't recall if I put the
9 information in the computer or another detective did.

10 Q. Well, you testified about specific descriptive
11 characteristics that were input in the Photo Manager, right?

12 A. Yes.

13 Q. And that's your independent recollection of what
14 happened almost three years ago?

15 A. Yes, to the best of my recollection.

16 Q. And you didn't, in fact, write that down anywhere?

17 A. Like I said, I don't recall if I put the information in
18 myself or another detective might have.

19 Q. Well, whether you did it yourself or whether you were
20 aware and informed another detective of what to put in there,
21 the question is, did you write it down?

22 A. No.

23 Q. And you did have your spiral notebook?

24 A. Yes.

25 Q. And you had a pen?

1 A. Yes.

2 Q. Now, do you remember how many photos were generated in
3 response to the descriptive information that was input into the
4 Photo Manager?

5 A. Not a specific number, no.

6 Q. Do you have a good idea of the range?

7 A. It could have been a couple of hundred photos.

8 Q. Do you know how long witness number 3 spent looking at
9 photographs on the Photo Manager that day?

10 A. About 10, 15 minutes.

11 Q. And did you observe that witness as witness number 3
12 went through photographs?

13 A. I was there in the van, yes.

14 Q. Okay. And each time a page was coming up, there were
15 six individual photographs displayed to the witness, right?

16 A. Yes.

17 Q. And the witness has an opportunity to select one of
18 those photographs or move to a new set of six photographs,
19 right?

20 A. You can go forward or backwards on the pages, yes.

21 Q. And did you make any notations as to the manner in
22 which the witness proceeded through the photographs displayed?

23 A. No.

24 Q. So you have no idea whether the witness spent any
25 amount of time with any six pack?

1 A. No.

2 Q. Or whether the witness sought to go back to pictures
3 previously viewed?

4 A. No.

5 Q. Over how many pictures total the witness viewed?

6 A. No.

7 Q. Or how many pictures of the same individual may have
8 been displayed to that witness?

9 A. No.

10 Q. And whether, in fact, a picture of Mr. ^{Client} [REDACTED] was ever
11 displayed in that photo array in any of those photo arrays?

12 A. Based on the description, his description, his photo
13 would not have come up on that.

14 Q. Well, that's the description from the arrest pedigree
15 information that you used to generate the wanted poster, right?

16 A. Correct.

17 Q. And at some point after Mr. ^{Client} [REDACTED] was arrested, did
18 you have an occasion to generate or look into his criminal
19 history?

20 A. I looked into his criminal history before I generated
21 that.

22 Q. And you were aware that Mr. ^{Client} [REDACTED] has numerous
23 arrests, right?

24 A. Yes.

25 Q. And that, as you indicated, each time a person is

1 21 photos. * * * * *

2 Q. But you are aware, you looked at the DCJS eJustice RAP
3 sheet, right?

4 A. Yes.

5 Q. And that indicates something like 76 arrests?

6 A. Correct.

7 Q. And you don't know whether any of those other
8 photographs were entered into the Photo Manager?

9 A. To the best of my knowledge, Photo Manager may have
10 come into use maybe in the year 1997 or 1998. Previous photos
11 that were taken of persons might have been in the previous
12 system, which you called the PIMS system. That system I can't
13 state for sure because I didn't know the program. But I don't
14 believe that they sent those pictures or put them in the new
15 system, in the Photo Manager system.

16 Q. But you don't know that for sure?

17 A. I can't state that for sure.

18 Q. Now, you had witness number 3 view photographs on the
19 Photo Manager in the van outside of the shooting location,
20 right?

21 A. Yes.

22 Q. And as you said, you don't know how many photographs
23 total that witness viewed?

24 A. I can't state for sure, no.

25 Q. You don't know how long he spent viewing these, each

1 individual photograph?

2 A. He might have been there 10, 15 minutes to the best of
3 my recollection.

4 Q. So you don't know whether he went back and forth in any
5 sequence of six packs?

6 A. No.

7 Q. You didn't record in any descriptive information that
8 you entered or someone entered in the Photo Manager?

9 A. No, ma'am.

10 Q. And as far as you're aware, was the Photo Manager able
11 to do a search of, "heavyset," this was one of the words that
12 you had used?

13 A. Yes, "heavyset," that is a term that you can use. You
14 don't have to use a specific weight to generate a result. You
15 can use either or.

16 Q. And witness number 3 did not select anyone from the
17 photographs he viewed on the Photo Manager?

18 A. That is correct.

19 Q. He didn't indicate that there were any that were a
20 possibility?

21 A. Not to my recollection, no.

22 Q. And if he had done so, you would have recorded that
23 somewhere?

24 A. Yes.

25 Q. And there is nothing in your notes, or spiral or DD-5s

Excerpt From Actual Hearing

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Q. After you spoke with Mr. ~~XXXXXX~~ ^{Complainant} about what happened to him on January the 23rd, 2014, you set him up on the Photo Manager; is that correct?

A. That's correct.

1 Q. You had him view a series of images of black men with
2 the address listed at 1368 Webster Avenue, who were in the
3 police system; is that correct?

4 A. Correct.

5 Q. And when he was on Photo Manager, Mr. [REDACTED] ^{complainant} could look
6 at each picture individually and click to move to the following
7 picture; is that correct?

8 A. That's correct.

9 Q. And Mr. [REDACTED] ^{complainant} during that -- withdrawn.

10 While viewing those photographs, Mr. Reyes did see an
11 image of Mr. [REDACTED] ^{Client}, correct?

12 A. Yes, he did.

13 Q. And that image appeared on his screen as the 13th
14 photograph that he viewed; is that correct?

15 A. Yes, it was.

16 Q. After he viewed that photograph, he viewed
17 approximately 67 other images, correct?

18 A. I know that he viewed more images, but I am not sure of
19 the exact number.

20 MR. [REDACTED] ^{Defense Counsel} I will ask the Assistant District
21 Attorney if she would stipulate to admitting the mugshot
22 viewing report at this time?

23 ADA [REDACTED]: That's fine.

24 No objection.

25 THE COURT: Thank you.

1 Q. So the ID procedure did not conclude when Mr. [REDACTED] ^{complaint}
2 first viewed Mr. [REDACTED] ^{CLINT}'s photograph at the 13th spot; is that
3 correct?

4 A. He did --

5 Q. I will --

6 ADA [REDACTED]: Counsel.

7 THE COURT: Finish your answer, detective.

8 A. He did ID him on the 13th photo, but he kept looking at
9 other photos.

10 So, yes, he did ID him on the 13th picture, but he
11 kept looking at photos, so I don't know which way to answer
12 that.

13 Q. So, the question is: Mr. [REDACTED] ^{complaint}
14 for a suspect after he viewed Mr. [REDACTED] ^{CLINT}'s photograph in the 13th
15 position; is that correct?

16 ADA [REDACTED]: Objection as to "suspect".

17 THE COURT: Overruled.

18 ADA [REDACTED]: The characterization.

19 THE COURT: I'm sorry.

20 ADA CAMPBELL: Objection as to the form of the
21 question, in looking for a suspect.

22 What the detective testified was that he ID'ed him
23 on the 13th photo but he kept looking at the photos.

24 THE COURT: Rephrase it.

25 Q. Mr. [REDACTED] ^{complaint} continued to look at the Photo Manager

1 photographs looking for a perpetrator after he viewed Mr. [REDACTED]'s
2 photograph in the 13th position; is that correct?

3 A. He continued looking. I don't know why he kept
4 looking, you know, I can't say that specifically, if he
5 continued to try to -- he already ID'ed him on the 13th one, he
6 just continued viewing the other photos.

7 Q. When he saw Mr. [REDACTED] ^{Client}'s photograph on January the 23rd
8 in the 13th position, he didn't tell you this is the man who cut
9 me?

10 A. He said it looks like the person who cut me without the
11 hair.

12 Q. What did you tell him?

13 A. Well, I don't remember the exact words I said, but I
14 was a little confused with him saying "without the hair",
15 because obviously he has dreadlocks in the picture that he
16 picked.

17 I didn't understand why he didn't know that he had
18 dreadlocks at that time.

19 Q. Aside from what you didn't understand what did you say,
20 if anything, to Mr. [REDACTED] ^{complaint}?

21 A. I don't remember exactly what I said.

22 Q. But you do know that Mr. [REDACTED] ^{complaint} looked at a number of
23 photographs --

24 THE COURT: We have already been through this.

25 Q. At what point did you conclude the Photo Manager

COMMITTEE ON COURTS AND LEGAL SERVICES

AND

COMMITTEE ON PUBLIC SAFETY

***Wrongful Convictions: Using Evidence-Based Procedures and
Technology to Keep Innocent People Out of Jail***



Testimony of the

**OFFICE OF THE
RICHMOND COUNTY DISTRICT ATTORNEY**

September 23, 2016

Thank you for the opportunity to present testimony today on this important topic.

Wrongful convictions not only negatively impact those who are falsely accused and imprisoned, they deny the victim of the crime, and the community at large, a proper accounting from the true perpetrator of the crime. They also undermine the integrity of our criminal justice system and the trust that the public has in our law enforcement institutions. That trust is a fundamental building block of our democracy and an important safeguard in protecting public safety in our communities.

As a prosecutorial agency that represents the People, the Richmond County District Attorney's Office (RCDA) recognizes the role we play in maintaining the confidence the public has in our criminal justice system and the obligation we owe under our sacred public oath to both prevent wrongful convictions on the front-end of the criminal justice process, and to ensure the validity of our convictions by providing a fair process of review and reflection on the back-end.

In today's testimony, we will discuss the methods employed within our office to effectuate this role and the ways in which we can commit to improve and better ensure the public's confidence in our conviction review process in the future.

Preventing Wrongful Convictions - Promoting an Ethical Office Culture

While there is no question that it is important to have a process for conviction review at the end of the deliberative legal process, it is perhaps even more important for prosecutorial agencies to take actions and enact policies that prevent wrongful convictions from ever occurring. At RCDA, we have implemented several strategies with this goal in mind, and have benefitted from developments in evidence-based techniques and technologies to that end.

First, every Assistant District Attorney who has been appointed by District Attorney McMahon is provided with a “*Statement of the District Attorney*,” signed by the District Attorney, which highlights his expectation that those in his employ “do the right thing.” Among other directives, the District Attorney instructs the legal staff that “...*you are not expected to win every case.*” A copy of a handbook created by the District Attorney’s Association entitled “*The Right Thing*” is also distributed to each prosecutor on staff. Furthermore, each ADA is provided a copy of the New York Rules of Professional Conduct. These efforts illustrate a commitment by RCDA to foster and promote a “culture of ethical compliance” that directs ADAs to respect and adhere to strict ethical guidelines in the performance of their duties at every step of the legal process, and to inculcate in them a sense that they all have a responsibility to prevent a wrongful conviction at each and every stage of a criminal prosecution.

Second, our office conducts internal Continuing Legal Education trainings, and sends ADAs to outside trainings, in the area of ethics to reinforce the commitment to the ethical obligations our legal staff must uphold as public prosecutors.

Third, RCDA assigns at an early stage two ADAs to every felony case that goes to trial. That team generally includes at least one senior ADA. This approach gives every case an experienced hand, and second set of eyes, in reviewing the available evidence. As an added component, RCDA has recently implemented a policy of conducting trial briefings where both ADAs assigned to a case must present the facts and relevant evidence to members of the Executive Team and the most senior ADAs in the office for review within the first 90-days of a case life. At this briefing, ADAs are advised and reminded by the most senior trial attorneys within the office to exercise their ethical obligations and to examine and carefully review each piece of evidence and facet of a case.

Utilizing Evidence-Based Techniques and Technology

Regarding interrogations, the NYPD now videotapes all stationhouse interrogations in all precincts, including the four located on Staten Island, after substantial collaboration during the pilot phase by this office and the other four District Attorneys' offices. This use of technology serves to instill confidence in the integrity of the investigative process by allowing the prosecutor, the defense counsel, the judge, and the jury to see for themselves what took place during the course of an interrogation that culminated in a confession.

Regarding identification evidence, the NYPD has instituted department-wide identification protocols for both photographic and corporeal identifications, once again, with substantial input from this office and the other four District Attorneys' offices. These protocols standardized the manner in which investigators interact with witnesses, and the questions posed to them, in an effort to avoid an instance of misidentification.

The Richmond County District Attorney Office's Conviction Review Committee

In recognizing the utmost importance of preserving the integrity of convictions in our jurisdiction, RCDA accepts cases for review and assigns those cases to a Committee comprised of two members of the office's Executive Team, both senior ADAs with significant trial and investigatory experience, for their independent analysis and determination as to whether an extensive review is warranted. If the case is determined by one or both of these Executives to warrant further analysis, an intensive and collaborative effort is undertaken, in conjunction with the leadership of RCDA's Appeals Bureau, to review the case from beginning to end. Such evaluations may include reviews of original case files, evidentiary findings, and trial minutes, as well as newly conducted interviews by detective investigators, who work for the District

Attorney, of witnesses, victims, police officers, trial prosecutors, counsel for the defendant, and where appropriate, the defendant. At the end of this extensive effort, the Committee, again in collaboration with the leadership of the Appeals Bureau, discusses their findings and presents a recommendation to the District Attorney for further action.

Unlike some of the City's larger boroughs, Staten Island has, to date, not had the volume of cases, such that it has necessitated the creation of a separate and unique unit to undertake the conviction review process. With our current volume, we have found that the process described above, which prioritizes the involvement of RCDA's most senior ADAs, to be a more meaningful and effective one. That said, we acknowledge that there are ways that we might improve and increase transparency and public access to this function within our office. As such, the District Attorney has committed to publishing information regarding the RCDA Conviction Review Committee and its process to our website and other public forums, which will include information regarding how and where requests for review can be made and what those requests should contain. And, in the future, if the volume of cases increases or the need were to arise, we would remain open to adjusting our process or, if resources allowed, to creating a distinct conviction review unit solely dedicated to this effort.

