# Mistaken Eyewitness Identification, False Confession, and Conviction of the Innocent

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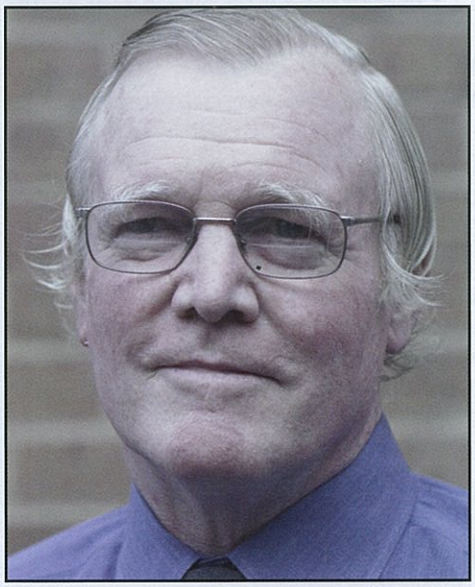

***Photo courtesy of Brian Cutler.***

Mistaken eyewitness identification and false confession have at least four things in common.

1. First, the two forms of investigative errors are among the leading precursors to conviction of the innocent. According to the U.S.-based Innocence Project, mistaken eyewitness identification has played a role in about 75%, and false confession about 25%, of the cases in which convicted felons have been exonerated on the basis of DNA evidence. In recognition of Canadian documented cases of miscarriages of justice and the results of inquiries that followed, the Federal, Provincial, Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions issued a 2005 report (and subsequently a 2011 report) containing recom-

mendations for reducing the risk of false identification and false confession. The societal problem of wrongful conviction is now widely known and the causes well understood. Attempts are being made to mitigate this risk of such miscarriages of justice, but there is much room for improvement, as we explain below.

2. Second, both mistaken eyewitness identification and false confession often have a common cause, namely problematic investigation procedures. Specifically, the manner in which investigators conduct a photoarray or lineup can increase the risk that eyewitnesses will mistakenly identify an innocent suspect as a perpetrator. The manner in which an investigator interrogates a suspect can increase the risk that he will eventually confess to a crime he did not commit. These kinds of errors have been, and continue to be, the focus of intensive scientific study. Considerable psychological research has been devoted to both topics.

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The roots of research on mistaken eyewitness identification and false confession can be traced to basic cognitive and social psychological research on human memory and social influence, topics that have been under psychological scrutiny for decades. With respect to quantity of research, there are literally thousands of scientific, peer-reviewed articles and books on memory and social influence. Basic research on human memory can be found in peer-reviewed journals such as *Memory and Cognition*, *Memory*, and *Psychological Science*. Similarly, basic research on social influence can be found in peer-reviewed journals such as the *Journal of Personality and Social Psychology* and the *Journal of Experimental Social Psychology*. In addition, there are numerous rigorously reviewed forensic psychology journals that routinely publish research on the psychology of eyewitness identification, interrogation, and false confessions. These journals include *Law and Human Behavior*, *Legal and Criminological Psychology*, and *Psychology, Crime & Law*. Fresh research on these topics is presented annually at the conference of the American Psychology-Law Society (Division 41 of the American Psychological Association).

The psychological research on eyewitness identification shows that certain factors increase the risk of mistaken identification. Some of these factors are eyewitness impairment factors (e.g., high stress, weapon focus, cross-race recognition) over which investigators have no control. Other factors, however, such as the manner in which a showup, photoarray, or lineup are conducted, are under the control of investigators. An investigator who fails to instruct the eyewitness that the perpetrator might not be present in a photoarray (or lineup), and it is important to not implicate innocent people, may create the impression that he believes that the suspect is the perpetrator and the eyewitness should make a positive identification. Research shows that the absence of such instructions increases the risk of false identification. More generally, an investigator who directly or indirectly encourages an eyewitness to make a positive identification increases the risk of false identification.

The risk of false identification can also be raised through the manner in which the fillers (i.e., non-suspects) are selected for a photoarray and the manner in which photos are presented to an eyewitness. Fillers that do not match the description of the perpetrator make it easier for an eyewitness to guess or deduce which member of the photoarray is the perpetrator rather than having to rely on memory for the perpetrator. Photoarrays presented simultaneously encourage the witness to choose the person who looks most like the perpetrator whether or not the suspect in the photoarray is innocent or guilty. Presenting photos sequentially reduces the risk of false identification.

