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"A Preliminary Study of How Plea Bargaining Decisions by Prosecution and Defense Attorneys Are Affected by Eyewitness Factors"

EXECUTIVE SUMMARY

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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. The research reported here assesses more specifically, how accurately attorneys can determine variations in the strength of the eyewitness evidence in eyewitness identification cases. 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.

RESEARCH GOALS AND OBJECTIVES. This preliminary 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). 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). 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.

METHODS, RESULTS AND CONCLUSIONS. A sample of 93 defense attorneys and 46 prosecutors from matched counties in California participated. 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. This was 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.

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 asked 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 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 1 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.

Table 1

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.

The pattern of results regarding the significant attorney group by cross-race condition interactions can be seen in the left half of Table 1. 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. Together, these findings suggest that defense attorneys thought that the same- versus cross-race condition was significantly more influential than did prosecutors.

The pattern of results regarding the significant attorney group by familiarity condition interactions can be seen in the right half of Table 1. 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.

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, 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.

IMPLICATIONS FOR POLICY, PRACTICE, & RESEARCH. The results of this research thus present a better indication of how prosecutors and defense attorneys use information regarding various eyewitness factors than has been reported in any previous studies. Although Wise et al. (2009) suggested that inaccurate appraisals of eyewitness testimony by prosecutors have lead to "25 more years of needless wrongful convictions from eyewitness error" (p. 1280), in fact, the results of this study 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. This does not mean that attorneys would not benefit from additional training regarding factors that affect the accuracy of eyewitness memory and identification, but rather that defense attorneys and prosecutors are likely to both benefit from such training.

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.

Finally, 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.

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