Thank you again for your attention to this important issue. We look forward to the feedback provided from this Council and the experiences offered from the other District Attorneys throughout the City.



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September 23, 2016

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Hon. Vanessa L. Gibson
New York City Council
Chair, Public Safety Committee
250 Broadway
New York, New York 10007

Hon. Rory I. Lancman
New York City Council
Chair, Committee on Courts and Legal Services
250 Broadway
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Dear Committee Chairs:

The Queens County District Attorney's Office - over the past 25 years, under the leadership provided by former Appellate Division Justice Richard A. Brown - is committed to doing everything in its power to prevent wrongful convictions and to set them aside when they are, unfortunately, found to have occurred.

The District Attorney's views - and his commitment - are more fully set forth in the annexed article dated September 15, 2008, which is based upon remarks delivered by him at the New York State Judicial Institute in White Plains on October 28, 2003.

* * * *

The District Attorney believes that it is the responsibility of everyone in our office to prevent wrongful convictions and that should a claim be raised that someone has been wrongfully convicted or is being wrongfully prosecuted to promptly and thoroughly investigate that claim to ensure that justice is done. It is his view that responsibility must be shared by everyone in our office - "in particular, his senior staff" - and not delegated to one unit and/or a handful of assistants. The course that we have followed has both consistently prevented wrongful convictions in the first place and dealt with those situations where a wrongful conviction, regrettably, has occurred.

It is to that end that experience has shown that the best protection against a wrongful conviction is to avoid a wrongful prosecution in the first place. Since 1996, when our office established our Felony Waiver/No Plea Policy, the immediate and apparent benefits to law enforcement included a more focused use of office and police resources devoted to cases that were destined to be litigated and not resolved by way of plea. However, a residual benefit that is more subtle is that under our policy, prior to indictment, assistants and defense counsel must engage in meaningful discussions about the specific strengths and weaknesses of the evidence against a defendant. And it is during these

discussions that a defendant's claim of innocence is triggered - at the critical moment when memories are fresh, evidence is still available, before witnesses move, become ill or even die, before construction changes locations, and while surveillance videos are most likely to be retrievable. It is this process and those discussions which, at the earliest date, will lead to the most thorough and comprehensive investigation possible and will most likely exonerate an innocent defendant, thereby sparing him the possibility of enduring the tragedy of a wrongful conviction, much less the tensions associated with a lengthy prosecution. This Felony Waiver Policy, in conjunction with our pre-arraignment interview program of those arrested and suspected of crime, helps provide us with not only the best evidence of guilt, but also the best opportunity of identifying the case where an individual has been wrongly accused of a crime.

We recognize that despite the robust systems that we have in place to prevent wrongful convictions, the tragedy of a wrongful conviction may nonetheless occur. Over the last two decades the office has exonerated several individuals wrongly convicted of serious crimes and in the midst of serving lengthy sentences. Judge Brown has long since concluded that these claims and the attendant investigations are best screened and conducted by members of the office's executive staff - the most experienced and dedicated members of the office. As these investigations are undertaken, no resource is spared and the progress of every investigative lead and initiative is reported directly to the District Attorney. Each of these investigations is time consuming, involving the examination of events that occurred perhaps more than a decade in the past, requiring the locating of many witnesses, among which are often several with no interest in cooperating, as well as the retrieving of physical evidence or perhaps examining ancient medical or telephone records, prison documents or police files, many of which are often incomplete and always deeply archived.

A review of cases that we have re-investigated and set aside reveals that the large majority of these wrongful convictions resulted during the 1990's, before our office's Felony Waiver Policy and pre-arraignment interview program were instituted. Where other offices are currently reviewing cases from the same era, it is obvious that our office previously conducted those important investigations.

Our office has a well-deserved reputation for fairness in the criminal justice community and we encourage defense counsel to approach us immediately if reason exists to believe that an individual has been wrongly accused or convicted. Simply stated, there is no time that is too late for us to listen to a genuine claim of innocence.

As a result of the attention brought to the tragedy of wrongful convictions, more claims are being made than ever before - several by individuals manifestly guilty of committing some of the county's most infamous crimes. Recent experience has shown that although more claims are being made, few of them prove to be genuine or substantive. Indeed, over the past two years, several members of our office's executive staff have spent untold hours engaged in litigating claims that court proceedings have proved to be untrue. Actually, in the case of Anthony Nwobi, for example, our investigation of his murder conviction revealed his media reported claims to be entirely untrue, but we detected other information favorable to him and we brought it to the court's attention and equitably adjusted Nwobi's sentence as a result.

After thoughtful review, we have concluded that we have avoided a cluster of wrongful convictions materializing at the same time by addressing the claims as they arose over the years. Since District Attorney Brown took office in 1991, we have readily undertaken review of cases

whenever a real issue is presented as to a defendant's guilt because we firmly believe that one conviction of an innocent person is one too many. We respect the fact that some other offices have chosen a different path to the same goal. We have confidence in the path that we have chosen and the full resources of the office are available to accomplish the goal of "getting it right" and achieving justice for all.

So, to most accurately answer the question so frequently posed to our office - whether we have a conviction review unit? The answer is yes. It consists of every man and woman in the Queens District Attorney's Office. It was established on June 1, 1991 - the day that Judge Brown took office, and has continued every day since.

Finally, you should all be cognizant of the significant efforts being made by the District Attorneys Association of New York's Best Practices Committee to develop the most robust identification procedures and concise protocols for the recording of suspect interrogations to help ensure that law enforcement throughout the City and State is utilizing the best methods available to investigate and prosecute crime. As a member of the sub-committee that produced the comprehensive protocols for both identification procedures and the recording of interrogations in 2010, I have spent considerable time training members of law enforcement all around the State on these improved practices and we remain gratified by the near universal adoption of these protocols by police agencies of all sizes throughout the State. I have taken the liberty of attaching various documents relevant to those endeavors for your consideration.

Thank you for the opportunity to provide my thoughts regarding this important topic. I remain available to discuss these matters at our mutual convenience.

Very truly yours,



Robert J. Masters
Executive Assistant District Attorney
Legal Affairs

Attachments
cc: Josh Hanshaft

Reducing Senior Social Isolation

Testimony to the NYC Council Committee on Aging
Submitted by Dr. Cynthia Maurer, Executive Director
Visiting Neighbors, Inc.
September 22, 2016

Isolation, fear and loneliness are serious issues many older New Yorkers face. For the past 44 years, Visiting Neighbors has been dedicated to reducing seniors' loneliness and isolation, major factors contributing to depression, illness and accidents which all too often result in seniors suffering injuries and being forced prematurely into nursing homes or worse.

We are experts at dealing with these issues. Our two primary programs, Friendly Visiting and Shop & Escort, provide vital services and help keep seniors connected with their community. Our dedicated volunteers, recruited, trained and supervised by our professional staff, serve as eyes and ears for our staff, alerting us immediately of any change in a senior's condition so the seniors can get the help they need before an emergency arises. We are a core service. Every day, we see the toll that loneliness and isolation take.

Our award-winning programs are successful because of the individual attention each senior receives. We know their needs, their fears and concerns, their likes and dislikes. Whether our volunteers are matched with a senior who they visit each week, or if they are escorting a senior to a medical appointment or helping them with shopping, they provide a trusted link to the outside world and an empathetic ear. Just because a senior is getting food delivered and seeing their doctors doesn't solve the problem of isolation, but knowing that VN is there checking in on them regularly makes all the difference in the world.

Many seniors, who have lost their families and friends, are hesitant to open their hearts to a new relationship. Our volunteers are trained to understand and accept the barriers that some seniors may construct to protect themselves, even though these barriers may not really be in the seniors' best interest. While isolation may be painful, we understand why many are resistant to someone or something new. We work closely with

both our seniors and volunteers to help ensure the success of our matches because we know the benefits the new relationship will have for the senior.

For more than four decades, we have built a network of partners who share our concern for our community's elderly. Seniors know they can count on our volunteers, and our volunteers know that our professional staff is always available to them.

While senior centers provide a creative outlet for those who are able to attend, most do not address the needs of homebound or frail seniors. Funding a program like ours is the solution. At Visiting Neighbors, we encourage those seniors who are mobile to attend their local senior center because we recognize the value of social interaction. We are expert at dealing with seniors' resistance. We encourage them to interact with our staff in a more intimate setting such as a small group discussion in our office, and we then follow that up with escorting them to their local senior center for the first few visits. Over the years, we have found that once our volunteers escort their seniors to their local senior center for the first few visits. It's often the first few visits to the senior center that may intimidate the senior. By having someone such as a Visiting Neighbors' volunteer accompany them, it becomes much less daunting for a senior to take this valuable step.

Visiting Neighbors is uniquely positioned to get seniors out into their community and when homebound bring the outside world to them. We provide a steady arm to lean on, encouragement and emotional support. For a senior who may be facing physical and emotional challenges, having a trusted friend can make all the difference. We pride ourselves on the dedication and commitment of our professional staff and volunteers.

By providing more funding for Visiting Neighbors' core programs of Friendly Visiting and Shop & Escort, we will get more seniors to senior centers to enjoy the emotional and physical benefits.

Cynthia Maurer, Ph.D., Executive Director
Visiting Neighbors, Inc.

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Outside Counsel

Police and District Attorneys Endorse Video Recording of Interrogations

Kristine Hamann

New York Law Journal, August 08, 2011



Kristine Hamann

New York State's law enforcement has made dramatic progress toward its goal of video recording the entire custodial interview of a suspect. This goal is the culmination of a gradual shift in approach from the days when only summary statements from suspects were recorded. On Dec. 14, 2010, the endorsement of video recording interrogations and statewide protocols spearheaded by the Best Practices Committee of the District Attorneys Association¹ was announced in a press conference led by Derek Champagne, District Attorney of Franklin County and president of the District Attorneys Association.

The statewide protocols were based on a review by the Best Practices Committee of early video recording pilot projects. The review was conducted in conjunction with the New York City Police Department (NYPD), the New York State Police, the state Chiefs of Police Association, and the state Sheriff's Association. After many conversations and drafts between police and district attorneys, a state standard emerged that could be used in all jurisdictions—urban, rural and suburban. As the protocols were created by experienced members of law enforcement, they reflected the practical realities of investigations and crime fighting, as well as regional differences.

Development of Pilot Projects

The pilot projects have demonstrated that when the entire police interrogation is recorded, no words will be forgotten, no nuances will be lost, and the conduct of the questioner and the questioned can be fully evaluated. The ability to solve crimes is enhanced because a suspect's own words can be reviewed in detail and analyzed in the light of the other evidence of the case. Though experience shows that guilty suspects rarely provide fully candid statements to the police, what they say or do not say to the police is revealing and probative.

Video recording is equally important to assess the possibility of a false confession. A review of wrongful convictions has demonstrated that false confessions are possible, even when the confession is to an extremely serious crime such as rape or murder. Some argue that juveniles or those who are mentally impaired may be especially susceptible to making a false confession. This issue, as well as any others that could affect the voluntariness and truthfulness of a suspect's statement, can be resolved by viewing a video recording of the entire interrogation.

Judges and juries will have a firm basis upon which to evaluate the entire questioning process. Did the police supply the suspect with critical evidence? Was the suspect coerced or threatened? Did the suspect appear to understand the questions? Was the suspect susceptible to suggestion? Questions such as these can be resolved by reviewing the recording.

District Attorney Gerald Mollen of Broome County, which includes the city of Binghamton, was the first law enforcement official in New York State to advocate for the full video recording of interrogations. After an evidence-tampering scandal in the early '90s, where the police falsified fingerprints in several cases, Mr. Mollen believed that there had to be a better way to preserve critical evidence. With little funding, but a great deal of conviction and resolve, he began in 1993 to use his significant persuasive powers to convince his police departments to create video-recording facilities. Over the course of the next decade, one department after another changed their practices and began recording the entirety of a defendant's interrogation in major felony cases.

Initially Mr. Mollen was met with a great deal of resistance, but as the officers grew more comfortable with the technology, their opposition turned to support. They soon discovered that the recordings were helpful to the prosecution of the case. Valuable details of a defendant's statement were preserved, claims of improper police behavior were easily thwarted, and juries could evaluate the credibility of the defendant's statements on their own.

Mr. Mollen had many visitors who came to see what he had accomplished. His vision began to be replicated in other areas of the state through pilot projects. Starting in 2006, grants from the Division of Criminal Justice Services (DCJS) and from the New York State Bar Association spurred the creation of additional video-recording facilities. With this financial support, the police departments in Rochester and Schenectady joined in, nudged along by District Attorneys Michael Green and Robert Carney. Gradually, video-recording facilities were being opened in small police departments in counties all around the state, including Cayuga, Chenango, Chautauqua, Clinton, Columbia, Dutchess, Franklin, Fulton, Genesee, Greene, Herkimer, Jefferson, Madison, Niagara, Oneida, Ontario, Orange, Otsego, Rensselaer, Sullivan, Tioga, Ulster, Washington and Wyoming.

The pilot projects allow law enforcement to experiment with various protocols and equipment and provide an opportunity to see how the recordings play out in a trial. It has taken up to two years from the time a grant application is submitted to getting an interview location up and running. Some departments will share facilities; other departments will need several facilities depending on geography

and volume of arrests. Since there are more than 550 police departments in New York State, there is much work to be done.

