

**REPORT OF THE  
VIRGINIA STATE CRIME COMMISSION**

**HJ 137  
Mistaken Identity**

**A BILL REFERRAL STUDY TO  
THE HOUSE RULES COMMITTEE AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



**COMMONWEALTH OF VIRGINIA  
RICHMOND  
MAY 2002**

## **I. Authority**

The *Code of Virginia*, §30-156, authorizes the Virginia State Crime Commission to study, report and make recommendations on all areas of public safety and protection. Additionally, the Commission is to study matters “including apprehension, trial and punishment of criminal offenders.” Section 30-158(3) provides the Commission the power to “conduct studies and gather information and data in order to accomplish its purposes as set forth in §30-156. . .and formulate its recommendations to the Governor and the General Assembly.”

Using the statutory authority granted to the Crime Commission, the staff conducted a study on mistaken identification in criminal cases.

## **II. Executive Summary**

During the 2002 Session of the Virginia General Assembly, Delegate Harry R. Purkey introduced House Joint Resolution 137 (HJ 137)<sup>1</sup>, establishing a joint subcommittee to study mistaken identification in criminal cases. This bill was referred to House Rules where it was passed by indefinitely and referred by letter to the Virginia State Crime Commission to examine the issues and determine if further study is warranted. As a result of the study effort, the following recommendations were made to improve eyewitness identification procedures in the Commonwealth.

### **Recommendation**

It is the recommendation of the Virginia State Crime Commission to require the Virginia Department of Criminal Justice Services (DCJS), Criminal Justice Services Board to develop a workgroup, consisting of local police, sheriffs, Commonwealth’s Attorneys, and the Virginia Department of Motor Vehicles, to consider adopting the United States Department of Justice Guidelines (DOJ Guidelines), applicable to Virginia, and report their findings to the Virginia State Crime Commission by November 2002.

## **III. Methodology**

The Virginia State Crime Commission utilized three research methodologies to examine HJ 137. First, a literary review of psychology and legal documents regarding mistaken eyewitness identification in criminal cases was conducted. Research from the United States Department of Justice and the National Institute of Justice “Eyewitness Evidence: Guidelines for Law Enforcement” (DOJ Guidelines) was reviewed. Second, other states’ policies were examined to determine if they had implemented the DOJ Guidelines. Third, staff conducted interviews with local law enforcement and state

---

<sup>1</sup> House Joint Resolution 137 (2002). See attachment 1.

agencies in the Commonwealth to determine whether to implement the DOJ Guidelines in Virginia and the fiscal impact of such implementation.

## **IV. Background**

Recent cases in which DNA evidence has been used to exonerate individuals previously convicted of crimes, prompted inquiries into what evidence was used to obtain these wrongful convictions. A national study in 1998 revealed that 90% of the DNA exoneration cases analyzed involved one or more mistaken eyewitness identifications.<sup>2</sup> Furthermore, of the first 60 wrongful convictions revealed by DNA technology, 53 had relied to some extent on mistaken eyewitnesses.<sup>3</sup> The possibility that the criminal justice system allowed these repeated mistakes led the United States Department of Justice, National Institute of Justice to form the Technical Working Group for Eyewitness Evidence (TWGEYEE) to specifically address these concerns and suggest solutions. The group consisted of 34 members from the fields of law enforcement, the legal system, and research professions, from both urban and rural jurisdictions in the United States and Canada. TWGEYEE met over a year long period with the goal of developing improved protocols for collecting and preserving eyewitness evidence so that the most accurate and reliable evidence could be presented in court.<sup>4</sup> The product of this collaboration was the handbook, *Eyewitness Evidence: A Guide for Law Enforcement*, which incorporates their years of scientific research on memory and interview techniques into investigative practices that can be used by various jurisdictions to ensure that the criminal justice system will fairly and effectively elicit accurate and reliable eyewitness evidence.<sup>5</sup> In 2001, New Jersey became the first state to officially adopt the recommendations issued by the United States Department of Justice in its *Eyewitness Evidence Guidelines*. This study looks into whether Virginia should follow suit and implement these guidelines, and if so, how this implementation would impact the Commonwealth.