Perhaps most counterintuitive is the finding that the risk of false identification can be raised if the person conducting the identification test knows which person in the photoarray is the suspect. When the investigator knows the identity of the suspect, there is an opportunity for her to advertently or inadvertently cue the eyewitness to select the suspect. Further, in these "non-blind" identification tests, it is difficult to know whether the eyewitness identification is due to the eyewitness' memory for the perpetrator or to the influence of the investigator who guided the procedure. "Blind" identification tests — those in which the identification test is conducted by an investigator who does not know which person is the suspect — reduce the risk of false identification and rule out investigator influence as an explanation for the eyewitness identification.

Just as investigative procedures can increase the risk of false identification, so, too, can they increase

the risk of false confession. There are clearly identifiable interrogation techniques that investigators commonly and effectively use to encourage guilty suspect to confess. These techniques include maximization and minimization strategies. Investigators are taught these techniques through workshops and manuals produced by John Reid and Associates, which claims to train thousands of investigators per year.[1]

Maximization refers to a cluster of techniques designed to convey the investigator's unshakable belief that the suspect is guilty. Tactics include forceful accusations of guilt, interruption, and refusal of the suspect's denials, the conveyance of real or manufactured evidence of the suspect's guilt (or the assertion that such evidence will soon be in hand), and the implicit or explicit threat of more serious consequence if the suspect continues to deny his guilt. These maximization techniques can create a sense of hopelessness in the suspect, even in the actually innocent suspect who begins the interrogation by vigorously asserting his innocence.

**Maximization and minimization techniques have been shown in psychological research to increase the risk of false confession in mentally healthy, high-functioning, intelligent adults.**

Minimization techniques, by contrast, serve the purpose of helping the suspect construct a moral justification for his actions. Mitigating circumstances may be proposed that can have the effect of reducing the apparent seriousness of the crime and consequently increase the likelihood that the suspect will accept responsibility for it. Minimizations include sympathizing and empathizing with the suspect's situation, making the crime appear like a normal reaction, something anyone, including the investigator would have done, and offering the suspect alternative, more socially acceptable explanations for having committed the crime. Although direct offers of leniency are typically not permissible, research shows that minimization techniques have the effect of creating the belief on the part of the suspect that a confession will be met with more lenient treatment.

Maximization and minimization techniques have been shown in psychological research to increase the risk of false confession in mentally healthy, high-functioning, intelligent adults.[2] Certain individual risk factors, however, further increase their influence on false confessions. Youth, persons with developmental disabilities, and persons with mental illness are particularly susceptible to coercive interrogation techniques. Ironically, innocence itself is a risk factor. People who are innocent are more likely to waive their rights to silence and to counsel, to cooperate with investigators, to freely offer information and alibis to police (who may regard this information critically and suspiciously), and continue to participate in interrogation under the belief that their innocence will set them free. Their innocent behaviour, however, may be met with more vigorous minimization and maximization tactics. Ultimately, fatigue, despair, and hopelessness, or the short-sighted desire to end a prolonged and uncomfortable interrogation, may trigger a false confession.

3. Third, mistaken eyewitness identifications and false confessions may at first glance seem like unrelated errors, but in reality the two can influence one another. One investigative error can increase the risk of another. Confessions, for example, can be so compelling that they generate false confidence on the part of investigators. The resultant tunnel vision, accompanied by a confirmation bias, can prematurely narrow the investigative focus, restrict what evidence is gathered, and bias how it is evaluated. We have an automatic, and largely unconscious tendency to look for and attend to evidence that is supportive of our beliefs. We look for corroboration. We search selectively for confirmation, and when we find it, we remember it. Consequently, at times investigators do not seek out or avail themselves of crucial evidence that could exonerate an innocent suspect and put them on the trail of the actual perpetrator.