In May 2011, DCJS announced \$477,846 in grants have been awarded to 22 upstate counties for either initial implementation or further expansion of video-recording facilities.² In all, DCJS has invested more than \$2 million in federal grant money to support this initiative. The state bar contributed \$200,000. With the awarding of these grants, 58 of the state's 62 counties in New York State either have at least one video-recording facility in a police department or are in the process of implementing a facility.³

Video Recording Protocols

The protocols developed by the Best Practices Committee with the state's police agencies provide guidance as to when and how to conduct a video-recorded interrogation of a suspect in custody on a qualifying offense. A series of circumstances where recording may not be practicable is outlined, for example, the equipment breaks, the interview room is in use, the suspect refuses to be recorded, or the suspect is at a location that has no recording device. Similarly, statements are not expected to be recorded if the statement is made spontaneously or if a suspect is questioned in the field about evidence critical to the investigation, such as "Where is the gun?" or "Where is your accomplice?"

The offenses qualifying for recording are left to the discretion of each jurisdiction. Some departments have begun with homicides, while others have chosen to begin with less serious crimes so that the kinks are worked out with less significant consequences. Already these growing pains are being resolved and the numbers of qualifying offenses are expanding where resources and logistics permit. In jurisdictions where video recording is well established, such as Broome, Monroe, Albany and Schenectady counties, some departments record all felonies.

Capacity is a significant factor in choosing qualifying offenses. In New York State there were 585,000 adult arrests in 2010. It would be physically impossible to record statements made by suspects in all of these felonies and misdemeanors given the facilities and funding available. Choices must be made. The NYPD has two pilot programs, one in Brooklyn and one in the Bronx, where suspects charged with felonious assault are video-recorded. From these two programs, NYPD will work through the technical and logistical issues that arise in a big city.

The protocols allow the police departments to choose whether to have the camera in view or hidden from the suspect. If the camera is covert, as most are, the investigator is required by the protocols to tell the suspect that the interrogation is being recorded only if the suspect inquires.

Legal issues are also addressed. The protocols alert the officer to the suspect's right to remain silent, the right to counsel, and the suspect's rights when an attorney comes to the police facility. For the questioning of a juvenile, the protocols suggest the use of simplified Miranda warnings that make it easier for a juvenile to understand his rights. However, these are complex issues, which cannot be fully explained in a protocol. Thus, training on these legal issues, as well as on the practical implementation

of video recording interrogations, is being conducted by DCJS, with the help of the Best Practices Committee.

Moving Forward

We have learned many lessons from the pilot programs. Technical problems plagued some of the new facilities, while logistics became an issue in others. In one homicide case, the soundproofing in the wall fell in front of the concealed microphone making the statement hard to hear; in another the audio and the video were not synchronized. Some found the position of the parties problematic, for example in the case where the fixed camera on the wall only recorded the side of a suspect's hoodie after he shifted in his chair. These problems are being resolved through shared experience.

In these difficult financial times, cost remains a significant issue. Video-recording is expensive. Though cameras and DVDs are reasonably priced—the costs range anywhere from \$5,000 to \$35,000 per room—they are just a small part of the overall budget needed to record statements. A soundproof room must be built, with proper lighting and sound recording abilities. Recordings have to be copied, stored, redacted and transcribed. Translators are needed, particularly in counties where many languages are spoken. Grand jury rooms and courtrooms must be equipped to display the recordings. Since the statements are recorded from beginning to end, they can be very long. One statement extended over a 24-hour period. Someone must listen to the recording and evaluate its contents. This is a time-consuming task for law enforcement personnel. Finally, equipment must also be upgraded and replaced as the project moves forward.

Despite the financial obstacles, video recording of interrogations has taken hold in New York. It is a program that helps law enforcement and suspects alike. With the generous funding from DCJS and the state bar, the state has moved far toward its goal of video recording all felonies. Studies are needed to evaluate its overall effect on the criminal justice system. Questions include: Are there more pleas and fewer trials? Are there fewer wrongful convictions? Does it inhibit a suspect's willingness to speak? Does it improve our ability to solve crimes? These questions will be answered as we move forward. In the meantime, we know that the video recording of interrogations will continue to expand and that New York is well served by creating a more transparent and open criminal justice system.

Kristine Hamann is executive assistant district attorney, Office of the Special Narcotics Prosecutor, and chair of the District Attorneys Association's Best Practices Committee. Lois Raff, counsel in the Queens District Attorney's Office, assisted in the preparation of this article.

Endnotes:

1. The Best Practices Committee, formed in 2009, is made up of district attorneys and experienced assistant district attorneys from 30 New York State counties of every size. It is a sub-committee of the Fair and Ethical Administration of Justice Committee, which is chaired by District Attorney William Fitzpatrick of Onondaga County. The committee's last major initiative was the development of statewide identification procedures that have been adopted by law enforcement around the state. See [NYLJ, Dec.](#)

[14, 2010](#). The identification procedures have been implemented or are in the process of being implemented in police departments around the state.

2. The counties receiving this funding are: Allegany, Cayuga, Chenango, Delaware, Dutchess, Essex, Jefferson, Lewis, Montgomery, Oneida, Onondaga, Oswego, Orange, Orleans, Putnam, Saratoga, Schuyler, St. Lawrence, Steuben, Wayne, Westchester and Yates.

3. Manhattan, Queens, Bronx, Staten Island and Brooklyn have video-recording capabilities in their District Attorneys' Offices and are awaiting the results of the NYPD pilot programs in Brooklyn and the Bronx.



Cyrus R. Vance, Jr.
New York County District Attorney

**Testimony Submitted to the New York City Council
Committees on Public Safety and Courts and Legal Services**

September 23, 2016

I thank the New York City Council for allowing me to submit this testimony regarding my Office's efforts to address the problem of wrongful convictions. This testimony will set forth the steps that my Office has taken to enhance the integrity of our prosecutions, and the procedures that we have developed for assessing, investigating, and acting upon claims of "actual innocence" following the entry of judgments of conviction.

Ensuring the integrity of all convictions is, of course, critically important for innocent defendants wrongfully convicted. But it is also important for victims, who want finality for the injuries that they have suffered, and for all members of the public, for whom the legitimacy of the criminal justice system must remain beyond reproach.

A. The Conviction Integrity Program

Many of the steps and programs that are described below were established under the aegis of my Office's Conviction Integrity Program ("CIP"), which I established shortly after I took office in 2010. We were the first prosecutor's office in New York State, and one of the first in the country, to have such a program. CIP's work is both forward-looking – implementing policies and procedures to prevent wrongful convictions before they take place – and backward-looking – addressing post-conviction claims of actual innocence.

B. Preventing Wrongful Convictions Before They Happen

1. Checklists and Standard Questions

One of CIP's first steps was to assemble teams of some of our most experienced and thoughtful assistant district attorneys, as well as a panel of outside advisors, including Barry Scheck of the Innocence Project. We asked them to consider topics that nationwide analyses of exoneration cases had identified as being problematic and as frequent sources of wrongful convictions. Those topics included: eyewitness identification; the use of informants; evaluation of police testimony; and preservation and disclosure of evidence favorable to the defendant. The teams of experienced ADAs and the outside panel worked together to ascertain the "best practices" in for each of the topics.

One of the products of this effort was the compilation of a set of questions to be asked in the initial analysis of every case. The compilation helps to ensure that our Assistants gather the right information and ask the right questions of witnesses at the outset of any case, so they can make well-informed decisions about whether to charge, who to charge, and what to charge.

CIP also looked beyond the legal community for lessons that would enhance the integrity of convictions. It is widely known that many non-legal professionals, most notably airplane pilots and surgeons, use checklists before every flight or operation. Use of checklists by even the most experienced professional helps to ensure that nothing is overlooked in the preparation for a serious flight or medical procedure. CIP has promoted the use of checklists in my office, so that our Assistants vet cases carefully at the outset. Such vetting will make it less likely that as the case proceeds to trial – or even after trial - they will find a critical flaw.

For example, in eyewitness testimony cases, particularly those involving one-witness identifications, our checklists direct the Assistant, at the outset of a case, to analyze the witness's opportunity to view the perpetrator. It further directs the Assistant to preserve the witness's first written or oral description of the perpetrator, and to investigate in detail any photographic or corporeal identification of the defendant. Most critically, the checklists encourage the Assistant to find independent evidence, such as cellphone tower or MetroCard records, that might place the accused at the scene of the crime, or that might establish an alibi. This information may be important to corroborate, or disprove, the one-witness identification.

One of the most important checklists we have developed is our *Brady/Giglio* checklist, which is designed to help ensure that Assistants identify and disclose to the defense any information that might be favorable to the defendant. In addition to the *Brady/Giglio* checklist, we have recently taken three additional steps to enhance disclosure to defendants: (a) We have articulated a presumption in favor of disclosing all material that is in our casefiles, even beyond that which is required by the law or the ethical rules; (b) we have expanded our disclosures with respect to law enforcement witness to include, for example, information about civil rights lawsuits filed against those witnesses; and (c) we have implemented a system to track deceitful civilian witnesses.

2. *Roundtables*

Convinced that deliberation with experienced colleagues leads to improved decisions in complex cases, we have established the practice of holding "round tables" for major or complex cases. Before such cases are presented to a grand jury, they are frequently presented to small groups of senior ADAs, who thoroughly vet the facts and investigative

steps in the case. The idea is simple: reduce the risk of prosecuting the wrong person, and through that process, strengthen the cases where we have identified the right person. Unfortunately, circumstances and the speedy trial rules sometimes make it impossible to present particular cases to the roundtable before they must be indicted; thus, not all cases can be round-tabled.

3. *Studying Pre-Trial Exonerations*

Recently, CIP has added another program to advance its mission. Sometimes Assistants realize before trial – it may be early in the investigation of a case, or on the eve of trial – that they have the wrong defendant. When they reach that realization, of course, the case must be dismissed immediately.

CIP has determined to review such instances of pre-trial exonerations to learn how Assistants came to realize that they had the wrong defendant, and how, if at all, they might have come to that realization earlier in the process. A representative of CIP therefore meets monthly with deputies from each of our Trial Bureaus to examine cases in which our own investigation (or information received from the defense or other sources) has demonstrated that the wrong person was arrested and charged. It is our hope that we will develop lessons from these cases for both Assistants and law enforcement (*e.g.*, police) to apply to future prosecutions.

Some of the cases that are examined become the basis for office-wide presentations that highlight the good investigative work that led to the “exoneration.” The purpose is not merely to teach our lawyers about specific case examples, but also to reinforce the message that good work that exonerates the innocent is recognized and valued, just as a significant conviction might be.

You may recognize what I have just described as being a form of “root cause analysis,” and indeed it is. We developed this program after meeting with experts in such analysis from the medical profession.

4. *The Implementation and Development of a Culture*

Of course, conviction integrity is not merely the work of one program or unit – it is a core mission of this Office. The steps that I have described have led to an evolution of the conscience and culture of the office. The steps are practical instances of the ideals of justice and integrity. Their implementation therefore transmits our highest values to new prosecutors, and reminds them that our duty is to do what is right in every case, wherever that leads.

C. **Post-Conviction Reviews**

1. *The Process of Review*

As you can imagine, we receive many communications from convicted defendants or their lawyers, claiming that the defendants, although convicted following legally sufficient trials or pleas, are actually innocent. The CIP has a procedure for handling such claims.

First, every post-conviction claim of actual innocence we receive is reviewed by the Chief of CIP, who reports directly to me, or someone working under his direct supervision. The Chief of CIP is an ADA with more than 30 years of experience prosecuting in the Office, and he was formerly a respected Bureau Chief in the Trial Division.

The Chief of CIP has the responsibility to determine whether a claim of actual innocence merits investigation or substantive review. (Some claims are so threadbare or

facially implausible that further review is simply not warranted. In such instances, the defendant is told, by letter, that the Office will not proceed further with the claim, and that the defendant is free to assert his or her claims in court.) If he determines that it does, then the case is assigned to an Assistant other than the one who handled the case. We are thus ensured that we will have a “fresh set of eyes” reviewing the case. The new Assistant is directed to conduct a reinvestigation of the case.

A typical re-investigation begins by reviewing the evidence presented at trial, but then goes beyond that. The reinvestigation Assistant may, for example, locate witnesses for interview and re-interview, with a particular eye toward trying to identify any witnesses who might have been overlooked in the original investigation, or who might only have come to light post-verdict. The reinvestigation Assistant will also typically seek out any new sources of physical or documentary or forensic evidence, and will offer to meet with the defendant and his or her attorney for an interview.

At the conclusion of her work, the reinvestigation Assistant reports her conclusions and recommendations to our Conviction Integrity Panel, which consists of approximately one dozen senior assistant district attorneys, many of whom also worked on the front-end protocols described above. Together with the Chief of the CIP, the Conviction Integrity Panel presents me with a recommendation as to the case.

2. The Standards of Review

This description of the process leaves unanswered the question of how – after we have re-investigated and after we have assembled all the evidence – we decide whether or not to vacate the conviction. There is no easy answer to this question. In most of the cases that we have considered, there was not a single piece of dispositive evidence, like DNA,

that clearly showed whether a defendant was or was not innocent. Instead, we have had to develop our standards as we learned more and more about the process.

When a conviction follows a trial, we must determine what weight to accord to the jury's verdict of guilty. If in reviewing a case, we have access to critical, newly discovered evidence the jury did not see, or if we have found some fundamental defect in the trial itself that suggests that the jury did not have a fair opportunity to evaluate the evidence, then we must look at the verdict with fresh eyes and ask whether, in fairness, it can stand. When we doubt that it can, we should, and we have, moved to vacate the conviction. But when we are looking at substantially the same evidence the jury saw, and where the trial was conducted in a fair and competent manner, we are very disinclined to vacate a jury verdict of guilty, even if we feel, in hindsight, that we might have reached a different verdict.

We have also decided that not even a plea of guilty will preclude full consideration of a claim of actual innocence. Where a defendant who has pled guilty asserts a claim of actual innocence, we review the plea allocution carefully, and consider whether there is a plausible reason for the plea of guilty and an evidentiary claim that seems worthy of investigation.

