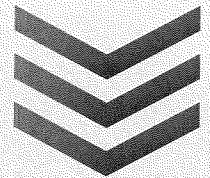


INNOCENCE PROJECT



Racial Disparities in Wrongful Convictions:

Reducing Bias through
Eyewitness Identification
Reform & Recording of
Interrogations



Racial Disparity in Wrongful Convictions

Wrongful convictions disproportionately affect people of color. However, all Americans suffer when an innocent person is convicted because the real criminal can harm others. The actual perpetrators in these cases went on to commit and be convicted of 145 additional crimes, including 77 rapes and 34 murders, while the innocent person was behind bars.¹

Data on Race & Wrongful Convictions

(Source: The Innocence Project)

- 70 percent of the 330 Americans who were wrongfully convicted and later proven innocent with DNA evidence are African American or Hispanic.
- Minors were wrongfully convicted in 10% of DNA exoneration cases, and 88 % of those innocent minors were African American. Even though some were as young as 14 when the crime occurred, all were tried in adult court.
- Youth of color are often accused of committing crimes in large groups, and group arrests occurred in 75% of DNA-based exonerations involving juveniles of color.

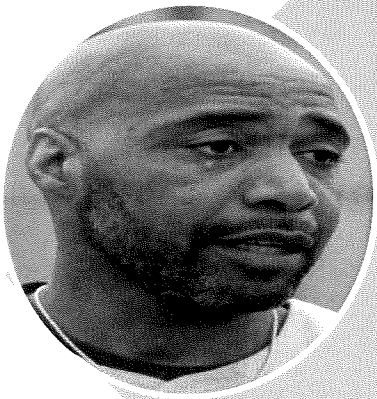
CASE IN POINT: Terry Harrington & Curtis McGee

Council Bluffs, IA

Harrington and McGee, who are African-American, were 17-years-old and living just across the state line in Omaha when they were arrested for the murder of a retired police captain in Council Bluffs in 1977. At the time, Harrington was captain of his high school football team and was being recruited by Yale.

The two men were implicated by Harrington's friend Kevin Hughes while he was being interrogated for his involvement in a car theft ring. During the interrogation, police fed Hughes details about the crime and promised reward money and dismissal of the charges against him. Based largely on Hughes's statements, Harrington was convicted by an all white jury and sentenced to life in prison without parole. McGee was also convicted and received a life sentence.

In 2003, a lawyer reinvestigated the crime, and tracked down Hughes, who recanted his statements. The investigation also uncovered a police report stating that a witness saw a white male running from the crime scene. The Iowa Supreme Court overturned the convictions, ruling that prosecutors committed misconduct by concealing the report. Harrington and McGee sued prosecutors for framing them, and the lawsuit reached the U.S. Supreme Court, but was dismissed after a settlement was reached with Pottawattamie County.



¹ www.innocenceproject.org

Reducing Inequities through Evidence-Based Practices

Bias can impact every stage of a wrongful conviction, from an initial investigation to sentencing. Minorities are arrested at higher rates for drugs, speeding, and other non-violent crimes, although whites participate at the same rates, and these cumulative arrests can lead to greater suspicion in future violent crimes.

However, bias in the system can be mitigated through evidence-based practices such as eyewitness identification reform and recording of custodial interrogations. These practices enhance transparency, fairness and accuracy in investigations, which prevents wrongful convictions and builds confidence in the criminal justice system.

Recommendation 1: Statewide adoption of key eyewitness identification reforms.

Mistaken eyewitness identifications played a role in 72% of the nation's 330 DNA exonerations, making it the leading contributing factor to wrongful convictions. Memory is not like a videotape that plays back events exactly as they occurred; it is a reconstruction of events that is influenced by "estimator variables," at the crime scene that cannot be controlled and "system variables" that law enforcement can control.

