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

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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

among the body of existing and expanding literature. Without the requested information, that inquiry is impossible.

Psychologists recognize the fragility of memory, in particular for traumatic events like crimes. *See, e.g.*, Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research*, 55 Am. Psychologist 581, 583 (2000). A witness's ability to observe and commit to memory aspects of an event can be impacted by a large number of factors, such as stress, "weapon focus," arousal, and cross-racial identification. *See id.* at 584; Brian Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 Law & Hum. Behav. 233–58 (1987); David B. Fishman & Elizabeth Loftus, *Expert Psychological Testimony on Eyewitness Identification*, 4 Law & Psychol. Rev. 87–103 (1978). Researchers also have observed that, even after the event, a witness's memory, and consequently the accuracy of any subsequent identification, still can be affected by variables introduced by investigators. For example, in the administration of lineups and photospreads, variables that can affect the accuracy of the identification include the composition of the lineup (*i.e.*, the "fillers" – non-suspects – that are selected), what the witness is told prior to and while viewing the lineup, and how the lineup is presented. *See, e.g.*, Wells, *From the Lab to the Police Station*, at 584-86; Nancy M. Steblay, *Social Influence In Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 Law & Hum. Behav. 283-98 (1997); C.A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification and the Selection of Distracters for Lineups*, 15 Law & Hum. Behav. 43-57 (1991).

Scientific research consistently has shown that more accurate and reliable identification results are obtained when (1) lineup members and/or photographs are presented sequentially (one at a time) rather than simultaneously (the usual method) and

(2) the process is conducted "double-blind," where neither the administrator/investigator nor the witness knows which lineup member or photograph is the suspect. The Illinois Pilot Project purports to show that the opposite is true.

The great weight of laboratory research has demonstrated that lineups and photospreads yield more reliable evidence when the individual lineup members or photographs are presented to the witness sequentially rather than simultaneously. *See* Wells, *From the Lab to the Police Station*, at 586 (describing study results showing no significant difference in accurate identifications where perpetrator was present in lineup, but 43 % mistaken identification rate with simultaneous procedure where perpetrator was not present, compared to only 17 % with sequential method); Rod C.L. Lindsay et al., *Sequential Presentation: Technique Matters*, 76 J. of Applied Psychol. 741-45 (1991). This disparity is linked to a phenomenon known as "relative judgment," a situation in which people tend to select the person who most resembles the perpetrator – in essence making the "best choice" among those available – rather than identifying the lineup member or photograph based on its own characteristics. In effect, the witness is saying that, "relative to the other lineup members (or photographs), this person looks the most like the perpetrator." *See* Wells, *From the Lab to the Police Station*, at 585-86. It is easy to see how this sort of identification can be problematic. What if the real perpetrator is not in the lineup? One would hope that the witness makes no identification. But sometimes witnesses, whether as a result of a desire to please and assist investigators, subtle pressure to make a selection, or faulty recollection, will choose – erroneously – the person who looks most similar to their memory of the perpetrator, even if none of the persons in the lineup is actually the perpetrator.

Laboratory studies also show that unintentional cues by a lineup or photospread administrator, such as body language, tone of voice, or verbal signals, may negatively impact the reliability of any resulting identification. *See, e.g.*, Wells, *Eyewitness Identification Procedures*, at 603-47; Willem A. Wagenaar & Elizabeth F. Loftus, *Ten Cases of Eyewitness Identification: Logical and Procedural Problems*, 18 J. Crim. Just. 291–319 (1990). Psychology researchers have long believed that such influences can be avoided by the use of "double blind" identification procedures. Because, in such procedures, neither the witness nor the lineup administrator knows which lineup member/photo is the actual suspect, the administrator cannot inadvertently influence the witness's identification or non-identification of a particular person.