The value of corroborative evidence needs to be appraised independently of any accompanying confession. The confession may make neutral evidence appear more incriminating than it really is. This process has been labeled "corroboration inflation".[3] What is perceived to be (and claimed to be) corroboration may not be corroboration at all. The confession may taint the interpretation of other evidence by police, lawyers and judges. Drawing on wrongful conviction case files, Kassin et al.[4] showed that false confession cases contained, disproportionately to other cases, invalid forensic evidence, false eyewitness identifications, and erroneous informant testimony. In one experiment, when eyewitnesses to a mock crime were told that a different lineup member

than the one they had identified had confessed, most of them subsequently changed their identifications. For those witnesses who had made no identification, half "selected" the so-called confessor, once his identity was revealed.[5]

Confessions may cause investigators to interpret ambiguous, nonprobative evidence as incriminating. It is a slippery slope because jurors may be told that in light of this allegedly supportive evidence, any worries they might have had about the trustworthiness of the confession have been alleviated. It is as if the mere presence of a confession trumps any misgivings there might be regarding the additional evidence. According to Sangero and Halpert,[6] the evidence against a suspect should be the main determinant of guilt; a confession is simply additional corroboration. When the case depends primarily on the confession, there is a danger of misinterpreting ambiguous evidence as inculpatory due to natural cognitive errors such as the confirmation bias and to a lack of understanding about how an innocent person could come to confess to a crime he did not commit.

**Forensic information that is inconsistent with the confession is often ignored or its reliability downplayed when its incompatible with acceptance of the confession.**

Forensic information that is inconsistent with the confession is often ignored or its reliability downplayed when it is incompatible with acceptance of the confession. In the Central Park Jogger case, five boys in their mid-teens falsely confessed to a brutal rape. Their accounts were rich in detail, but wildly divergent from each other and from the known facts. In Manitoba, Kyle Unger falsely confessed to murder to an undercover officer in a Mr. Big sting. He said he had killed his victim beside a bridge, and he actually took the officer to the bridge to show him the location. The bridge had not even been built at the time of the murder. In the Norfolk Four case, non-matching DNA was interpreted to mean that the suspect was simply an accomplice of the actual rapist, and the investigators looked for another culprit without doubting the culpability of the first suspect. When the DNA of the new suspect also failed to match, he was added to the gang of accomplices, and the search went on until they ended up with seven accomplices, none of whom were a match with the rapist's DNA.

Just as a confession can taint the interpretation of other evidence, so, too, can the confession itself be the product of an interrogation that was triggered by untrustworthy collateral information. Suppose investigators have a suspect for whom inculpatory evidence is rather modest. They also have an eyewitness. A lineup administrator may conduct a suggestive identification procedure that results in a false identification. By providing the eyewitness with confirmatory feedback following a false identification ("you picked the right guy"), the investigator inflates the eyewitness' confidence in her own illusory accuracy, making her a compelling eyewitness. The newly confident eyewitness confirms the earlier suspicions of the investigators who now interrogate the presumed-guilty suspect. The Reid manual's repeated assurances that innocent suspects will not succumb to the interrogation tactics obviate the need for caution. Should a confession be forthcoming, it provides spurious validation of the mistaken eyewitness identification, and, more generally, provides specious endorsement of the interrogation method used to obtain the confession. At trial, jurors will see a confident prosecutor presenting evidence from a confident eyewitness whose testimony is buttressed by the defendant's confession. In hindsight, evidence of suggestive eyewitness identification procedures and coercive interrogation procedures may be discounted in light of the very compelling evidence against the defendant. Likewise, eyewitness identification and confession evidence, even when erroneous, often trump evidence of innocence. Liebman and his colleagues analyzed wrongful conviction cases and showed that exculpatory evidence is routinely noticed but not appreciated.[7] We sometimes do not attach enough importance to "non matching" clues that can reveal a suspect's innocence. In a sense, we are duped by own cognitive foibles and deficient investigative procedures.

4. Fourth, some attorneys have turned to expert witnesses as a means of educating the court and the jury about the psychology of mistaken eyewitness identifications or false confessions in the hopes that an informed jury will reach a more just decision.

Mistaken eyewitness identifications and false confessions need not lead to wrongful conviction. Eyewitnesses do not convict defendants, and defendants do not convict themselves. Judges and juries decide cases based on all of the evidence at hand. Theoretically, the criminal trial serves as a safeguard to prevent erroneous evidence from leading to wrongful conviction. Why, then, are mistaken identifications and false confessions among the most common sources of investigative error in known

cases of wrongful conviction? We believe that they are at least partly attributable to fundamental misunderstandings on the part of legal professionals and lay juries about these issues. With respect to the former, research has examined what people (both lay and professional) understand about the factors that increase the risk of mistaken eyewitness identification and has revealed that there are gaps in their knowledge.

