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**FINAL TECHNICAL REPORT**


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*"A Preliminary Study of How Plea Bargaining Decisions by Prosecution and Defense Attorneys*

*Are Affected by Eyewitness Factors"*

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Principal Investigator: Kathy Pezdek, Claremont Graduate University

# FINAL TECHNICAL REPORT

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**FINAL TECHNICAL REPORT**

## I.    INTRODUCTION

### A.    STATEMENT OF THE PROBLEM

This preliminary study attempted to assess how appraisals of the strength of eyewitness evidence affect plea bargaining decisions by prosecutors and defense attorneys. A sample of 93 defense attorneys and 46 prosecutors from matched counties in California participated. The attorneys had extensive experience practicing law and trying felony criminal cases in Superior Court. The attorneys were presented four scenarios in which two specific eyewitness factors – (a) same- versus cross-race identification and (b) prior contact or not – were experimentally manipulated in a factorial design. After reading each scenario, they were asked five questions regarding whether they would plea bargain the case, the lowest/highest plea bargain they would offer/accept, and their estimate of the probability that the defendant was guilty and the probability that they would win the case if it went to trial. This study attempted to experimentally assess how these typical decisions regarding plea bargaining are influenced by variations in the strength of two eyewitness factors, and the whether this pattern of results differs for prosecutors versus defense attorneys.

### B.    LITERATURE CITATIONS AND REVIEW

Eyewitness evidence is critical for solving crimes, and it is often the sole source of evidence for determining the perpetrator's identity. However, studies consistently report that eyewitness misidentifications are the leading cause of erroneous convictions (Huff, 1987; Huff, Rattner, & Sagarin, 1996; Penrod & Cutler, 1999); eyewitnesses frequently identify the wrong individual, or they fail to identify the correct individual. There is a wealth of scientific research on the psychological factors that affect the accuracy of eyewitness memory, and several reviews

of this research are available. These include a meta-analysis of facial identification studies by

Shapiro and Penrod (1986) and more recent articles by Wells, Memon, and Penrod (2006), Wells

and Olson (2003), and chapters by Pezdek (2007, 2009).

Most of the research on eyewitness memory has examined the factors that affect

eyewitness memory and how this information influences jurors' decision making. The present

study assessed how appraisals of the strength of eyewitness evidence affect plea bargaining

decisions by prosecutors and defense attorneys. There are important public policy implications of

this research because, in fact, it is these individuals who estimate the strength of the eyewitness

evidence in real criminal cases and determine which cases will go to trial. Although the 6th

amendment of the U.S. Constitution guarantees all criminal defendants the right to a trial, it has

been estimated that approximately 90% of cases are resolved through plea bargaining (Libuser,

2001). Regarding federal criminal cases alone, between October 1, 2004 and September 20,

2005, 86% of all such cases filed were resolved with a guilty plea (Bureau of Justice Statistics,

2005). Attorneys' decisions regarding whether to plea bargain a case are largely based on the

strength of the evidence against the defendant (Burke, 2007; Pritchard, 1986). This is consistent

with both decision theory accounts of plea bargaining and economic models of plea bargaining

(Covey, 2007; Kramer, Wolbransky, & Heilbrun, 2007). When the evidence is weak, prosecutors

are more likely to offer a plea bargain; when the evidence is strong, defense attorneys are more

likely to recommend a plea bargain.

More specifically, the presence of an eyewitness identification has been reported to

increase the probability that a prosecutor will take a case to trial (Myers & Hagan, 1979). This

conclusion was reached from an archival analysis of felony cases in the state of Indiana. A

similar conclusion was reached in an experimental study by McAllister (1990) in which a large

sample of prosecutors and defense attorneys read scenarios of cases that involved either (a) eyewitness identification of the defendant, or (b) nonidentification of the defendant by the eyewitness. When the eyewitness in the scenario positively identified the defendant, there was a significant reduction in the prosecutors' desire to plea bargain and a significant increase in the defense attorneys' desire to plea bargain. This suggests that both prosecuting and defense attorneys generally perceive an eyewitness identification to be strong evidence. This is important because eyewitness evidence is one of the more frequently encountered types of evidence in criminal cases. Wells, Small, Penrod, Malpass, Fulero, and Brimacombe (1998) estimated that each year in the United States, eyewitness evidence is the primary or sole evidence against the defendant in at least 77,000 criminal trials.

However, in eyewitness identification cases, how accurately can attorneys determine variations in the strength of the eyewitness evidence? Although the courts assume that attorneys understand the factors that influence the fairness of identification procedures (*United States v. Wade*, 1967; *Kirby v. Illinois*, 1972), the results of research studies on this topic are less convincing. A number of studies have examined how well attorneys understand the specific factors that relate to the accuracy of eyewitness evidence (Brigham & Wolfskeil, 1983; Lindsay, MacDonald, & McGarry, 1990; Stinson, Devenport, Cutler, & Kravitz, 1996). However, the findings of these studies are now largely out of date because they did not include the scope of eyewitness factors now known to be significant, nor did these studies compare the knowledge and beliefs of prosecutors with defense attorney. On both points, a more recent study by Wise, Pawlenko, Safer, and Meyer (2009) is more useful.

Wise et al. (2009) had a national sample of prosecutors and defense attorneys with extensive criminal trial experience complete a survey that primarily focused on 13 questions

assessing knowledge of eyewitness factors. The major finding was that prosecutors were

significantly less knowledgeable about the factors that affect the accuracy of eyewitness memory

than the defense attorneys; prosecutors responded correctly to significantly fewer of the 13

eyewitness questions ($M = 6.07$) than did the defense attorneys ($M = 10.10$). Prosecutors were

also less skeptical of eyewitness evidence than defense attorneys and less skeptical of jurors'

knowledge of eyewitness testimony.

### C.    STATEMENT OF MOTIVATION FOR THE RESEARCH

The findings reported above by Wise et al. (2009) suggest that if prosecutors assessed

eyewitness evidence more accurately, they would be better able to discriminate between the

cases they should plea bargain (i.e., those with relatively weak eyewitness evidence) and those

they should not (i.e., those with relatively strong eyewitness evidence). If prosecutors and

defense attorneys had more accurate knowledge about when eyewitness evidence is truly more

likely to be weak versus strong, this would positively influence plea bargaining decisions and

better protect the rights and liberties of individuals on both sides of the bar.

## II. RATIONALE, METHODS, RESULTS AND DISCUSSION

### A.    RATIONALE

A sample of 93 defense attorneys and 46 prosecutors from matched counties in California

participated. The attorneys had extensive experience in practicing law and trying felony criminal

cases in Superior Court. This study experimentally assessed how typical decisions regarding plea

bargaining by prosecutors and defense attorneys are influenced by variations in the strength of

two of these eyewitness factors. These two factors are (a) same- versus cross-race identification

and (b) whether the eyewitness had had prior contact with the perpetrator (i.e., familiar) or not

(i.e., unfamiliar). After reading each scenario, attorneys were asked five questions regarding their

estimate of the probability that the defendant was guilty (question 1), the probability that they would win the case if it went to trial (question 2), whether they would plea bargain the case (questions 3 and 4), and the lowest/highest plea bargain they would offer/accept (question 5). Only questions 3, 4 and 5 specifically ask about plea bargaining. However, given that the willingness to plea bargain has been shown to be related to estimates of the strength of evidence against the defendant (Burke, 2007; Pritchard, 1986), we also asked about estimates of guilt and estimates of winning the case as these are likely to be prerequisite conditions to evaluating plea bargain options.

The cross-race effect (also known as the own-race bias) is one of the strongest factors associated with identification accuracy (Kassin, Tubb, Hosch, & Memon, 2001; Meissner & Brigham, 2001), and attorneys are generally aware of the detrimental effect of the cross-race identification on eyewitness accuracy (Wise et al, 2009). Meissner and Brigham (2001) reviewed 39 research studies on cross-race identification and reported that eyewitnesses were 1.4 times more likely to correctly identify a previously viewed own-race than other-race faces. Further, selection of the wrong suspect was 1.56 times more likely with other-race than same-race individuals. The cross-race effect has also been observed to be consistent across a wide age range (Pezdek Blandon-Gitlin, & Moore., 2003).