These now generally accepted research findings cannot be reconciled with the results of the Illinois Pilot Project, which purports to show the opposite: that, in practice, double-blind and sequential procedures are inferior to simultaneous, non-blind administration, with the double-blind and sequential procedures producing a higher number of "filler" (non-suspect) identifications and a lower number of picks of the suspect. Sheri L. Mecklenburg, *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures* 6 (2006), *available at* http://www.psychology.iastate.edu/faculty/gwells/Illinois_Report.pdf (the "Mecklenburg Report"). Briefing by NACDL in the actions consolidated in this appeal describes the numerous study design problems that infected the Illinois Pilot Project and led to these odd results, which are consistent with neither the prevailing scientific literature nor common sense. Likely the most egregious flaw was the Pilot Project's failure to use a "blind" administrator for simultaneous lineups while sequential lineups *were* conducted double-blind (in other words, changing more than one variable at a time),

thus violating a foundational principle of empirical research. *See generally* Daniel L. Schacter et al., *Policy Forum: Studying Eyewitness Investigations in the Field*, 32 Law & Hum. Behav. 3, 4 (2007); Timothy P. O'Toole, *What's the Matter With Illinois? How an Opportunity Was Squandered to Conduct an Important Study on Eyewitness Identification Procedures*, Champion, Aug. 2006, at 18. The Blue Ribbon Panel led by Harvard psychology professor Daniel Schacter that reviewed the design of the Illinois Pilot Project in 2007 concluded that the consequences of this confound were "devastating" to the ability to evaluate "the real-world implications of this particular study." Schacter, *Policy Forum*, at 4. As constructed, it cannot answer the question whether sequential lineup procedures are superior to simultaneous, nor whether double-blind procedures are superior to non-blind. A fuller understanding of the Illinois Pilot Project's data and procedures would ensure that the flaws in the Pilot Project can be properly explored, and that its shortcomings can serve as a lesson for future field studies.

C. The recommendations that have flowed from the psychological research have led to successful reforms in law enforcement procedures around the country.

Since the initial set of guidelines for improved eyewitness identification procedures was issued by the Department of Justice in October 1999, a number of jurisdictions have successfully adopted and implemented the same or similar procedures, even expanding the DOJ recommendations to fully embrace the "sequential double-blind" technique as standard lineup procedure. These jurisdictions include the states of New Jersey (in 2001)[1] and North Carolina (in 2003),[2] as well as Boston and

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[1] Letter from John J. Farmer Jr., New Jersey Attorney General, to County Prosecutors et al. 1-2 (Apr. 18, 2001), *available at* http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.

[2] Winn S. Collins, *Looks Can Be Deceiving: Safeguards for Eyewitness Identification*, Wis. Law., Mar. 2004, at 8, 49 (citing Letter from I. Beverly Lake Jr., Chief Justice, Supreme Court of North Carolina, to Scott Perry et al., Director, Criminal Justice

Northampton, Massachusetts; Madison, Wisconsin; Winston-Salem, North Carolina; Hennepin and Ramsey counties in Minnesota (home of Minneapolis and St. Paul); Santa Clara County, California; and Virginia Beach, Virginia. In addition, the state of Wisconsin has established its own voluntary "double-blind sequential" guidelines and made the procedures a part of law enforcement training.[3]

Most recently, the Dallas Police Department has indicated that it will implement sequential double-blind procedures for photo lineups, making it the eighth department in the state of Texas to do so. Dallas police declined to wait for field study results (in which they had planned to participate), believing the new procedures too important to be delayed any longer. Jennifer Emily, *Dallas police drop study, plan photo-lineup changes*, Dallas Morning News, Jan. 16, 2009, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/011609dnmetsequentialblind.4311ff6.html. Since post-conviction DNA testing began in Texas in 2001, Dallas County has seen more DNA exonerations (19) than any jurisdiction in the nation, and Dallas police investigated 13 of the 19 cases. All but one of the 19 wrongful convictions were based on mistaken eyewitness identification. *Id.*

The reforms undertaken by these states, cities, and counties are a model for other jurisdictions and show the positive impact that can result from improved

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Training & Standards, North Carolina Department of Justice (Oct. 9, 2003)); N.C. Gen. Stat. Ann. § 15A-284.52 (West 2007) (requiring North Carolina law enforcement agencies to employ variety of research-based reforms, including sequential double-blind procedures and proper witness instructions).

