Eyewitness Evidence

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My background

- Ph.D. in Experimental Psychology
- Associate Professor of Psychology at ASU
- My expertise is in legal psychology:
  - The reliability of eyewitness testimony
  - How jurors (and judges) evaluate scientific evidence
  - Extra-legal factors in courtroom decision making (emotion, race)
- Expert witness in eyewitness identification
- Consultant with the Arizona Justice Project
- Teach courses in statistics, psychology & law, jury decision making
My talk

- System and estimator variables
- Lineup composition
- Post-identification events
- Witness instructions
- Eyewitness evidence in the courts
- Significant recent cases
<table>
<thead>
<tr>
<th>7 most common causes of wrongful conviction</th>
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<tr>
<td>☐ Eyewitness misidentification</td>
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<tr>
<td>☐ Unreliable or limited science</td>
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<td>☐ False confessions</td>
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<tr>
<td>☐ Forensic science fraud or misconduct</td>
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<td>☐ Government misconduct</td>
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<td>☐ Informants or snitches</td>
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<td>☐ Bad lawyering</td>
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Contributing Causes of Wrongful Convictions (first 225 DNA exonerations)

Total is more than 100% because wrongful convictions can have more than one cause.

- Eyewitness Misidentification (173 cases)
- Unvalidated / Improper Forensics (116 cases)
- False Confessions / Admissions (51 cases)
- Informants / Snitches (36 cases)

Percentage of exoneration cases

- 77%
- 52%
- 23%
- 16%
Eyewitness Identification

About 80% of post-conviction DNA exonerations in the United States involved mistaken eyewitness ID. In many of these cases, challenges were raised that the eyewitness identification evidence was unduly suggestive. All of these due process challenges failed and the eyewitness evidence was deemed admissible, contributing to the wrongful convictions of defendants later exonerated through post-conviction DNA testing.
Eyewitness Identification: 2 pronged problem

1. There are many circumstances that can affect the reliability of an eyewitness identification
   - Event-related factors
   - System factors
Eyewitness Identification: 2 pronged problem

2. Eyewitness evidence is heavily relied upon by judges and jury members in making decisions about the case
   - Its impact is especially great in the absence of other evidence
   - Is accepted at face value, even when it contradicts other evidence
   - Eyewitnesses are believable even when their testimony is contradicted by experts in the field
“The eyewitness was mistaken because...”

There is a long list of possibilities:

Estimator Variables vs. System Variables
What are *estimator* variables?

- Situational factors that happen at the crime
- The criminal justice system has no control
Some estimator variables...

- Level of stress experienced by the witness
- Presence of a weapon
- Cross-race situation
- Environmental conditions
- Exposure duration
- Intoxication
Estimator variables

- These variables can at best increase the probability that the criminal justice system can sort accurate from inaccurate identifications
What are *system* variables?

- Directly under control of the justice system
- Procedures implemented by law enforcement
- They can help prevent inaccurate identifications from occurring in the first place
- Literature largely focuses on examining these
Some system variables...

- Construction of the lineup
- Lineup presentation method
- Witness interview
- Admonitions to the witness
- Feedback to the witness
- Double-blind lineup administration
Evaluating the system variables

- Was the ID contaminated?
  - Procedures interfere with eyewitness’s memory?
  - Was anything suggested to the witness?

- An eyewitness’s memory should be treated as other forms of trace evidence
  - Fragile, gathered with caution, preserved in original state
Lineups
Constructing lineups

- Structure of the lineup should be fair
  - The suspect should not stand out in the lineup
  - The fillers should be adequate alternatives to the suspect
Let’s evaluate the adequacy of the following lineups from real cases...
Eyewitnesses provided this description of a culprit:

Black male
Late teens
Small build
Between 5’2” - 5’5” in height
Long hair in some kind of braids
Using the *Mock Witness Technique*

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<tr>
<th>White &quot;witnesses&quot;</th>
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<td>21 0 0</td>
<td>18 0 0</td>
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<td>0 0 0</td>
<td>0 2 0</td>
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The defendant in this case is in position #1.