The second eyewitness factor manipulated in the scenarios is whether the eyewitness had previously seen the perpetrator. It would seem a matter of common sense that eyewitnesses would be more likely to correctly identify someone they know well than someone who they do not know at all. For example, if a store clerk is robbed and tells the police that he can identify the shooter because he is a regular customer, *the clerk is probably correct.* And, in fact, at least one court has held the exclusion of an eyewitness expert harmless when the witness claimed to have

been familiar with the defendant and seen him on a daily basis for "well over a year," *Hagar v. United States, 856 A.2d 1143 (D.C. Cir. 2004)*. However, it is unclear how accurately individuals can look at a person and determine whether they have casually encountered that person in the past. For example, if an eyewitness observes a drive-by shooter and says he can identify him in a line-up because he has seen him around the neighborhood at some point, is it likely that the eyewitness has really seen him before?

In a recent study by Pezdek and Stolzenberg (2011), Caucasian and Asian sophomores (N=139) in two small private high schools viewed yearbook pictures of (a) graduated students from their school who were seniors when participants were freshman ("familiar") and (b) unfamiliar individuals, and responded whether each was "familiar." The design was completely crossed; familiar faces at each school served as unfamiliar faces at the other school. Based on *d'* recognition data, the cross-race effect resulted even with familiar faces. The measure of *d'* assesses the recognition sensitivity to discriminate between old and new items. Also, although individuals' familiarity judgments were diagnostic of prior contact, recognition accuracy was low (mean hit rate = .42; mean false alarm rate = .23), rendering an eyewitness's report that he had seen a perpetrator *casually* in the past of limited forensic value.

In the familiar condition in this study, the scenario included the following sentence: "The clerk was a 22 year old Hispanic male who, at the scene of the crime, told the police that he had seen the robber a couple of times in the neighborhood last summer." This study assesses the extent to which prosecutors and defense attorneys consider this statement of casual familiarity indicative of actual prior contact and predictive of eyewitness identification accuracy.

Relevant to this research is the question of whether individuals can assess the accuracy of eyewitness statements from written scenarios and whether findings from written scenarios will

generalize to real criminal cases. In a recent study, Lindholm (2008) had police detectives, judges and lay-people judge the accuracy of eyewitness statements from their videotaped responses or from transcripts. Across all samples, participants were actually more accurate evaluating eyewitness statements when this information was in writing rather than videotaped. Similarly, Pezdek, Avila-Mora, and Sperry (2010) recently presented mock jurors with a video or transcript of a trial to assess the consistency of perceptions of eyewitness evidence as a function of the trial presentation medium. Few differences resulted between the video and transcript conditions. Together, these findings suggest that the use of written crime scenarios in this study does not greatly restrict the generalizability of the findings to real criminal cases.

## B.  METHODS

1. PARTICIPANT SAMPLE. This study utilized a convenience sample; the data were collected from county offices of the District Attorney and Public Defender in the state of California. Because the questionnaire included questions about sentencing, and sentencing guidelines vary by state in the U.S., it was necessary to restrict data collection to one state. In the data collection phase, over a period of 18-months, email, telephone, and postal mail were used to contact repeatedly, the head District Attorney and Public Defender in each of the 58 counties in California, to request the participation of the Deputy District Attorneys and Deputy Public Defenders in their county (see letter of solicitation in Appendix A). Only the data from counties in which there were completed test materials from both the offices of the District Attorney and the Public Defender were included in this study. This was done to match the two samples, at least in terms of the counties in which they served. These included 8 counties, contributing a total of 93 Deputy Public Defenders and 46 District Attorneys. Within each county, it was

simply required that each participant had had felony trial experience. Participants were given the option to complete the test materials online or using hard copies; most used the hard copy option.

On the questionnaire, each participant was asked four background questions. These questions, and the mean response for prosecutors and defense attorneys, are presented in Table 1. For none of the four background questions in Table 1 was there a significant difference between the responses of these two groups, all t-values < 1.00. Consequently, differences in the pattern of responses to the questions regarding assessments of eyewitness evidence cannot be attributed to differences in felony trial experience between the two groups.

Table 1

*Background Data Demonstrating Equivalence Between Prosecutors and Defense Attorneys*

| Question | Prosecutors Mean Rating (SD) | Defense Attorneys Mean Rating (SD) | Tests of Significance |
|---|---|---|---|
| 1. How many years have you been a trial attorney? | 14.24 (9.28) | 12.82 (10.98) | $t(135) = .75$ |
| 2. How many cases do you estimate you have tried? | 56.79 (50.56) | 54.75 (78.10) | $t(134) = .16$ |
| 3. In a typical year, how many of your cases involve eyewitness evidence? | 15.35 (29.04) | 19.51 (28.97) | $t(94) = .65$ |
| 4. In the last 5 years, what percent of your cases typically are settled through plea bargaining? | 86.23 (19.95) | 86.23 (19.22) | $t(132) = .01$ |

Note. There were no statistically significant differences between prosecutors and defense attorneys in this sample.

**2. DESIGN AND STATISTICAL ANALYSES**. This was a 2 (prosecutor vs. defense attorney) x 2 (familiar vs. unfamiliar suspect) x 2 (same-race vs. cross-race identification) mixed factor design with only the first factor varied between subjects. Four different versions of a crime scenario were drafted in which the conditions of familiarity (the eyewitness had seen the suspect previously or this was not mentioned) and cross-race condition were varied. The four scenarios were identical except for the slight wording changes required to vary these conditions.

Separate analyses were conducted on responses to each of the five questions following each scenario as a function of the 2 (prosecutor vs. defense attorney) x 2 (familiar vs. unfamiliar suspect) x 2 (same-race vs. cross-race identification) mixed factor design of the study. *Post hoc* simple effects tests followed all significant interactions using Tukey HSD tests. These are essentially pair-wise comparisons of means in the conditions that comprise the significant interactions.

**3. PROCEDURE AND EXPERIMENTAL MATERIALS.** Each attorney read four versions of a crime scenario (counterbalanced across participants for order of presentation). The scenarios described a store robbery in which identification by one eyewitness was the only evidence against the defendant. Included in Appendices B and C are sample protocols administered to prosecutors and defense attorneys. Because in 1977, California enacted a Statutory Determinate Sentencing Law, it was necessary to construct scenarios that specifically allowed for a discrete range of plea bargaining options (e.g. no weapon, no physical harm) [1]. After reading each scenario, attorneys were asked to respond to five questions in light of the facts presented. The five questions are specified on the research protocols included in Appendices B and C.

**4. MODIFICATIONS TO PROCEDURES IN THE ORIGINAL RESEARCH DESIGN.** The grant proposal specified that a total of 125 Deputy District Attorneys and 125 Deputy Public Defenders would participate in this study. Although every District Attorneys' Office and every Public Defenders' Office in California was repeatedly contacted to participate in this study, the

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[1] In 1994, Proposition 184, commonly known as the "Three Strikes Law," was approved by California legislators and voters. As its name suggests (in reference to the fact that in baseball, three-strikes and you are out) the law requires, among other things, a minimum sentence of 25 years to life for three-time repeat offenders with multiple prior serious or violent felony convictions. Relevant to the present study it is important to note that in considering plea bargains, accepting a strike can have considerable consequences.

final sample size included only 93 Deputy Public Defenders and 46 Deputy District Attorneys from 8 counties. The primary concern that was expressed by both groups of attorneys was their distrust of how the findings from such a study would be presented, specifically, the extent to which the findings might denigrate representatives of their office. Although the sample size in this preliminary study was small, the total number of participants exceeded that required to detect effects with an effect size of .25, alpha = .05 and power = .80 (Faul, Erdfelder, Lang, & Buchner, 2007).

Because of the difficulty securing attorneys to participate in this research, it was necessary to alter the design so that we could capitalize on the attorneys who did volunteer. The original research design specified that (a) two different crime scenarios would be used (store robbery and residential robbery), and (b) from the 4 versions of each scenario, defined by the 2 (familiar vs. unfamiliar suspect) x 2 (same-race vs. cross-race identification) design of the study, each attorney would read two versions. When it became clear in pilot testing of this project that it was going to be difficult to secure our original sample size, we altered the procedure such that (a) only one crime scenario was used (the store robbery), and (b) each attorney read all four versions of this scenario and responded to the five questions following each. Although the order of presenting the four scenarios was counterbalanced across participant attorneys, it is nonetheless possible that responses to earlier scenarios affected responses to later scenarios by highlighting the variables of interest to the researchers. This is a shortcoming of the revised design implemented in this preliminary study.

## C.   RESULTS AND DISCUSSION

Following each scenario were the same five questions. Separate analyses were conducted on responses to each of the five questions as a function of the 2 (prosecutor vs. defense attorney)

x 2 (familiar vs. unfamiliar suspect) x 2 (same-race vs. cross-race identification) mixed factor

design of the study. *Post hoc* simple effects tests followed all significant interactions using

Tukey HSD tests. The means (and Standard Deviations) for all conditions for all five questions

are presented in Table 2 and discussed below.