[3] Bureau of Training & Standards for Criminal Justice, Wis. Dep't of Justice, *Model Policy and Procedure for Eyewitness Identification* 3 (2005), *available at* http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf; Wis. Stat. § 175.50 (2007) (requiring every law enforcement agency in the state to adopt written policies governing eyewitness identification procedures, and to consider employing double-blind sequential procedures).

identification procedures. In addition, they offer a striking example of what a collaborative effort on the part of law enforcement agencies, prosecutors, and social scientists can achieve. This is the sort of cooperation that has been fostered to date by the DNA exoneration studies and the eyewitness identification research – as the system gradually has realized the terrible scope of the problem – and is the progress that the Illinois Pilot Project threatens to curtail.

D. An earlier field study produced results contrary to the Illinois Pilot Project, and future field studies will benefit from an understanding of this discrepancy.

Illinois was not the first to experiment in the field with sequential double-blind procedures, despite being the first to engender such controversy. An earlier, well-constructed sequential double-blind field study conducted in Hennepin County, Minnesota produced results consistent with those predicted by the psychological research and laboratory trials, including acceptable suspect identification rates and low "filler" identification rates. Amy Klobuchar et al., *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 Cardozo Pub. L. Pol'y & Ethics J. 381 (2006). Four police departments participated, and after the study's conclusion, all four remained committed to the new procedures. Indeed, officers who initially had expressed reservations about implementing the proposed reforms "found they were not hindered by the [new procedures]." Amy Klobuchar & Hilary Lindell Caligiuri, *Protecting the Innocent/Convicting the Guilty: Hennepin County's Pilot Project in Blind Sequential Eyewitness Identification*, 32 Wm. Mitchell L. Rev. 1, 24 (2005). In the end, the results of the Hennepin County pilot project "indicate[d] that the double-blind sequential protocol is workable for police in both large and small

departments without undercutting the ability to solve cases." Klobuchar, *Improving Eyewitness Identifications*, at 413.

Still, it is clear that more field studies are needed. *See, e.g.*, Schacter, *Policy Forum*; Brian L. Cutler & Margaret Bull Kovera, *Introduction to Commentaries on the Illinois Pilot Study of Lineup Reforms*, 32 Law & Hum. Behav. 1, 2 (2008); Beth Schuster, *Police Lineups: Making Eyewitness Identification More Reliable*, NIJ J., Oct. 2007, *available at* http://www.ncjrs.gov/pdffiles1/nij/219603a.pdf. Some are already underway. *See* Schuster, *Police Lineups*, at 8; *see also* Jennifer Emily, *Dallas police drop study, plan photo-lineup changes*, Dallas Morning News, Jan. 16, 2009, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/011609dnmet sequentialblind.4311ff6.html (explaining how delays in DOJ-funded field study led Dallas police to drop out and implement reforms anyway, stating that they could not wait any longer). But only with a complete picture of everything that went wrong with the Illinois Pilot Project can other jurisdictions learn from those mistakes and continue this important work.

E. In light of the uniformly negative reaction to the Illinois Pilot Project results among the research community, the weight given to the study by some law enforcement policymakers and courts is troubling.

The potential for this single study, the Illinois Pilot Project, to roll back the progress in eyewitness identification reform is very real. Even in New Jersey and Massachusetts, states at the forefront of the reform movement, its impact has been felt. Prosecutors in Massachusetts expressed concern that sequential lineup procedures not be mandatory in light of the Illinois Pilot Project's conclusions. *See, e.g.*, Mass. District Attorneys Ass'n, *Report of the Justice Initiative: Recommendations of the Massachusetts Attorney General and District Attorneys to Improve the Investigation and Prosecution of*

Cases in the Criminal Justice System 11 (2006), *available at* http://www.mass.gov/Dmdaa/docs/justice_iniative_report/justice_initiative_report. pdf. And New Jersey – the first state to adopt the Department of Justice guidelines and take them one step further, mandating the use of sequential double-blind lineup procedures whenever practicable – also reacted to the Illinois Pilot Project with some vacillation. The Illinois Pilot Project prompted the New Jersey Attorney General's Office to review the procedures that its police agencies had been following successfully for five years. *See* Scott Ehlers, *State Legislative Affairs Update*, Champion, Aug. 2006 at 32, 33 (citing "State Reassessing Police Lineups," NorthJersey.com, July 3, 2006).

