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# Jurors' Perceptions of Eyewitness and Hearsay Evidence

Margaret Bull Kovera,\* Roger C. Park,\*\*  
and Steven D. Penrod\*\*\*

The study presented in this Article examines mock jurors' ability to differentiate between good and poor hearsay testimony. It suggests that mock jurors are more skeptical of hearsay testimony than eyewitness testimony. In addition, subjects indicated more sensitivity to the varying quality and accuracy of testimony from hearsay witnesses than eyewitnesses. This Article presents the study's findings and reviews its implications for hearsay reform.

## I. THE CONTROVERSIAL NATURE OF THE RULE AGAINST HEARSAY

Federal Rule of Evidence 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."<sup>1</sup> Unless one of the many exceptions to the hearsay rule applies, hearsay testimony is inadmissible at trial.

When hearsay is received, the adverse party cannot explore defects in the out-of-court declarant's memory, perception, narration, or sincerity. The principal reason for excluding hearsay is the fear that the jury will be incapable of accurately evaluating the declarant's credibility.<sup>2</sup> Some commentators also have expressed concern about other effects, including the danger of in-court witnesses fabricating testimony.<sup>3</sup>

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1. FED. R. EVID. 801(c).

2. Stephan Landsman & Richard F. Rakos, *Research Essay: A Preliminary Empirical Enquiry Concerning the Prohibition of Hearsay Evidence in American Courts*, 15 LAW & PSYCHOL. REV. 65, 70-72 (1991) (explaining that jurors' inability "to analyze second hand information" is one of the "fundamental props of the hearsay rule").

3. For a full catalog of possible reasons for excluding hearsay, see Roger

A number of legal commentators have urged lawmakers to liberalize the rule against hearsay, or at least substantially reduce its exclusionary effect. Some critics have urged outright abolition of the hearsay doctrine.<sup>4</sup> Others believe that courts should admit hearsay in civil cases if the party producing the evidence gives notice to the opponent.<sup>5</sup> Still others suggest that courts admit hearsay upon a discretionary finding by the trial judge that it is trustworthy.<sup>6</sup> American jurisdictions have been slow to accept these reforms but a number of Commonwealth jurisdictions have liberalized their hearsay rules along these lines.<sup>7</sup>

Proponents of reform argue "that it is better to admit flawed testimony for what it is worth, giving the opponent a chance to expose its defects, than to take the chance of a miscarriage of justice because the trier is deprived of information."<sup>8</sup> Critics have argued further that since jurors routinely rely on hearsay testimony in their everyday lives, they have sufficient practice judging such evidence.<sup>9</sup> Whether jurors are capable of accurately judging the validity of hearsay evidence is an empirical question. This study suggests that jurors are, in fact, skeptical of hearsay evidence and capable of differentiating between accurate and inaccurate hearsay testimony.

## II. JURORS' PERCEPTIONS OF WITNESS TESTIMONY AND CREDIBILITY

There have been relatively few empirical investigations of jurors' evaluations of hearsay witnesses and their testimony. In a study conducted by Professors Landsman and Rakos, mock jurors read a trial transcript which included both hearsay and non-hearsay evidence.<sup>10</sup> The researchers systematically varied

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C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 55-67 (1987).

4. See Paul J. Brysh, Comment, *Abolish the Rule Against Hearsay*, 35 U. PITT. L. REV. 609 (1974).

5. See Park, *supra* note 3, at 112-14, 119-22 (discussing notice based proposals for admitting hearsay in civil contexts).

6. See, e.g., Irving Younger, *Reflections on the Rule Against Hearsay*, 32 S.C. L. REV. 281, 293 (1980) (arguing that admission of hearsay could follow a judicial determination of trustworthiness); see also Charles T. McCormick, *Law and the Future: Evidence*, 51 NW. U. L. REV. 218, 219 (1956) (same).

7. See Colin Tapper, Presentation at the Hearsay Reform Conference (Sept. 6, 1991) (tracing hearsay reform in England and Wales from 1938 to the present and discussing new schemes of reform in South Africa and Scotland).

8. Park, *supra* note 3, at 52.

9. *Id.* at 54.