Table 2

*Mean Response (with SD) for Each of the 5 Questions for Prosecutors and Defense Attorneys in*

*the Same- and Cross-Race Conditions for Familiar and Unfamiliar Suspects*

| Question | Prosecutors | | | | Defense Attorneys | | | |
| | Familiar | | Unfamiliar | | Familiar | | Unfamiliar | |
| | Same-Race | Cross-Race | Same-Race | Cross-Race | Same-Race | Cross-Race | Same-Race | Cross-Race |
| 1 | In the above scenario, what do you think is the probability that the defendant is guilty? Specify on a scale from 0% – 100%. | | | | | | | |
| | .89 (.14) | .89 (.13) | .81 (.17) | .81 (.17) | .45 (.22) | .39 (.21) | .35 (.21) | .30 (.20) |
| 2 | In the above scenario, what is the probability that you would win this case if it went to trial? Specify on a scale from 0% – 100%. | | | | | | | |
| | .81 (.19) | .79 (.19) | .71 (.21) | .70 (.24) | .45 (.20) | .47 (.20) | .51 (.21) | .53 (.22) |
| 3 [a] | In the above scenario, assume that you are prosecuting/defending the accused. Would you offer (prosecutor)/ recommend (defense attorney) any plea bargain to the defendant?  Circle one: YES   NO | | | | | | | |
| | .70 (.47) | .72 (.46) | .80 (.40) | .83 (.39) | .73 (.45) | .68 (.47) | .63 (.49) | .54 (.50) |
| 4 | In the above scenario, what is the probability that you would offer (prosecutor) /recommend (defense attorney) any plea bargain to the defendant? Specify on a scale from 0% – 100%. | | | | | | | |
| | .69 (.36) | .71 (.37) | .78 (.29) | .78 (.33) | .50 (.28) | .46 (.27) | .43 (.24) | .37 (.27) |
| 5 [b] | From the list of 7 potential plea bargain offers specified below, circle the very lowest offer you would offer (prosecutor)/ highest offer you would recommend (defense) to the defendant in this scenario. | | | | | | | |
| | 0.39 | 0.41 | 0.30 | 0.26 | 0.44 | 0.39 | 0.31 | 0.25 |

[a] Responses to this question were coded such that "no" = 0 and "yes" = 1. [b] Values presented for Question 5 represent the proportion of prosecutors and defense attorneys who indicated that they would offer a plea bargain above the mode for their attorney group.

**1. RESULTS FOR EACH QUESTION.** The central issue in this study is whether prosecutors

differed from defense attorneys in how their plea bargaining decisions are influenced by two

specific eyewitness factors, (a) same- versus cross-race identification and (b) whether the

perpetrator was familiar to the eyewitness. Thus, in the analysis of each question it is the

interaction of attorney group x cross-race factor and the interaction of attorney group x

familiarity that are most relevant. In Table 3 are the means for these interactions involving

attorney group. In none of the analyses of the results was there a significant interaction of cross-

race condition x familiarity, nor did this interaction significantly interact with attorney group.

Table 3

*Summary of Mean Responses (with SD) for the Interactions of Attorney Group by Cross-Race*

*Condition and Attorney Group by Familiarity Condition*

| | Prosecutors | | Defense Attorneys | | Prosecutors | | Defense Attorneys | |
|---|---|---|---|---|---|---|---|---|
| Question | Same-Race | Cross-Race | Same-Race | Cross-Race | Familiar | Unfamiliar | Familiar | Unfamiliar |
| 1 [a] | In the above scenario, what do you think is the probability that the defendant is guilty? Specify on a scale from 0% – 100%. | | | | | | | |
| | .85 (.15)  =  .85 (.15) | | .40 (.21)  >  .34 (.21) | | .89 (.13) | .81 (.17) | .42 (.22) | .32 (.20) |
| 2 | In the above scenario, what is the probability that you would win this case if it went to trial? Specify on a scale from 0% – 100%. | | | | | | | |
| | .76 (.20)  >  .74 (.21) | | .48 (.21)  <  .50 (.21) | | .80 (.19)  >  .71 (.22) | | .46 (.20)  <  .52 (.22) | |
| 3 [b] | In the above scenario, assume that you are prosecuting/defending the accused. Would you offer (prosecutor)/ recommend (defense attorney) any plea bargain to the defendant? Circle one: YES   NO | | | | | | | |
| | .75 (.43)  =  .77 (.42) | | .68 (.47)  >  .61 (.48) | | .71 (.46)  <  .82 (.39) | | .70 (.46)  >  .58 (.49) | |
| 4 | In the above scenario, what is the probability that you would offer (prosecutor) /recommend (defense attorney) any plea bargain to the defendant? Specify on a scale from 0% – 100%. | | | | | | | |
| | .74 (.33)  =  .74 (.35) | | .47 (.26)  >  .42 (.27) | | .70 (.36)  <  .78 (.31) | | .48 (.27)  >  .40 (.26) | |

[a] With question 1, although the main effect of familiarity was significant, the attorney group x familiarity interaction was not significant. This is the only first-order interaction with attorney group that was not significant.  [b] Responses to this question were coded such that "no" = 0 and "yes" = 1.                                                                                     \

*Question #1: In the above scenario, what do you think is the probability that the*

*defendant is guilty? Specify on a scale from 0% – 100%.*

The mean response data per condition by prosecutors and defense attorneys on Question

#1 are presented below in Figure 1. A 2 (prosecutor vs. defense attorney) x 2 (familiar vs.

unfamiliar suspect) x 2 (same-race vs. cross-race identification) Analysis of variance (ANOVA)

was conducted on responses to this question. As can be seen in Figure 1, all three main effects

were significant and all in the direction consistent with expectations. There was a significant

main effect of attorney group; prosecutors ($M = .85$, $SD = .15$) were more likely to think that the

defendant was guilty than were defense attorneys ($M = .37$, $SD = .21$), F (1,134) = 231.07, $p <$

.001, $\eta^2$ = .63. There was also a significant main effect of the cross-race condition; estimates of the probability that the defendant was guilty were higher in the same-race ($M$ = .63, $SD$ = .18) than cross-race condition ($M$ = .60, $SD$ = .18), F (1, 134) = 14.42, $p$ < .001, $\eta^2$ = .10. There was a significant main effect of familiarity as well; estimates of the probability that the defendant was guilty were higher with familiar ($M$ = .66, $SD$ = .17) than unfamiliar defendants ($M$ = .57, $SD$ = .19), F (1, 134) = 61.21, $p$ < .001, $\eta^2$ = .31. There was one significant interaction in the analyses of results to this question, that is the interaction between attorney group and race, F (1,134) = 10.85, $p$ < .01, $\eta^2$ = .08. For prosecutors, estimates of the defendant's guilt were similar in the same-race ($M$ = .85, $SD$ = .15) and cross-race conditions ($M$ = .85, $SD$ = .15), $t$ (45) = .61, $r$ = .01. However for defense attorneys estimates of the defendant's guilt were higher in the same-race ($M$ = .40, $SD$ = .21) than cross-race condition ($M$ = .34, $SD$ = .21), $t$ (89) = 5.20, $p$ < .01, $r$ = .14. The interaction of attorney group and familiarity was not significant; prosecutors and defense attorneys were equally likely to think that the defendant was guilty in the familiar and unfamiliar conditions.

