MAINTAINING THE RELIABILITY OF EYEWITNESS EVIDENCE: AFTER THE LINEUP

NANCY K. STEBLAY†

I. INTRODUCTION

Two decades of DNA exonerations have highlighted the role of mistaken eyewitness identifications in wrongful convictions of innocent persons. Approximately 75% of exoneration cases documented by the Innocence Project have involved eyewitness error, a percentage that brings eyewitness evidence under scrutiny and its reliability into question.¹ Fortunately, long before the problem of eyewitness misidentification reached public consciousness through post-conviction DNA exoneration cases, psychological researchers explored the memory and social influence processes underlying identification errors. One segment of this laboratory research focused on revised police lineup procedures designed to reduce the likelihood that an eyewitness will make a false identification.² In the last decade, eyewitness researchers have produced recommendations for police lineups that include five core components: 1) effective use of fillers, 2) “blind” administration of the lineup, 3) a cautionary instruction to the witness that the culprit may or may not be present in the set of photos, 4) sequential rather than simultaneous presentation of photos, and 5) a statement of certainty from the witness secured at the time of the identification decision.³ A number of jurisdictions across the United

† Professor of Psychology, Augsburg College, Minneapolis, Minnesota. This paper was presented as part of the Creighton University Law School Symposium on Evolving Litigation Issues, Creighton Law Review, April 3, 2009.


States have brought these science-based recommendations to effective field practice in an attempt to produce more reliable eyewitness evidence.  

Most recently, lineup research has produced an ancillary line of investigation focusing on the integrity of an eyewitness's recollections after the lineup decision is made. This Article discusses three avenues of scientific investigation into lineup practices, each with indicators of where eyewitness evidence may become problematic even after the eyewitness has made a lineup decision, and each with implications for improved identification practice and more reliable eyewitness evidence.

II. THE POST-IDENTIFICATION FEEDBACK EFFECT

One strong benefit of employing a lineup administrator who does not know the identity of the suspect (a “blind administrator”) is that a blind administrator will not, in fact cannot, provide meaningful feedback to the eyewitness at the time of the identification decision. A blind lineup administrator cannot provide any message to the eyewitness to confirm or disconfirm the accuracy of the eyewitness’s decision. This constraint on feedback to the witness is desirable, given that a sizable body of research has revealed the astonishing effect of a lineup administrator’s casual comment on eyewitness memory. In the first study to examine this phenomenon, Wells and Bradfield showed eyewitness-participants a security video of a crime being committed and subsequently asked them to identify the culprit from a lineup. The lineup did not include the culprit, yet all eyewitnesses picked a member from the lineup. Immediately after these mistaken identifications, feedback confirming the identification was provided to a randomly assigned group of eyewitnesses, specifically the statement, “Good, you identified the actual suspect.” Eyewitnesses assigned to the control group were told nothing about the accuracy of their identifications. The confirming feedback significantly increased eyewitnesses’ reports


of certainty in the accuracy of their identifications, compared to the certainty reports of the no-feedback control group. Interestingly, the feedback manipulation affected eyewitness' retrospective reports of how certain they were at the time of their identifications. Perhaps more alarming is that an extensive range of variables was inflated in conjunction with retrospective certainty including eyewitness judgments of the quality of their view of the culprit, the clarity of their memory, and ease of the identification. Furthermore, the eyewitnesses who received confirming feedback believed that the confirming feedback did not affect their perceptions of the crime event or of the identification. 6

A 2006 review of twenty post-identification feedback effect laboratory tests showed a robust impact across three categories of variables. 7 As in the original 1998 study on the post-identification feedback effect, eyewitnesses whose decisions were confirmed became more certain of the accuracy of their identification at the time of the feedback (perhaps not surprisingly), but also expressed that they were more certain at the time of the identification. This phenomenon is more than a simple hindsight bias ("I knew it all along"), as eyewitnesses' memories are distorted beyond the boundaries of simply misremembering what their earlier decisions had been. 8 In fact, memory of the circumstances surrounding the identification task has been altered. After the confirming feedback, these eyewitnesses recall greater ease in the identification task and greater speed of identification. Perhaps the most striking effect of confirming feedback is how eyewitnesses evaluate their experience at the time of witnessing the crime. Eyewitnesses who receive confirming feedback report having had a better view of the culprit, having paid more attention to the crime, having a better basis to make an identification, and having greater clarity of the culprit's image in mind. Finally, these eyewitnesses show changes in related subjective measures, including an elevation in the belief that they possess better memory for strangers than the average person, a greater trust in eyewitnesses with similar experiences, and an increased willingness to testify about their eyewitness experience. The post-identification feedback effect occurs even if