The State of Wisconsin also took the time to consider the Illinois Pilot Project results, but declined to alter its eyewitness identification reforms, pointing to the very different results in the Hennepin County study. In a special report issued in response to the Illinois Pilot Project study, Wisconsin found that "the design of the [Illinois] program does not seem to support [the] inference or conclusion [that the higher rate of filler identification is due to the sequential procedure]." Bureau of Training & Standards for Criminal Justice, Wis. Dep't of Justice, *Response to Chicago Report on Eyewitness Identification Procedures* 3-4 (2006), *available at* http://www.doj.state.wi.us/dles/tns/ILRptResponse.pdf. The report concludes that, despite the Illinois Pilot Project results, "the extensive prior laboratory research revealing that the double-blind and sequential procedures are superior remains the best scientific information available." *Id.* at 4.

But even as some jurisdictions cautiously reject the implications of the Illinois Pilot Project for their own policies, the study's ill effects are being felt by defendants in legal proceedings. One court already has declined to order a sequential double-blind

lineup, sought by the defendant, rather than simultaneous, apparently concluding that the Illinois Pilot Project's results had single-handedly undermined settled laboratory research on the superiority of sequential presentation. *In re Walthour*, No. 39960/2007, 2008 WL 623034, at *3 (N.Y. Sup. Ct. Mar. 5, 2008). Although the New York court was swayed by the Illinois Pilot Project's results, it at least acknowledged the study's "methodology inconsistencies," citing the Schacter panel's review. *Id.* But the problem remains that other courts, like the one in New York, may be dissuaded from relying on years of highly regarded research based on this one flawed field study.

It is not surprising that criminal justice practitioners who are unschooled in the rigors of scientific inquiry would fail to understand the significant flaws known and suspected in the Illinois Pilot Project and would allow its findings to influence their policies and procedures. This unfortunate result will continue, threatening to undo many years of manifestly important eyewitness identification reform, unless and until the results and conclusions of the Illinois Pilot Project can be subjected to the requisite scientific scrutiny. The requested information is critical to that inquiry. In addition, the direction and construction of future field studies will benefit from the lessons to be gleaned from the Illinois Pilot Project's failures.

II. A COMPLETE UNDERSTANDING OF THE ILLINOIS PILOT PROJECT'S SHORTCOMINGS AND RAMIFICATIONS FOR FUTURE RESEARCH IS NOT POSSIBLE WITHOUT A THOROUGH SCIENTIFIC ASSESSMENT OF ITS CONCLUSIONS.

The Blue Ribbon Panel that reviewed the design of the Illinois Pilot Project in 2007 was unable to evaluate the conclusions drawn by the study's author because of the fatal flaw in the study design, except to note the general nonutility of the study's results to practitioners, explaining: "[W]e cannot know on the basis of the Mecklenburg study whether [lineup administrator] bias is operating, even though the entire interpretation of

the significance of the study for real-world practices hinges on this issue." Schacter, *Policy Forum*, at 5. Without access to the field data from the Illinois Pilot Project, the scientific community cannot interpret the extent to which the study's results reflect the lineup procedures employed or some other factor(s) extraneous to the identification procedures, such as the witness's own memory. And consequently, no real conclusion can be made concerning the implications of the Illinois Pilot Project outcomes versus those obtained through years of laboratory study.

Scientific peer review, if carried out on the Illinois Pilot Project prior to publication of the Mecklenburg Report, should have shed some light on the questions above. Peer review, a crucial step in the scientific process, is a prerequisite to the general acceptance of any study's conclusions and its integration into practice and generally is performed prior to the publication of a study's results. *See, e.g.*, *In re Detention of Erbe*, 344 Ill. App. 3d 350, 371-72, 800 N.E.2d 137, 154-55 (2003) (describing peer review as one factor in Illinois's *Frye* "general acceptance" test, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), for admissibility of scientific evidence); *Bachman v. Gen. Motors Corp.*, 332 Ill. App. 3d 760, 780-81, 776 N.E.2d 262, 282-83 (2002) (explaining that data were subject to peer review as part of "general acceptance" analysis). *See generally Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993) (holding that, in the federal courts, whether scientific evidence has been subject to peer review is a critical factor in determining reliability for purposes of admissibility). Scientists describe peer review as a meticulous evaluation and critique of a study's methodology, results, and conclusions carried out by others in the relevant field who have the necessary training and appropriate level of expertise, who have no financial or other bias with respect to the topic, and who are independent of the entity that initially conducted the study. J.B. Ruhl

& James Salzman, *In Defense of Regulatory Peer Review*, 84 Wash. U. L. Rev. 1, 5-6 (2006). The quality-control aspect of peer review is essential to reducing misinformation and confusion concerning the implications of a study's findings. Dale J. Benos et al., *The Ups and Downs of Peer Review*, 31 Advances in Physiology Educ. 145, 145 (2007).