*Figure 1*

*Mean Response per Condition by Prosecution and Defense Attorneys on Question #1*
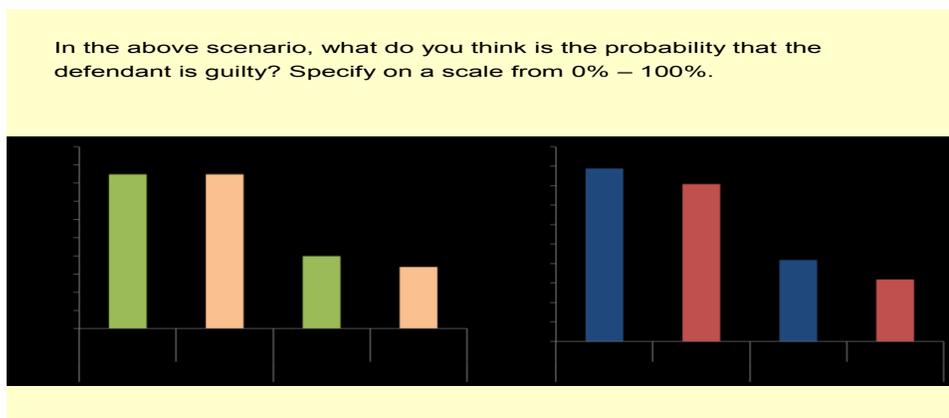
*Question #2: In the above scenario, what is the probability that you would win this case if it went to trial? Specify on a scale from 0% – 100%.*

The mean response data per condition by prosecutors and defense attorneys on Question #2 are presented below in Figure 2. A 2 (prosecutor vs. defense attorney) x 2 (familiar vs. unfamiliar suspect) x 2 (same-race vs. cross-race identifcation) ANOVA was conducted on responses to this question. There was a significant main effect of attorney group. As might be predicted, prosecutors ($M = .75$, $SD = .21$) were more likely than defense attorneys ($M = .49$, $SD = .21$) to think they would win the case if it went to trial, $F (1,135) = 57.76$, $p < .001$, $\eta^2 = .30$. There was a significant interaction of attorney group and the cross-race condition, $F = (1, 135) = 7.57$, $p < .01$, $\eta^2 = .05$. Whereas prosecutors indicated that the probability that they would win the case (i.e., get a guilty verdict) if it went to trial was significantly higher in the same-race ($M = .76$, $SD = .20$) than cross-race condition ($M = .74$, $SD = .21$), $t (45) = 2.20$, $p < .05$, $r = .05$, for defense attorneys, estimates of the probability that they would win the case (i.e., get a not guilty verdict) if it went to trial were higher in the cross-race ($M = .50$, $SD = .21$) than same-race condition ($M = .48$, $SD = .21$), $t (90) = 2.26$, $p < .05$, $r = .05$. The interaction between attorney group and the familiarity condition was also significant, $F (1, 135) = 35.54$, $p < .001$, $\eta^2 = .21$. Consistent with expectations, whereas prosecutors indicated that the probability they would win the case if it went to trial was significantly higher in the familiar ($M = .80$, $SD = .19$) than unfamiliar condition ($M = .71$, $SD = .22$), $t (45) = 4.28$, $p < .01$, $r = .22$, defense attorneys indicated that the probability they would win the case was significantly higher in the unfamiliar ($M = .52$, $SD = .22$) than familiar condition ($M = .46$, $SD = .20$), $t (90) = 4.11$, $p < .01$, $r = .14$. No other main effects or interactions were significant.

*Figure 2*

*Mean Response per Condition by Prosecution and Defense Attorneys on Question #2*
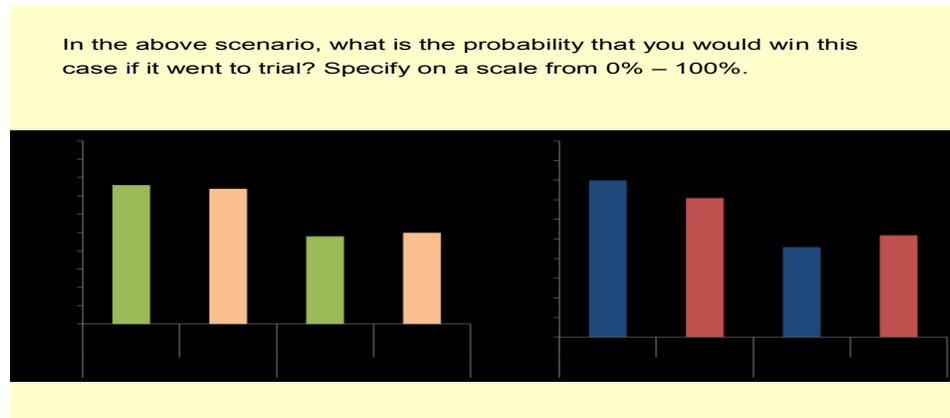


In the above scenario, what is the probability that you would win this case if it went to trial? Specify on a scale from 0% – 100%.

*Question #3: In the above scenario, assume that you are prosecuting/defending the accused. Would you offer (prosecutor)/ recommend (defense attorney) any plea bargain to the defendant?  Circle one: YES   NO*

The mean response data per condition by prosecutors and defense attorneys on Question #3 are presented below in Figure 3. A 2 (prosecutor vs. defense attorney) x 2 (familiar vs. unfamiliar suspect) x 2 (same-race vs. cross-race identification) ANOVA was conducted on responses to this question, with "yes" coded as 1 and "no" coded as 0. There was a significant interaction between attorney group and cross-race condition, $F(1, 135) = 5.68$, $p < .05$, $\eta^2 = .04$. For prosecutors, there was no significant difference in their willingness to offer a plea bargain in the same-race ($M = .75$, $SD = .40$) and cross-race conditions ($M = .77$, $SD = .38$), $t(45) = 1.00$, $r = .03$. However, defense attorneys were more willing to recommend a plea bargain in the same-race ($M = .67$, $SD = .45$) than cross-race condition ($M = .61$, $SD = .43$), $t(92) = 2.47$, $p < .05$, $r = .07$. There was also a significant interaction between attorney group and familiarity, $F(1, 135) = 15.39$, $p < .001$, $\eta^2 = .10$. Consistent with expectations, whereas prosecutors were more willing to offer a plea bargain in the unfamiliar ($M = .82$, $SD = .39$) than familiar condition ($M = .71$, $SD =$

.44), $t$ (45) = 2.34, $p < .05$, $r = .13$, defense attorneys were more willing to recommend a plea

bargain in the familiar ($M = .70$, $SD = .44$) than unfamiliar condition ($M = .58$, $SD = .46$), $t$ (92)

= 3.65, $p < .01$, $r = .13$. No main effects or other interactions were significant.

***Figure 3***

*Mean Response per Condition by Prosecution and Defense Attorneys on Question #3*



In the above scenario, assume that you are prosecuting /defending the accused. Would you offer (prosecutor)/ recommend (defense attorney) any plea bargain to the defendant? Circle one: YES    NO
(Reported below as percent "yes" responses)

*Question #4: In the above scenario, what is the probability that you would offer*

*(prosecutor) /recommend (defense attorney) any plea bargain to the defendant? Specify on a*

*scale from 0% – 100%.*

The mean response data per condition by prosecutors and defense attorneys on Question

#4 are presented below in Figure 4. Question #4 addressed the same issue as Question #3, but

provided attorneys with a continuous response scale. Responses to Questions #3 and #4 were

consistent. A 2 (prosecutor vs. defense attorney) x 2 (familiar vs. unfamiliar suspect) x 2 (same-

race vs. cross-race identification) ANOVA was conducted on responses to this question. There

was a significant main effect of attorney group; prosecutors ($M = .74$, $SD = .34$) were more likely

to offer a plea bargain to the defendant than were defense attorneys to recommend one ($M = .44$,

$SD = .26$), F (1,135) = 38.83, $p < .001$, $\eta^2 = .22$. There was also a significant interaction of

attorney group by cross-race condition, F (1, 135) = 5.33, $p < .05$, $\eta^2 = .04$. For prosecutors, there

was no difference in the probability that a plea bargain would be offered for same-race ($M = .74$, $SD = .33$) and cross-race defendants ($M = .74$, $SD = .35$), $t(45) = .32$, $r = .01$. However, defense attorneys were more likely to recommend a plea bargain to a same-race ($M = .47$, $SD = .26$) than a cross-race defendant ($M = .42$, $SD = .27$), $t(90) = 3.53$, $p < .01$, $r = .09$. Finally, there was a significant interaction of attorney group by familiarity condition, $F(1,135) = 29.65$, $p < .001$, $\eta^2 = .18$. Prosecutors were more likely to offer a plea bargain to an unfamiliar ($M = .78$, $SD = .31$) than a familiar defendant ($M = .70$, $SD = .36$.), $t(45) = 2.79$, $p < .01$, $r = .12$. However, defense attorneys were more likely to recommend a plea bargain to a familiar ($M = .48$, $SD = .27$) than an unfamiliar defendant ($M = .40$, $SD = .26$), $t(90) = 5.31$, $p < .01$, $r = .17$. No other main effects or interactions were significant.

