OFFICE OF THE BROOKLYN BOROUGH PRESIDENT

Testimony of Brooklyn Borough President Eric L. Adams
New York City Council Committee on Public Safety
April 6, 2016

Good morning, Chair Vanessa Gibson and members of the New York City Council's Committee on Public Safety. My name is Eric L. Adams, and I am the Brooklyn borough president, representing the 2.6 million residents who call Brooklyn home. Thank you for the opportunity to submit written testimony in support of Res 0674-2[redacted]5, a resolution calling upon the New York State Legislature to pass and the Governor to sign Nicholas' Bill, submitted on my behalf by Council Member Jumaane D. Williams. Thank you to Council Members Margaret Chin, Vincent Gentile, and Chair Gibson for co-sponsoring this important legislation as well.

In December 2010, 12-year-old Nicholas Naumkin of Saratoga Springs, New York, died after being shot by a friend who was playing with his father's unlocked gun. In response, State Senator Jeff Klein and Assembly Member Amy Paulin are serving as sponsors of the Child Access Prevention (CAP)/Safe Storage bill, also named "Nicholas' Bill." I thank them, and the more than 50 state senators and assembly members who have signed on as co- or multi-sponsors of this legislation.

Nicholas' Bill would require the safe storage of all guns not in the immediate possession or control of the gun owner, either in a safe storage depository or with a locking device, to prevent access by children and others who should not have access to them. The law would prevent gun injuries and deaths by limiting children's access to guns.

More than half of states in the United States have safe storage on their books. Despite New York's traditionally strong gun laws, CAP is not one of them. According to New Yorkers Against Gun Violence (NYAGV), a chief proponent of this legislation, "studies have found these laws to be effective in reducing accidental shootings of children by as much as 23 percent." In addition, according to NYAGV, "among states with the highest levels of child gun deaths, 7 of 10 do not have CAP laws" while "states with low levels of child gun deaths, 7 of 10 do have CAP laws.

New York State's continued reluctance to pass this legislation has real casualties.

Unfortunately, Nicholas' story is just one of the many that afflict our state and country. According to "Innocents Lost: A Year of Unintentional Child Gun Deaths," a report from Everytown for Gun Safety, at least 100 children were killed in unintentional shootings from December 2012 to December 2013; nearly two-thirds of which could have been avoided if gun owners stored their guns responsibly and prevented children from accessing them.

In New York State alone, from 2015 to today, 10 children were killed or injured unintentionally. Five of those shootings occurred in New York City, three of which took place in my borough of Brooklyn.

Enough is enough.

Brooklyn's Borough Board passed a resolution endorsing Res 0674-~~2015~~ last year. I urge the New York City Council to follow suit and pass this important resolution calling on the New York State Legislature to enact, and Governor Cuomo to sign, Nicholas' Bill.

NYAGV
New Yorkers Against Gun Violence

Testimony submitted to the New York City Council, Wednesday, April 6, 2016

Re: Proposed Res. No. 853 - calling on Congress to pass, and the President to sign, H.R. 1217, also known as the Public Safety and Second Amendment Rights Protection Act of 2015, which closes loopholes in the current gun background check system.

Conducting a criminal background check with every gun sale is the easiest and most effective way to keep dangerous weapons from getting into the hands of criminals, violent abusers, and the dangerously mentally ill. Currently, federal law does not require a background check on private sellers at gun shows, at flea markets, or over the internet, which represent approximately 40% of all gun sales. This gaping loophole contributes to the epidemic of gun deaths and injuries in the US.

Effect of Background Checks in NY State. New York State closed the private sale loophole in 2013 with the passage of the SAFE Act. This means that background checks must be performed for all gun sales, with the exception of transfers between immediate family members. As a result of New York's relatively strong gun laws, our gun death rate is the nation's fourth lowest. Gun deaths fell 14% from 2013 - 2014.[1]

The Missouri Case. There is compelling evidence that background checks work. For decades, Missouri required handgun buyers to pass a background check and obtain a permit to purchase firearms. In 2007, the state dismantled its permit system and eliminated its background check requirement. While federal law continues to require background checks for all gun sales by licensed dealers, handgun buyers who shop with unlicensed sellers in Missouri are no longer subject to background checks or the permit system. Felons, convicted domestic abusers and others legally prohibited from buying guns can evade background checks by seeking out unlicensed sellers, including at gun shows or online. As a result, it became easier for criminals to buy guns. Three things happened: a) the share of crime guns recovered in Missouri that were purchased in-state grew by 28%; b) gun trafficking nearly doubled, and c) the gun homicide rate increased 25% per year.[2]

H.R. 1217, by requiring criminal background checks on all commercial gun sales, i.e., at gun shows and on the internet, would help keep guns out of the wrong hands.