6. Id.
the feedback is delayed for forty-eight hours after the identification task and is found in real eyewitnesses to real crimes.9

Douglass and Steblay contend that the post-identification feedback effect is noteworthy for multiple reasons.10 First, eyewitnesses in the feedback research paradigm typically have made identifications from culprit-absent photo lineups; as such all of the eyewitnesses’ identifications in these scenarios are inaccurate. Consequently, eyewitnesses’ distorted judgments correspond to mistaken identifications of innocent suspects, a forensically-relevant scenario of critical importance given the eyewitness errors exposed by DNA exoneration cases.11 Second, a simple, casual, even seemingly helpful comment from the lineup administrator produced this powerful effect. Third, the aspects of eyewitness experience distorted by post-identification feedback, for example certainty, eyewitnesses’ perception of their view of the culprit, attention given to the witnessed event, and ease of identification, are the very attributes that are likely to bolster eyewitness credibility in the eyes of investigators, prosecutors, and juries. Psychological research has established that people who evaluate eyewitness identifications routinely and naturally assume that confidence (certainty) is correlated with accuracy, and therefore, continue to use confidence to assess accuracy, even after being told that confidence and accuracy are not reliably linked.12

Court systems explicitly use the very criteria distorted by post-identification feedback to evaluate eyewitness evidence. Most notably, the United States Supreme Court recommended, in Neil v. Biggers,13 that jurors use eyewitnesses’ self-reports of certainty, view, and attention to assess eyewitness testimony. The Court confirmed these criteria in Manson v. Braithwaite,14 in which the Court adopted the reliability, or totality, approach to analyzing eyewitness testimony. According to the Manson two-pronged test for exclusion, if the

10. Douglass & Steblay, supra note 7, at 859.
first prong is met, that is the lineup was suggestive, the second prong requires the reliability of the eyewitness identification to be decided by weighing five criteria: 1) the eyewitness's opportunity to view the culprit, 2) the attention paid to the culprit, 3) the accuracy of the description provided by the eyewitness, 4) the passage of time between crime and identification, and 5) eyewitness certainty. As Wells and Quinlivan discussed at length in 2009,¹⁵ three of the Manson reliability factors, specifically view, attention, and certainty, are derived from the eyewitnesses' retrospective judgments of their experience. These eyewitness retrospective self-reports are now known to be highly vulnerable to the corrosive impact of post-identification feedback.¹⁶

Scientists recommend blind lineup administration to avoid post-identification feedback problems.¹⁷ A blind lineup procedure can eliminate the possibility of administrator feedback affecting the eyewitness who has just made an identification decision. Furthermore, documentation of the eyewitness's level of certainty secured at the time of the identification decision and before subsequent interaction with the case detective will memorialize eyewitness and administrator comments for later use in court.

III. REPEATED IDENTIFICATION LINEUPS

Law enforcement may develop eyewitness evidence by securing identification of the suspect first through a photo lineup and subsequently with a live lineup, with the same eyewitness providing both identifications. This practice of repeated lineup identifications may appear reasonable at first glance and necessary if a court generally precludes evidentiary use of photo lineups. Consider the best possible scenario resulting from a repeated identification procedure: The eyewitness has confidently identified the suspect from a photo lineup and is then asked to identify the same suspect from a live lineup. A pick of the same suspect from the live array is at best a confirmation of the eyewitness's earlier identification decision, and if the suspect is the true culprit, a good outcome. However, even in this best-case scenario, the second identification is not independent of the first identification, and as eyewitness evidence goes, the second identification has decisively moved away from a true test of recognition memory for the crime event.