10. Landsman & Rakos, *supra* note 2, at 73.

the strength of the hearsay testimony and the strength of the remaining evidence using different versions of a trial transcript.<sup>11</sup> The subjects reported that strong or moderate hearsay testimony was more important to their decisions than weak hearsay testimony or innocuous statements, but they were no more likely to convict a defendant against whom strong hearsay testimony had been introduced than one against whom no hearsay evidence had been introduced.<sup>12</sup> The authors suggested that the lack of influence that hearsay evidence has on verdicts may be the result of jurors' skepticism regarding hearsay testimony.<sup>13</sup>

Miene, Park, Borgida, and Anderson conducted another study that examined jurors' perceptions of hearsay testimony.<sup>14</sup> The study used a videotaped trial simulation to present subjects with either circumstantial evidence, hearsay testimony and circumstantial evidence, eyewitness evidence and circumstantial evidence, or a combination of all available evidence. The hearsay witnesses and the eyewitnesses provided virtually identical factual evidence. Nonetheless, jurors were less likely to convict the defendant when they heard hearsay testimony than when they heard eyewitness testimony.<sup>15</sup> Mock jurors also reported that they considered eyewitness testimony more influential and more reliable than the testimony provided by the hearsay witness.<sup>16</sup> Furthermore, subjects rarely found the hearsay evidence determinative of the trial's outcome.<sup>17</sup> On the basis of these findings, the authors concluded that jurors do not rely heavily on hearsay testimony. In fact, it appeared that mock jurors in their study undervalued hearsay testimony.

Although little research has focused on the effects of hearsay testimony on juror decision making, there is a wealth of in-

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11. *Id.*

12. *Id.* at 75-76.

13. *Id.* at 76. Landsman and Rakos, however, did not compare the subject's evaluations of hearsay testimony and the other evidence to determine whether a difference in evaluations was statistically significant.

14. Peter Miene et al., *The Evaluation of Hearsay Evidence*, Presented at the Annual Meeting of the American Psychological Association, Boston, Massachusetts (Aug. 1990) in *CURRENT ISSUES IN INDIVIDUAL AND GROUP DECISION-MAKING RESEARCH* (N. John Castellan ed., forthcoming 1992).

15. *Id.* Overall, the conviction rates were not significantly different under the circumstantial and hearsay conditions, nor were the rates different between the eyewitness and all evidence conditions.

16. *Id.*

17. *Id.* In open-ended responses to a question asking the subjects for the most important pieces of evidence presented at trial, the hearsay witness's testimony was rarely mentioned.

formation on jurors' perceptions of eyewitness testimony. Most psycholegal research on jurors' perceptions of eyewitness testimony has found that jurors are insensitive to factors that affect the accuracy of eyewitnesses' memories.<sup>18</sup> A study by Cutler,

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18. See, e.g., Steven G. Fox & H.A. Walters, *The Impact of General Versus Specific Expert Testimony and Eyewitness Confidence Upon Mock Juror Judgments*, 10 LAW & HUM. BEHAV. 215 (1986); R.C.L. Lindsay et al., *Mock-juror Evaluations of Eyewitness Testimony: A Test of Metamemory Hypotheses*, 16 J. APPLIED SOC. PSYCHOL. 447 (1986) [hereinafter Lindsay et al., *Test of Metamemory Hypotheses*] (illustrating that neither lighting conditions at the time of a criminal incident nor the length of the perpetrator's exposure to a witness significantly influenced jurors' evaluation of an eyewitness); Gary L. Wells et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. APPLIED PSYCHOL. 688 (1981) (suggesting that, because eyewitness testimony is tractable—subject to "briefing" etc.—confidence in a false memory can be enhanced and is therefore not an indicator of witness accuracy); Gary L. Wells & Michael R. Leippe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail Can Be Misleading*, 66 J. APPLIED PSYCHOL. 682 (1981) [hereinafter Wells & Leippe, *Memory for Peripheral Detail*] (suggesting that jurors place too great a weight on eyewitnesses' memories of peripheral detail); Gary L. Wells et al., *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 LAW & HUM. BEHAV. 275 (1980) [hereinafter Wells et al., *Effects of Expert Psychological Advice*] (reviewing recent research regarding human performance in judging eyewitness testimony and concluding that jurors are overly willing to believe in the accuracy of eyewitness testimony); Bernard E. Whitley, Jr. & Martin S. Greenberg, *The Role of Eyewitness Confidence in Juror Perceptions of Credibility*, 16 J. APPLIED SOC. PSYCHOL. 387 (1986) (discussing, on the issue of how well jurors interpret eyewitness testimony, the different assumptions made by lay people and the judicial system compared to those by psychological researchers).