While the Schacter Blue Ribbon Panel did conduct a form of post-publication peer review of the Illinois Pilot Project's *design*, the group was unable to perform the same searching review of the *conclusions* reached in the Mecklenburg Report. As explained above, because of the irreconcilable confound in the study design – the attempted comparison of blind sequential procedures to *non*-blind simultaneous – one cannot interpret for practice the conclusions drawn from it. Perhaps the most problematic of these conclusions is the notion that the results of this field study call into question the results obtained throughout decades of laboratory research. *See, e.g.*, Sheri H. Mecklenburg et al., *Eyewitness Identification: What Chiefs Need to Know Now*, Police Chief, Oct. 2008. This is a question that could not be addressed by review of the study design alone – rather, it is dependent upon the data set employed in the Illinois Pilot Project. In the laboratory, researchers can control for various factors. For example, identification procedures in the lab generally involve *first attempts* at *stranger* identifications. But in the real world (and in field studies), the data do not always conform to such neat little boxes. A witness in the field may be presented with a lineup that includes someone he or she knows or has seen before. Perhaps the perpetrator was not a true stranger. Or, perhaps the witness identified the perpetrator at the scene or from a photo, and a later lineup is merely confirmatory. These are factors that cannot be known to researchers seeking to review the results of the Illinois Pilot Project, because the defendants refuse to disclose the underlying data.

Moreover, proper scientific review requires access to enough detail to enable independent researchers to replicate the study with precision in a different setting or a different jurisdiction. Only in doing so may a study's process, data, and conclusions undergo adequate scrutiny and have any meaning for the community expected to adopt the study's results in practice. Data sharing is a necessary component of the replication process, because without access to the raw data upon which a study's conclusions are based, a researcher seeking to replicate the study is simply unable to achieve scientifically comparable results.

Data sharing has been called an "ideal of science" and an "honored tradition" because it permits others in the scientific community to evaluate the overall merits of the research. D. Michael Risinger et al., *Brave New "Post-*Daubert *World" – A Reply to Professor Moenssens*, 29 Seton Hall L. Rev. 405, 432 n.90 (1998). And the underlying data – as the foundation of any study's results – are essential for scrutiny and reanalysis by others. "Scientific inquiry must be open, and the sharing of data serves to make it so. Disputes among scientists are common; without the availability of data, the diversity of analyses and conclusions is inhibited, and scientific understanding and progress are impeded." Comm. on Nat'l Statistics, Nat'l Research Council, *Report of the Comm. on Nat'l Statistics*, *in* Sharing Research Data 3, 9-10 (Stephen E. Fienberg et al. eds., 1985) (citations omitted).

But academic custom is not the only reason for such transparency in scientific research. As a matter of public policy, the data involved in publicly funded research, such as the Illinois Pilot Project, generally should be available *to the public*. *See, e.g.*, Risinger, 29 Seton Hall L. Rev. at 432 n.90 (citing Jerome M. Clubb et al., *Sharing Research Data in the Social Sciences*, *in* Sharing Research Data 39, 74); D. Michael

Risinger & Michael J. Saks, *Rationality, Research and Leviathan: Law Enforcement-Sponsored Research and the Criminal Process*, 2003 Mich. St. L. Rev. 1023 (2003). Indeed, "[d]ata relevant to public policy should be shared as quickly and widely as possible." Comm. on Nat'l Statistics at 27.