One challenge that we continue to face is to devise a metric to answer the question whether our conviction integrity program is working. I confess that I am not sure how to do this, although I have some intuitions: Of the roughly 200 claims we have reviewed, and the 19 cases reinvestigated, we have vacated six convictions. That strikes me as about what we might expect to find.

E. Conclusions

The programs and the statistics can inform our judgment, but they cannot substitute for it. What doing justice means is entrusted to our sound conscience: We try to do what we believe is right, in every case and in all our decisions.

Once again, thank you for allowing me to submit this testimony, and for your Committees' commitment to ensuring fairness in our criminal justice system.

###

Identification Procedures: Photo Arrays and Line-ups Model Policy

March 2015



**Municipal Police
Training Council**

New York State Division of Criminal Justice Services
80 South Swan Street, Albany, New York 12210

www.criminaljustice.ny.gov



Identification Procedures: Photo Arrays and Line-ups Model Policy



STATE OF NEW YORK
Division of Criminal Justice Services
Office of Public Safety

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Identification Procedures: Photo Arrays and Line-ups Model Policy

The Identification Procedures: Photo Arrays and Line-ups Model Policy is intended to allow for the individual needs of each of the police departments in New York State regardless of size or resource limitations. Police and district attorneys are encouraged to customize these protocols to meet their regional needs, while being mindful of the intent of the policy. As with all model policies adopted by the Municipal Police Training Council (MPTC), this policy is non-binding upon agencies within NYS and is meant to serve as a guide to be used in developing a department's individual policy.

The Municipal Police Training Council (MPTC) approved the model policy in March 2015.

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The District Attorney's Association of the State of New York "Photo Identification Guidelines", the District Attorney's Association of the State of New York "Line-up Procedure Guidelines", the International Association of Chiefs of Police "Eyewitness Identifications Model Policy", the National Academy of Sciences report titled: "Identifying the Culprit: Assessing Eyewitness Identification", and the recommendations made by the New York State Justice Task Force in their document titled: "Recommendations for Improving Eyewitness Identifications" served as a basis for this model policy.

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District Attorney's Association of the State of New York

New York State Association of Chiefs of Police

New York State Police

New York City Police Department

New York State Sheriff's Association

New York State Office of Victim Services

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I Purpose

The purpose of this policy is to establish guidelines on how to conduct fair and reliable eyewitness identifications.

This policy is intended to allow for the individual needs of each of the police departments in New York State regardless of size or resource limitations. Police and district attorneys are encouraged to customize these protocols to meet their regional needs, while being mindful of the intent of the policy. As with all model policies adopted by the Municipal Police Training Council (MPTC), this policy is non-binding upon agencies within NYS and is meant to serve as a guide to be used in developing a department's individual policy.

There is a body of work that supports the reliability and accuracy of identification procedures conducted close in time to the commission of the crime, frequently a photo array identification, using the methods outlined within this policy. Currently, however, evidence from photo array identification procedures is not admissible at trial in New York State. The MPTC feels strongly that evidence from a photo array identification procedure conducted with safeguards contained in this model policy should be admissible pursuant to CPL 60.25 or 60.30. The MPTC unanimously agrees that CPL 60.25 and 60.30 should be amended promptly to allow for the admissibility of photo array evidence.

Video or audio recording of the identification procedure is endorsed by the MPTC only if testimony regarding the identification procedure and resulting identification is admissible at trial pursuant to CPL 60.25 or 60.30. This conditional endorsement is not, however, meant to discourage agencies who are recording their procedures from continuing to do so.

II Policy

It is anticipated that the use of eyewitness identification procedures will assist law enforcement in identifying potential suspects and maximize the reliability of those identifications.

III Definitions

- A. **Photo array:** A collection of photographs that are shown to a witness to determine if the witness can recognize a person involved with the crime.
- B. **Line-up:** A collection of individuals, either sitting or standing in a row, who are shown to a witness to determine if the witness can recognize a person involved with the crime.
- C. **Suspect:** Person the police believe has committed the crime.

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- D. **Filler:** A person, other than the suspect who is used in either a live line-up or a photo array.
- E. **Administrator:** The person who is conducting the identification procedure.
- F. **Blind Administrator:** A term used to describe the administrator of the procedure where the administrator does not know the identity of the suspect.
- G. **Blinded Procedure:** A description of the procedure, meaning that the administrator may know who the suspect is, but by virtue of the procedure's administration, the administrator is unable to inadvertently provide cues to the witness. For example, the use of a folder or envelope to conceal an array from the administrator, blinds the procedure.
- H. **Double-blind Procedure:** Where a blind administrator is used, the procedure is considered to be double-blind.
- I. **Confidence Statement:** A statement from an eyewitness immediately following their identification regarding their confidence or certainty about the accuracy of their identification. The witness should be asked to provide their level of certainty in their own words as opposed to using a numerical scale.

IV Photo Arrays

- A. Selection of fillers
 - 1. Fillers should be similar in appearance to the suspect in the array.
 - 2. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features, or other distinctive characteristics.
 - 3. An administrator should not use a filler if the administrator is aware that the filler is known to the witness.
 - 4. There should be at least five fillers, in addition to the suspect.
 - 5. Only one suspect should be in each array.
 - 6. If there is more than one suspect, then different fillers should be used in separate arrays for each suspect.
 - 7. Photo quality, color and size should be consistent. Administrators should ensure that the photos do not contain any stray markings or information about the subject. Color and black and white photos should not be mixed.

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8. Any identifying information contained on any of the photos should be covered and those areas of the other photos used should be similarly covered.
- B. Inviting the witness to view the array
1. When a suspect is known and the investigator calls a witness to arrange for the viewing of a photo array, the investigator should simply advise the witness that he/she intends to conduct an identification procedure and should not say anything about the suspect. For example, the investigator should say to the witness: "We'd like you to come in to view a photo array in connection with the crime committed on (*date and location*)."
 2. The investigator should avoid addressing whether or not a person is in custody unless specifically asked.
 3. Investigators should give no opinion on their perception of the witness's ability to make an identification.
 4. Investigators should not inform the witness about any supporting evidence such as confessions, other ID's, or physical evidence that may have been obtained.
 5. Witnesses should be prevented from speaking to the victim and any other witnesses about the identification procedure when they arrive to view the array.
- C. Instructions to witness
1. Consideration should be given to providing written instructions to the witness. The instructions should be communicated in various languages when appropriate. The instructions should be read to the witness and signed by the witness after being read.
 2. Before the procedure begins, the administrator should tell the witness what questions will be asked during the identification procedure.
 3. The investigator should tell the witness that as part of the ongoing investigation into a crime that occurred on (*date*) at (*location*) the witness is being asked to view the photo array to see if the witness recognizes anyone involved with the crime.
 4. These instructions let the witness know that they should not seek assistance from the administrator in either making a selection or confirming an identification. They also address the possibility of a witness feeling any

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self-imposed or undue pressure to make an identification. The instructions are as follows:

- a. The perpetrator may or may not be pictured.
 - b. Do not assume I know who the perpetrator is.
 - c. I want you to focus on the photo array and not to ask me or anyone else in the room for guidance about making an identification during the procedure.
5. Instructions to the witness about the quality of the photographs.
 - a. Individuals presented in the photo array may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
 - b. Photographs may not always depict the true complexion of a person; it may be lighter or darker than shown in the photo.
 - c. Pay no attention to any markings that may appear on the photos, or any other differences in the type or style of the photographs.
6. The witness should be informed that if they make an identification at the conclusion of the procedure they will be asked to describe their level of certainty about that identification in their own words and should avoid using a numerical scale of any kind.
7. The witness should be advised that the investigation will continue regardless of whether or not they make an identification.
8. Where the procedure is to be recorded by the use of audio or video, the witness should be informed prior to the start of the procedure, and their consent should be requested prior to the recording.
 - a. The witness should sign the form indicating their consent or lack of consent.
 - b. If the witness does not consent, the officer should not record the procedure.

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D. Administering the procedure

1. Photo arrays must always be conducted using either a “blinded procedure” or “double-blind procedure”. A “double-blind” procedure is preferable where circumstances allow and it is practicable.
2. One method to accomplish a blinded procedure is by placing the array into a folder before handing it to the witness. Additional methods can be employed to further enhance the “blinded” nature of the procedure, such as:
 - a. “Two person shuffle” – the array is assembled by an officer other than the investigator and then it is placed into a folder for the investigating officer.
 - b. “One person shuffle” – multiple arrays are created by the investigating officer and the suspect’s position is different in each. Three folders containing the arrays are provided to the witness who selects one to use.
3. Regardless of the method of administration that is to be used, the administrator should be positioned in such a way so that they are not in the witness’ line of sight during the viewing of the array. Where practicable, the administrator should still be able to view the witness and hear what they say.
4. If there are multiple witnesses viewing the array, they should be prevented from speaking to each other about the identification procedure before, during, and after the process.
5. The witnesses must view the array separately. Multiple copies of the same array may be used for the same suspect for each new witness viewing the array.
6. To protect the integrity of the identification procedure, the administrator must remain neutral so as not to, even inadvertently, suggest a particular photograph to the witness.
7. Attention should be given to the location of the procedure so that the witness is not influenced by items in the room such as wanted posters or BOLO (be on the lookout) information.

E. Post viewing questions

1. After viewing the array ask the witness the following questions:

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- a. Do you recognize anyone?
 - b. If so, what number photograph do you recognize?
 - c. From where do you recognize the person?
2. If the witness' answers are vague or unclear, the administrator will ask the witness what he or she meant by the answer.
3. Confidence Statement
 - a. Ask the witness to describe his/her certainty about any identification that is made.
 - b. Ask the witness to use his/her own words and not a numerical scale.
- F. Documentation
 1. Document any changes made to any of the photographs used.
 2. Document where the procedure took place, who was present, the date and time it was administered.
 3. Preserve the photo array in the original form that was shown to each witness.
 4. Each witness should complete a standardized form after viewing the array and the actual array used should be signed and dated by each witness.
 5. Recording the Procedure
 - a. The entire identification procedure should be memorialized and documented in the most reliable way possible. Where practicable and appropriate, the procedure should be memorialized using audio or video recording - provided that the procedure to be recorded is admissible in a court of law, pursuant to CPL 60.25 or 60.30.
 - b. Where the procedure is to be recorded by the use of audio or video, the witness' consent should be obtained and documented on a form prior to recording. If the witness does not consent to the recording, the officer should not record the identification procedure and should request that the witness sign a form saying he/she refused to be recorded.

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- c. Audio or video recording may not always be possible or practicable. Some reasons that may prevent the identification procedure from being recorded include, but are not limited to: witness safety; recording equipment malfunctions; recording equipment is not available; identification procedure is conducted at a location not equipped with recording devices and the reasons for using that location are not to subvert the intent of this policy, e.g., the witness is out of state, in a hospital or is in a correctional facility; inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel.
- 6. Any physical or verbal reaction to the array should be memorialized in a standardized manner. If this is done in writing, anything said by the witness should be verbatim.
- 7. The confidence statement should be documented verbatim.
- 8. Where an identification is made, complete a CPL 710.30 Notice. Note: Failure to provide this notice could prevent its use in court.
- G. Speaking with the witness after the procedure
 - 1. The administrator, or other appropriate person, should document the statements, comments or gestures of the witness regarding the identification procedure before talking with the witness about next steps.
 - 2. Once the identification procedure is concluded and documented, the administrator can talk to the witness about how the case will proceed or what the next steps in the case may be.
 - 3. The administrator should not comment or make gestures on the identification itself by saying things such as: “Great job” or “We knew you would recognize him” or even nodding his/her head in agreement.
 - 4. The witness should be told not to discuss what was said, seen, or done during the identification procedure with other witnesses, nor should the investigator discuss any other identification procedures with the witness.
- H. All members who will be involved in the administration of a photo array shall receive training on how to properly administer photo arrays.

V Live Line-ups

- A. Selection of fillers
 - 1. Fillers should be similar in appearance to the suspect in the line-up.

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2. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features, or other distinctive characteristics.
 3. An administrator should not use a filler if the administrator is aware that the filler is known to the witness
 4. Where practicable there should be five fillers, in addition to the suspect, but in no case should there be less than four fillers used.
 5. Only one suspect should appear per line-up.
 6. If necessary, all members of the line-up should be seated to minimize any differences in height.
 7. If there is more than one suspect, then different fillers should be used in separate line-ups for each suspect.
 8. The suspect should be allowed to pick his position within the line-up. If a prior identification was made using a photo array that number should be avoided unless insisted upon by the suspect.
 9. The fillers must be instructed not to speak with each other or make unnecessary gestures. All members of the line-up should be instructed to remain still, hold the placard, and look forward unless instructed otherwise by the security officer.
- B. Inviting the witness to view the line-up
1. When an investigator calls a witness to arrange for the witness to view a line-up, the investigator should simply ask the witness to come in for the identification procedure and should not say anything about the suspect. For example, the investigator should say to the witness: "We'd like you to come in to view a line-up in connection with the crime you witnessed on (*date and location*)."
 2. Investigators should give no opinion on their perception of the witness' ability to make an identification.
 3. Unless the witness specifically asks the investigator if someone is in custody, the witness should not be informed that an arrest has been made and that the police have a suspect that the witness will be viewing.
 4. Investigators should not inform the witness about any supporting evidence such as confessions, other IDs, or physical evidence that may have been obtained.

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5. Witnesses should be prevented from speaking to the victim or any other witnesses about the identification procedure when they arrive to view the line-up.