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[1] CDC WISQARS database, http://webappa.cdc.gov/cgi-bin/broker.exe

[2]Daniel Webster, Cassandra Kercher Crifasi, and Jon S. Vernick, "Erratum to: Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides," Journal of Urban Health 91, no. 3 (June 2014); doi:10.1007/s11524-014-9865-8.

However, H.R. 1217 would not close the private sale loop-hole . But it would go some way towards keeping guns out of dangerous hands and would benefit New York by reducing gun trafficking into our state.

Effect of Background Checks on Suicides and Mass Shootings. Background checks reduce gun suicides. A recent study showed that there are 48% fewer gun suicides in states that require background checks for private handgun sales than in states that do not.[3]

In states that require criminal background checks for all handgun sales, there were 52% fewer mass shootings between January 2009 and July 2015. Significantly, states with background check requirements for all handgun sales had 63% fewer mass shootings committed by people prohibited from possessing firearms and 64% fewer domestic violence mass shootings.[4]

We urge the City Council to pass this resolution in support of strengthening our weak federal gun laws by expanding criminal background checks.

Thank you.

[3] http://everytownresearch.org/state-background-check-requirements-and-suicide/
[4] http://everytownresearch.org/state-background-check-requirements-mass-shootings/

NYAGV
New Yorkers Against Gun Violence

Testimony submitted to the New York City Council, Wednesday, April 6, 2016

Re: Proposed Res. No. 940 – calling on Congress to pass, and the President to sign, H.R. 2612/S. 1473, in relation to congressional funding for gun violence research.

Research into the causes of gun violence is critical to devising policies that will reduce gun deaths and injuries and make our communities safer. Without good research, it's far more difficult to develop effective life-saving policies, something the NRA and corporate gun lobby understood when it succeeded in getting Congress to cut off federal funding for gun violence research in 1996.

In 1992, the Centers for Disease Control and Prevention (CDC) launched the National Center for Injury Prevention and Control to do research on the causes of injury in America. The Center sought to research injuries that were considered "intentional." Guns, which have consistently killed over 33,000 and injured over 84,000 Americans each year, fell into that category. A year later, the New England Journal of Medicine published a CDC-funded research paper that found keeping a gun in the home was strongly and independently associated with a greater risk of homicide by a family member or intimate partner.[1]

The NRA saw the results as an impending disaster for gun sales, already in decline since the 1970s. So the NRA leadership directed its point person, Arkansas Republican Congressman Jay Dickey, to insert language in the 1996 Appropriations bill stripping the CDC of its entire budget of $2.6 million for firearm injury research. It also included a provision explicitly prohibiting any CDC funding "to advocate or promote gun control."[2]

The so-called Dickey Amendment was effective in achieving the NRA's goals.

- Public funding for gun violence research plummeted from $2.5 million from 1993-96 to just $100,000 in 2012, a decline of 96%. As a result, the rate of firearms injury has remained unchanged over the past 20 years. Firearms killed 28,874 Americans in 1999, and 33,599 in 2014, an increase of 15%.[3]

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[1] http://smartgunlaws.org/science-under-the-rug-how-government-and-industry-hide-research-on-gun-violence/

[2] ibid

[3] WISQARS data, CDC, http://webappa.cdc.gov/cgi-bin/broker.exe

- By contrast motor vehicle injury claimed 40,965 lives in 1999. A $500 million annual research budget led to policies that reduced this to 33,736 in 2014, a decrease of 18%.[4]
- Since 1996, the gun industry, through its willing minions in Congress, has restricted law enforcement's access to gun trace data, preventing cities and elected officials from sharing data about gun crimes.
- In 2004, the National Research Council issued a report, Firearms and Violence, an assessment of the state of knowledge in the field and said "the inadequacy of data on gun ownership and use is among the most critical barriers to a better understanding of gun violence... if policy makers are to have a solid empirical and research base for decisions about firearms and violence, the federal government needs to support a systemic program of data collection and research that specifically addresses this issue."[5]

The virtual research blackout has stymied efforts to craft legislation to reduce gun violence since there is little empirical evidence to rely on. A meaningful, evidence-based discussion has given way to an emotional and ideological debate, yielding no new federal firearm safety legislation since 1994.

We urge the City Council to pass Resolution 940 without delay.

We would like to leave you with a proposal that is within our power as New Yorkers to realize. In the current absence of federal gun violence research, we ask you to support the creation of a gun violence research center in New York.

That's what California is trying to do. A bill currently before the California senate would fund firearm violence research by establishing the *California Firearm Violence Research Center* within the University of California. The Center would provide scientific research into the origin of firearm violence and prevention models.
https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1006 The SUNY or CUNY (John Jay College) systems could host such a center.