The lineup is biased towards the defendant because he stands out from the fillers in the lineup.
An eyewitness provided this description of a culprit:

*Hispanic man*

*Thin*

*Mustache*

*Collar-length hair*
Mock Witness Evaluation

2  0  4
25  0  1

The defendant in this case is in position #4.
An eyewitness provided this description of a culprit:

Black male
Medium build
6” to 6'6" tall
About 250 pounds
Short dirty, black hair
Round face
Small, squinted eyes
Medium color skin
Mock Witness Evaluation

The defendant in this case is in position #4.
Let’s try this again with one small change:

Black male
Medium build
6” to 6'6" tall
About 250 pounds
Short dirty, black hair
Round face
Small, squinted eyes
Medium color skin
Mock Witness Evaluation

The suspect no longer stands out, but some fillers are still inadequate.
Witness one described perpetrator as:
   African American or Somalian Male
   Late 30’s/Early 40s
   Approximately 6’ Tall
   Approximately 185 lbs, possible a little thinner
   Black curly hair – short or a short afro

Witness two described perpetrator as:
   Black Male
   Late 30’s/Early 40’s
   Curly black hair ("a black person’s hair"), wouldn’t describe as an afro, hair was too short
   Had crooked teeth
   Approximately 6’ Tall
   Approximately 170 lbs
Contamination by repeated IDs...

- Only the first identification procedure involving a defendant is valid
- All subsequent identification attempts including the defendant are contaminated ... including in-court IDs
- The same lineup should not be shown more than once to any witness
More on lineup procedures

- Sequentially presented lineups may reduce the rate of false identifications of innocent people.
- One-on-one identifications are suggestive and may increase the rate of false identifications of innocent people.
- The suspect should not be placed in the same lineup position for any two witnesses.
- Contamination through multiple witnesses: witnesses should be kept separated for interview and lineup.
Lineup administration: Double-blind

- Interaction between lineup administrator and witness can be highly personal
  - Close physical distance, eye contact, visible facial expressions, verbal exchanges
  - Experimenter expectancy effects: researcher can unconsciously influence participants ... this applies to lineup administration

- Typically an absence of video recordings of these interactions
Post-Identification Events
Post-Identification events

- Witnesses’ reports about what they remember and how certain they are in those memories can be affected dramatically
- “Good, you identified the right guy”
Damaging effect of investigator feedback

- Greater confidence in their ID
- Having a better view of the culprit
- Being better able to make out the details of the culprit’s face
- Making their IDs more easily
- Taking less time to make the ID
- Having a better image in their mind of the culprit’s face
- Being more willing to testify about their ID
Post-identification feedback

- Contaminates witness’s original memory for event
- Once given confirming feedback, the witness will forever be more confident
- Can be avoided by asking about confidence at the time of the ID
- Use blind ID procedures
Witness Instructions
Witness should be admonished

- Witness should be informed that the suspect may or may not be in the lineup
- Failing to inform
  - Produces a suggestive lineup
  - Increases the risk of false ID
Wells et al. (1998) Recommends 4 Rules

1. The person who conducts the lineup should not be aware of which member is the suspect
2. Witnesses should be told explicitly that the person in question might not be in the lineup and therefore should not feel that they must make an ID
3. The suspect should not stand out in the lineup as being different from the fillers... based on factors that would draw extra attention to the suspect
4. A clear statement should be taken from the eyewitness at the time of the ID and prior to any feedback as to his or her confidence that the identified person is the actual culprit
Suggestiveness
Suggestive ID procedures

- Procedures that suggest to the witness exactly who police think committed the crime
- Inflates the chance of a mistaken identification
  - One-on-one identification procedure
  - When the suspect in the lineup stands out relative to the fillers
  - Failing to warn the eyewitness that the actual culprit might not be in the lineup
- Prior viewing of the suspect in another lineup
- Behavior of the investigator
- Investigator feedback
How do the courts deal with suggestive ID procedures?

  - Courts ruled that any suggestive identification procedures used must have created a substantial risk of a mistaken identification to occur
  - Set up a 2-pronged test the identification evidence must pass
How do the courts deal with suggestive ID procedures?

- **First: Suggestiveness Prong**
  - Was the ID procedure used unnecessarily suggestive?
    - If not, the ID not excluded
    - If so....

- **Second: Accuracy Prong** considered
  - Judge considers a set of accuracy criteria to weigh against the potential corruption of the suggestive procedure in determining whether to exclude the ID
What is the Court’s multifactor test for what counts as reliable?

Biggers/Manson criteria:

1. Eyewitness’s opportunity to view the culprit at the time of the crime
2. Eyewitness’s degree of attention
3. Accuracy of the eyewitness’s description of the culprit
4. Eyewitness’s degree of certainty displayed at the time of the identification
5. Length of time between the crime and the identification procedure
Flaws in the Biggers/Manson logic?

- When these decisions were made in 1970s, psychological science on eyewitness identification was virtually non-existent ... now there have been thousands of studies and we know there are flaws in this approach
First flaw in the Biggers/Manson logic

- Several of the criteria are self-reports that can be incorrect ... and – importantly – can be distorted by suggestive procedures.