### **DNA and Mistaken Eyewitness Identification**

In 1989, Virginia became the first state to establish a criminal DNA database. Now, it has 176,000 DNA profiles on file, more than any other state. As of May 1, 2002, the Division of Forensic Science (DFS) at the Virginia Department of Criminal Justice Services has recorded 700 cold hits. Notably, 68 hits occurred in April 2002, and the DFS expects 1000 hits by the end of calendar year (CY) 2002. The DFS has received 3,500 requests for DNA analysis, and this number has increased by 50% in the last two years. Furthermore, one quarter to one third of these DNA requests eliminate a suspect.<sup>6</sup>

<sup>2</sup> Of 40 cases analyzed, 36 of the subsequent exonerations involved convictions that were based on one or more erroneous eyewitness identifications. Wells, G.L., M.Small, S.D. Penrod, R.S. Malpass, S.M. Fulero, and C.A.E. Brimacombe. "Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads." *Law and Human Behavior*. Vol. 22, No.6.

<sup>3</sup> Dwyer, Scheck & Neufeld, *Actual Innocence* (2000).

<sup>4</sup> Doyle, Larson, and DiTraglia, "The Eyes Have It – Or Do They? New Guides for Better Eyewitness Evidence Procedures." *Criminal Justice, American Bar Association's Section of Criminal Justice* (Fall 2001).

<sup>5</sup> See attachment 2.

<sup>6</sup> Phone interview with Dr. Paul Ferrara, Director, Division of Forensic Science, Virginia Department of

As Barry Scheck, co-founder of the Benjamin N. Cordozo School of Law at Yeshiva University's Innocence Project states, "DNA testing truly is revolutionary. It's transforming the way we do business in the criminal justice system."<sup>7</sup> He specifically states that the most important aspect of the DNA exoneration cases is that, "mistaken identification is the single greatest cause of the conviction of the innocent."<sup>8</sup> In the 90% of convictions later cleared through DNA evidence involving mistaken eyewitness accounts, "In each case, witness reliability and identification were challenged but upheld by the courts."<sup>9</sup> Although extremely significant, DNA is only one safeguard for the wrongfully convicted because it cannot exonerate those persons wrongfully convicted on the basis of eyewitness testimony where no DNA evidence exists. The fact that DNA evidence only exonerates those convicted individuals who leave trace evidence and that the vast majority of these convictions resulted from eyewitness identification highlights the need for a change in eyewitness identification procedures in the Commonwealth.

Specifically, the recent DNA exoneration cases in Virginia revealed mistaken eyewitness identification to be at the heart of the conviction. Ronald Cotton was sent to prison for 11 years on the confident, but mistaken, testimony of the rape victim. She even testified that she had never seen another suspect in the case, Bobby Poole. Yet, in 1995, DNA tests proved that the witness's identification was wrong – Cotton was innocent, Poole was guilty.<sup>10</sup> In the case of Anderson, who spent 15 years in prison on the identification of an Ashland rape victim, it was a color photograph that tainted the identification procedures. Because no mug shot was available for Anderson, a color photo was used in the identification amongst numerous black and white photos and the victim chose Anderson, and then subsequently identified him in the line-up. The victim was mistaken.<sup>11</sup>

In the above cases DNA was available to exonerate the innocent, however, in the case of Michael Kenneth McAlister, no DNA evidence was left and he remains imprisoned on the basis of claims of credible, mistaken eyewitness identification.<sup>12</sup> McAlister was identified, convicted and sentenced to 35 years in prison on the strength of the identification.<sup>13</sup> The investigator and prosecutor both now believe he is innocent. Unfortunately without any DNA evidence to test, he will be left in prison.<sup>14</sup>

---

Criminal Justice Services.

<sup>7</sup> Frontline, "What Jennifer Saw" available at [www.pbs.org/gbh/pages/frontline/shows/dna/interviews/scheck.html](http://www.pbs.org/gbh/pages/frontline/shows/dna/interviews/scheck.html).

<sup>8</sup> Id.

<sup>9</sup> Myers, Linda. "Innocence Project co-director sees eyewitness error," available at [www.news.cornell.edu/Chronicle/oo/10.5.00/Neufeld.html](http://www.news.cornell.edu/Chronicle/oo/10.5.00/Neufeld.html). (October 5, 2000).