In NY my Assemblyman, Matthew Titone of Assembly District 61 on Staten Island, recently proposed two bills, A 9245 and A 9224, that would start a gun violence research fund supported by a $5 fee on firearm registrations and establish a dedicated tax payer gift check-off on State returns. If two of the largest states, New York and California, were to take this step, it would help not only NY address our epidemic of gun violence with evidence-based policies, but it would also provide pressure on Congress to finally repeal the "Dickey Amendment" and get on with this life-saving research at the federal level.

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[4] ibid

[5] http://smartgunlaws.org/science-under-the-rug-how-government-and-industry-hide-research-on-gun-violence

NYAGV
New Yorkers Against Gun Violence

Testimony submitted to the New York City Council, Wednesday, April 6, 2016

Re: Proposed Res. No. 674-A – calling upon the NY State legislature to pass and the Governor to sign A.53-A/S.2291-A, also known as Nicholas's Law, that would require the safe storage of firearms not in the immediate possession or control of the gun owner.

The unsafe storage of firearms is a public health and safety issue in the United States. A 2000 study of firearm storage practices in American homes with children found that 55% reported having 1 or more firearms in an unlocked place, and 43% reported keeping guns without a trigger lock in an unlocked place.[1] A 2005 study on adult firearm storage practices in U.S. homes found that over 1.69 million children and youth under age 18 are living in homes with loaded and unlocked firearms.[2]

Unintentional Shootings. Each year, firearms cause thousands of unintentional deaths and injuries. A 2013 NY Times study found that unintentional shooting deaths occurred roughly twice as often as the records indicate, because of inconsistencies in how such deaths are classified by the authorities. [3] Nevertheless, between 1999 and 2014, 10,500 people in the United States were reported as dying from unintentional shootings, including 2,974 children and young people ages 0-21. In New York over the same period, 240 people died from unintentional shootings, including 56 children and young people ages 0-21. [4]

In New York State an annual average of 210 children aged 19 and under are treated in a hospital because of an unintentional firearm injury; 75 seriously enough to be hospitalized. Two children die each year because of an unintentional firearm incident. [5]

Suicides. Suicides by firearm represent nearly two thirds of all US gun deaths annually. Between 1999-2000, over 290,000 Americans killed themselves with a

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[1] Mark A. Schuster et al., *Firearm Storage Patterns in U.S. Homes with Children*, 90 Am. J. Pub. Health 588, 590 (Apr. 2000), at http://www.rand.org/content/dam/rand/pubs/reprints/2005/RAND_RP890.pdf.
[2] Catherine A. Okoro et al., *Prevalence of Household Firearms and Firearm-Storage Practices in the 50 States and the District of Columbia: Findings from the Behavioral Risk Factor Surveillance System, 2002*, 116 Pediatrics e370, e371-e372 (Sept. 2005), *at* http://pediatrics.aappublications.org/cgi/content/full/116/3/e370.
[3] http://www.nytimes.com/2013/09/29/us/children-and-guns-the-hidden-toll.html?pagewanted=all&_r=0
[4] WISQARS database, Centers for Disease Control and Prevention, http://webappa.cdc.gov/sasweb/ncipc/dataRestriction_inj.html
[5] http://www.health.ny.gov/prevention/injury_prevention/children/fact_sheets/birth-19_years/firearm_injuries_birth-19_years.htm

gun, 7,145 in New York State. In 2014, firearm suicides were 54% of total New York gun deaths.[6] About 85% of suicide attempts with a firearm are fatal whereas many other of the most widely used suicide attempt methods have fatality rates below 5%.[7]

A 1999 study found that more than 75% of the guns used in youth suicide attempts and unintentional injuries were stored in the home of the victim, a relative or a friend.[8] At least two studies have found that the risk of suicide increases in homes where guns are kept loaded and/or unlocked.[9] Between 2010-2014, 250 New York children and young people ages 24 and under used a gun to commit suicide.[10]

The US Secret Service and Department of Education published a study in 2004 of 37 school shootings from 1974-2000. The study found that in more than 65% of the cases, the shooter got the gun from their home or that of a relative.[11]

Research has shown that laws requiring the use of gun locks or storage containers are effective at preventing suicides and saving lives. States with a law in place that required handguns be locked at least in certain circumstances 68% fewer firearm suicides per capita than states without these laws.[12]

Gun Thefts. Securing firearms not only reduces unintentional shootings and suicides but also gun thefts. Research indicates that at least 500,000 firearms are stolen annually from residences.[13] Many stolen guns are used to commit subsequent crimes. A U.S. Department of the Treasury study revealed that nearly a quarter of ATF gun trafficking investigations involved stolen firearms and were associated with over 11,000 trafficked firearms.[14] Ten percent of the investigations involved guns stolen from residences.[15]

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[6] WISQARS database, Centers for Disease Control and Prevention, http://webappa.cdc.gov/sasweb/ncipc/dataRestriction_inj.html

[7] http://www.hsph.harvard.edu/means-matter/means-matter/risk/

[8] David C. Grossman, Donald T. Reay & Stephanie A. Baker, *Self-Inflicted and Unintentional Firearm Injuries Among Children and Adolescents: The Source of the Firearm*, 153 Arch. Pediatr. Adolesc. Med. 875, 875 (Aug. 1999), at http://archpedi.jamanetwork.com/article.aspx?articleid=347593.

