NOS. 1-08-2073, 1-08-3414

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Plaintiff-Appellant,

v.

SUPERINTENDENT OF THE CHICAGO POLICE DEPARTMENT *et al.*,
Defendants-Appellees.

On Appeal from the Circuit Court of Cook County, County Dept., Chancery Div., *National Association of Criminal Defense Lawyers v. Superintendent of the Chicago Police Department et al.*, No. 07 CH 3622, Hon. Mary Anne Mason, Judge Presiding; and the Circuit Court of Will County, *National Association of Criminal Defense Lawyers v. Joliet Police Department*, No. 07 MR 530, Hon. Bobbi N. Petrungaro, Judge Presiding

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BRIEF *AMICUS CURIAE* OF

THE INNOCENCE NETWORK;
THE NORTHAMPTON (MASSACHUSETTS) POLICE DEPARTMENT;
CAPT. KENNETH PATENAUDE, NORTHAMPTON POLICE DEPARTMENT;
SGT. PAUL CARROLL (RET.), FORMERLY OF THE CHICAGO POLICE DEPT.;
STEVEN D. PENROD, DEPARTMENT OF PSYCHOLOGY,
JOHN JAY COLLEGE OF CRIMINAL JUSTICE;
D. MICHAEL RISINGER, SETON HALL UNIVERSITY SCHOOL OF LAW;
JON B. GOULD, CHAIR, INNOCENCE COMMISSION FOR VIRGINIA,
AND DIRECTOR, CENTER FOR JUSTICE, LAW & SOCIETY,
GEORGE MASON UNIVERSITY;
MAURICE POSSLEY, FREELANCE JOURNALIST; AND
LAURA SPINNEY, FREELANCE JOURNALIST

IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF INTEREST

Amici Curiae The Innocence Network; the Northampton (Massachusetts) Police Department; Captain Kenneth Patenaude of the Northampton Police Department; retired Sergeant Paul Carroll, formerly of the Chicago Police Department; Steven D. Penrod, Distinguished Professor of Psychology at John Jay College of Criminal Justice; D. Michael Risinger, John J. Gibbons Professor of Law at Seton Hall University School of Law; Jon B. Gould, Chair of the Innocence Commission for Virginia and Director of the Center for Justice, Law & Society at George Mason University; and freelance journalists Maurice Possley and Laura Spinney submit this brief in support of Plaintiff National Association of Criminal Defense Lawyers ("NACDL"). *Amici Curiae* are a group of organizations and individuals with particular interest in the issues presented on this appeal.

The Innocence Network is an association of the individual Innocence Projects throughout the United States and internationally, which provide pro bono legal services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. It is dedicated to improving the accuracy and reliability of the criminal justice system, and advocates study and reform designed to enhance the system's truth-seeking functions to ensure that future wrongful convictions are prevented, including improvements in eyewitness identification procedures.

The law enforcement *Amici* on this brief include the Northampton Police Department, Captain Kenneth Patenaude of that department, and retired Sergeant Paul Carroll, formerly of the Chicago Police Department. These *Amici* are uniquely concerned with the issues presented on this appeal because they themselves have advocated for, and indeed use, the eyewitness identification procedures that purportedly were examined in

the Illinois field study that is the subject of this litigation, and are intimately familiar with the implementation of different procedures in practice.

Also participating as *Amici* are members of academia – Professors Steven Penrod, Michael Risinger, and Jon Gould. Their concentrations and extensive scholarship in psychology, law, and criminal justice – especially with regard to eyewitness identification and scientific research – make them uniquely suited to offer the Court guidance on the issues surrounding the Illinois field study.

Finally, *Amici* include freelance journalists Maurice Possley and Laura Spinney, each of whom has a particular interest in the problem of mistaken eyewitness identifications and law enforcement's implementation of improved procedures. They each have investigated and authored articles concerning these issues.

Additional information about the interests and backgrounds of *Amici Curiae* is set forth in the accompanying motion for leave to file this brief.

INTRODUCTION

Amici Curiae urge this Court to overturn the rulings of the Cook and Will County Circuit Courts and to compel the production of the information requested by the NACDL in its Freedom of Information Act ("FOIA") requests.

This appeal arises from NACDL's FOIA requests for disclosure by the Illinois State Police and the Chicago, Evanston, and Joliet Police Departments of, *inter alia*, the complete study protocol and raw data that supported the final report of the Illinois Pilot Project. The Illinois Pilot Project was a legislatively authorized field study of the reliability of different eyewitness identification procedures in criminal investigations, and its results and conclusions appear to contradict years of scientific inquiry. All of the police agencies denied the FOIA requests, with the only exception that Joliet did produce

some limited records. NACDL sought relief from the denials in the Cook County Circuit Court; the Joliet action was later transferred to Will County. The Evanston Police Department ultimately produced a substantial amount of the requested information, which has revealed serious flaws in the study. The State Police produced to NACDL some of the information requested, and informed NACDL that the remaining documents in its possession are derived from the three municipal police departments. The State Police elected not to actively participate in the litigation but agreed to be bound by the courts' decisions with regard to the requests of the municipal departments. The Cook and Will County Courts, while agreeing that some of the records sought by NACDL should be produced, ruled against NACDL with respect to the bulk of their requests, including the raw data underlying the Illinois Pilot Project, thereby denying NACDL access to this data for scientific review of the Project.