<sup>10</sup> Green, Frank. "Eyes don't always have it: Eyewitnesses can be sure but still be wrong on ID." Richmond Times-Dispatch. (January 28, 2002).

<sup>11</sup> Id.

<sup>12</sup> Green, Frank, "A conviction full of questions: A man found guilty on eyewitness identification alone." Richmond Times-Dispatch (April 21, 2002).

<sup>13</sup> Id.

<sup>14</sup> Id.

## **Department of Justice, National Institute of Health Guidelines**

As noted earlier, the Department of Justice, National Institute of Health produced, *Eyewitness Evidence: A Guide for Law Enforcement*.<sup>15</sup> The purpose of the guidelines is to prevent eyewitness error rather than correcting errors after they have occurred. The guidelines take the basic elements of police investigations and suggest workable changes in order to achieve more consistent eyewitness results. For example, standard police questioning practices originally were designed to elicit information from uncooperative suspects rather than to foster reliable information for cooperative witnesses.<sup>16</sup> The guidelines focus on increasing the amount of information gathered in eyewitness interviews and ensuring that only the eyewitness supplies the information.<sup>17</sup> Specifically, the guidelines look to establish criteria for photo-identifications and lineups and address the many opportunities these situations afford for a biased result.

The guidelines suggest:

- Showing only one suspect per identification,
- Selecting photos of “fillers”, or nonsuspects, that match the eyewitness’s description of the criminal rather than the person the investigators suspect of the crime. The original process of choosing persons who match the description of the suspect narrows the universe of options for the witness and risks creating a subtle suggestion to the witness about what the police think the suspect looks like,<sup>18</sup>
- Avoiding the use of nonsuspects who so closely resemble the suspect that a person familiar with the suspect might have difficulty distinguishing between the nonsuspect and the suspect; and,
- Placing a suspect in different positions in each photo array when dealing with more than one eyewitness in a given case.

Additionally, the guidelines propose that the witness be properly instructed that the actual suspect might not be present in the lineup. They also propose that the suspects be displayed sequentially, or one at a time, rather than in a line at the same time. This technique avoids the possibility that an eyewitness might choose a suspect based on the fact that he looked most like what the eyewitness remembered rather than on a genuine recognition of the suspect.<sup>19</sup>

---

<sup>15</sup> See attachment 2.

<sup>16</sup> Doyle, Larson, and DiTraglia, “The Eyes Have It – Or Do They? New Guides for Better Eyewitness Evidence Procedures.” *Criminal Justice, American Bar Association’s Section of Criminal Justice* (Fall 2001).

<sup>17</sup> Id.

<sup>18</sup> Doyle, Larson, and DiTraglia, “The Eyes Have It – Or Do They? New Guides for Better Eyewitness Evidence Procedures.” *Criminal Justice, American Bar Association’s Section of Criminal Justice* (Fall 2001).

<sup>19</sup> Doyle, Larson, and DiTraglia, “The Eyes Have It – Or Do They? New Guides for Better Eyewitness Evidence Procedures.” *Criminal Justice, American Bar Association’s Section of Criminal Justice* (Fall 2001).

## **Profile of New Jersey**

In April 2001, the New Jersey Attorney General, who has the power to dictate law enforcement policy, issued the *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures*.<sup>20</sup> With these Guidelines, New Jersey became the first state to officially adopt the recommendations issued by the United States Department of Justice in its *Eyewitness Evidence Guidelines*. The implementation of these guidelines required appropriate training. To allow for this training, the Attorney General delayed the effective date 180 days, and requested that each county prosecutor designate key law enforcement personnel and police training coordinators to work with the Division of Criminal Justice to train its staff as well as the local law enforcement agencies within each jurisdiction.

The New Jersey Attorney General's Office, Division of Criminal Justice, Prosecutors & Police Bureau oversees the implementation of the Guidelines.<sup>21</sup> There are 21 County Prosecutors who report directly to the Attorney General. Furthermore, every county consists of county and municipal police departments who report to the County Prosecutor. In total, there are approximately 700 of these county and municipal police departments. Therefore, in order to consolidate training efforts, the New Jersey Attorney General's Office conducted one statewide-training, requesting all the local trainers to attend. Then, each trainer left with a CD-rom and a training manual to allow them to train their officers locally.