[9] Matthew Miller & David Hemenway, *The Relationship Between Firearms and Suicide: A Review of the Literature*, 4 Aggression & Violent Behavior 59, 62-65 (1999) (summarizing the findings of multiple studies).

[10] http://webappa.cdc.gov/cgi-bin/broker.exe

[11] U.S. Secret Service & U.S. Dep't of Education, *The Final Report & Findings of the Safe School Initiative – Implications for the Prevention of School Attacks in the United States* 27 (July 2004), at http://www2.ed.gov/admins/lead/safety/preventingattacksreport.pdf.

[12] Michael D. Anestis, et al, *The Association Between State Laws Regulating Handgun Ownership and Statewide Suicide Rates*, Am. J of Pub. Health (2015).

[13] Bureau of Alcohol, Tobacco & Firearms, U.S. Department of Justice, *2012 Summary: Firearms Reported Lost or Stolen* 4 (June 2013), at https://www.atf.gov/sites/default/files/assets/Firearms/2012-summary-firearms-reported-lost-and-stolen-2.pdf.

[14] Bureau of Alcohol, Tobacco & Firearms, U.S. Department of the Treasury, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* xi, 41 (June 2000), at http://www.mayorsagainstillegalguns.org/downloads/pdf/Following_the_Gun%202000.pdf.

[15] *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers*, *supra* note 6, at 11, 41.

In the City of Albany, over 100 firearms were reported stolen from homes and motor vehicles between 2010 and 2015. Law enforcement supports safe storage laws because they help prevent gun thefts, reducing the numbers of illegal guns on the streets.

Safe Storage Laws are Consistent with the Second Amendment. Opponents of laws requiring the safe storage or firearms claim that such laws violate the Second Amendment. This claim ignore the scope of the right articulated by the US Supreme Court in District of Columbia v. Heller, and has been repeatedly rejected by the courts.

In challenges to the law on Second Amendment grounds, the courts have consistently found that safe storage laws place only a minor burden on the Second Amendment because the firearm is accessible in a matter of seconds, and this burden is justified by the state's interest in public safety and keeping firearms from falling into the hands of children and other prohibited individuals.

Existing NY Safe Storage Laws. Safe storage laws have been enacted in the following NY jurisdictions: Rochester, Syracuse, Buffalo, New York City, Westchester County and Albany. The 2013 NY SAFE Act requires firearm safe storage only in households where individuals live who have been convicted of a crime, involuntarily committed or subject to an order of protection. However, there is no law requiring gun owners to safely store firearms around children.

State Laws. There is no national firearm safe storage law. However, twenty-eight states and the District of Columbia have some form of child access prevention law. Massachusetts is the only state that requires that all firearms be stored with a locking device in place when not in the owner's immediate possession or control. New York, if it passes Nicholas's Law, would be the second state to have a safe storage law.

We urge the City Council to pass Resolution 674-A, in support of Nicholas's Law, which will help keep guns out of the hands of children and young people – who may otherwise use them in unintentional shootings, suicides or school shootings – and away from thieves.

Thank you.

INNOCENCE PROJECT

Benjamin N. Cardozo School of Law, Yeshiva University

New York City Council Committee on Public Safety
Innocence Project Testimony in Support of Resolution 979-2016
April 6, 2016

My name is Rebecca Brown and I am the Policy Director of the Innocence Project, a national organization based in New York City that works to exonerate the wrongfully convicted with DNA evidence and to enact policies that prevent future wrongful convictions.

According to the National Registry of Exonerations, 148 innocent people in New York City have been exonerated of crimes they did not commit. Thanks to Brooklyn District Attorney Ken Thompson and others like him, more wrongful conviction cases in our city are being revealed and overturned. In these cases, not only were the innocent and their families impacted, but the entire community was at risk because the real perpetrators were free to commit additional crimes.

Witness misidentification and false confessions are two of the leading contributors to wrongful convictions nationally. We are grateful to Chairwoman Gibson for authoring Resolution 979 calling on the state legislature to address these issues by passing Assembly Bill 8157-A/Senate Bill 5875 (A.8157-A/S. 5875). This legislation requires law enforcement to use evidence-based lineup procedures and to record custodial interrogations. At the close of session last year, progress was made among the parties and negotiations continue. We hope this bill will be the vehicle that sees these reforms through.