***Figure 4***

*Mean Response per Condition by Prosecution and Defense Attorneys on Question #4*
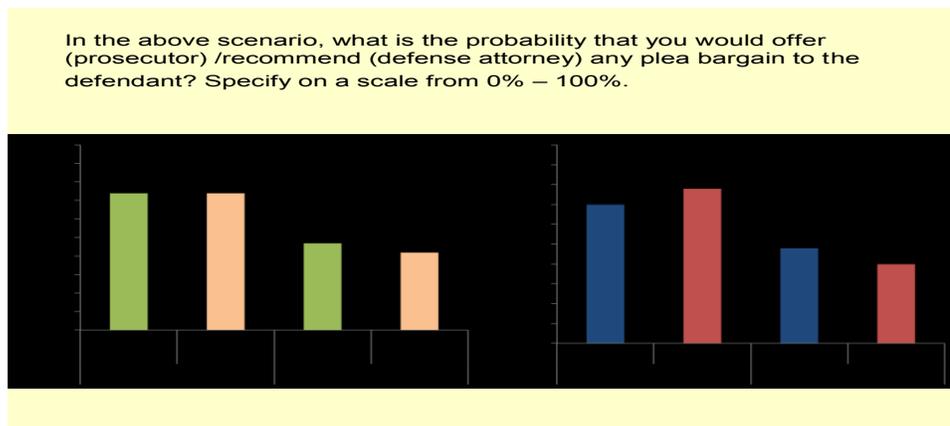


*Question #5: From the list of 7 potential plea bargain offers specified below, circle the very lowest offer you would offer (prosecutor)/ highest offer you would recommend (defense) to the defendant in this scenario. Please respond to this question but use only these 7 options:*

| No Plea. | No Strike Probation | No Strike 16-months | One Strike Probation | One Strike 2-years | One Strike 3-years | One Strike 5-years |
|---|---|---|---|---|---|---|

This response scale represents the seven options available in the four versions of the scenario presented in this case under the California Statutory Determinate Sentencing Law. This response scale is not an interval scale, and thus the options for statistical tests of significance are limited. Thus the results in response to Question #5 will be presented only descriptively. The probability distributions of responses by prosecution and defense attorneys on question #5 are presented below in Figure 5. The modal response for each attorney group is indicated in Figure 5 with a star. In each of the four scenarios, the modal response by prosecutors was the same; the lowest offer they would offer was "no strike probation." The modal response by defense attorneys was also the same in each of the four scenarios; the highest offer they would recommend was "one strike probation."

***Figure 5***

*Probability Distributions of Responses by Prosecution and Defense Attorneys on Question #5*
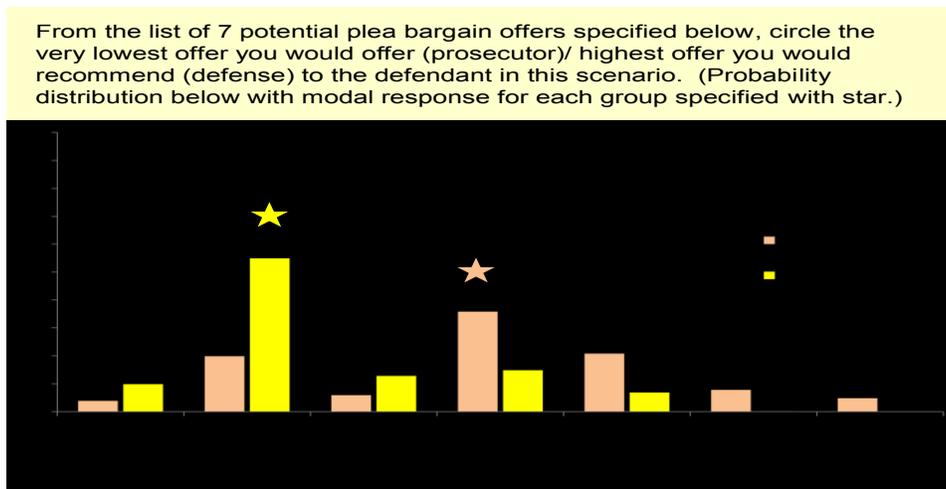


An additional analysis was conducted to assess how representative the mode was as an indication of the response to question #5 by each attorney group. In this analysis we examined for each condition, the proportion of prosecutors and defense attorneys who indicated that they would offer/recommend a plea bargain above the mode that was reported for their attorney

group. These proportions are reported in the bottom row of Table 2 above. In these descriptive statistics, it can be seen that the modal plea offer was more representative of the responses of both attorney groups in the unfamiliar than the familiar condition. When the perpetrator was familiar, prosecutors were more likely to offer a plea that was larger than the modal offer for prosecutors in this condition. Similarly, when the perpetrator was familiar, defense attorneys were more likely to recommend a plea that was larger than the modal offer for defense attorneys in this condition. This finding suggests that both prosecutors and defense attorneys considered identifications of familiar perpetrators to be more compelling than identifications of unfamiliar perpetrators, and were likely to adjust their plea bargaining offers/recommendations accordingly. Consistent with the results reported for questions 3 and 4, on question 5, the cross-race factor had less impact on the distribution of plea bargaining decisions especially for prosecutors.

      2. SUMMARY OF SIGNIFICANT INTERACTIONS WITH ATTORNEY GROUP. The central issue in this study is addressed by the interaction of attorney group x cross-race factor and the interaction of attorney group x familiarity in responses to each of the test questions. In Table 3 are the means for these interactions involving attorney group for each of the four questions for which significance tests are available. Of these eight interactions, all but the interaction of attorney group x familiarity for question 1, appraisals of guilt, were significant. The extent to which decisions regarding plea bargaining differed between prosecutors and defense attorneys was not the same when the cross-race factor was manipulated as when the familiarity factor was manipulated.

      The pattern of results regarding the significant attorney group by cross-race condition interactions can be seen in the left half of Table 3 above. Whereas defense attorneys were more likely to think the defendant was guilty (question 1) and recommend a plea (questions 3 and 4) in

the same-race than cross-race condition, prosecutors responded similarly to same-race and cross-race scenarios on these three questions. On question 2, regarding the probability of winning the case, consistent with expectations, defense attorneys thought they were more likely to win (i.e., get a not guilty verdict) in the cross- than same-race condition, but prosecutors thought they were more likely to win (i.e., get a guilty verdict) in the same- than cross-race condition. With the exception of prosecutors' responses on Question 2, these results suggest that decisions regarding plea bargaining by defense attorneys but not prosecutors were influenced by knowledge that the case involved a cross-race eyewitness identification. There was a similar pattern of results in Figure 5 as well as the descriptive statistics reported in Table 2 for question 5.

The pattern of results regarding the significant attorney group by familiarity condition interactions can be seen in the right half of Table 3 above. The direction of these interactions, where there were significant differences, was a general pattern of consistency rather than inconsistency between prosecutors and defense attorneys. That is, when the perpetrator was familiar, prosecutors indicated a higher probability of winning the case (i.e., getting a guilty verdict) on question 2, and a lower willingness to offer a plea on questions 3 and 4. On the other hand, when the perpetrator was familiar, defense attorneys indicated a lower probability of winning the case (i.e., getting a not guilty verdict) on question 2, and a greater willingness to offer a plea on questions 3 and 4. There was a similar pattern of results in Figure 5 as well as the descriptive statistics reported in Table 2 for question 5.

**3. SUMMARY OF SIGNIFICANT MAIN EFFECTS OF ATTORNEY GROUP.** In addition to these interactions with attorney group, there were three significant main effects of attorney group. On question 1, prosecutors ($M = .85$, $SD = .15$) were more likely to think that the defendant was guilty than were defense attorneys ($M = .37$, $SD = .21$), F $(1,134) = 231.07$, $p < .001$, $\eta^2 = .63$.

On question 2, prosecutors ($M$ = .75, $SD$ = .21) were more likely than defense attorneys ($M$ = .49, $SD$ = .21) to think they would win the case if it went to trial, F (1,135) = 57.76, $p$ < .001, $\eta^2$ = .30. And, on question 4, prosecutors ($M$ = .74, $SD$ = .34) were more likely to offer a plea bargain to the defendant than were defense attorneys to recommend one ($M$ = .44, $SD$ = .26), F (1,135) = 38.83, $p$ < .001, $\eta^2$ = .22. These results present a consistent pattern of results that suggest that prosecutors feel that they are more in control of what is likely to happen in a trial and thus generally more likely to offer a plea bargain (although a less lenient one), and probably less likely to waiver on their initial offer than are defense attorneys, although this latter point was not specifically tested in this study. These results are important for defense attorneys to know as they enter into plea bargain negotiations for their clients.