The rulings below should be reversed. The courts' decisions frustrate legitimate inquiry into a study that purports to be scientific, threatening – indeed already harming – the commendable progress that has been made in recent years in reducing the number of erroneous eyewitness identifications, a substantial number of which result in wrongful convictions and incarcerations of innocent people. The central purpose of FOIA statutes is to prevent governmental entities from conducting business in secret without any opportunity for informed scrutiny by the citizenry. *See* 5 ILCS 140/1. To further that end, the Illinois FOIA requires that any restraint on public access to information be extremely limited. The general rule is that "people have the right to know the decisions, policies, procedures, rules, standards, and other aspects of government activity that affect the conduct of government and the lives of any or all of the people." *Id.* Any exceptions to this general rule must be justified, carefully weighing the public

interest in disclosure against any potential harm that could result from disclosure. In this case, two compelling public interests strongly militate in favor of disclosure of the requested information, either of which independently overrides the defendants' arguments to restrict access.

First, the public has an abiding interest in ensuring that the right people are identified as the perpetrators of crime and are ultimately tried and convicted. Without a proper review of the data and procedures used in the Illinois Pilot Project, however, criminal justice policy cannot respond effectively to the disturbing problem of erroneous eyewitness identification. While the full extent of the problem is unknown, it is known that erroneous eyewitness identifications contributed to approximately three quarters of the wrongful convictions ultimately overturned by DNA evidence – an extremely troubling statistic. Over the years, researchers have studied this problem and developed a significant body of convincing evidence that has helped shape criminal justice policy reforms. In short, progress has been made and erroneous eyewitness identifications have been reduced. Yet, contrary to this large body of scientific evidence, the Illinois Pilot Project concluded that existing eyewitness identification procedures were extremely reliable, and even superior to the alternative procedures supported by numerous scientific experts. This asserted conflict has stalled the reform movement and, in some places, started to roll it back, causing some law enforcement officials and others to question which identification methods to employ. In addition, some courts have cited the Illinois Pilot Project's results as a reason not to require use of improved procedures. This situation is extremely dangerous – and painfully unfortunate. Without access to the requested information concerning the Illinois Pilot Project, its reported results and conclusions will stand, inviolate, despite the study's many known and suspected flaws,

and it will continue to frustrate progress in what until now has been a remarkable, collaborative reform movement in the criminal justice system. Even more tragically, this stalled progress will undoubtedly lead to additional wrongful convictions based on erroneous eyewitness identifications.

Second, access to the Illinois Pilot Project data is absolutely essential to scientific review of these data and to understanding the study's real implications for law enforcement policy and procedure. The Illinois Pilot Project is of little value if its conclusions are not subjected to peer review, a cornerstone of the scientific method, and cannot be replicated by further studies. Perhaps most troubling is the Illinois Pilot Project's conclusion that its field data are comparable to, yet contradict the conclusions gleaned from, the large body of data used in scientific laboratory experiments. The failure to grant NACDL access to the requested data makes it impossible to assess this comparison, and thus to understand the true implications of the Illinois Pilot Project's conclusions. Without the necessary scientific review of this study, the development of research in this crucial field is hampered.

ARGUMENT

I. WITHOUT A COMPLETE UNDERSTANDING OF THE ILLINOIS PILOT PROJECT, THE CRIMINAL JUSTICE SYSTEM'S PROGRESS IN DEALING WITH THE PROBLEM OF MISTAKEN EYEWITNESS IDENTIFICATION WILL BE STALLED, AND FUTURE LAW ENFORCEMENT POLICY AND PROCEDURE CANNOT PROPERLY BE SHAPED TO AVOID SUCH MISIDENTIFICATIONS.

A. DNA exonerations have highlighted the significant role of mistaken eyewitness identification evidence in wrongful convictions.

Eyewitness testimony can be extraordinarily compelling evidence at trial. Indeed, there likely is "*nothing more convincing* [to a jury] than a live human being who

takes the stand, points a finger at the defendant, and says 'That's the one!'" *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis in original). But with that testimony comes the substantial risk that the witness, despite the certainty of the identification, could be wrong. As early as 1967, the United States Supreme Court recognized that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967). Only in recent decades has the advent of DNA technology offered the scientifically convincing proof needed to re-examine questioned cases where convictions hung upon little or no more than an eyewitness's identification, affording an unprecedented opportunity to identify cases in which the eyewitnesses "got it wrong" and to explore the reasons for the errors. Indeed, numerous post-conviction studies have concluded that, in the vast majority of cases reviewed, an erroneous eyewitness identification was the most influential evidence leading to a wrongful conviction.