One estimator variable that we cannot control is "own-race bias," which is the tendency to more easily recognize members of one's own race, making cross-racial identification difficult. A meta-analysis of over 5,000 witnesses found that people were 50% more likely to misidentify a face of another race than of their own.² In 44 percent of wrongful convictions involving misidentification, a witness incorrectly identified a person of another race.³

To mitigate the effects of estimator variables like own-race bias, law enforcement can use evidence-based procedures to prevent "memory contamination" and improve the accuracy of witness identifications. The National Academy of Sciences, the nation's premier independent scientific entity, the International Association of Chiefs of Police, the President's Task Force on 21st Century Policing, and many other organizations have recommended the following practices to improve the accuracy of witness identifications:

"Core Four" Best Practices

- 1. Blind/Blinded Administration:** The officer administering the lineup is unaware of the suspect's identity, or if that is not practical, the administrator is "blinded" using a technique such as the folder shuffle method that prevents him or her from seeing which lineup member is being viewed by the witness at a given time, which prevents any suggestiveness in the procedure.
- 2. Instructions:** Prior to the procedure, witnesses should be instructed that the perpetrator may or may not be in the lineup and that the investigation will continue regardless of whether an identification is made.
- 3. Proper Use of "Non-Suspect" Fillers:** Non-suspect "fillers" used in the lineup should match the witness's description of the perpetrator.
- 4. Confidence Statements:** Immediately following the lineup procedure, the eyewitness should provide a statement, in his or her own words that articulates the level of confidence in the identification.

² Meissner, Christian & Brigham, John C. Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review (2001). *Psychology, Public Policy, and Law*, Vol. 7, No. 1, 3-35.

³ www.innocenceproject.org

Minimal Costs

The only cost of implementing reform is training, and the Innocence Project offers statewide courses hosted by a certified eyewitness identification trainer. Of the 11 states that have passed laws requiring adoption of best practices, all of the fiscal notes estimated zero to minimal costs.

National Status on Eyewitness Identification Reform

- The core four best practices have been implemented by statute in 11 states (CO, CT, GA, MD, NC, OH, RI, TX, VT, WI and WV) and by court rule in 2 states (NJ, OR).
- An additional 12 states have issued model policies that include key reforms.
- National groups including the International Association of Chiefs of Police (IACP), Major City Chiefs Association and American Bar Association have endorsed key reforms.

Status of Eyewitness Identification Reform in Iowa

In 2013, Dr. Neal McNabb, an associate professor of Criminology and Criminal Justice at Buena Vista University and board member of the Iowa Innocence Project, surveyed 198 law enforcement agencies in Iowa on their eyewitness identification practices. The agencies surveyed included all county sheriffs and a sampling of local police departments. Approximately 59% of the agencies responded (116 agencies), and the results were as follows:

- 58% of respondents did not have written eyewitness identification policies and procedures.
- 96% selected fillers based on their resemblance to the suspect, as opposed to their resemblance to the witness's description of the perpetrator, as recommended by the U.S. Department of Justice, IACP and other groups.
- 53% of respondents indicated that they were aware of an investigation conducted by their agency where an eyewitness picked an individual who was not the suspect or perpetrator.

To ensure consistency in practice, there should be uniform statewide adoption of evidence-based procedures at law enforcement agencies throughout Iowa.

Recommendation 2: Adopt a mandatory statewide policy of recording custodial interrogations in their entirety, with a jury instruction as a penalty for failure to comply.

False confessions are another leading contributor to wrongful convictions proven with DNA evidence. Of the exonerees who falsely confessed 59% were African American and 10% were Hispanic, and false confessions played a role in 84% of cases in which juveniles of color were wrongfully convicted.

Because minorities are more likely to be arrested as juveniles, false confessions and fictitious incriminating statements are more prone to occur. Juveniles are particularly susceptible to false confessions and in several wrongful conviction cases juveniles of color were coerced into give incriminating statements that significantly differed from the crime scene evidence.