## III. CONCLUSIONS

### A.    DISCUSSION OF FINDINGS AND THEIR IMPLICATIONS FOR POLICY, PRACTICE, AND RESEARCH

Several previous studies have compared prosecutors with defense attorneys on their knowledge and beliefs about the role of various eyewitness factors in eyewitness identification accuracy. Comparing their more recent findings with those of Brigham and Wolfskeil (1983) a quarter of a century prior, Wise et al. (2009) concluded that differences in prosecutors' and defense attorneys' knowledge and beliefs about eyewitness testimony "may even be greater today" (p. 1277). Specifically, in both studies it was reported that prosecutors were significantly less knowledgeable than defense attorneys on almost every issue. The results of the present study are more encouraging; prosecutors and defense attorneys provided similar responses in their appraisals of the role of the familiarity of the perpetrator on issues related to their willingness to plea bargain. However, defense attorneys were more consistent than were prosecutors in their

appraisals of the role of the cross-race condition on issues related to their willingness to plea bargain. These results suggest that prosecutors and defense attorneys are actually quite similar in terms of how they incorporate eyewitness memory factors into their decisions regarding how to evaluate cases and how to prosecute or defend defendants.

In addition, there are implications for practice suggested by the three significant main effects of attorney group that resulted in this study. Prosecutors were more likely to think that the defendant was guilty than were defense attorneys (Question 1), more likely than defense attorneys to think they would win the case if it went to trial (Question 2), and more likely to offer a plea bargain to the defendant than were defense attorneys to recommend one (Question 4). These results present a consistent pattern that suggests that prosecutors feel they are more in control of what is likely to happen in a trial and thus generally more likely to offer a plea bargain, and they are probably less likely to waiver on their initial offer than are defense attorneys, although this latter point was not specifically tested in this study. These results are important for defense attorneys to know as they enter into plea bargain negotiations for their clients.

In terms of implications of this work for research and practice, given the challenges of conducting field studies with practicing attorneys as subjects, researchers should establish partnerships with both sides of the bar to address recruitment issues.

## B.    STUDY LIMITATIONS

There are two caveats to this preliminary study. First, this study included only two eyewitness factors. As a consequence, the study is more focused than many previous studies that have examined how plea bargaining decisions are made. Additional research is necessary to determine from the full list of potential eyewitness factors, those most likely to yield similarities

between prosecutors and defense attorneys and those likely to yield differences, and the basis for these differences. Second, in light of the difficulty securing a large sample size in this study, it was necessary to revise the design such that (a) only one crime scenario was used, a convenience store robbery, and (b) each participant attorney read all four scenarios in which familiarity and the cross-race factor were manipulated. Although the order of presenting the four scenarios was counterbalanced across participant attorneys, it is nonetheless possible that responses to earlier scenarios affected responses to later scenarios by highlighting the variables of interest to the researchers.

## IV. DISSEMINATION OF RESEARCH FINDINGS

The results of this research have been written up and submitted for publication in a peer-review journal. The status of this manuscript is currently revised and resubmitted. In addition, this research has been or will be presented at the following national conferences:

- November, 2011 meeting of the American Society of Criminology in Washington, D.C.

- March, 2012 meeting of the American Psychology – Law Society in Puerto Rico.

These findings will also be presented in continuing education workshops by the Principal Investigator, including a presentation on April 14 to the California Bar Association and at other opportunities thereafter.

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**Appendix A: Template 3-Page Letter of Solicitation**



**INSERT DATE:**

**INSERT ATTORNEY NAME**
**INSERT ATTORNEY ADDRESS**

*Re: Office of Justice Programs – Research Project*

Dear **INSERT ATTORNEY NAME**,

I am the Principal Investigator on a research grant recently funded by the National Institute of Justice. The project is entitled, *"How are Plea Bargaining Decisions by Attorneys Affected by Eyewitness Evidence?"* With the support of the Office of Justice Programs, I am now seeking the participation of several hundred Deputy Public Defenders in California. A letter of endorsement from the Bureau of Justice Assistance is attached.

This research will have practical significance in first, informing the practice of attorneys deciding the merits of criminal cases that rely heavily on eyewitness evidence, and second, determining in such cases what plea agreement would be in the best interest of justice. Participation in this study takes very little time, requires no follow up or paperwork on your part, and will be conducted entirely in one sitting. If setting aside time to participate is a concern, an online version of the survey is available allowing your deputy [district attorneys] to participate at their convenience during a specified week. The specific details of the research procedure are indicated on the page that follows. *Participation is completely anonymous and confidential; individuals' names will not be associated with any data collected, nor will the data from any participating county be reported separately.*

I believe that the results of this study will benefit both the practice and—because of the support of the Bureau of Justice Assistance —the prestige of the Office. This research will be conducted throughout the state of California; I hope that I can include **INSERT COUNTY NAME** in the study.

*You can contact me directly:*
**INSERT RESEARCHER CONTACT INFORMATION**

**Claremont**
**GRADUATE UNIVERSITY**

## NATIONAL INSTITUTE OF JUSTICE GRANT FUNDED RESEARCH
## PROGRAM ON CRIME AND JUSTICE RESEARCH
## OVERVIEW OF RESEARCH STUDY

*What is required?* Each attorney who volunteers for this study will be presented four crime scenarios, one short paragraph each. Attorneys will read each scenario and answer five questions regarding (a) their estimate of the probability that they could win the case if it went to trial, and (b) whether they would recommend a plea bargain to the defendant, and if so, the highest offer they would recommend. *Based on our pilot study, participation takes less than 15 minutes in only one session.*

*How will the data be collected?* There are two options for collecting data from the attorneys in your office; you can decide which option is easier for you and your staff. This research can be conducted online, via a secure data collection site, or I can meet with your staff personally and administer hard copies of the materials. The first option allows attorneys in your office the option of participating online at their convenience during a specified week. The second option might be easier if in the near future you have a scheduled meeting with your felony trial attorneys and could spare me 15 minutes at the beginning or end of the meeting.

*Who is eligible to participate?* Participants must have current or past experience as criminal felony trial attorneys. Responses of several hundred attorneys throughout the state of California are necessary. **Participation is completely anonymous and confidential; individuals' names will not be associated with any data collected, nor will the data from any participating county be reported separately.**

**U.S. Department of Justice**

Office of Justice Programs

*Bureau of Justice Assistance*

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March 12, 2010                              *Washington, D.C. 20531*

RE:  NIJ Grant to Study Plea Bargaining Decisions and Eyewitness Factors

This letter is to thank you in advance for your important contribution to the National
Institute of Justice (NIJ) grant awarded to Claremont University for a research study of
how plea bargaining decisions are affected by eyewitness factors.

As described in the project overview, this research examines strength of evidence by
studying the impact of prosecutor and defender assumptions regarding race/ethnicity,
casual nonstranger familiarity, and eyewitness evidence on plea bargaining.  Information
will be collected anonymously from deputy district attorneys and deputy public defenders
in multiple California counties using various store/residential robbery scenarios.

The Bureau of Justice Assistance (BJA) supports law enforcement, courts, corrections,
treatment, victim services, technology, and prevention initiatives that strengthen the
nation's criminal justice system. BJA provides leadership, services, and funding to
America's communities by emphasizing local control, building relationships in the field,
provide training and technical assistance to state, local and tribal criminal justice systems,
promoting capacity building through planning, encouraging innovation, and
communicating the value of justice efforts to decision makers at every level.

Eyewitness identification represents a critical issue for lawyers and judges, and findings
from this study will have important implications for practice and policy.

The success of this important project is directly related to your contributions, and we
appreciate the effort required to comply with the researcher's request for study
participation, especially during this period of State and local resource concerns. Your
perspective will provide BJA and NIJ with invaluable insight on how plea bargaining
decisions are affected by eyewitness factors and will assist over time in forming
recommendations to the criminal justice field.

Thank you for your interest in this study.  Please do not hesitate to contact me at
kim.norris@usdoj.gov or 202-307-2076 if you have any questions.

Sincerely,

*K.B. Norris*

Kim Ball Norris, JD
Senior Policy Advisor for Adjudication
Bureau of Justice Assistance, Office of Justice Programs
US Department of Justice

Cc:    Linda Truitt, Ph.D., NIJ

**Appendix B: Sample Research Protocol for Defense Attorneys**



## Department of Justice Research Project
## Eyewitness Evidence & Plea Bargaining Decisions

### *Informed Consent Form*

You are being asked to participate in a study funded by the Department of Justice and conducted by Professor Kathy Pezdek, at Claremont Graduate University. The study investigates how attorneys' plea bargaining decisions are influenced by various eyewitness memory factors. The study will take about 15 minutes. It involves reading 4 scenarios and answering a few questions regarding each. Some summary questions follow on the last page.