Eyewitness Misidentification

Nationally, eyewitness identification is the leading contributor to DNA-based exoneration cases, and in New York City it played a role in 56 wrongful conviction cases proven with DNA or other evidence. Witness memory is often unreliable and can be contaminated by "estimator variables" at the crime scene that cannot be controlled such as lighting, distance and cross-racial factors. Memory can also be impacted by system variables that can be controlled, such as the way that lineup procedures are administered.

A.8157 would require police to adopt evidence-based lineup procedures that have been proven to enhance the accuracy of witness identifications. The National Academy of Sciences, the nation's leading scientific entity, the International Association of Chiefs of Police, the American Bar Association and many other organizations have recommended these best practices, which include:

1. Blind or blinded administration, meaning that the officer conducting the lineup is unaware of the suspect's identity, or if that is not practical a "blinded" procedure is used to prevent the officer from seeing which lineup member is being viewed at a given time, removing the risk of suggestiveness.
2. Witness instructions that the perpetrator may or may not be present.
3. Proper use of non-suspect "fillers" that generally match the witness description of the perpetrator and do not make the suspect stand out.
4. Eliciting a witness confidence statement immediately after a selection is made in which the witness is asked to state, in his or her own words, the level of certainty in the identification.

Nationally, 14 states have uniformly adopted eyewitness identification best practices. An additional 13 states have developed non-binding model policies on the same. This legislative proposal would require the blind administration of lineups and require the dissemination of and training in a model policy created by the Municipal Police Training Council of the Division of Criminal Justice Services (DCJS), which addresses the other core reforms.

Recording Interrogations

A.8157 would also require recording of interrogations in their entirety for several serious felonies, which protects against wrongful convictions stemming from false confessions. False confessions played a role in 18 exonerations in New York City. While people with mental limitations and juveniles are especially susceptible, even mentally capable adults have confessed to crimes they did not commit.

Recording interrogations in their entirety sheds light on the circumstances that led up to a confession, which benefits both the innocent and law enforcement. For the innocent, the practice can deter against coercive and illegal interrogation tactics. It can also alert judges and juries if the defendant has intellectual limitations or other vulnerabilities that increase the risk of false confessions. For law enforcement, recordings substantiate authentic confessions, protect against frivolous claims of misconduct and reduce court time needed to testify on motions to suppress statements. Nationally, 19 states have enacted similar laws – through legislation or court action - and federal law enforcement agencies have a policy of recording interrogations for all crimes.

This legislation could have made a difference in the Central Park Five case, where five teenagers were wrongfully convicted of rape after confessing to the crime. The judge and jury only saw the final confessions, not the 30 hours of interrogations that led up to the confessions. While the teenagers were convicted of a crime they did not commit, the actual perpetrator went on to rape another woman. Had the entire interrogation been recorded this injustice may not have occurred.

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In conclusion, A.8157 would protect against wrongful convictions and benefit the entire criminal justice system by increasing transparency, accuracy and fairness. We hope that the Committee on Public Safety will approve Resolution 979 to encourage the state legislature to enact this bill.

NYSACDL
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
An Affiliate of the National Association of Criminal Defense Lawyers | Founded in 1986

MEMO IN OPPOSTION
STATEMENT AND IDENTIFICATION INTEGRITY ACTS

The New York State Association of Criminal Defense Lawyers (NYSACDL) is a statewide organization of approximately 1,000 criminal defense practitioners, both public and private, in every county of New York State. Our members have extensive experience litigating the guilt or innocence of our clients and the police procedures that contribute to wrongful convictions. We are knowledgeable, perhaps more than anyone, of the very real risk of an innocent person getting convicted of a crime.

NYSACDL members desire to support measures designed to reduce the chances of a wrongful arrest and/or conviction. For this reason, we appreciate the intention and some of the elements of the proposed legislation. However, NYSACDL reaffirms its strong belief that any legislation intended to reduce the likelihood of wrongful convictions must first begin with discovery reform, which is not included in the current legislation. Any legislation must also preserve other protections against wrongful convictions, which is not the case with the current bills.

NYSACDL recognizes the work that has gone into the drafting of these bills. We are also cognizant that it is a sincere effort to create a framework to protect against wrongful convictions. However, we cannot support these bills in their current form. In addition to the failure of these bills to reform discovery procedures, we have significant concerns about aspects of these bills, as presently constituted, that may contribute to the conviction of innocent persons as well as the bills' failure to provide sufficient sanctions to deter non-compliance with the letter and spirit of the law.