C. Instructions to witness

1. Consideration should be given to providing written instructions to the witness. The instructions should be communicated in various languages when appropriate. The instructions should be read to the witness and signed by the witness after being read.
2. Before the procedure begins, the administrator should tell the witness what questions will be asked during the identification procedure.
3. The investigator should tell the witness that as part of the ongoing investigation into a crime that occurred on *(date)* at *(location)* the witness is being asked to view the line-up to see if the witness recognizes anyone involved with that crime
4. These instructions let the witness know that they should not seek assistance from the administrator in either making a selection or confirming an identification. They also address the possibility of a witness feeling any self-imposed or undue pressure to make an identification. The instructions are as follows:
 - a. The perpetrator may or may not be present.
 - b. Do not assume I know who the perpetrator is.
 - c. I want you to focus on the line-up and not to ask me or anyone else in the room for guidance about making an identification during the procedure.
 - d. Individuals presented in the line-up may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.
5. Instructions to the witness about line-up members moving, speaking, or changing clothing:
 - a. Consideration should be given to telling the witness that the line-up members can be asked to speak, move or change clothing, if requested.

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- b. If one line-up member is asked to speak, move, or change clothing then all the line-up members will be asked to do the same.
 - 6. The witness should be informed that if they make an identification at the conclusion of the procedure they will be asked to provide their level of certainty in their own words, and not by using a numerical scale.
 - 7. The witness should be advised that the investigation will continue regardless of whether or not they make an identification.
 - 8. Where the procedure is to be recorded by the use of audio or video, the witness should be informed prior to the start of the procedure, and their consent should be requested prior to the recording.
 - a. The witness should sign the form indicating their consent or lack of consent.
 - b. If the witness does not consent, the officer should not record the procedure.
- D. Administering the procedure
 - 1. Where practicable, taking into account resource limitations, a blind administrator should be used to conduct and administer a line-up, but a blind administrator is not required to conduct a line-up.
 - 2. After the instructions are given, the administrator – whether a blind administrator or the investigator in the case – should stand away from the witness during the line-up, in a neutral manner, while still being in a position to observe the witness. The key is for the administrator to stand outside the witness' line of sight while the witness is viewing the line-up. This will reduce any inclination by the witness to look at the administrator for guidance.
 - 3. Where practicable, consideration should be given to avoid viewings of the suspect in multiple identification procedures in which the same witness is asked to view the same suspect. For example, where a witness makes an identification from a photo array and a line-up is subsequently conducted, consideration should be given to avoid showing subsequent witnesses both a photo array and a line-up with the same suspect.
 - 4. Witnesses must view the line-up separately.
 - 5. If there are multiple witnesses viewing the line-up, they should be prevented from speaking to each other about the identification procedure before, during, and after the process.

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6. The position of the suspect should be moved each time the line-up is shown to a different witness, assuming the suspect and/or defense counsel agree.
 7. Attention should be given to the selection of a neutral location for the procedure so that the witness is not influenced by items in the room such as wanted posters or BOLO (be on the lookout) information.
 8. The security officer who is monitoring the suspect and fillers in the line-up room should remain out of view of the witness. This will eliminate the potential for any claims of inadvertent suggestions by the security officer and it also removes the potential for distracting the witness as the line-up is being viewed.
- E. Post-viewing questions
1. After viewing the line-up the witness should be asked:
 - a. Do you recognize anyone?
 - b. If so, what is the number of the person that you recognize?
 - c. From where do you recognize the person?
 2. If the witness' answers are vague or unclear, the administrator will ask the witness what he or she meant by the answer.
 3. Confidence statement
 - a. Ask the witness to describe his/her certainty about any identification that is made.
 - b. Ask the witness to use his/her own words and not a numerical scale
- F. Documenting the procedure
1. Recording the Procedure
 - a. The entire identification procedure should be memorialized and documented in the most reliable way possible. Where practicable and appropriate the procedure should be memorialized using audio or video recording.
 - b. Where the procedure is to be recorded by the use of audio or video, the witness' consent should be obtained and documented by the use of a form prior to recording. If the witness does not consent to the recording, the officer should not record the identification procedure

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and should have the witness sign a statement indicated they refused to be recorded.

- c. Audio or video recording may not always be possible or practicable. Some reasons that may prevent the identification procedure from being recorded include, but are not limited to: witness safety concerns; recording equipment malfunctions; recording equipment is not available; identification procedure is conducted at a location not equipped with recording devices and the reasons for using that location are not to subvert the intent of this policy, e.g., the witness is out of state, in a hospital or is in a correctional facility; inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel.
 - d. The line-up should be preserved by photograph. The witness should sign the photograph to verify that it is the line-up that he or she viewed.
- 2. Any physical or verbal reaction to the line-up should be memorialized in a standardized manner. If this is done in writing, anything said by the witness should be verbatim.
 - 3. The confidence statement should be documented verbatim.
 - 4. Document where the procedure took place, who was present, the date and time it was administered.
 - 5. Anything the line-up members are asked to do (e.g., speak, move, or change clothing) must be documented.
 - 6. Document all people in the viewing room with the witness and the line-up room with the suspect.
 - 7. Document the officer or person who escorts the witnesses to and from the line-up room.
 - 8. Document requests made by the defense counsel and whether they were granted, and if not, why not. Reasonable requests from defense counsel should be honored and documented. Any defense request for a change in the line-up that is not, or cannot be, honored must also be documented.
 - 9. Where an identification is made, complete a CPL 710.30 Notice. Note: Failure to provide notice of the identification could prevent its use in court.

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- G. Defendant's right to counsel
 - 1. There are circumstances where during a line-up a suspect may have a defense attorney that is present.
 - 2. Investigators should consult with their District Attorney's Office for guidance regarding a defendant's right to counsel.
 - 3. When in attendance, the defense attorney must be instructed not to speak in the viewing room when the witness is present.
- H. Speaking with the witness after the procedure
 - 1. The administrator, or other appropriate person, should document the statements, comments or gestures of the witness regarding the identification procedure before talking with the witness about next steps.
 - 2. Once the identification procedure is concluded and documented, the administrator can talk to the witness about how the case will proceed or what the next steps in the case may be.
 - 3. The administrator should not comment or make gestures on the identification itself by saying things such as: "Great job" or "We knew you would recognize him" or even nodding their head in agreement.
 - 4. The witness should be told not to discuss what was said, seen, or done during the identification procedure with other witnesses, nor should the investigator discuss any other identification procedures with the witness
- I. All members who will be involved in the administration of a live line-up shall receive training on how to properly administer line-ups.

LINE-UP FORM

WITNESS INSTRUCTIONS

READ THE FOLLOWING TO THE WITNESS PRIOR TO SHOWING THE LINE-UP

- ☐ With your consent, the procedure will be recorded using video or audio.
- ☐ Do you consent to recording? Video and Audio ☐ Audio Only ☐ No ☐ Initial: _____
- ☐ As part of our on-going investigation into a crime that occurred at *(location)* on *(date)* you are about to view a line-up. *(Use similarly neutral language to invite witness to the identification procedure.)*
- ☐ You will look through a one-way mirror and see six people in the line-up. They will not be able to see you.
- ☐ There will be a number associated with each person on the other side of the mirror.
- ☐ Take whatever time you want to view the line-up.
- ☐ The perpetrator may or may not be present.
- ☐ Do not assume I know who the perpetrator is.
- ☐ I want you to focus on the line-up and not look to me or anyone else in the room for guidance about making an identification during the procedure.
- ☐ Individuals presented in the line-up may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.
- ☐ Members of the line-up can be requested to speak, move, or change clothing.
- ☐ If one line-up member is asked to speak, move, or change clothing then all the line-up members will be asked to do the same.
- ☐ If you do make an identification I will ask you to describe your level of certainty about that identification using your own words.
- ☐ After you have had an opportunity to view the line-up I will ask you the following questions:
 1. Do you recognize anyone?
 2. If you do, what is the number of the person you recognize?
 3. From where do you recognize the person?
 4. **ONLY IF AN ID IS MADE:** In your own words describe your certainty about the choice that you have made. Avoid using numbers.
- ☐ I may ask follow up questions.
- ☐ The investigation will continue regardless of whether or not you make an identification.
- ☐ **DO NOT discuss with other witnesses what you see, say or do during this procedure.**

WITNESS MUST SIGN

The above instructions have been read to me. _____ Date: _____

THIS PAGE OF THE FORM **MUST NOT** BE SHOWN TO THE WITNESS

LINE-UP CASE INFORMATION SHEET

Complaint or Case Report #: _____ Crime Date & Location: _____

Line-up Date: _____ Time: _____ Location: _____

Crime Committed: _____ Witness' Name: _____

Was Witness Transported? Yes ☐ No ☐

Transporting Officer: _____

Rank: _____ Command: _____ ID #: _____

Line-up Administrator: _____

Rank: _____ Command: _____ ID #: _____

Investigating Officer: _____

Rank: _____ Command: _____ ID #: _____

Security Officer: _____

Rank: _____ Command: _____ ID #: _____

Asst. District Attorney Present? Yes ☐ No ☐

Name of ADA: _____ Phone #: _____

Interpreter Present? Yes ☐ No ☐ Name: _____

Was the procedure video recorded? Video Only ☐ Audio & Video ☐ Audio Only ☐ No ☐

Line-up photograph taken? Yes ☐ No ☐ Witness initialed? Yes ☐ No ☐

Position	Name	Number Held	Age	Height	Weight
1					
2					
3					
4					
5					
6					

Suspect's name: _____ D.O.B. _____ Position: _____

Comments: _____

Signature of Administrator: _____ Date: _____

LINE-UP FORM

RUNNING THE LINE-UP AND RESULTS

Witness: _____ Administrator: _____

Instructions to the administrator conducting the line-up:

- Remain neutral. Do not comment on the identification before, during or after the identification procedure.
- After instructing the witness, stand away and out of the witness' line of sight, while still being able to observe and hear the witness.
- Where practicable and appropriate, video record the entire procedure.
- If video or audio recording obtain consent from the witness.
- A photo should be taken of the line-up and the witness should sign the photo to attest that it represents the line-up that they viewed.
- Introduce by name all individuals present in the viewing room to the witness.
- Tell the witness when the identification procedure will begin, (e.g. "You will now look through the one way mirror.")
- If there is a need to have a line-up member speak, move, change clothing, or some other activity, then all the line-up members must do the same activity.
- Complete the entire CASE INFORMATION SHEET that accompanies this form.

AFTER THE WITNESS HAS VIEWED THE LINE-UP, ASK THE FOLLOWING QUESTIONS

- ☐ Did you recognize anyone in the line-up? _____
- **If the answer to the preceding question is negative, STOP and go to the signature line.**
 - **If the answer is positive, proceed to the next question:**
- ☐ If so, what is the number of the person that you recognize? _____
- ☐ From where do you recognize that person? _____

Record the words and gestures of the witness: _____

CONFIDENCE STATEMENT

In your own words describe your certainty about the choice that you have made. Avoid using numbers. _____

Date: _____ Time: _____ Witness Signature: _____

LINE-UP FORM

DEFENSE COUNSEL SHEET

Suspect's Attorney Present? Yes ☐ No ☐

Defense Attorney: _____ Telephone: _____

The Defense Attorney was instructed **not** to speak while in the viewing room with the witness.

Yes ☐ No ☐

If Defense Attorney makes requests about the line-up, record the request and whether the request was agreed to or refused:

1. Request: _____

Agreed ☐ Refused ☐

Reason for refusal? _____

2. Request: _____

Agreed ☐ Refused ☐

Reason for refusal? _____

3. Request: _____

Agreed ☐ Refused ☐

Reason for refusal? _____

PHOTO ARRAY FORM

WITNESS INSTRUCTIONS

READ THE FOLLOWING TO THE WITNESS PRIOR TO SHOWING THE PHOTO ARRAY

- ☐ With your consent, the procedure will be recorded using video or audio.
- ☐ Do you consent to recording? Video and Audio ☐ Audio Only ☐ No ☐ Initial: _____
- ☐ As part of the ongoing investigation into a crime that occurred on (*date*) at (*location*) you will view a photo array. (*Use similarly neutral language to invite witness to the identification procedure.*)
- ☐ It consists of six photographs of individuals. Each photograph has a number underneath the photograph.
- ☐ Take whatever time you want to view the photo array.
- ☐ The perpetrator may or may not be pictured.
- ☐ Do not assume that I know who the perpetrator is.
- ☐ I want you to focus on the photo array and not look to me or anyone else in the room for guidance about making an identification during the procedure.
- ☐ Individuals presented in the photo array may not appear exactly as they did on the date of the incident because features, such as head and facial hair, are subject to change.
- ☐ Photographs may not always depict the true complexion of a person; it may be lighter or darker than shown in the photo.
- ☐ Pay no attention to any markings that may appear on the photos, or any other difference in the type or style of the photographs.
- ☐ If you do make an identification I will ask you to describe your level of certainty about that identification using your own words.
- ☐ After you have had an opportunity to view the photo array I will ask you the following questions:
 1. Do you recognize anyone?
 2. If you do, what is the number of the person you recognize?
 3. From where do you recognize the person?
 4. **ONLY IF AN ID IS MADE:** In your own words describe your certainty about the choice that you have made. Avoid using numbers.
- ☐ I may ask follow up questions.
- ☐ The investigation will continue regardless of whether or not you make an identification.
- ☐ **DO NOT discuss with other witnesses what you see, say or do during this procedure.**

WITNESS MUST SIGN

The above instructions have been read to me. _____ Date: _____

THIS PAGE OF THE FORM **MUST NOT** BE SHOWN TO THE WITNESS

PHOTO ARRAY CASE INFORMATION SHEET

Complaint or Case Report #: _____ Crime Date & Location: _____

Photo Array Date: _____ Time: _____ Location: _____

Crime Committed: _____ Witness' Name: _____

Was Witness Transported? Yes ☐ No ☐

Transporting Officer: _____

Rank: _____ Command: _____ ID #: _____

Photo Array Administrator: _____

Rank: _____ Command: _____ ID #: _____

Investigating Officer: _____

Rank: _____ Command: _____ ID #: _____

Interpreter Present? Yes ☐ No ☐ Name: _____

Was the procedure video recorded? Video Only ☐ Audio & Video ☐ Audio Only ☐ No ☐

The original photo array MUST be preserved.