- The five criteria were heavily weighted toward self-report variables.
  - Eg: “How much attention did you pay to the culprit at the time of the crime?” ... “How long was the culprit’s face in view?” ... “Was your view blocked?”

- Self-reports are notoriously unreliable.

- People tend to overestimate things like time and speed and distance, especially when under stress.
Second flaw in the Biggers/Manson logic

- The criteria are not particularly predictive of eyewitness accuracy, for example...
  - There is often not a close relationship between the description of a perpetrator and the likelihood of an accurate identification
  - There is only a weak relationship between confidence and accuracy
  - Memory for details of an event or someone’s face can decay very quickly
Flaws in the *Biggers/Manson* logic: Gary Wells

- “These self-reports might not be particularly indicative of accuracy under the best of circumstances, but they might be especially misleading when a suggestive procedure was involved.

- Irony (or flawed policy?) of the *Manson* test:
  - If the procedure was suggestive, then the criteria used in the second prong are themselves contaminated by the existence of the suggestive procedure.
  - The existence of suggestiveness (1st prong) serves to help guarantee that the witness will pass the 2nd prong, which is then used to justify not being concerned about the suggestive procedure.”
Safeguards
The justice system’s safeguards to protect against mistaken ID

- Presence of counsel
- Voir dire of prospective jurors
- Cross-examination of the eyewitness
- Expert testimony
- Judge’s instructions
Are the safeguards effective?

- Presence of counsel
  - Applies only to live lineups
- Voir dire of prospective jurors
  - Attorneys sometimes limited in the questions they can ask
  - Studies on jurors’ attitudes toward eyewitnesses don’t necessarily predict how they will react to eyewitness evidence
- Cross-examination of the eyewitness
  - Sometimes good for sorting among truthful vs. deceptive witnesses, but not good for distinguishing between witnesses who make accurate IDs and those who honestly make mistakes
Are the safeguards effective?

- **Expert testimony**
  - Often not available to most defendants because ruled inadmissible, expensive, too few experts, limits on what expert can say

- **Judge’s instructions**
  - Do judges understand issues of suggestiveness? If not, instructions will not be effective
  - Instructions can be incomprehensible
Reforms
Suggestions for modifications in the system

- Clear guidelines for non-suggestive eyewitness identification procedures are now widely available to law enforcement
Suggestions for modifications in the system

- Better juror education
  - Revise judge’s instructions to be more specific about the effects of certain variables and more accurately reflect recent research
  - Admissibility of expert eyewitness testimony
  - Perhaps court-appointed rather than defense-appointed?
Reforms in some jurisdictions

- New Jersey, North Carolina, Wisconsin and several large cities have implemented new procedures and improved the quality of their identifications
  - Blind lineup administration
  - Composing fair lineups
  - Unbiased instructions
  - Collecting confidence statements immediately
  - Videotaping procedures
  - Adopting sequential lineups
Significant Recent Cases
**New Jersey v. Henderson (2011) - Landmark**

- N.J. Supreme Court revised the *Manson* test for assessing eyewitness reliability
- Cited a disconnect between the old standard versus modern scientific evidence
  - Indicated the old standard did not adequately measure reliability or deter police misconduct, and relied too heavily on jurors’ interpretation
- The Court found that all relevant system and estimator variables should be taken into account at a pretrial hearing when there is evidence of suggestiveness
New Jersey v. Henderson (2011)

- System variables to take into account...
  - Blind lineup procedures
  - Lineup instructions
  - Lineup composition
  - Investigator feedback
  - Prior exposure
New Jersey v. Henderson (2011)

- Estimator variables to take into account...
  - Stress
  - Presence of a weapon
  - Duration of the event
  - Distance
  - Cross-race identification
New Jersey v. Henderson (2011)

- If the defendant shows evidence pre-trial of suggestiveness, the State must then offer proof that the ID is reliable in terms of accounting for these system and estimator variables.

- If the evidence is still admitted, the Court should provide tailored jury instructions that addresses how those variables affect memory.

- Question was not one of suggestiveness, but whether the defendant has a constitutional right not to have unreliable eyewitness evidence introduced at his trial
  - Witness gave scant description, then made one-on-one ID through apartment ID, but later could not ID from lineup

- 8-1 margin, U.S. Supreme Court didn’t buy it
  - Perry unsuccessfully argued that eyewitness identifications are a uniquely unreliable form of evidence
Implications

- Some argue that there is no area in which social science research has done more to illuminate a legal issue ... over 2000 studies in the past 30 years

- Ruling in *Henderson* shows increased acceptance of psycho-legal research concerning eyewitness identification

- Researchers remain hopeful that the law will catch up to the science
Thank you!

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