In order for the conclusions of the Illinois Pilot Project to be reviewed and evaluated, the public must have access, at a minimum, to the following: (a) the complete design and protocol for the Illinois Pilot Project , including all training materials for its implementation; (b) the complete data set, including witness identification history, individual eyewitness responses, and circumstances surrounding individual attempts at identification; (c) lineup reports and photographs with the witness description used to select fillers for each lineup, and the witness's decision for each lineup; and (d) access to all raw data. Appropriate redactions to protect personal information will not impact the utility of the data. *See* Affidavit of Dr. Nancy Steblay ¶¶ 12-25, attached as Ex. A to Plaintiff's Mem. in Opp'n to Mot. for Summary Judgment, Case No. 07 CH 03622 (Cook County Cir. Ct., filed Sept. 27, 2007).

The raw data behind the Illinois Pilot Project are especially critical to a review of where deviations from the study's protocol occurred and any consequent impact on the study's results. The raw data also are necessary for reviewers to ascertain how well the Illinois Pilot Project addressed eyewitness identification performance based upon memory alone, rather than a witness's response to variables introduced by initial observation circumstances or the identification procedures themselves. For example, the eyewitness's identification history is imperative to determine whether a witness has identified an individual in more than one lineup or photo array, and then to analyze those selections in relationship to his or her memory of the crime versus memory of the

previous lineup identification. Researchers also need the opportunity to compare original case records, including each witness's description of the perpetrator, with the actual configuration of the lineups. Further, examination of the raw data will enable analysis of the "filler" selections reported by the study and understanding of the Mecklenburg Report's refusal to count some witnesses' selections and not others.

Such review is essential to allow researchers conducting future field studies to understand the impact on the Illinois Pilot Project's results of the particular data involved in that project, and to account for the project's shortcomings. Without the opportunity for questions to be raised by scientific reviewers concerning the process or data used to support the Illinois Pilot Project's conclusions, the publicity surrounding the Illinois Pilot Project may spur other unreliable studies at a great cost to the system. *See* Benos, *The Ups and Downs of Peer Review*, at 148. And without clarification from the research community concerning the Illinois Pilot Project's conclusions, those conclusions likely will continue to be used in an effort to deter needed reforms in identification procedures. Additionally, a thorough scientific review of the Illinois Pilot Project methodology and underlying data will result in public dissemination of the real implications of this field study for law enforcement practices. In sum, absent disclosure of the information requested by NACDL, the necessary review of the Illinois Pilot Project cannot take place, and whatever scientific and forensic value it may have is dramatically diminished – or, arguably, completely extinguished.

CONCLUSION

For the foregoing reasons, this Court should reverse the decisions of the Cook and Will County Circuit Courts and compel production of the information sought by NACDL's FOIA requests.

DATED: February 3, 2009

Respectfully submitted,

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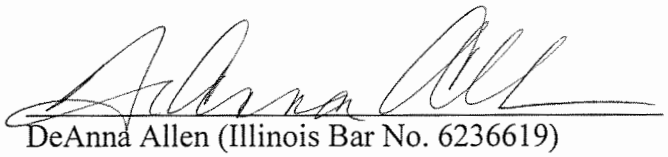
RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) of the Civil Appeals Rules of the Illinois Supreme Court. The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 24 pages.



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PROOF OF SERVICE

I, Lisa M. Kaas, am an attorney with the law firm of Dickstein Shapiro LLP, counsel for *Amici Curiae* in this matter. I hereby certify that an original and eight (8) copies of the foregoing Brief *Amicus Curiae* In Support of Plaintiff-Appellant were mailed via United States Postal Service certified mail to the Court at the address below, by depositing said copies in the mail, with full and proper postage prepaid, before 11:58 p.m. this 3d day of February, 2009, at the National Capitol United States Post Office located at 2 Massachusetts Ave, NE, Washington, DC 20002-9997.

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I further certify that three (3) copies of the foregoing Brief *Amicus Curiae* In Support of Plaintiff-Appellant were served via United States Postal Service Express Mail on each of the counsel listed below, by depositing said copies in the mail, with full and proper postage prepaid, before 11:58 p.m. this 3d day of February, 2009, at the National Capitol United States Post Office located at 2 Massachusetts Ave, NE, Washington, DC 20002-9997.

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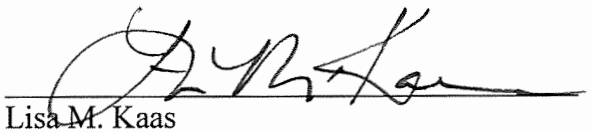

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