Attach a copy of the photo array to this form and provide the information below, if available.

Position	Name	NYSID (where applicable)	Date of Photo
1			
2			
3			
4			
5			
6			

Suspect's name: _____ D.O.B. _____ Position: _____

Was any photo altered? Yes ☐ No ☐

If yes, which? _____

Describe the alteration: _____

Comments: _____

Signature of Administrator: _____ Date: _____

PHOTO ARRAY FORM

SHOWING THE PHOTO ARRAY

Witness: _____ Administrator: _____

Instructions to the administrator showing the photo array:

- Remain neutral. Do not comment on the identification before, during or after the identification procedure.
- Provide the photo array in an envelope or folder when handing it to the witness.
- Stand out of the witness' line of sight, where practical, but still observe the witness as the witness views the photo array.
- Where practicable and appropriate, video record the entire procedure.
- If video or audio recording obtain consent from the witness.
- Complete the entire CASE INFORMATION SHEET that accompanies this form.

AFTER THE WITNESS HAS VIEWED THE ARRAY, ASK THE FOLLOWING QUESTIONS

- ☐ Did you recognize anyone in the photo array? _____
- **If the answer to the preceding question is negative, STOP and go to the signature line.**
 - **If the answer is positive, proceed to the next question:**
- ☐ If so, what is the number of the person that you recognize? _____
- ☐ From where do you recognize that person? _____

Record the words and gestures of the witness: _____

CONFIDENCE STATEMENT

In your own words describe your certainty about the choice that you have made. Avoid using numbers. _____

Date: _____ Time: _____ Witness Signature: _____

Police, District Attorneys Unveil Statewide Identification Procedures

Kristine Hamann

New York Law Journal

December 14, 2010



Kristine Hamann

In a unique collaboration, law enforcement agencies at all levels of government across New York State have agreed upon new statewide guidelines for identification procedures. The voluntary adoption of the New York State Identification Procedure Guidelines for the showing of photo arrays and lineups to witnesses of crimes was announced on May 19, 2010, by New York State's District Attorneys and all of the state's police agencies. These guidelines will result in reliable and fair identifications that will enhance law enforcement's ability to solve crime and protect the rights of the accused.

The guidelines are the first major project of the District Attorneys Association's Best Practices Committee. The committee was formed to bring together innovative ideas from disparate parts of the state for the first time. It had its initial meeting in September 2009.¹ The Best Practices Committee is made up of district attorneys and experienced assistant district attorneys from 25 counties, including rural, metropolitan and suburban offices.² As an example of the difference between the counties on the committee, compare Franklin County with a population of 50,000 residents in 1,700 square miles, to Brooklyn with 2.5 million residents in 97 square miles.

The goal of the Best Practices Committee is to develop best practices for law enforcement, to review innovative initiatives, and to analyze the causes of wrongful convictions and the various recommendations surrounding that issue. The committee has set an ambitious agenda which will include an examination of topics including video recording interrogations, community initiatives, forensic evidence, *Brady* issues and discovery. It is anticipated that in each area, discussions will lead to concrete suggestions for improvement.

The identification procedure guidelines evolved as the Best Practices Committee reviewed the identification procedures currently in place in the over 550 police departments around the state. These departments range in size from the New York City Police Department with 35,000 officers to the Malone Police Department with 10 full-time officers. Practices and resources vary widely across the state. For example, New York City and its closest suburbs use a so-called live lineup, in which the suspect is viewed with four or five similar looking fillers. For the rest of the state, this practice is rarely used. Instead, a photograph of the suspect is put together with five other photographs into a photo array and then shown to the witness.

The committee's review revealed that there was no uniformity in the procedures used, some protocols were not in writing, and training was sporadic. Given the disparity in practice and the fact that identification issues have played a role in some wrongful convictions in New York State,³ it became clear that identification was a topic worthy of revisiting.

The committee worked to create identification procedures with multiple objectives in mind: accurate identifications of guilty persons, respect for the rights of the accused, protection of witnesses and consideration for the practical realities imposed by location and funding. The guidelines had to be equally relevant and useful in New York City as in Lake Placid, Rochester or Glens Falls.

Many good ideas were found by looking at identification procedures in other states.⁴ Studies on eyewitness identification were also part of the analysis. Research has demonstrated that eyewitness identification can be fragile, so that any procedure to elicit a witness' identification must be fair, reliable and free of influence—intentional or unintentional. Social scientists in the field, whose work has been peer-reviewed and published, were consulted.⁵ Eyewitness identification is an evolving field of study; nevertheless, the social scientists provided valuable insights and suggestions based on the research to date.

One significant observation we heard from the social scientists, as well as from practitioners around the country, is that voluntary, self-generated protocols, such as the new statewide guidelines, are far more likely to be successfully and uniformly implemented than procedures that are imposed by legislation or executive fiat. Clearly, when law enforcement initiates the reform and is committed to it, the outcome is likely to be positive.

A significant benefit to voluntary guidelines is that the procedures can easily evolve and improve. This is particularly important since there is still much to be learned about eyewitness identification. Inevitably, there will be new ideas about how best to elicit an accurate identification from a witness. Legislated or mandated procedures do not allow for experimentation, improvement or comparative study. In contrast, the new statewide guidelines are already in their second version based on practical input received after they were first released.

With the help of Kate Hogan, District Attorney of Warren County and the 2009 president of the District Attorneys Association, the draft was circulated among the various police agencies in the state. From upstate, the New York State Police, the New York State Sheriffs' Association, and the New York State Association of Chiefs of Police actively participated in providing

suggestions, comments and practical advice. At the same time the NYPD reviewed the procedures and gave constructive suggestions for improving the protocols. As the guidelines progressed, they were presented for input and approval to the Municipal Police Training Counsel, a statewide body that sets standards for police training.

One of the goals of the New York State Guidelines is to protect a witness' memory of the perpetrator from inappropriate influences. Even the best procedures cannot prevent illegal conduct, such as false accusations by a witness, or intentional misconduct by a rogue police officer. However, neutral and fair protocols can minimize any unintentional influence or cuing of a witness.

It is worth noting that from years of experience in dealing with eyewitnesses, Best Practice Committee members have seen that witnesses are motivated by wanting to identify the criminal, not a desire to please the police. Indeed, often witnesses are reluctant to cooperate with police, either from fear or apathy. Nevertheless, no matter what type of witness is called to an identification procedure, it is important to create fair and neutral procedures that are practical, capable of being implemented and that properly capture and preserve the witness' memory of the perpetrator.

Summary of the Guidelines

The statewide identification procedure guidelines enhance current lawful practices. They lead an officer from the point where the witness is called by law enforcement to participate in the identification procedure to the completion of the process. As a fundamental principle, the officer must remain neutral in his or her dealings with a witness. The witness is instructed on the procedure before it begins and signs a form acknowledging the receipt of the instructions. When the procedure is over, the witness is admonished not to discuss with any other witness what he or she observed or said during the identification procedure.

The guidelines spell out how to compose a fair photo array or lineup so that the suspect does not stand out in some way that could encourage an incorrect identification. Documentation of the procedure is stressed. The photo array must be preserved, and the lineup must be photographed. Standardized forms require the officer to list the names of the officers involved, the instructions given to the witness, and the responses of the witness.

The procedures can be conducted "double blind" or "blinded." A double blind procedure is one where the officer administering the identification procedure does not know the identity of the suspect. Such an officer cannot provide any inadvertent cues to the witness. Unfortunately, double blind procedures are resource-intensive and can be difficult to achieve in departments or units where all the officers often know the identity of the suspect. Nevertheless, it is expected that pilot projects will emerge around the state to identify how double blind procedures can be practically accomplished.

With the understanding that double blind procedures are not always possible, the guidelines have developed "blinded" procedures that allow the case detective to conduct the procedure in a manner that avoids inadvertent cues. Similar to mechanisms used by social scientists,⁶ this is

done in three ways. First the witness is given a series of admonitions, including: "The perpetrator may or may not be present," "Do not assume that I know who the perpetrator is," and "Do not look to me or anyone else in the room for guidance."

Second, the officer must stand to the side of the witness during the procedure to avoid any inadvertent cues. When a photo array is used, the officer must also hand the array to the witness in a folder to prevent any unintentional influence. Third, the guidelines require that the officer not reinforce the identification before, during or after the procedure is concluded.

To preserve the identification, the guidelines require the officer to memorialize the words and gestures of the witness at the time of the identification. The officer is required to record the witness' full responses to three questions: "Do you recognize someone?" "What is the number of the person that you recognize?" "From where do you recognize the person?" It is no longer sufficient for the officer to simply say, for example, "Positive hit."

If the witness provides an answer that is vague or unclear, such as, "I think it is number 3" or "It looks like number 3" then the officer must follow up by asking, "What do you mean by that?"⁷ This open-ended, non-leading question is designed to elicit an answer from the witness, uninfluenced by the nature of the question asked. The officer may not confirm the identification, if there is one, and may only discuss next steps in the process after the identification procedure is documented.

Training and Monitoring

Daylong training on these guidelines is underway throughout New York State. By the end of December, officers will be trained in Rockland, Nassau, Rochester, Albany, Watertown, Buffalo, Binghamton and Syracuse. The training is conducted collaboratively by the Division of Criminal Justice Services and the Best Practices Committee. In New York City, the NYPD is also training its officers and implementing the guidelines.⁸

In many instances this is the first intensive training on identification procedures that some officers have had since the academy. The training includes discussion of the impact of inaccurate identifications on wrongful convictions as well as the importance of avoiding inadvertent influences. The guidelines have triggered a productive, statewide conversation in law enforcement about the importance of fair and neutral procedures.

The Best Practices Committee will monitor implementation of the procedures and will continue to gather suggestions for new methods of conducting identification procedures gleaned from experience and further research.

Kristine Hamann is executive assistant district attorney in the Office of the Special Narcotics Prosecutor for the City of New York and chair of the District Attorneys Association's Best Practices Committee. **Patricia Bailey**, Bureau Chief of the Special Litigation Unit, New York County District Attorney's Office, and **Lois Raff**, counsel, Queens District Attorney's Office, assisted in the preparation of this article.

Endnotes:

1. The Best Practices Committee is a sub-committee of the Fair and Ethical Administration of Justice Committee, which is chaired by District Attorney William Fitzpatrick of Onondaga County. This committee has two other subcommittees: the Ethics Committee and the Mutual Assistance Committee.
2. The represented counties are: Albany, Allegany, Bronx, Brooklyn, Broome, Erie (Buffalo), Franklin, Jefferson, Livingston, Monroe (Rochester), Nassau, New York, Oneida, Onondaga (Syracuse), Ontario, Putnam, Queens, Rockland, Saratoga, Schenectady, Sullivan, Staten Island, Suffolk, Warren, Westchester and the Office of Special Narcotics.
3. See Report of the New York State Bar Association's Task Force on Wrongful Convictions (2009).
4. Procedures from Wisconsin, Illinois, Minnesota, Washington D.C., and Massachusetts, among others, were studied.
5. Roy Malpass, Ph.D., Professor, Department of Psychology, University of Texas at El Paso, Brian Cutler, Ph.D., Professor of Criminology, Justice and Policy Studies at the University of Ontario Institute of Technology, Heather D. Flowe, Ph.D., Lecturer of Forensic Psychology, University of Leicester, England; Steven Clark, Ph.D., Professor, Department of Psychology, University of California, Riverside, California.
6. See "Seventy-Two Tests of the Sequential Lineup Superiority Effect: A Meta-Analysis and Policy Discussion," Nancy K. Steblay, Augsburg College; Jennifer E. Dysart, John Jay College of Criminal Justice; Gary L. Wells, Iowa State University, Article in press: Psychology, Public Policy, and Law (2010), p. 26.
7. This procedure used by law enforcement in Washington D.C.
8. As of October 2010, the state identification procedure guidelines have been implemented in eight New York City precincts.



Press Release

For immediate release: May 19, 2010

Contact: Warren County District Attorney Kate Hogan
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NEW YORK STATE LAW ENFORCEMENT AGENCIES ADOPT BEST PRACTICE GUIDELINES FOR IDENTIFICATION PROCEDURES

In a unique collaboration, law enforcement agencies at all levels of government across New York State have agreed upon new statewide guidelines for identification procedures that will enhance law enforcement's ability to solve crime and protect the rights of the accused. The adopted guidelines build on current lawful procedures and will result in more reliable and fair identifications, while minimizing the potential for misidentification. The safety of victims and witnesses was also a significant consideration in developing the protocols.

This is the first time in the nation that law enforcement agencies have proactively worked statewide to establish best practices for photo array and lineup procedures that determine whether an individual is implicated in a crime. The procedures were developed by the Best Practices Committee of the New York State District Attorneys Association with extensive consultation and input from the New York City Police Department, the New York State Police, the New York State Association of Chiefs of Police, the New York State Sheriffs' Association, the state Division of Criminal Justice Services and the state Municipal Police Training Council. Representatives from each of those organizations and agencies announced the groundbreaking collaboration at a press conference today in Manhattan.

Individuals contributing to these procedures have years of experience in solving crimes and working with victims. Academic studies and social scientists were also consulted and provided valuable insights and suggestions. No new costs are associated with these procedures.

The guidelines take into account the diversity of police departments around the state, and can be implemented easily by small departments with fewer than 10 officers and large departments with thousands of officers. Eight New York City police precincts have implemented the procedures already, with the remaining precincts, and other municipalities in the state, to follow. The goal is to continue to review and improve the procedures as practical experience is gained and as knowledge in this area develops.