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The cases of Terry Harrington and Curtis McGee in Council Bluffs, Iowa show how false youth statements can lead to wrongful convictions. Harrington's friend Kevin Hughes had been picked up with other young African American suspects as part of an investigation into a stolen car ring and he falsely implicated the two young men in the murder of a retired police chief in exchange for leniency and other perceived benefits.

Electronic recording of custodial interrogations in their entirety provides a complete and irrefutable account of what transpired during closed-door sessions, which protects against false confessions. It deters illegal or coercive techniques, ensures defendants' rights are protected and alerts fact finders to mental limitations and other factors that make people more susceptible to falsely confessing. The practice also benefits law enforcement by removing any doubt about the voluntariness of a confession, reducing motions to suppress statements/confessions and court time for officers to appear at suppression hearings, and protecting against frivolous complaints and lawsuits related to officer misconduct during an interrogation.

Minimal Costs

Digital cameras can be purchased for as little as \$50 each. A growing number of law enforcement agencies are purchasing body-worn cameras, and in addition to capturing field interactions, many of these devices can be used to record custodial interviews. Recording interrogations can result in long-term savings through fewer pretrial motions to suppress statements and confessions, an increased number of guilty pleas, fewer hours spent reviewing and piecing together notes from interviews, and reductions in lawsuits stemming from frivolous claims of officer misconduct during custodial interviews.

National Status of Recording Custodial Interrogations

- 21 states have policies requiring law enforcement to electronically record custodial interrogations: AL, AK, AZ, CT, IL, IN, MA, MN, MD, MI, MO, MT, NE, NJ, NM, NC, OR, RI, UT, VT and WI.
- The U.S. Department of Justice requires the FBI, DEA, and ATF to record custodial interviews.
- National groups support recording interrogations including the American Bar Association, the Major Cities Chiefs Association, and the International Association of Chiefs of Police.
- The Uniform Law Commission adopted an electronic recording of custodial interrogations act in 2010.

Status of Recording Interrogations in Iowa

In Iowa, the state Supreme Court encouraged agencies to electronically record interrogations in the 2006 *State v. Hajtic* decision. The following year Attorney General Tom Miller stated that the *Hajtic* decision should be interpreted as essentially requiring agencies to record and the Department of Public Safety implemented the practice.

In 2011 the Iowa State Bar Association surveyed the state's 400 plus law enforcement agencies, and received responses from about 205 agencies. Of the agencies that responded, all but six said that they owned equipment or could access it through other agencies, and 99 percent said that they record interrogations. However most said that they did not have a written policy, which means there is no uniformity in practice.

The state of Iowa should pass a law requiring recording of interrogations in their entirety to ensure the fair administration of justice. The law should articulate exceptions to the requirement and state that, as a penalty for non-compliance, a jury shall be instructed that it is the state's policy to record and non-compliance should be considered when assessing the voluntariness of a statement/confession.

NAACP Resolution 2014
***Preventing Wrongful Convictions by Improving Accuracy in Eyewitness
Interrogation Techniques and Access to DNA Testing***

Lorraine C. Miller, Interim President and CEO adoption without amendment

WHEREAS, wrongful convictions have a disastrous and rippling effect on families and communities; and

WHEREAS, a number of factors lead to wrongful convictions, including eyewitness misidentification, false or coerced confessions, and lack of access to DNA testing; and

WHEREAS, the 316 individuals that have been exonerated by DNA evidence have erroneously spent an average of 13 years behind bars, with 18 of those individuals wrongfully sentenced to death; and

WHEREAS, 69% of the 316 innocent people exonerated and freed by DNA because of mistaken identification are people of color - as individuals of color are disproportionately harmed by criminal justice error and wrongful convictions; and

WHEREAS, mistaken eyewitness identifications contributed to approximately 73% of the 316 wrongful convictions in the United States overturned by post-conviction DNA evidence; and