Thank you very much for volunteering to participate. Without your assistance, this important research could not be conducted.

<u>Additional Institutional Research Board (IRB) Points:</u>

**Potential Risks & Benefits:** No potential risks to you are anticipated; unfortunately, you will not be compensated for your participation.

**Voluntary Nature of Participation:** Participation is completely voluntary and confidential. Your privacy will be maintained in all publications or presentations resulting from this study. In fact, you will not be asked to provide your name on the research protocol. Also, no reported results will be linked to a specific county office.

**For Additional Information:** If you have any questions or would like to obtain a copy of the findings from this research, please contact Professor Kathy Pezdek at Kathy.Pezdek@cgu.edu. The Claremont Graduate University IRB has approved this project. For any questions you may also contact the CGU IRB at (909) 607-9406 or at irb@cgu.edu.

*By participating in this study I am expressing my understanding*

*of the above information.*

Claremont
GRADUATE UNIVERSITY

**Department of Justice Research Project**
**Study on Eyewitness Evidence & Plea Bargaining Decisions**

1. How many years have you been a trial attorney? _____

2. How many cases do you estimate that you have tried? _____

3. In a typical year, how many of your cases involve eyewitness identification
    evidence? _____

4. In the last 5 years, what percent of your cases typically are settled through plea
    bargaining? _____%

5. In what county are you currently employed? _____

**Instructions:**  In this packet are 4 crime scenarios that differ in terms of
the details of the eyewitness evidence.  Please read each scenario
carefully and then respond to each of the 5 questions that follow the
scenario. Please respond to each scenario independently. Please do your
best to respond to every question; do not leave any question blank.

**Important: In each scenario, you should assume that a very
thorough investigation of the case has uncovered no more
information besides what is presented in the scenario, and there was
no video operating in the store. Also, the defendant is not a minor
and he has no priors. He denies involvement but has no solid alibi.**

*Please continue to the next page*

Scenario A

A neighborhood convenience store in East Los Angeles was robbed on February 3, 2009. The robber approached the clerk from behind and although no weapon was present, he forced the clerk to empty the cash drawer into his gym bag. As the robber ran from the store, the clerk saw him across the counter, face to face, for a couple of seconds; this was his only opportunity to see the robber.  The clerk was a 22 year old Hispanic male who, at the scene of the crime, told the police that he had seen the robber a couple of times in the neighborhood last summer. He described the robber as a Black teenager dressed in dark clothing. Three weeks later the clerk called the police because he thought he saw the suspect at the neighborhood gas station. When the police arrived they apprehended the defendant after the clerk told them, "yes, that's the guy." One count of robbery has been filed against the defendant.

1. In the above scenario, assume that you are defending the accused. Would you *recommend any plea bargain* to the defendant?  Circle one: YES    NO

2. In the above scenario, what is the probability that you would *recommend any plea bargain* to the defendant? Specify on a scale from 0% – 100% _____.

3. From the list of 7 potential plea bargain offers specified below, circle the ***very highest offer you would recommend*** to the defendant in this scenario. Please respond to this question but use only these 7 options:

| No Plea . | No Strike Probation | No Strike 16-months | One Strike Probation | One Strike 2-years | One Strike 3-years | One Strike 5-years |
|---|---|---|---|---|---|---|

4. In the above scenario, what do you think is the probability that the defendant is guilty? Specify on a scale from 0% – 100% _____.

5. In the above scenario, what is the probability that you would win this case if it went to trial? Specify on a scale from 0% – 100% _____.

***When you have completed this page, please turn to the next page.***

Scenario D

A neighborhood convenience store in East Los Angeles was robbed on February 3, 2009. The robber approached the clerk from behind and although no weapon was present, he forced the clerk to empty the cash drawer into his gym bag. As the robber ran from the store, the clerk saw him across the counter, face to face, for a couple of seconds; this was his only opportunity to see the robber. The clerk was a 22 year old Hispanic male. He described the robber as a Hispanic teenager dressed in dark clothing. Three weeks later the clerk called the police because he thought he saw the suspect at the neighborhood gas station. When the police arrived they apprehended the defendant after the clerk told them, "yes, that's the guy." One count of robbery has been filed against the defendant.

1.  In the above scenario, assume that you are defending the accused. Would you *recommend any plea bargain* to the defendant?  Circle one: YES    NO

2.  In the above scenario, what is the probability that you would *recommend any plea bargain* to the defendant? Specify on a scale from 0% – 100% _____.

3.  From the list of 7 potential plea bargain offers specified below, circle the ***very highest offer you would recommend*** to the defendant in this scenario. Please respond to this question but use only these 7 options:

| No Plea . | No Strike Probation | No Strike 16-months | One Strike Probation | One Strike 2-years | One Strike 3-years | One Strike 5-years |
|---|---|---|---|---|---|---|

4.  In the above scenario, what do you think is the probability that the defendant is guilty? Specify on a scale from 0% – 100% _____.

5.  In the above scenario, what is the probability that you would win this case if it went to trial? Specify on a scale from 0% – 100% _____.

***When you have completed this page, please turn to the next page.***

<u>Scenario C</u>

A neighborhood convenience store in East Los Angeles was robbed on February 3, 2009. The robber approached the clerk from behind and although no weapon was present, he forced the clerk to empty the cash drawer into his gym bag. As the robber ran from the store, the clerk saw him across the counter, face to face, for a couple of seconds; this was his only opportunity to see the robber. The clerk was a 22 year old Hispanic male. He described the robber as a Black teenager dressed in dark clothing. Three weeks later the clerk called the police because he thought he saw the suspect at the neighborhood gas station. When the police arrived they apprehended the defendant after the clerk told them, "yes, that's the guy." One count of robbery has been filed against the defendant.

1.  In the above scenario, assume that you are defending the accused. Would you *recommend any plea bargain* to the defendant?  Circle one: YES    NO

2.  In the above scenario, what is the probability that you would *recommend any plea bargain* to the defendant? Specify on a scale from 0% – 100% _____.

3.  From the list of 7 potential plea bargain offers specified below, circle the ***very highest offer you would recommend*** to the defendant in this scenario. Please respond to this question but use only these 7 options:

| No Plea . | No Strike Probation | No Strike 16-months | One Strike Probation | One Strike 2-years | One Strike 3-years | One Strike 5-years |
|---|---|---|---|---|---|---|

4.  In the above scenario, what do you think is the probability that the defendant is guilty? Specify on a scale from 0% – 100% _____.

5.  In the above scenario, what is the probability that you would win this case if it went to trial? Specify on a scale from 0% – 100% _____.

***When you have completed this page, please turn to the next page.***

Scenario B

A neighborhood convenience store in East Los Angeles was robbed on February 3, 2009. The robber approached the clerk from behind and although no weapon was present, he forced the clerk to empty the cash drawer into his gym bag. As the robber ran from the store, the clerk saw him across the counter, face to face, for a couple of seconds; this was his only opportunity to see the robber. The clerk was a 22 year old Hispanic male who, at the scene of the crime, told the police that he had seen the robber a couple of times in the neighborhood last summer. He described the robber as a Hispanic teenager dressed in dark clothing. Three weeks later the clerk called the police because he thought he saw the suspect at the neighborhood gas station. When the police arrived they apprehended the defendant after the clerk told them, "yes, that's the guy." One count of robbery has been filed against the defendant.

1. In the above scenario, assume that you are defending the accused. Would you *recommend any plea bargain* to the defendant? Circle one: YES   NO

2. In the above scenario, what is the probability that you would *recommend any plea bargain* to the defendant? Specify on a scale from 0% – 100% _____.

3. From the list of 7 potential plea bargain offers specified below, circle the ***very highest offer you would recommend*** to the defendant in this scenario. Please respond to this question but use only these 7 options:

| No Plea . | No Strike Probation | No Strike 16-months | One Strike Probation | One Strike 2-years | One Strike 3-years | One Strike 5-years |
|---|---|---|---|---|---|---|

4. In the above scenario, what do you think is the probability that the defendant is guilty? Specify on a scale from 0% – 100% _____.

5. In the above scenario, what is the probability that you would win this case if it went to trial? Specify on a scale from 0% – 100% _____.