¹⁶. Id.
¹⁷. Douglass & Steblay, supra note 7, at 859.
A much worse identification scenario is unfortunately demonstrated in a number of DNA exoneration cases, albeit anecdotally. For example, John Jerome White was arrested in 1979 for a burglary and rape that had occurred six weeks earlier. Convicted in 1980 for these crimes, White was released from prison in 2007 after DNA evidence exonerated him.\(^{18}\) In White’s case, the elderly victim identified him in a photo lineup, stating she was almost positive that White was her attacker. A week later, White was placed in a live lineup of five men. At that point, the victim was positive of her identification of White as the culprit. White’s case is particularly revealing of the danger of multiple lineups, as the true culprit was in the second lineup. At the time of the second lineup, the rapist happened to be in jail on another charge and was recruited for the live lineup. Despite the fact that the culprit was in the live lineup, the victim mistakenly identified the common denominator in the two lineups, an innocent suspect.

In another DNA exoneration case, Ronald Cotton served a decade in prison for a rape he did not commit until DNA evidence proved his innocence and the state freed him in 1995. Jennifer Thompson, the rape victim, identified Cotton as the rapist first in a photo lineup and subsequently in a live lineup. Indeed, Cotton became the face of the rapist that Thompson saw in her mind’s eye.\(^{19}\) Even when confronted with the true rapist, Thompson did not recognize him as the culprit, but instead persisted in her belief of Cotton’s guilt.\(^{20}\)

As these DNA exoneration cases illustrate, repeated lineups may cause problems that affect the trustworthiness of eyewitness evidence. Eyewitness scientists recommend identification procedures that have been developed for the first identification attempt of an eyewitness either through a photo or live lineup. The first identification test best determines whether an eyewitness’s recognition memory supports police suspicions about the identity of the culprit. The eyewitness’s identification decision at a second identification task (or beyond) is fraught with at least four serious confounds, each one challenging the fidelity of the eyewitness’s memory with an alternate reasonable explanation.

First, the result of repeated identification tasks is based on the eyewitness’s familiarity with the suspect, but that familiarity may stem from exposure to the suspect at the first lineup rather than at the crime scene. A cognitive error, known as source confusion, occurs when a memory failure for the circumstances of the previous encoun-

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20. Id.
ter results in the eyewitness’s sense that the face is familiar, but the correct context for that memory has been lost. This source confusion can manifest when an eyewitness fails to identify the suspect at the first lineup, but makes a subsequent positive identification at the live lineup. A related cognitive error can occur when at the later identification the eyewitness’s memory of the culprit’s face has been supplanted with a memory of the suspect’s face from the first lineup. This confusion of a familiar face with the actual culprit is known as unconscious transference. These two errors of familiarity, source confusion and unconscious transference, are similar in that they redirect the eyewitness’s memory onto a new object, the innocent suspect. A third possible problem, one of simple deduction, occurs when an eyewitness detects that the common denominator across the two lineups is the suspect. The fact that all but one of the lineup members have changed from the first to the second array is highly suggestive. In this circumstance, whatever the eyewitness’s decision at the time of the first lineup, the eyewitness can be fairly certain who the police suspect is at the time of the second lineup. A fourth and final factor, commitment, may prompt an eyewitness to stick with a decision made at the first lineup, presumably to reduce the eyewitness’s anxiety and to help the police investigation.

Deffenbacher, Bornstein, and Penrod’s 2006 review of laboratory research on the mugshot exposure effect provides evidentiary support for these four processes. This laboratory research revealed that an eyewitness’s exposure to a suspect during examination of mugshots prior to the photo lineup can result in decreased lineup identification accuracy. In particular, an increased probability exists that the eyewitness will choose the lineup member whose mug shot the eyewitness previously viewed, particularly when the real culprit is absent from the lineup.

The practice of repeated lineups has been studied in the field and laboratory. Behrman and Davey’s 2001 documentation of field lineups in California showed that second identification tasks were associated with increased identifications of suspects. Eyewitnesses identified suspects significantly more at second lineup identification attempts (62%) compared to eyewitnesses who attempted a single identification (45%).