We, therefore, oppose these bills in their current form and raise the following concerns:

1. **Statement Integrity Act: Electronic Recordation of Custodial Interrogations**

While current law does not require anything but the officer's word that a statement was made, the new rule would affirmatively require that only "custodial interrogations" and recitation of an individual's rights be recorded. It is intended that this procedure will reduce the number of false confessions. Electronic recording of the ***entire interview,***

however, will not only assist the court in determining the legal admissibility during the trial of such statements, but also help the jury determine whether a statement was coerced or is otherwise unreliable, as when the defendant appears to be parroting facts and details provided to him by the police. We fully support videotaping **all** interviews and interrogations that occur at a "detention facility" for these reasons.

NYSACDL has some concerns about some of the specifics and the enforceability of these provisions and we ask the Legislature to consider the following recommendations:

- **THE ENTIRE INTERROGATION MUST BE RECORDED AND NOT JUST WHEN A PERSON IS DEEMED BY THE POLICE TO BE "IN CUSTODY."** The new legislation requires such video recording when a person is "in custody". For many of our clients, unbeknownst to them, this does not officially occur until after they have made a full statement. The requirement that questioning, statements, or other interactions between suspects and the police be recorded should start from the moment a person of interest enters the precinct. The only exception should be when the police truly were not aware that they were speaking with a potential suspect.

- **THE LEGISLATION SHOULD SPECIFICALLY REQUIRE THE POLICE TO HAVE A RECORDING DEVICE IN EACH INTERROGATION ROOM.** It has been our experience that police may try to avoid the obligation to video the interrogation by saying there was no equipment available or it is in disrepair.

- **THE CURRENT LAW HAS A LIMITED GROUP OF OFFENSES FOR WHICH THE REQUIREMENT TO ELECTRONICALLY RECORD APPLIES.** We believe that ***all*** offenses should be included in the video requirement. The chance of a problematic statement by an innocent accused person is not limited to those who are charged with certain crimes. There is no moral justification for parsing the requirement in this manner. Moreover, pursuant to the proposed bill, the police officer is the sole arbiter of what "crime" the person is suspected of committing and thereby whether there is a requirement to video the interrogation. Many criminal acts fall under more than one statute, some may be under the recording requirements and others may not. The ultimate decision may even depend upon what the suspect says during the statement. The purpose of the electronic recording of interrogations is to avoid negative consequences caused by inadequate police procedures and potential misconduct on the part of certain officers. The way in which this bill is written has a significant chance of failing to fulfill these purposes.

- **THIS LEGISLATION SHOULD INCLUDE A REMEDY FOR ITS VIOLATION.** Under the current Act, if a Detective simply decides to ignore the requirement to record an interrogation and confession, this is **not** a ground for suppression under this bill. The primary purpose of the exclusionary rule (suppression of evidence) is to deter police from violating the laws put in place to protect citizens from overreaching and abuse by the police. If the recording of interrogations is a legal requirement, as it should be, then the remedy that applies in cases of the failure to follow such requirement has to be the exclusion of the evidence wrongfully obtained. Anything short of that will make the law entirely voluntary and ineffective.

- **IF A SUSPECT DECLINES OR "REFUSES" TO BE VIDEOTAPED, THERE SHOULD BE A RECORDING OF THAT INTERACTION BETWEEN THE POLICE AND THE DEFENDANT.** Since this amounts to an exception to the requirement of videotaping the interrogation, both the judge and jury must have the opportunity to decide whether that "refusal" was knowingly, voluntarily, and appropriately made, as well as whether there, in fact, was a refusal. If the suspect was electronically recorded just for this purpose, there will be clarity about who said what, when, and under what circumstances.

2. **Amendment to § 837 of Executive Law. Functions, powers and duties of division**

NYSACDL supports the state-wide implementation of the Municipal Police Training Council Model Policy on Identification Procedures. The Model Policy sets forth procedures that should be implemented by all law enforcement agencies to protect against suggestive and inaccurate identifications. Included in this is the "blind or blinded procedure" to be used in both photo array and line-up identification procedures as well as other best practices, including sequential line-ups. Research has shown that the use of these procedures produces the most accurate results. In addition, contemporaneously recording the procedure creates an accurate record of the witness's confidence and the methodology used in the identification process.