**Appendix C: Sample Research Protocol for Prosecutors**


Claremont
GRADUATE UNIVERSITY

## Department of Justice Research Project
## Eyewitness Evidence & Plea Bargaining Decisions

### *Informed Consent Form*

You are being asked to participate in a study funded by the Department of Justice and conducted by Professor Kathy Pezdek, at Claremont Graduate University. The study investigates how attorneys' plea bargaining decisions are influenced by various eyewitness memory factors. The study will take about 15 minutes. It involves reading 4 scenarios and answering a few questions regarding each. Some summary questions follow on the last page.

Thank you very much for volunteering to participate. Without your assistance, this important research could not be conducted.


Additional Institutional Research Board (IRB) Points:

**Potential Risks & Benefits:** No potential risks to you are anticipated; unfortunately, you will not be compensated for your participation.

**Voluntary Nature of Participation:** Participation is completely voluntary and confidential. Your privacy will be maintained in all publications or presentations resulting from this study. In fact, you will not be asked to provide your name on the research protocol. Also, no reported results will be linked to a specific county office.

**For Additional Information:** If you have any questions or would like to obtain a copy of the findings from this research, please contact Kathy Pezdek at Kathy.Pezdek@cgu.edu. The Claremont Graduate University IRB has approved this project. For any questions you may also contact the CGU IRB at (909) 607-9406 or at irb@cgu.edu.


*By participating in this study I am expressing my understanding*

*of the above information.*

**Claremont**
GRADUATE UNIVERSITY

**Claremont Forensic Psychology Center**
**Study on Eyewitness Evidence & Plea Bargaining Decisions**

1. How many years have you been a prosecutor? _____

2. How many cases do you estimate that you have tried? _____

3. In a typical year, how many of your cases involve eyewitness identification
    evidence? _____

4. In the last 5 years, what percent of your cases typically are settled through plea
    bargaining? _____%

5. In what county are you currently employed? _____

**Instructions:**  In this packet are 4 crime scenarios that differ in terms of
the details of the eyewitness evidence.  Please read each scenario
carefully and then respond to each of the 5 questions that follow the
scenario. Please respond to each scenario independently. Please do your
best to respond to every question; do not leave any question blank.

**Important: In each scenario, you should assume that a very
thorough investigation of the case has uncovered no more
information besides what is presented in the scenario, and there was
no video operating in the store. Also, the defendant is not a minor
and he has no priors. He denies involvement but has no solid alibi.**

*Please continue to the next page*

Scenario A


A neighborhood convenience store in East Los Angeles was robbed on February 3, 2009. The robber approached the clerk from behind and although no weapon was present, he forced the clerk to empty the cash drawer into his gym bag. As the robber ran from the store, the clerk saw him across the counter, face to face, for a couple of seconds; this was his only opportunity to see the robber.  The clerk was a 22 year old Hispanic male who, at the scene of the crime, told the police that he had seen the robber a couple of times in the neighborhood last summer. He described the robber as a Black teenager dressed in dark clothing. Three weeks later the clerk called the police because he thought he saw the suspect at the neighborhood gas station. When the police arrived they apprehended the defendant after the clerk told them, "yes, that's the guy." One count of robbery has been filed against the defendant.


1.  In the above scenario, assume that you are prosecuting the accused. Would you *offer any plea bargain* to the defendant?  Circle one: YES    NO

2.  In the above scenario, what is the probability that you would *offer any plea bargain* to the defendant? Specify on a scale from 0% – 100% _____.

3.  From the list of 7 potential plea bargain offers specified below, circle the **very lowest offer you would offer** to the defendant in this scenario. Please respond to this question but use only these 7 options:

| No Plea . | No Strike Probation | No Strike 16-months | One Strike Probation | One Strike 2-years | One Strike 3-years | One Strike 5-years |
|---|---|---|---|---|---|---|

4.  In the above scenario, what do you think is the probability that the defendant is guilty? Specify on a scale from 0% – 100% _____.

5.  In the above scenario, what is the probability that you would win this case if it went to trial? Specify on a scale from 0% – 100% _____.


***When you have completed this page, please turn to the next page.***

Scenario D


A neighborhood convenience store in East Los Angeles was robbed on February 3, 2009. The robber approached the clerk from behind and although no weapon was present, he forced the clerk to empty the cash drawer into his gym bag. As the robber ran from the store, the clerk saw him across the counter, face to face, for a couple of seconds; this was his only opportunity to see the robber.  The clerk was a 22 year old Hispanic male. He described the robber as a Hispanic teenager dressed in dark clothing. Three weeks later the clerk called the police because he thought he saw the suspect at the neighborhood gas station. When the police arrived they apprehended the defendant after the clerk told them, "yes, that's the guy." One count of robbery has been filed against the defendant.



1.  In the above scenario, assume that you are prosecuting the accused. Would you *offer any plea bargain* to the defendant?  Circle one: YES   NO

2.  In the above scenario, what is the probability that you would *offer any plea bargain* to the defendant? Specify on a scale from 0% – 100% _____.

3.  From the list of 7 potential plea bargain offers specified below, circle the **very lowest offer you would offer** to the defendant in this scenario. Please respond to this question but use only these 7 options:

| No Plea . | No Strike Probation | No Strike 16-months | One Strike Probation | One Strike 2-years | One Strike 3-years | One Strike 5-years |
|---|---|---|---|---|---|---|

4.  In the above scenario, what do you think is the probability that the defendant is guilty? Specify on a scale from 0% – 100% _____.

5.  In the above scenario, what is the probability that you would win this case if it went to trial? Specify on a scale from 0% – 100% _____.



***When you have completed this page, please turn to the next page.***

Scenario C

A neighborhood convenience store in East Los Angeles was robbed on February 3, 2009. The robber approached the clerk from behind and although no weapon was present, he forced the clerk to empty the cash drawer into his gym bag. As the robber ran from the store, the clerk saw him across the counter, face to face, for a couple of seconds; this was his only opportunity to see the robber. The clerk was a 22 year old Hispanic male. He described the robber as a Black teenager dressed in dark clothing. Three weeks later the clerk called the police because he thought he saw the suspect at the neighborhood gas station. When the police arrived they apprehended the defendant after the clerk told them, "yes, that's the guy." One count of robbery has been filed against the defendant.

1. In the above scenario, assume that you are prosecuting the accused. Would you *offer any plea bargain* to the defendant?  Circle one: YES   NO

2. In the above scenario, what is the probability that you would *offer any plea bargain* to the defendant? Specify on a scale from 0% – 100% _____.

3. From the list of 7 potential plea bargain offers specified below, circle the **_very lowest offer you would offer_** to the defendant in this scenario. Please respond to this question but use only these 7 options:

| No Plea . | No Strike Probation | No Strike 16-months | One Strike Probation | One Strike 2-years | One Strike 3-years | One Strike 5-years |
|---|---|---|---|---|---|---|

4. In the above scenario, what do you think is the probability that the defendant is guilty? Specify on a scale from 0% – 100% _____.

5. In the above scenario, what is the probability that you would win this case if it went to trial? Specify on a scale from 0% – 100% _____.

***When you have completed this page, please turn to the next page.***

Scenario B


A neighborhood convenience store in East Los Angeles was robbed on February 3, 2009. The robber approached the clerk from behind and although no weapon was present, he forced the clerk to empty the cash drawer into his gym bag. As the robber ran from the store, the clerk saw him across the counter, face to face, for a couple of seconds; this was his only opportunity to see the robber.  The clerk was a 22 year old Hispanic male who, at the scene of the crime, told the police that he had seen the robber a couple of times in the neighborhood last summer. He described the robber as a Hispanic teenager dressed in dark clothing. Three weeks later the clerk called the police because he thought he saw the suspect at the neighborhood gas station. When the police arrived they apprehended the defendant after the clerk told them, "yes, that's the guy." One count of robbery has been filed against the defendant.



1.  In the above scenario, assume that you are prosecuting the accused. Would you *offer any plea bargain* to the defendant?  Circle one: YES    NO

2.  In the above scenario, what is the probability that you would *offer any plea bargain* to the defendant? Specify on a scale from 0% – 100% _____.

3.  From the list of 7 potential plea bargain offers specified below, circle the **very lowest offer you would offer** to the defendant in this scenario. Please respond to this question but use only these 7 options:

| No Plea . | No Strike Probation | No Strike 16-months | One Strike Probation | One Strike 2-years | One Strike 3-years | One Strike 5-years |
|---|---|---|---|---|---|---|

4.  In the above scenario, what do you think is the probability that the defendant is guilty? Specify on a scale from 0% – 100% _____.

5.  In the above scenario, what is the probability that you would win this case if it went to trial? Specify on a scale from 0% – 100% _____.