Press Release

The Division of Criminal Justice Services, in cooperation with the Municipal Police Training Council, is developing a statewide training program on the guidelines for law enforcement. In addition, the New York Prosecutors Training Institute will be conducting training programs for District Attorneys' Offices and police. Webinars and podcasts are planned to provide easy access to the training for law enforcement officers who are unable to attend training sessions in person.

Highlights of the new guidelines include:

- How to create a fair photo array and live lineup.
- How to invite a witness to an identification procedure.
- How to instruct a witness before the identification procedure in a neutral and unbiased way.
- How to display a photo array or live lineup in a fair and neutral manner.
- How to conduct a "blinded" identification procedure, or, if possible, a "double blind" identification procedure.
- How to document the results of the identification procedure.
- What to do after the identification procedure is concluded.
- The creation of new forms that guide an officer through the new protocols.
- Training on how to conduct a fair, reliable and neutral identification procedure.

Warren County District Attorney Kate Hogan, President of the New York State District Attorneys Association: "New York State's law enforcement community has demonstrated once again that it is innovative, collaborative and effective in addressing criminal justice issues. These identification protocols are a product of law enforcement agencies in our state working together to reduce crime while at the same time developing new ideas that protect both public safety and the rights of the accused. Today marks what we expect will be the beginning of our continued partnership to create fair, reliable and practical improvements to our criminal justice system."

Police Commissioner Raymond W. Kelly, New York City Police Department: "These are major steps forward in synchronizing our efforts and furthering our common interest in an unimpeachable criminal justice system. Reducing the chances of misidentification and increasing the certainty of a fair trial must be among our highest priorities."

Acting Commissioner Sean M. Byrne, Division of Criminal Justice Services: "These groundbreaking guidelines on the proper management of police lineups and photo arrays will promote the goals of accurate criminal identification while ensuring the process is not tainted by improper procedures or mistaken witness identification. Working in partnership with the state's Municipal Police Training Council, DCJS will provide training to police officers, investigators and law enforcement executives on these procedures. We want to ensure that officers of all ranks have the skills necessary to do their jobs effectively, while at the same time,



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protect the rights of the accused and safeguard the victim's role in the process of advancing the ends of justice."

Acting Superintendent John P. Melville, New York State Police: "The State Police is privileged to have contributed to the enhanced guidelines for identification procedures that will be implemented by law enforcement agencies around the state. These best practices for identifying accused criminals will increase the overall reliability of witness identifications and increase the safety of both crime victims and witnesses."

Orange County Sheriff Carl DuBois, President of the New York State Sheriffs' Association: "The Sheriffs of New York are pleased to have joined with their partners in law enforcement across this state to develop best practices for lineups and for photo arrays. These procedures guarantee that the rights of all our citizens are protected. They are critical tools for solving crime and protecting the public, while also respecting the rights of the accused. Victims and witnesses will also benefit from these procedures that are considerate of their safety and will encourage them to come forward to cooperate with law enforcement."

Chief William Kilfoil, Port Washington Police District (Nassau County), President of the New York State Association of Chiefs of Police: "New York State's Police Chiefs fully support the standardized guidelines that were created with input from law enforcement from around the state. These fair and reliable guidelines will benefit all the parties in the criminal justice system, from the accused to the victims. Standardized training procedures based on the guidelines will ensure that the police properly conduct the identification procedures that are needed to solve crime and protect the public. I am certain that future collaborations by New York State's law enforcement will be equally effective."

Thomas Belfiore, Chair of the Municipal Police Training Council: "The Municipal Police Training Council endorses these new procedures that will further law enforcement's commitment to just outcomes for victims and those suspected of criminality. Statewide training programs will deliver these best practices to police officers throughout the state so that they can be practically applied as officers serve their communities daily."

Roy Malpass, Ph.D., Professor, Department of Psychology, University of Texas at El Paso, Eyewitness Identification Lab: "The most important aspect of New York's newly developed standardized procedures is that the criminal justice system itself has created thoughtful, in-depth procedures. Not only have specific procedures been developed, but a process through which continuing improvement can be achieved has also been adopted. These protocols take into account the concern for reducing false identifications, while being based on the practicalities associated with the collection of eyewitness evidence, as well as the science which examines eyewitness identification procedures."

Heather D. Flowe, Ph.D., Lecturer of Forensic Psychology, University of Leicester, England: "New York State's law enforcement community has produced cutting-edge guidelines for conducting criminal identification procedures. The guidelines are commendable because they demonstrate New York law



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enforcement's commitment to using research evidence to inform eyewitness identification procedures. These identification guidelines are sure to be emulated by all forward-looking law enforcement agencies."

Brian Cutler, Ph.D., Professor of Criminology, Justice and Policy Studies at the University of Ontario Institute of Technology: "The newly established guidelines represent an important and impressive accomplishment. The need to establish guidelines for identification tests is based on the growing recognition that eyewitness memory, like other forms of evidence, is susceptible to influences both within and outside the control of the criminal justice system. The standardization of identification procedures should reduce the risk that innocent suspects are falsely identified as crime perpetrators."

Representatives from law enforcement agencies from the following counties also attended today's press conference:

Albany	Orange
Allegany	Putnam
Broome	Queens
Bronx	Rensselaer
Clinton	Rockland
Dutchess	Saratoga
Franklin	Schenectady
Kings	Staten Island
Livingston	Steuben
Monroe	Suffolk
Nassau	Ulster
New York	Warren
Oneida	Westchester
Onondaga	

Also in attendance: John Grebert, executive director of the New York State Association of Chiefs of Police; Peter Kehoe, executive director of the New York State Sheriffs' Association; and the Special Narcotics Prosecutor for the City of New York Bridget G. Brennan.



Press Release

Contact: Franklin County District Attorney Derek P. Champagne
President, New York State District Attorneys Association
518-569-9586 (cell) or 518-481-1544 (work)

For immediate release: Tuesday, Dec. 14, 2010

New York State Law Enforcement Agencies Endorse Video Recording of Interrogations, Statewide Guidelines to Ensure Integrity of the Practice

State announces availability of grant funding to expand the initiative

ALBANY – New York State’s law enforcement agencies, at all levels of state and local government, joined together today to endorse the practice of video recording interrogations of suspects who are in custody in their entirety.

At a press conference in the well of the Legislative Office Building, leaders of the New York State District Attorneys Association, the New York State Sheriffs’ Association, the New York State Association of Chiefs of Police, the New York City Police Department and the New York State Police announced their support for video recording of interrogations and the adoption of statewide protocols to ensure the integrity of the practice.

Law enforcement in more than 40 counties in the state have already voluntarily developed programs for video recording the entire questioning of suspects who have been arrested for various designated felonies. These recordings capture critical evidence needed in the investigation and prosecution of criminal cases and preserve information used to resolve a person’s claim of innocence.

The New York State Division of Criminal Justice Services (DCJS) and the New York State Bar Association have already provided more than \$1.6 million in funding to support these projects, and DCJS today announced the availability of \$400,000 in federal Byrne Justice Assistance Grant funding to expand video recording to counties that currently do not have the capability.



Press Release

Franklin County District Attorney Derek P. Champagne, president of the New York State District Attorneys Association, said: “The more than 40 counties that have voluntarily adopted the video recording of interrogations demonstrate law enforcement’s commitment to a program that will benefit public safety and safeguard the rights of the accused. We are grateful for the funding already received from DCJS and the New York State Bar Association. The additional funding pledged by DCJS today will be critical in helping us to move forward in recording statements around the state.”

This is the second time that law enforcement executives have come together to support statewide protocols for critical investigatory processes. In May, leadership of the District Attorneys, Chiefs and Sheriffs’ associations, the N.Y.P.D. and State Police announced their endorsement of best practices for identification procedures, which are used to determine whether an individual is implicated in a crime. These procedures are now being implemented throughout the state.

District Attorney Champagne added: “The adoption of statewide protocols and best practices to govern video recording – as well as our collective support for identification procedures announced earlier this year – confirms law enforcement’s commitment to creating fair, reliable and practical improvements to our criminal justice system. Going forward, that commitment will only continue and grow stronger as we seek other ways to ensure the integrity of the system.”

The New York State Guidelines for Recording Custodial Interrogations of Suspects (*attached*) were spearheaded by the Best Practices Committee of the District Attorneys Association. Using existing protocols from counties that have already embraced the practice, the committee created guidelines that are relevant to all regions of the state. In addition, extensive practical input, born from years of real-life experience, was received from the N.Y.P.D., the State Police and the Sheriffs’ and Chiefs’ associations.



Press Release

While the guidelines outline when and how to record an interrogation, they also recognize the dynamics of police work and suspect encounters that may not lend themselves to the availability of recording equipment.

Law enforcement leaders praised the additional funding being provided by DCJS exclusively for equipment purchase and installation, but urged legislators for greater financial support, which will be essential to maintain and expand current programs while allowing those counties and agencies without the capability to institute the practice.

Successful implementation of video recording involves more than the purchase and installation of equipment. While shared facilities and group purchasing rates are being explored to reduce costs, significant additional costs remain, including the construction or renovation of interview rooms, particularly if an agency wishes to sound-proof the space; the purchase and maintenance of equipment so recordings can be played for grand juries, court hearings and trials; and the maintenance, storage and transcription and redaction of recordings.

Significant expenditures also are involved when a suspect does not speak English, since an interpreter is needed to ask questions and a translator is required to create an English transcript that can be used as evidence. For example, in Queens County, where up to 137 languages are spoken, the number of cases where translation services will be needed may be extensive.

Though united in their embrace of recording interrogations, counties have adopted a variety of recording models and practices to best meet the needs of their jurisdictions and to stay within the limitations of their funding. Some programs have been in existence for many years, such as in Broome County, while others are just beginning.



Press Release

In addition to Broome, the following counties outside of New York City have a video recording program: Albany, Cayuga, Chenango, Chautauqua, Clinton, Columbia, Dutchess, Erie, Franklin, Fulton, Genesee, Greene, Herkimer, Jefferson, Madison, Monroe, Nassau, Niagara, Oneida, Onondaga, Ontario, Orange, Otsego, Rensselaer, Schenectady, Suffolk, Sullivan, Tioga, Tompkins, Ulster, Washington, Westchester and Wyoming.

Six additional counties outside of the city – Chemung, Cortland, Livingston, Rockland, Saratoga and Warren – are developing video recording programs. In New York City, the District Attorneys' offices in the Bronx, Kings, Queens, Manhattan and Richmond have set up programs under which interviews of suspects conducted by assistant district attorneys or detective investigators are videotaped in their entirety. The N.Y.P.D. will be starting two pilot programs, one in Brooklyn and one in the Bronx, where detectives will video record the interrogations of arrested suspects in felony assault cases.

District attorneys and their law enforcement partners from the state's remaining 17 counties – Allegany, Cattaraugus, Delaware, Essex, Hamilton, Lewis, Montgomery, Orleans, Oswego, Putnam, Schoharie, Schuyler, Seneca, Steuben, St. Lawrence, Wayne and Yates – have committed to the program if they can secure funding for it.

The following statements were given in support of today's announcement:

Raymond W. Kelly, Commissioner of the New York City Police Department: "As technology improved and better equipment became available, it made sense for the department to test video recording of custodial interrogations. Anything that supports the integrity of a criminal confession and ensures justice is served should be thoroughly evaluated, which is what we intend through this pilot program."



Press Release

Sean M. Byrne, Acting Commissioner of the New York State Division of Criminal Justice

Services: “Despite the state’s difficult fiscal times, Governor Paterson’s administration has made a commitment to funding effective, proven programs that reduce crime and enhance the integrity of the criminal justice system. This initiative certainly meets both those aims, and I am pleased to announce the availability of dedicated funds to expand the program. While these funds are a fraction of what is necessary to allow all agencies in the state to fully participate in this program, it is my hope that they will help keep the momentum going so that law enforcement can make statewide video recording a reality.”

John P. Melville, Acting Superintendent of the New York State Police: “We believe that the videotaping of interrogations, where possible and practical, is an effective law enforcement tool. These guidelines will enhance this investigative tool and assist in the fair prosecution of criminal cases.”

Orange County Sheriff Carl DuBois, President of the New York State Sheriffs’ Association: “The Sheriffs of New York are pleased to have joined with our partners in law enforcement across this state to develop best practices for video recording of custodial interrogations. We believe these guidelines provide a solid framework that will allow sheriffs from rural, suburban and urban counties to develop protocols that meet their agencies’ needs, safeguard the rights of the accused and preserve key evidence for investigation and prosecution. Within our changing society and demographics, the New York State Sheriffs, along with all of Law Enforcement in New York State, have readily adapted to the constant challenges of change, in that we invite practices or processes that further improve our ability to prepare cases for seamless prosecution that will withstand constitutional scrutiny.”

Dryden (Tompkins County) Police Chief Margaret E. Ryan, President of the New York State Association of Chiefs of Police: “Electronic recordings of custodial interrogations enhance the investigative process and assist in the investigation and prosecution of criminal cases. As additional funding and resources become available to assist those agencies who are not already utilizing electronic recordings, the ability to conduct electronic recorded interrogations will expand throughout the state.”



Press Release

New York State Bar Association President-Elect Vincent Doyle: “The New York State Bar Association has, for more than five years, urged that custodial interrogations be recorded. It has collaborated with several District Attorneys in granting them funds for a pilot project. We are pleased that well over half of the state’s District Attorneys and many others in the law enforcement community now believe that this practice promotes justice in the prosecution of criminal cases.”

Representatives from law enforcement agencies in the following counties also attended today’s press conference: Albany, Clinton, Columbia, Franklin, Kings, Livingston, New York, Oneida, Onondaga, Orange, Putnam, Queens, Rensselaer, Richmond, Rockland, Saratoga, Schenectady, Warren and Washington.

Also in attendance: John Grebert, Executive Director of the New York State Association of Chiefs of Police and Peter Kehoe, Executive Director of the New York State Sheriffs’ Association.