However, there is a serious omission in the current MPTC policy statement which has been previously raised on numerous occasions. The MPTC policy statement says nothing about the role of the description of the perpetrator in forming lineups and photo arrays and the heightened suggestiveness where the suspect stands out in relation to the description, though otherwise "similar in appearance" to the fillers. This concern was raised by the United States Supreme Court in the seminal decision regarding the identification process, United States v. Wade, 388 U.S. 218 (1967), where the Court noted concern where the suspect is the only person

closely resembling the description. Since it is so easy to have fillers who appear similar to the suspect, but very different when the description is taken into account, it is a serious omission not to focus on both the appearance of the suspect and the description. This same concern was voiced in both the 1999 DOJ Report of the Technical Working Group and most recently in 2013 by the Police Executive Research Foundation which found that "The most relevant research indicates that in order to reduce the likelihood of false identifications, lineup "fillers"—persons who are not suspected of the crime but are used to fill out the remaining spots in a live or photographic lineup—should reflect the eyewitness's description of the *culprit*." (at Pg, 6)

3. Amendment to C.P.L. §§ 60.25 and 60.30 Permitting In Court Testimony of Photo Array Identification

Currently, photo array procedures are not admissible during the presentation of the government's case against a defendant. There are many reasons why this is an important procedure that protects innocent people—perhaps most importantly because a photo does not show height or body language or other nuances that contribute to the accuracy of an identification. Studies have shown that simple facial recognition, as is the case with most photo identifications that result from "mug shots," is less reliable than in-person identifications. Our current law works well because it essentially forces the police and prosecution to do a more reliable identification procedure, such as a line-up, or wait until trial where the witness will have a better look at the live defendant.

If the amendment is enacted as is, the entire photo array will be admissible during the government's case. Such evidence has a very strong appearance of reliability, even though it is not actually reliable. In our opinion, based on our experience going to trial on thousands of cases over the years, the repeal of this important protection is unfair to the defendants who are wrongfully picked out in photo arrays by making it even more difficult for the jury to understand that it could be a mistake. Permitting the admission of testimony regarding the photo array procedure will result in more wrongful convictions. It is unfair to trade off one set of protections for another when New York is among the states most likely to convict an innocent person.

Additionally, the process of complying with the repeal of this important protection for people charged with crimes will of necessity involve testimony about the defendant's "mug shot" because most photo identifications derive from a photo obtained during a prior arrest. This will communicate to the jury that the defendant has had a prior arrest, a fact that is not normally allowed during the government's case in chief because it will unfairly prejudice the jury against the defendant. The concern with enacting the amendment in its current form is that it will overturn well-settled case law addressing this specific issue. In 1966, the NYS Court of Appeals

in People v. Caserta, 19 NY2d 18, 21 (1966), stated that "[a]s for previous identification from photographs, not only is it readily possible to distort pictures as affecting identity, but also where the identification is from photographs in the rogues' gallery. . , the inference to the jury is obvious that the person has been in trouble with the law before." As the New York Court of Appeals ruled in People v Schwartzman, 24 NY2d 241, 247 (1969) , "the rules governing the admissibility of evidence of other crimes represent a balance between the probative value of such proof and the danger of prejudice which it presents to an accused. When evidence of other crimes has no purpose other than to show that a defendant is of a criminal bent or character and thus likely to have committed the crime charged, it should be excluded." Allowing admission of such potentially prejudicial evidence would deprive the accused of being judged exclusively on the present case and allow the jury to make its decision on what may have occurred in the past.

Another concern we have is that many of the photos in the arrays used by the police are quite old, sometimes several years old. Thus, the witness viewing the photos is identifying the defendant based on what the perpetrator looks like now and comparing it to what the defendant looked like many years ago. As an example of how this is unfair, imagine that a five-year-old picture of a clean-shaven man could be selected by a victim of a crime committed by a clean-shave man, yet the man in the picture could now have a two-foot long beard. With our current law repealed, this evidence could constitute the full case against the defendant—admitted as a positive identification of the defendant. This unfairly shifts the burden of proof to the defendant to prove his appearance is different than it was in the photo.

This portion of the proposed legislation lacks remedies for violation of the rules set forth in the bill. For instance, if the police fail to get a "confidence statement" from the witness at the time of the identification (one of the most important parts of this legislation), the identification will still ***not*** be suppressed. As was stated earlier in this memo, suppression is the best remedy for failure of police to follow proper procedures and to deter such conduct in the future.

Finally, permitting testimony about "blind or blinded procedures" on direct examination pursuant to C.P.L. § 60.30 in cases where the witness has made an in-court identification allows for bolstering of the in-court identification by reference to procedures that bring an additional element of prejudice through the inferential reference to prior arrests of the accused. Such testimony is currently not permitted due to this obvious prejudice. "Testimony by prosecution witnesses about pretrial photo identifications of the accused has long been prohibited in this State on the ground that it improperly repeats and reinforces the witness's testimony (see,

People v. Griffin, 29 N.Y.2d 91, 93 (1971))." People v. Cuiman, 229 A.D.2d 280, 282 (1st Dept. 1997).

However, if the concept in this proposal does become law, it is important to make sure that judges are required to consider the failure to follow the "blind" procedures at pre-trial hearings to determine the admissibility of the identification procedure. As best practice, it is important that the court consider the possible effect of nonverbal cues on the witness. The judge should be required to consider both the fact that the police failed to follow acceptable protocols and the potential affect this may have had on the witness when making the suggestiveness determination.