Why do people have such strong faith in eyewitnesses? The answer is that generally speaking, humans have good memories for routine activities. On a day-to-day basis, we are able to remember where we live, where we work, where we parked, who our family and friends are, and where to get a good cup of coffee. Eyewitnesses, however, are often challenged to identify strangers seen for a very short time and under adverse conditions, conditions that make eyewitness identification difficult. Particularly relevant to investigative procedures, most people have *no* experience with eyewitness identification procedures such as photoarrays, so it is understandable that they would lack a nuanced understanding of how these procedures can influence eyewitness memory. More specifically, lay people (and many professionals) do not understand how the instructions given to eyewitnesses prior to or during a photoarray can increase the risk of false identification. Many do not understand that the way that photos are presented can increase the risk of false identification, or why it is important to have a photoarray conducted by an investigator who does not know which photo is that of the suspect. Many do not appreciate the fact that an eyewitness' confidence can be artificially inflated by validation and positive reinforcement by an investigator. This lack of knowledge makes it difficult for both professionals and lay people to understand the effects of suggestive identification procedures on false identification. Indeed, one trial simulation study conducted 20 years ago found that many factors known from the research to influence identification accuracy were not considered by the jurors at trial. The only factor that *did* influence them was the confidence of the eyewitness, a factor known from the research to be malleable and under many circumstances a notoriously poor predictor of identification accuracy.[8]

Why do people have such strong faith in confessions? We are socialized to believe that confession is good for the soul. Confession plays an essential role in many religions. We teach our children that they should admit to and take responsibility for their transgressions. We believe that confession is an essential element of rehabilitation (e.g., parole boards use it as a factor in

deciding whether to grant early release). And ultimately we find it hard to believe that one would confess to a crime that one did not commit, particularly given the adverse consequences of doing so. Just as our faith in human memory is justified, so, too, is our faith in confessions because, undoubtedly, most confessions are true. But we now have hard data that not all suspects who confess are giving authentic confessions, counterintuitive though this may be. As noted above, psychological research has shed considerable light on the social pressures exerted by investigators that put many people at risk of false confession, as well as some of the personal factors that may make that risk even higher.

Peoples' faith in false confessions is borne out by the psychological research. Laypeople *and* police officers are barely better than chance at discriminating true from false confessions provided by prison inmates. Confession evidence is highly influential in trial simulation studies. Jurors in these studies fail to take coercive investigative procedures into account when deciding cases. Even when they recognized that a procedure was coercive, their verdicts were not affected by the strong-arm tactics that produced the confession. Nor is the persuasiveness of confessions restricted to mock jurors. Wallace and Kassin asked judges to appraise culpability in a study in which confessions were either present or absent and the corroborative evidence was either weak or strong. Some confessions were extracted with very high-pressure tactics. The suspect was depicted being questioned for 15 hours and threatened with the death penalty while his interrogators brandished a gun. Even with weak corroborative evidence, the conviction rate increased fourfold in the high-pressure condition, relative to the "no confession" control group (17% versus 69% respectively). Remarkably, perceptions of coercion and judgments of guilt were independent of one another. Ratings of the voluntariness of the confessions did not predict verdicts. More than a third of the judges who read about the high-pressure confession (accompanied by weak evidence) perceived the confession as coercive but simultaneously judged the suspect to be guilty.[9]

Given peoples' misconceptions about eyewitness memory and false confessions, some lawyers have turned to expert witnesses to educate juries (and the court) in the hopes that they will make more informed and just decisions. Eyewitness experts are typically cognitive and social psychologists who are knowledgeable about human memory and/or social influence processes in general and the eyewitness research in particular. The eyewitness expert offers general testimony about how memory works, the case-relevant factors that influence eyewitness memory, and, as relevant, the influence of suggestive eyewitness identification procedures. The expert may inform the court about reforms of eyewitness identification procedure that reduce the risk of mistaken eyewitness identification. The expert may testify about the relation between eyewitness confidence and accuracy and the factors that can make an eyewitness more or less confident without influencing identification accuracy. In accordance with the law, the expert does not offer an opinion about the accuracy of an eyewitness (though the expert may opine on the suggestiveness of eyewitness identification procedures). In short, the role of the expert is that of educator: to educate the jury about psychological factors that influence eyewitness identification.