Recording of Custodial Interrogations

Model Policy

Municipal Police Training Council

NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES
80 South Swan Street
Albany, New York 12210

www.criminaljustice.ny.gov



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STATE OF NEW YORK
Division of Criminal Justice Services
Office of Public Safety

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Recording of Custodial Interrogations Model Policy

The Recording of Custodial Interrogations Model Policy was developed to provide law enforcement agencies with guidance to assist them in developing their own policy and training. The use of this policy is not mandatory.

The Municipal Police Training Council (MPTC) approved the model policy in December 2013.

Acknowledgements

The District Attorney's Association of the State of New York "Guidelines for Recording Custodial Interrogations", the New York State Association of Chiefs of Police "Electronic recording of Custodial Interviews Model Policy", and the recommendations made by the New York State Justice Task Force in their document titled: "Recommendations Regarding Electronic Recording of Custodial Interrogation" served as a basis for this model policy.

The New York State Division of Criminal Justice Services (DCJS) acknowledges the extensive work done by the following associations and agencies:

District Attorney's Association of the State of New York

New York State Association of Chiefs of Police

New York State Police

New York City Police Department

New York State Sheriff's Association

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Municipal Police Training Council

I Purpose

The purpose of this policy is to establish broad guidelines for the electronic recording of suspects' statements in custodial interrogations and the associated use, management, storage and retrieval of such recordings. The policy is intended to allow for the individual needs of police departments in New York State. Police and district attorneys are encouraged to modify these protocols to conform to their specific needs, while being mindful of the intent of the procedures. While this policy endorses the practice of recording custodial interrogations, it also recognizes the dynamics of police work, field operations and suspect encounters. This policy is mindful of the benefits of recordings balanced with the overwhelming public policy demands upon the police in solving crimes. This policy provides latitude for officers in conducting interrogations at times that may not lend themselves to the availability of recording equipment.

II Policy

It is expected that electronically recording custodial suspect interrogations will enhance the investigative process and assist in the investigation and prosecution of criminal cases. Critical evidence can be captured through the recording of interrogations. The recording will also preserve information needed regarding a person's right to counsel and the right against self-incrimination and it can be used to resolve a person's claim of innocence. Similarly, the electronic recording of custodial interrogations will assist in defending against civil litigation and allegations of officer misconduct.

III Definitions

- A. **Custodial interrogation:** *Custodial:* The objective standard for determining a suspect's custodial status is whether a reasonable person, innocent of any wrongdoing, would have believed that he or she was not free to leave.
Interrogation: Interrogation refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally associated with arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.
- B. **Electronic recording:** A digital, electronic video or other recording on electronic media.
- C. **Electronic media:** Video signals recorded on any of several storage media, including, but not limited to, analog tape (VHS, S-VHS, Hi 8), digital recording (DVD) or other portable digital storage media (CD, MP3 player, hard drive, etc.).

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- D. **Recording room:** For the purpose of this policy, includes any designated room outfitted with audio-video recording equipment, and any police vehicle similarly equipped.

IV Qualifying Offenses

- A. Whenever possible and practicable, an electronic recording of a custodial interrogation should be made when the subject to be interviewed is reasonably suspected in the commission of the following, including but not limited to:
 - 1. All A-I non-drug felonies;
 - 2. All B violent felonies codified in Section 125 of the New York State Penal Law;
 - 3. All B violent felonies codified in Section 130 of the New York State Penal Law.
- B. Nothing in this policy prohibits the use of electronic recording equipment for any other interview or offense at the discretion of the police department.

V Exceptions

It is understood that recording may not always be possible. The following are some, but not all, of the practical reasons that may prevent an interrogation from being recorded:

- A. Electronic recording equipment malfunctions.
- B. Electronic recording equipment is not available, e.g., it is already in use.
- C. Statements are made in response to questions that are routinely asked during the process of arresting a person.
- D. Spontaneous statements are made that are not in response to police questioning.
- E. Statements are made by the suspect at the time of arrest.
- F. Statements are given in response to a custodial interrogation at a time when the interviewer is unaware that a qualifying offense occurred.
- G. Statements are made during a custodial interrogation that is conducted at another location not equipped with recording devices, and the reasons for using that location are not to subvert the intent of this policy.

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- H. Statements are made during a custodial interrogation at a location other than the recording room identified in these procedures because the defendant cannot be in the recording room, e.g., the defendant is out of the state, in a hospital or is in a correctional facility.
- I. Statements are made after a suspect has made a documented refusal to participate in the interrogation if it is recorded.
- J. Inadvertent error or oversight occurs that was not the result of intentional conduct of law enforcement personnel.

VI Field Interviews

This policy is not meant to discourage field interviews. Gathering “real time” information in the field can be critical for an investigation. For example, information is often immediately needed to locate a weapon, to find victims or accomplices, or to secure a crime scene. If information is gathered from the suspect in the field regarding a qualifying event, efforts should be made to memorialize the statements at the earliest practicable time.

VII Miranda Warnings

Any custodial interrogation must be preceded by the reading of Miranda Warnings. This does not preclude pre-interrogation discussions with the subject before Miranda Warnings are read and the actual interrogation commences. In cases involving qualifying offenses where the interrogation is to be recorded, all conversations that occur inside the recording room must be recorded, including pre-interrogation discussions and the administration of the Miranda Warnings.

VIII Prior to Recording

- A. **Record entire interview:** The recording equipment should be turned on prior to the subject being placed within the recording room and should only be turned off after the subject has left the room after the interrogation is completed. All discussions in the recording room, including any pre-interrogation discussions, even if they occur before the reading of Miranda Warnings, must be included in the recording. Should the need arise for either the subject or the interrogating officer to leave the recording room; recording devices should continue to operate without interruption. If the recording is temporarily stopped, the reason for stopping the recording and the duration should be documented.
- B. **Suspect search:** Prior to the interview, the interviewing officer should be certain that the suspect, who is in custody, was searched for weapons, contraband,

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evidence, electronic devices or telephones and that all relevant items were removed.

- C. Covert Recording:** If an agency chooses to make the electronic recording equipment covert, the officer shall not inform the subject that the interrogation is being recorded, nor discuss the topic of recording. If the subject asks about the recording, the department shall determine protocols for responding within the confines of the law.
- D. Eavesdropping:** Article 250 of the Penal Law must be followed to avoid any circumstance in which conversations are recorded in which no party thereto is aware of the recording. To legally record a conversation, at least one party must be aware of, and have consented to, the recording.
- E. Juveniles:** So that juveniles (over seven and less than sixteen years old) and adults can be questioned in the recording room, the room may also be designated a juvenile room, where practical. To meet these criteria, the room must have been designated by the Chief Administrator of the Courts as a suitable place for the questioning of juveniles and it must comply with the requirements of 22 N.Y.C.R.R. 205.20. Note: A juvenile room is not required for a person between thirteen and fifteen years of age who will be prosecuted as an adult in criminal court as a juvenile offender. CPL 1.20 (42) [defining “juvenile offender”].

When questioning a juvenile, who will be prosecuted as a juvenile delinquent under the Family Court Act (over seven and less than sixteen years old), the interview should take place in a designated juvenile room.

The officer should be aware of other considerations, including the parental notification requirements and the requirement that the parent or guardian of the child be given Miranda Warnings of Family Court Act Section 305.2 (applicable to the questioning of juvenile delinquents), and Criminal Procedure Law Section 140.20(6) (requiring the arresting officer to notify the parent or guardian of a juvenile offender arrested without a warrant of the arrest and the location where the juvenile is detained). The officer may also consider using simplified Miranda Warnings when questioning a juvenile.

- F. Recording Device Responsibility:** At least one officer conducting the interrogation shall be responsible for operating the recording device used during the interrogation and should know the Department’s electronic recording protocols.
- G. Recording Time and Date:** Date and time stamping of the electronic recording is encouraged. If the equipment cannot digitally time stamp the video, the video camera should be positioned to also capture in frame an analog clock, preferably

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with a sweeping second hand to show the linear and uninterrupted passage of time. The clock should be positioned out of the suspect's line of sight so as not to serve as a distraction.

- H. Camera Position and Field of View:** To the extent practicable, the camera positioning and field of view should be set to capture as much of the room and occupants as possible while still maintaining a frontal high angle view of the interrogated subject.
- I. Recording Capacity:** Before the interrogation begins, the officer should make sure there is enough capacity to record the entirety of the interrogation.
- J. Document Equipment Challenges:** The time and nature of any irregularities that occur with the equipment should be documented by the officer in writing. Even if there is a problem with the electronic media, the electronic media must be preserved.

IX During Recording

- A. Attorney Visit:** If the subject of a recorded interrogation has an attorney visit, the subject and attorney shall be offered a separate, private area in which to confer if one is available. The recording of the empty room can continue during their absence to memorialize the event until such time that the interrogation is either resumed or terminated. Alternatively, a record can be made of when the recording was discontinued for the attorney visit. If the interrogation re-commences after the attorney visit, then there should be documentation of the attorney's agreement to allow the questioning to continue and the time that the recording began again. In no event shall the visit between the attorney and the suspect be recorded.
- B. Written Statements:** After the subject of the recorded custodial interrogation has provided all of the pertinent information, a written statement may be obtained from the subject. If the officer opts to obtain a written statement, that procedure should also be recorded.
- C. Identification of Parties:** All persons within the recording room should be identified on the recording, whether by the interviewing member or by the subjects themselves.
- D. Acknowledgement of Provisions to Subject:** Where possible, it should be made clear on the recording when a subject is or has previously been provided with food, drink, cigarettes, access to toilet facilities, etc.

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X After Interview

- A. **Label Recording Media:** After the custodial interrogation, the officer(s) conducting the interrogation, or an employee designated by the Department, shall label all applicable documents, recorded media and notes according to Department protocols.
- B. **Avoid Altering Media:** No person shall alter the operation of the electronic recording equipment. No person shall, in any manner or for any purpose, alter the original “master” electronic recording of a custodial interrogation.
- C. **Copies:** Reproductions of the recorded interrogation should be made according to Department protocols. Any defense request for a copy of the interrogation should be referred to the District Attorney’s Office.
- D. **Originals:** The original of the electronic media should be appropriately vouchered in accordance with Departmental evidence procedures. The original should be retained according to the Department’s retention policy. Accordingly, electronic media may be utilized to create an authoritative original of the recording for systems that write and maintain the video file on a hard drive or server.
- E. **Dissemination of Recordings:** Any dissemination of any recording shall be carried out according to documented Department rules and procedures. Policies for the viewing of recordings should be developed to allow for training, related investigations, quality control, supervision, and the like.
- F. **710.30 Notice:** Complete either a 710.30 CPL Notice of Statement or a Felony Interview Reporting Form, and indicate that an electronic recording was made, or conversely, was not made, of a custodial interrogation. The substance of all oral admissions must also be documented on the 710.30 CPL form from all involved members regardless of whether there was a subsequent recorded and/or written statement. Note: Failure to notify the prosecutor of the recorded interview could prevent its use in court.

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Name: Daniel Conviser (PLEASE PRINT)

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I represent: Persons / Judge

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I represent: Myself.

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I represent: John Jay College of Crim Justice

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Name: MARK HALE, CHIEF
CONVICTION REVIEW

Address: BROOKLYN DA OFFICE

I represent: _____

Address: _____

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Date: 9/23/2016

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Name: Yung-Mi Lee

Address: _____

I represent: Brooklyn Defender Services

Address: _____

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Name: Chief William Brooks

Address: _____

I represent: Norwood PD ; Mass. Chiefs of Police

Address: President Association

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Date: 9/23/16

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Name: Shabaku Shakur

Address: _____

I represent: Wrongfully convicted

Address: _____

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Date: 9/23/16

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Name: Alan Newman

Address: _____

I represent: Wrongfully convicted

Address: _____

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Date: 1/25/16

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Name: Sharroene Salazar

Address: _____

I represent: Central Park 5, Mayor of NYC

Address: Salazar

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☐ in favor ☐ in opposition

Date: 9/23/16

(PLEASE PRINT)

Name: Barry Scheek

Address: _____

I represent: Innocence Project

Address: 40 Worth St.

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☐ in favor ☐ in opposition

Date: 9/29/16

(PLEASE PRINT)

Name: Barry Gibbs

Address: 1512 Palisade Ave APT 14E

I represent: Myself

Address: _____

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Name: DR. Jennifer Pysart

Address: _____

I represent: John Jay College of Crim. Justice

Address: _____

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☒ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Lonnie Soury FAMILIES of

Address: Wrongfully Convicted

I represent: 212 414 5857

Address: _____

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THE CITY OF NEW YORK**

Appearance Card

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☐ in favor ☐ in opposition

Date: 9.23.16

(PLEASE PRINT)

Name: MARK DWYER

Address: 111 CENTRE ST NY NY

I represent: JUSTICE TASK FORCE

Address: SAME

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Date: 9-23-16

(PLEASE PRINT)

Name: Martin Tankleff

Address: 144 Bedell St. W. Babylon, NY 11704

I represent: Innocence Project

Address: 40 Worth St, NYC

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Name: David Loftis

Address: _____

I represent: LEGAL AID Society

Address: _____

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☐ in favor ☐ in opposition

Date: 9-23-2016

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Name: Julian David O'Connor

Address: _____

I represent: Bronx DA Office

Address: _____

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(PLEASE PRINT)

Name: Marika Meis

Address: The Bronx Defenders 300 E 161 St, NY 10451

I represent: The Bronx Defenders

Address: _____

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Name: Elizabeth Glazer

Address: _____

I represent: Director, Mayor's Office of Criminal Justice

Address: 1 Centre Street, NY, NY

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☐ in favor ☐ in opposition

Date: 9/23/16

(PLEASE PRINT)

Name: Alex Crohn

Address: _____

I represent: General Counsel, Mayor's Office of Criminal Justice

Address: 1 Centre Street NY, NY

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