Over the last fifteen years or so, the evidence has been mounting that mistaken eyewitness identification occurs frequently and tragically leads to the conviction of the innocent. In 1996, the Department of Justice published the results of a study involving 28 cases in which post-conviction DNA testing had revealed that the person convicted could not have been the perpetrator. Nat'l Inst. of Justice, U.S. Dep't of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996), *available at* http://www.ncjrs.gov/pdffiles/dnaevid.pdf. In 24 of those cases, an eyewitness or victim identification had been the primary evidence offered at trial. *See id.* By 1998, 90% of wrongful conviction cases examined (36 of 40) were determined to involve one or more mistaken eyewitness identifications. Gary L. Wells et al., *Eyewitness Identification Procedures:*

Recommendations for Lineups and Photospreads, 22 Law & Hum. Behav. 603 (1998). In 2000, an analysis of the 62 DNA exoneration cases known at that time found that 52 of them involved mistaken identifications by a total of 77 witnesses. Barry Scheck et al., *Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted* (2000). In 2005, 63 of 80 DNA exonerations reviewed were found to involve mistaken identifications. James Doyle, *True Witness: Cops, Courts, Science And The Battle Against Misidentification* (2005). Most recently, it has been reported that "[e]yewitness misidentifications contributed to over 75% of the more than 220 wrongful convictions in the United States overturned by post-conviction DNA evidence." Innocence Project, Eyewitness Identification Reform, *available at* http://www.innocenceproject.org/Content/165.php. Most disturbingly, some of those wrongful convictions carried death sentences.

The upshot of the DNA exoneration studies is the unavoidable conclusion that eyewitness identification evidence, while given great weight by juries, can be some of the most *unreliable* evidence there is. While the DNA exonerations have led to overwhelming evidence of this problem, it is important to remember that DNA evidence is not even available in the vast majority of crimes. The availability of DNA evidence generally is limited to sexual assaults and homicides (and then only some of them), which, although the most notorious and heinous crimes investigated, represent only a very small percentage of all crimes. Thus, the available figures say nothing about the incidence of mistaken identification that occurs in cases that do not involve biological evidence, like most robberies or drive-by shootings, and therefore grossly understate the incidence of erroneous eyewitness identifications leading to convictions. More than 35 years ago, the United States Supreme Court recognized the fallibility of eyewitness

identification evidence in *Neil v. Biggers*, 409 U.S. 188, 198 (1972). *See also People v. Tisdel*, 201 Ill. 2d 210, 220, 775 N.E.2d 921, 927 (2002). However, DNA exonerations in the past decade have brought into sharp focus the problem of mistaken eyewitness identification and have, fortunately, drawn the attention of all corners of the criminal justice system, leading to remarkable collaboration in fashioning a response. The Illinois Pilot Project, and the dissemination of its suspect conclusions, now threatens the progress that has been made.

B. An expansive body of psychological research explains why eyewitnesses sometimes make errors and how those errors can be prevented.

For more than the past quarter century, researchers have been exploring the reasons for misidentifications and, in some cases, suggesting reforms to minimize the incidence of future errors. No one doubts that eyewitness evidence can be tremendously valuable in helping to develop leads, identify suspects, convict the guilty, and exonerate the innocent. But at the same time, even the most honest and well-meaning witnesses can make mistakes. Of course external factors – such as poor lighting, shielded views, or distractions – can complicate accurate identifications, but researchers have learned that the very nature of human memory also can lead to mistakes. This is why the issue of eyewitness identification has been at the forefront of an ever-growing body of empirical knowledge among researchers. The combination of this research and the DNA exoneration cases discussed above prompted the Department of Justice a decade ago to promulgate – via a multidisciplinary working group of police, social scientists, prosecutors, and defense lawyers – a set of targeted guidelines for the nation's law enforcement agencies on the collection of eyewitness identification evidence. The goal of the guidelines was to maximize the accuracy and reliability of the evidence obtained

from witnesses, in an effort to decrease the incidence of wrongful convictions based on erroneous identifications. Nat'l Inst. of Justice, U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/178240.pdf. Moreover, adoption of the improved procedures was seen as a potential boon to the prosecution, in that adherence to better investigative techniques would help ensure that reliable eyewitness evidence would be given proper weight at trial. *Id.* at 2.

The DOJ guidelines built on the psychological research, laying out simple sets of investigative tasks that, when employed in interviewing eyewitnesses or presenting live or photo lineups, should overcome many of the factors that adversely affect eyewitness recall and behavior and consequently can lead to less reliable identifications. These procedures include things like asking primarily open-ended questions to elicit more information from the witness, reminding the witness that the actual perpetrator may or may not be present in the lineup, and obtaining a statement from the witness concerning the witness's confidence in an identification. The guidelines and even more broad-reaching procedural reforms now adopted in a number of jurisdictions have contributed to the courts' recognition of the value of the eyewitness identification research findings. *See, e.g.*, *United States v. Langan*, 263 F.3d 613, 622 (6th Cir. 2001) ("[T]he science of eyewitness perception has achieved the level of exactness, methodology, and reliability of any psychological research.") (internal quotations omitted). These advances are now threatened by the findings of the Illinois Pilot Project that run counter to the prevailing psychological research, underscoring the need for that project to be available for a full scientific inquiry, in order to assess its proper place