The Guidelines apply to all law enforcement, including sheriffs. However, in New Jersey, campus police do not rise to the same level, and therefore receive assistance from the county police departments.<sup>22</sup> The Guidelines are used in all cases, including juvenile cases. Anytime an identification procedure is used, the officers must adhere to the Guidelines. New Jersey has no indication that the Guidelines are not being followed but insist that the greatest assurance that the Guidelines will be followed is a defense attorney arguing lack of adherence to the Guidelines on cross-examination.<sup>23</sup>

As far as the costs of implementing the Guidelines in New Jersey, the biggest cost comes from the elimination of the 6-pack folders previously used for photo-identification. One county had an innovative solution to this cost in that they hired a carpenter to build a sequential photo box from the original 6-pack folder.<sup>24</sup> So, law enforcement are free to determine their own ways to implement the Guidelines. Another cost associated with the implementation are staffing concerns for small localities who do not have a trained independent officer to conduct the identification procedures, and they cannot afford to train additional staff. As a solution to this problem, local departments are banding

---

<sup>20</sup> See attachment 3.

<sup>21</sup> Lori Linskey, Prosecutor, New Jersey Attorney General's Office.

<sup>22</sup> Lori Linskey, Prosecutor, New Jersey Attorney General's Office.

<sup>23</sup> Id.

<sup>24</sup> Id.

together and forming task forces, with officers on call to help out in the procedures wherever they are needed. Additionally, the County Prosecutor provides assistance.

The overall response to the adoption of the DOJ Guidelines in New Jersey has been positive, both within the state and throughout the country. The Attorney General's Office reports that the state's law enforcement are inquisitive, innovative, and dedicated to the process.<sup>25</sup> The New Jersey Attorney General's Office also receive inquiries from almost every other jurisdiction, including Ohio, Connecticut, Rhode Island, Hawaii, and Missouri. They also recently confirmed that the Syracuse, New York District Attorney's Office has implemented the Guidelines.<sup>26</sup>

### **Profile of Virginia's Current System**

Currently, in Virginia, the Virginia Department of Criminal Justice Service, Standards and Training Section is responsible for the implementation of regulations promulgated by the Criminal Justice Services Board pertaining to minimum and in-service training requirements for police and sheriff's departments. The current training curriculum is taught to the newly employed within 12 months of employment. It is this curriculum that contains the training standard related to photographic line-ups.<sup>27</sup> The in-service training occurs every other year, and that curriculum changes in order to provide an opportunity for growth and advancement. Thirty police academies in Virginia conduct the training. A curriculum review committee meets periodically to suggest changes to the curriculum. This committee makes recommendations and has a public hearing before the Criminal Justice Services Board which establishes the minimum training requirements.

---

---

## **V. Recommendation**

### **Recommendation**

It is the recommendation of the Virginia State Crime Commission that DCJS develop a workgroup, consisting of local police, sheriffs, Commonwealth's Attorneys, and the Virginia Department of Motor Vehicles to consider adopting the DOJ Guidelines, applicable to Virginia, and report their findings to the Virginia State Crime Commission by November 2002.

In promulgating guidelines regarding photo identification and lineup procedures, DCJS shall convene a workgroup consisting of local police, sheriffs, commonwealth's attorneys, the Virginia Department of Motor Vehicles, and the Virginia State Crime Commission. This workgroup shall determine how to tailor training requirements that incorporate the DOJ Guidelines to Virginia's unique circumstances. The workgroup

---

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> See attachment 4.

must complete its work and report back to the Virginia State Crime Commission by November 2002.

---

## **VI. Acknowledgements**

The Virginia State Crime Commission extends its appreciation to the following agencies and individuals for their assistance and cooperation on this study.

**Virginia Public Defender Commission**

Richard C. Goemann, Deputy Director

**Virginia Sheriff's Association**

John Jones, Executive Director

**Virginia Department of Criminal Justice Services**

George Gotschalk, Section Chief, Standards and Training Division

**New Jersey Office of the Attorney General**

Lori Linskey, Prosecutor