Experts in interrogation and false confession are typically social or cognitive psychologists who are knowledgeable about social influence processes in general and their role in interrogation procedures. The confessions expert offers testimony about why a witness might falsely confess. She would explain the (potential) role of individual risk factors in false confessions and would speak to the influence of factors such as situational stress and fatigue that increase susceptibility to social influence. The expert would educate the jury about specific interrogation procedures that police investigators are trained to use (e.g., the Reid Technique) and would explain why these procedures are effective at increasing the likelihood of both true and false confession. The expert would explain how innocence itself can increase the risk of a false confession, as discussed above. In keeping with the law, the expert would *not* advance an opinion about whether a defendant's confession is true or false; rather, the role of the expert is to familiarize the trier of fact with the factors that can compromise the reliability of a confession among both innocent and guilty people so that a more informed determination of the confession's accuracy can be made.

## Summary and Conclusions

The authors of the FTP report have explicitly recommended that the core values of scientific inquiry be incorporated into the criminal justice system. Averting to the reliability of hypnotically refreshed memories, the Supreme Court of Canada noted in *R. v. Trochym, infra*[10] that "the admissibility of scientific evidence is not frozen in time." In other words, prior acceptance of a procedure is no guarantee of its continued acceptance. The courts are not going to grandfather in a bad idea just because it was not recognized as a bad idea when it was first implemented. Experts will be increasingly required to point to the empirical foundation for their opinions, especially since the Goudge inquiry. The same will be asked of forensic practitioners, including the police. Personal experience is valuable, but personal experience alone is going to be insufficient for the justification of any particular practice.

Eyewitness identification techniques and police interviewing, whether of suspects or witnesses, are pivotal com-

ponents of any investigation. Some police departments have laudably reformed their eyewitness identification procedures and now properly instruct witnesses and use blind, sequential presentation. These procedures should reduce the risk of mistaken identification. Departments that have not scrutinized their procedures in light of the psychological research should do so.

The continued and pervasive use of the Reid technique when interviewing suspects, however, perpetuates an inherent and unnecessary risk of eliciting false confessions. The Reid manual assures trainees that "none of what is recommended is apt to induce an innocent person to offer a confession." This statement has been included in every issue of the manual from the time of its inception in 1942. Since DNA testing became available, we know of hundreds of DNA-exonerated suspects who confessed prior to their convictions. It is clear that innocent suspects are not immune to the Reid Technique tactics. Similarly, we now know of the frequency with which wrongful convictions were based on faulty eyewitness identifications that arose from procedural improprieties.

Not only is reform with respect to interrogation procedures possible, it has already begun. A number of police jurisdictions in Newfoundland and Labrador, Ontario, Alberta, and British Columbia have received training in the PEACE model of interviewing.[11] PEACE constitutes a major departure from the Reid technique. It is designed to get the suspect talking without relying on accusatory or manipulative strategies. It is also grounded in empirical research. PEACE moves the investigator's focus away from obtaining a confession to getting a full account of the event, an account that may reveal innocence or guilt. Obvious lies or contradictions can illustrate guilt regardless of whether the suspect articulates it. A confession is a bonus, but it is not the primary objective of the interview. Similarly we now know how best to interview eyewitnesses without compromising the reliability of their reports. All these procedural reforms have a sound empirical foundation.

Evidence-based policing practices can be cultivated by means of direct collaborative projects that involve researchers and frontline practitioners.[12] Forging these alliances is a challenge, but the social costs of wrongful convictions make them imperative.

In closing, psychology has much to offer with respect to improving investigative procedures, reducing the risk of conviction of the innocent, and educating lay and professional audiences about the cognitive and social psychological factors that may give rise to mistaken eyewitness identification and false confession. Indeed, psychological links may be made to other known causes of miscarriages of justice, such as racial and ethnic bias, unreliable informant testimony, and tunnel vision.[13]

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**NOTES:**

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