WHEREAS, established research in the field of psychology has clearly demonstrated that cross-racial identifications are particularly unreliable, and that at least 40% of the DNA exonerations involving misidentification were cross-racial in nature; and

WHEREAS, the need for eyewitness identification reform has been recognized by law enforcement officials, prosecutors and the judiciary, as well as national justice organizations, including the National Institute of Justice and the National Bar Association; and

WHEREAS, false confessions contributed to more than 25% of the 316 wrongful convictions in the United States overturned by post-conviction DNA evidence; and

WHEREAS, mandated electronic recording of the entire interrogation process - which has already been adopted by 23 states - protects against false and coerced confessions by ensuring integrity in the interrogation process, and reliable record of what transpired during the course of an interrogation; and

WHEREAS, although all fifty states have post-conviction DNA testing access statutes, many of these testing laws deny deserving categories of potential petitioners access to that testing; and

WHEREAS, improper forensic science contributed to approximately 50% of the 316 wrongful convictions overturned by post conviction, DNA evidence.

THEREFORE, BE IT RESOLVED that the NAACP will advocate for states to adopt core procedural reforms to improve the accuracy of eyewitness identification including blind administration of lineups, proper

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composition of lineups, proper instructions to the witness and taking statements in the witness' own words at the time of the identification; and

BE IT FURTHER RESOLVED that the NAACP advocate for states to electronically record all interrogations in felony cases in their entirety; and

BE IT FURTHER RESOLVED that the NAACP advocate that all states remove all restrictions to post conviction DNA testing; and

BE IT FINALLY RESOLVED the NAACP advocate that the federal government promote forensic science research and require scientifically developed standards, and implement uniform standards to ensure that scientific evidence offered in court is valid, comprehensive, and conforms to the limits of science so that criminal justice can be adjudicated objectively, transparently, and accurately.

**Comments to the
Governor's Working Group on Justice Policy Reform
Lisa Davis-Cook
Iowa Association for Justice
October 15, 2015**

Good Afternoon and thank you for the opportunity to address the Working Group. My name is Lisa Davis-Cook and I am the Director of Government Affairs for the Iowa Association for Justice. IAJ has approximately 650 attorney members across the state, about a third of which belong to our Criminal Law section. Section leaders actively monitor legislation that modifies our criminal code. We are very pleased that this group is considering reforms to make Iowa's criminal justice system more equitable.

While there are many areas I could discuss, such as mandatory minimums and other sentencing issues, I will focus on the programs that our group has supported for many years: drug courts and more recently family treatment and mental health courts as well.

Our members have seen first hand how these types of specialty courts can help Iowans become productive citizens, rather than becoming another number in our already over-burdened corrections system. One of our members who works with the Youthful Offender project in Polk County has said that in the last couple of years they have started to pay more attention to the mental health needs of the participants in the program – making sure they are keeping appointments with doctors and therapists, staying on their medications, etc. He told me when they stay on top of these issues the participants fair much better. It seems like a simple concept – if people have mental health issues and receive the help they need they have a better chance of staying out of our criminal justice and corrections systems.

The same can be said of drug courts. Our prisons are full of people who have committed crimes that are directly tied to their substance abuse problems. I

remember sitting in a legislative budget meeting while then District Court Judge Tom Bowers talked about his drug court in Black Hawk County. He brought participants, graduates and other judicial/corrections staff who worked with the program and all sang the praises of how the drug court had changed the lives of those involved. They were not sitting in jail waiting out their sentences – they were receiving the treatment and training they needed and were getting their lives back on track in their communities. Isn't that what we want for the citizens of Iowa?

Again, thank you for the opportunity to address you this afternoon. As I said, there are other reforms I could have discussed with you today. I chose to focus on the concept of specialty courts, because we believe they can have an immediate impact and in the long run will save the state money. It does require a continuing investment by the Judicial Branch, Corrections and others, at a level that will sustain and expand the programs state-wide, but IAJ believes is well worth it and will pay dividends in the end.