THE PROPOSD STATUTE SHOULD BE CHANGED AS FOLLOWS:

(c) For purposes of this section, a "blind or blinded procedure" is one in which the witness identifies a person in an array of pictorial, photographic, electronic, filmed or video recorded reproductions under circumstances where, at the time the identification is made, the public servant administering such procedure: (i) does not know which person in the array is the suspect, or (ii) does not know where the suspect is in the array viewed by the witness. The failure of a public servant to follow such a procedure shall result in the preclusion of testimony regarding the identification procedure as evidence in chief, but shall not alone constitute a legal basis to suppress evidence on a motion made pursuant to subdivision six of section 710.20 of this chapter. This article neither limits nor expands subdivision six of section 710.20 of this chapter.

Additionally, if an identification from a photo array is to be permitted in evidence, then the defense must have discovery of the documents and data (most photo arrays are now assembled using computer systems) relating to the composition and administration of the identification confrontation, or needed to replicate it as well as the original description that the witness gave to the police at the time of the incident.

DISCOVERY

Any legislation intended to prevent the conviction of innocent people must include an overhaul of New York's archaic and restrictive discovery rules, which have not been updated since 1979. As Chief Judge Lippman noted in his 2015 State of the Judiciary address, discovery reform is just as

"critical" as the proposed bills under consideration. As more and more innocent New Yorkers are being exonerated, most often resulting from the years-later discovery of important evidence that was withheld from them at the time of their trials, discovery reform is of vital importance at this time.

CONCLUSION

NYSACDL cannot support these bills at this time and opposes passage without significant adjustments to meet the concerns stated above.

Please feel free to contact us for further information through our legislative co-chairs, Andy Kossover (ak@kossoverlaw.com; 845-797-9567) or Lisa Schreibersdorf (lschreib@bds.org; 917-593-0078), or through our government relations representative, Sandra Rivera (srivera@sriveralaw.com; 518-423-2796).

NYSACDL
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
An Affiliate of the National Association of Criminal Defense Lawyers | *Founded in 1986*

TESTIMONY

BEFORE THE NEW YORK CITY COUNCIL

COMMITTEE ON PUBLIC SAFETY

RE: RES. NO. 979

April 6, 2016

The New York State Association of Criminal Defense Lawyers (NYSACDL) is a statewide organization of approximately 1,000 criminal defense practitioners, both public and private, in every county of New York State. Our members have extensive experience litigating the guilt or innocence of our clients and the police procedures that contribute to wrongful convictions. We are knowledgeable, perhaps more than anyone, of the very real risk of an innocent person getting convicted of a crime.

NYSACDL has serious concerns about A.8157-A/S.5875-A, legislation that provides safeguards against wrongful convictions by requiring law enforcement to implement evidence-based eyewitness identification procedures and recording of custodial interrogations. As the statewide organization for criminal defense lawyers, we strongly support strengthening identification and interrogation procedures, but we cannot support the bill in its current iteration. If the Committee wants to support A.8157-A/S.5875-A, we ask that you qualify your support and acknowledge existing flaws in the legislation that do not adequately protect the rights of people facing criminal allegations.

For more information about our specific concerns with this legislation, please see the attached memorandum.

Please feel free to contact us for additional information through our legislative co-chairs, Andy Kossover (ak@kossoverlaw.com; 845-797-9567) or Lisa Schreibersdorf (lschreib@bds.org; 917-593-0078), or through our government relations representative, Sandra Rivera (srivera@sriveralaw.com; 518-423-2796).

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 674-A

☒ in favor ☐ in opposition

Date: 4/6/16

(PLEASE PRINT)

Name: Tonya L. Cantlo

Address: 209 Coralomon Street, Brooklyn, NY

I represent: Brooklyn Borough President Eric L. Adams

Address: 25-45 Bessonard Avenue, Bayswater NY 11691

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Date: _____

(PLEASE PRINT)

Name: Rebecca Brown

Address: 40 Worth St. NY, NY

I represent: Innocence Project

Address: 40 Worth St NY, NY

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I intend to appear and speak on Int. No. _____ Res. No. 853

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Name: Paul May

Address: 151 Linden Road Mineola NY 11501

I represent: New Yorkers Against Gun Violence

Address: 87 Lafayette Street NY, NY

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(PLEASE PRINT)

Name: LAUREL DURST

Address: 600 West End Ave, NY, NY, 10024

I represent: New Yorkers Against Gun Violence

Address: 87 Lafayette St, NY NY

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Date: 4/6/2016

(PLEASE PRINT)

Name: Phil Jonas

Address: 42 St, Austins Place, SI NY

I represent: New Yorkers Against Gun Violence

Address: 87 Lafayette St, NY NY

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