Steblay and colleagues tested the impact on eyewitness accuracy of repeated lineups in the laboratory and reported their findings in

In this laboratory research, eyewitness-participants viewed a thirty-second computer video that depicted a purse-snatching incident. After viewing the purse-snatching video, eyewitnesses attempted to identify the culprit from a six-person lineup. The experimenter cautioned eyewitnesses that the culprit may or may not be in the lineup. Two weeks after this initial identification task, all eyewitnesses returned to the laboratory, where scientists asked them to view a second lineup and attempt to identify the culprit a second time. The eyewitness’s second lineup decision could reflect a number of the psychological mechanisms outlined above, but importantly, the eyewitness’s memory now incorporated the first lineup experience.

In this laboratory research, the two lineups viewed by the eyewitnesses involved the following three configurations. One group of eyewitnesses first viewed a lineup that included the culprit and then a second lineup that again included the culprit in a different position and surrounded by different filler photos (the culprit as the common denominator across lineups). A second group of eyewitnesses viewed the same two lineups, but the culprit was replaced by an innocent suspect who was the common denominator in both lineups. This innocent suspect was determined through a previous pilot study to be the most frequently chosen lineup member when the true culprit was absent from the lineup. In a third ‘control condition’ a group of eyewitnesses viewed the two lineups, with all photos changing from the first to the second lineup and not including either the culprit or a designated innocent suspect (no common denominator).

Current study outcomes are presented in Table 1. The implications of this data for an innocent suspect are perhaps most clearly viewed with a consideration of the risk to individual lineup members in culprit-absent lineups. In the control condition, the overall eyewitness choosing rate at the first lineup is 39%; thus, risk to any individual lineup member is approximately 7% (39%/6). At the time of the second lineup in the control condition, the eyewitness choosing rate increases to 52%, but that risk is shared across lineup members with the risk to any single lineup member increasing to 9% (52%/6). When a designated innocent suspect is the common denominator in repeated culprit-absent lineups, that suspect’s individual risk at the time of the second lineup is 52%, significantly greater than that suspect’s risk at

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the first lineup and greater than any other lineup member in the culprit-absent lineups.

Three points should be acknowledged. First, this study depicts perhaps a worst-case scenario, in that the same photo of the innocent suspect was present in both lineups. It is unclear from the present research whether the common denominator effect would be diminished or exacerbated if the eyewitness was shown a different photo of the same suspect in the second lineup or if a live lineup including the same innocent suspect followed a photo lineup. Second, innocent people become criminal suspects in a variety of ways, such as having a record of similar crimes or residing near the crime scene. The designated innocent suspect in the laboratory research was in the lineup because he possessed physical characteristics similar to the criminal in the purse-snatching video. In pilot work, the designated innocent suspect was rated as no more physically similar to the culprit than were the other filler photos, yet some aspect of his appearance evidently made him salient to eyewitnesses when the true culprit was missing from the lineup. The common denominator effect may be limited to the circumstances of this specific suspect. Third, ongoing research is attempting to determine the underlying cognitive and/or motivational reasons for the eyewitnesses' lineup decisions—that is, to separate the many reasons for the common denominator effect. Nevertheless, the study has demonstrated that a common denominator effect can occur with a sizable increase in risk to an innocent suspect who appears in repeated lineups. Additionally, this study provides empirical evidence that the eyewitness decision at the second lineup is not merely a replication of the eyewitness decision at the first lineup. For reasons unrelated to the soundness of the eyewitness's memory, the impact of repeated lineup viewings changes the identification decision for some eyewitnesses. In short, repeated lineups involving the same suspect presented to the same eyewitness should not constitute proper memory evidence. Whether from a photo array or a live lineup, eyewitness evidence should be collected only once—at the eyewitness's first attempt to identify a culprit.

IV. CONFESSION EVIDENCE

The disruption of an eyewitness's memory by procedural intrusions, such as post-identification feedback or repeated lineups, has been illustrated in the two previous examples. Hasel and Kassin recently demonstrated a third means by which the fidelity of eyewitness
evidence can be undermined. In Hasel and Kassin's 2009 study, eyewitnesses to a live theft were asked to identify the thief from a six-person lineup. Two days later, the eyewitness-participants returned to the laboratory for a follow-up interview and a subsequent reconsideration of their lineup decision. Importantly, the experimenter told each eyewitness that one of the lineup members had confessed to committing the theft. When the experimenter reported to the eyewitness that the confessor was a suspect not identified by the eyewitness at the first lineup, sixty-one percent of eyewitnesses who had made an identification of a lineup member two days earlier changed their earlier identification in accordance with the "confession" of the other lineup member. Some eyewitnesses offered a rationale for the change in their identification, such as a statement that, "His face now looks more familiar than the one I chose before." Fifty percent of those eyewitnesses who had not made an identification at the first session now changed their prior non-identification decision to identification of the "confessor." The implications of the Hasel and Kassin study are significant. An eyewitness's new knowledge of one type of evidence—a confession—can corrupt another line of evidence, the eyewitness identification. Furthermore, potential exculpatory evidence, specifically that an eyewitness initially failed to identify the suspect, is undermined by the confession. As Hasel and Kassin discuss, the finding that confession evidence can corrupt eyewitness identification evidence challenges the legal presumption that these two types of evidence are independent. This assumed independence of confession and eyewitness evidence is illustrated in appeal courts' "harmless error" doctrine.

The Hasel and Kassin paradigm somewhat mimicked the repeated identification sequence outlined above, in that eyewitnesses were allowed to reconsider their identification two days after the initial lineup. The Steblay multiple-lineup study did not include an information intervention between the two lineups. However, one can speculate that a combination of repeated identification attempts, in addition to confession evidence, would have the potential to exacerbate the problems of repeated lineups.

25. Id.
26. Id. An appellate court sometimes must decide whether an error of law was serious enough to strike down a decision made at trial. If the error is deemed harmless, the decision of the trial court is affirmed.
V. CONCLUSION

This Article outlined three difficulties related to eyewitness evidence, all three problems resting on underlying psychological principles that work against the integrity of eyewitness testimony. The malleability of eyewitness memory is now well documented.27 Eyewitness memory is vulnerable to even subtle intrusions. In addition, eyewitnesses and investigators, like all humans, are prone to cognitive confirmation bias—the tendency to seek or interpret information in line with existing beliefs.28 Just as new information is shaped to conform to an existing schema or belief, memory of past events can be reshaped to fit newly acquired information. When an investigation revisits eyewitness memory by supplying new information to the eyewitness through a second lineup or case details, these intervening events can play havoc with the trace evidence of the original memory. Fortunately, the problems described in this paper are system variables, factors under the potential control of the criminal justice system.29 Awareness of the issues is the first step in resolving the problems associated with eyewitness memory. More broadly, the legal system can be guided to recognize and correct the potential for serious errors in eyewitness identifications that flow from the procedures discussed in this Article. Many jurisdictions already have appropriate protocols in place. In other jurisdictions, change can be initiated from the field by law enforcement, from legislated directives, or from points in between—including vigilant attention to eyewitness issues by defense and prosecuting attorneys.30 The consideration of how to increase the reliability of eyewitness evidence has already achieved a productive collaboration of law enforcement and eyewitness scientists. Hopefully, threats to eyewitness integrity that occur post-lineup can be reduced through a similar ongoing collaboration.

TABLE 1. EYEWITNESS DECISIONS IN REPEATED SIMULTANEOUS-FORMAT LINEUPS (PERCENTAGES)

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<tr>
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<th>LINEUP 1</th>
<th>LINEUP 2</th>
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<tbody>
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<td>CULPRIT-PRESENT LINEUP</td>
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<td></td>
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<tr>
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<td>.66</td>
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<td>FILLER PICK</td>
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<tr>
<td>NO CHOICE FROM LINEUP</td>
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<tr>
<td>CULPRIT-ABSENT LINEUP</td>
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<td>.41</td>
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<td>INNOCENT SUSPECT</td>
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<td>CULPRIT-ABSENT LINEUP (NO COMMON PHOTO)</td>
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