Research methodologies in this area have varied. Some researchers have used questionnaire studies which assessed the potential jurors' knowledge regarding factors which affect the accuracy of eyewitness testimony (often using a multiple-choice format). See, e.g., Kenneth A. Deffenbacher & Elizabeth F. Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 6 LAW & HUM. BEHAV. 15 (1982) (concluding that there is no common understanding of variables which affect eyewitness testimony); A. Daniel Yarmey & Hazel P. Jones, *Accuracy of Memory of Male and Female Eyewitnesses to Criminal Assault and Rape*, 2 BULL. OF THE PSYCHONOMIC SOCIETY 89 (1983) (determining that attitudes towards rape do not lead to more reliable identification by eyewitnesses in a simulated sexual assault context). In other studies, researchers asked subjects to predict accuracy rates of eyewitnesses in experiments after the witnessing conditions were described to the subject. See, e.g., Michael R. Leippe et al., *Crime Seriousness as a Determinate of Accuracy in Eyewitness Identification Accuracy*, 63 J. APPLIED PSYCHOL. 345 (1978) (illustrating that eyewitness accuracy is a function of the perceived seriousness of an event). Some researchers have employed mock jury studies in which subjects tried a case which included eyewitness testimony. See Brian L. Cutler et al., *Juror Decisionmaking in Eyewitness Identification Cases*, 12 LAW & HUM. BEHAV. 41 (1988) (concluding that lay people are insensitive to factors that influence eyewitness testimony); R.C.L. Lindsay et al., *Can People Detect Eyewitness Identification Accuracy Within and Across Situations?*, 66 J. AP-

Penrod, and Stuve found that actual jurors, as well as mock jurors, have difficulty differentiating between good eyewitness testimony and poor eyewitness testimony.<sup>19</sup> Overall, these studies unequivocally demonstrate that jurors are not sensitive to factors which reduce the probative value of eyewitness testimony, such as retention interval, disguise of a robber, lineup instructions, and lineup construction. Therefore, jurors' judgments about eyewitness accuracy are often erroneous. Given that jurors cannot differentiate between accurate and inaccurate eyewitnesses, is there any reason to believe that jurors are capable of gauging the accuracy of hearsay witnesses? If jurors cannot judge the accuracy of a hearsay witness's description of an event, are jurors able to assign the appropriate weight to hearsay evidence? Finally, even if jurors can differentiate between accurate and inaccurate hearsay testimony, will the introduction of hearsay evidence decrease jurors' satisfaction with the judicial process? The study in this Article attempts to address these questions by examining jurors' perceptions of the testimony offered by eyewitnesses and hearsay witnesses to a single event.

### III. METHOD

#### A. SUBJECTS

One-hundred sixty-two undergraduates from the University of Minnesota participated in this study. These participants received extra credit in their introductory psychology course or four dollars compensation.

#### B. PROCEDURE

Subjects acted as jurors at a professional misconduct hearing. Researchers told the subjects that their task was to determine whether the attorney under investigation was guilty of manufacturing a defense for his client. Participants read a description of the charges which had been brought against the attorney. The charge alleged that Paul Stewart, an attorney, had been representing Tom Mannion, a criminal defendant charged with murder. Researchers further explained that although it is ethical for an attorney to defend a client, even if the attorney

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PLIED PSYCHOL. 79 (1981) (finding a small relationship between witness accuracy and witness confidence leading to jurors placing too much weight on witness accuracy when confidence is high).

19. See Brian L. Cutler, et al., *Juror Sensitivity to Eyewitness Identification Evidence*, 14 LAW & HUM. BEHAV. 185 (1990).

does not believe in the innocence of the client, it is unethical for the attorney to offer false evidence or otherwise urge his client to fabricate a defense.

All subjects watched the videotaped testimony of a law clerk who was an eyewitness to Stewart's alleged misconduct. The law clerk was present during two meetings between Stewart and Mannion in which they discussed Mannion's defense. Some subjects also watched the testimony of a hearsay witness who reported the substance of her conversation with a second law clerk who was also present at the two meetings.

Three graduate students in psychology played the role of the law clerk eyewitness to the two meetings. They viewed a portion of the film *Anatomy of a Murder*. The film portrayed two meetings between an attorney and his client. The eyewitnesses were interviewed about the meetings after varying intervals, in some cases one day, in others two days or one week. The researchers videotaped the eyewitnesses as they answered questions about what they had witnessed. Researchers first asked the eyewitnesses to describe everything they remembered from the meetings. The researchers then asked eyewitnesses specific questions about general topics that were discussed during the meetings. Finally, the interrogators asked the eyewitnesses specific questions about particular events that occurred during the two meetings. However, the researchers did not show the subjects the portions of the videotape that contained the eyewitnesses' responses to specific questions.<sup>20</sup>

Six graduate students in psychology also served as hearsay witnesses in the simulated hearing. The researchers showed the hearsay witnesses the eyewitnesses' videotaped responses to the first two series of questions.<sup>21</sup> After either a one-day or a one-week delay, the two hearsay witnesses for each eyewitness, in turn, answered the same questions the eyewitnesses had an-

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20. These specific questions were included so that the accuracy of the witnesses' recall could be more thoroughly assessed.

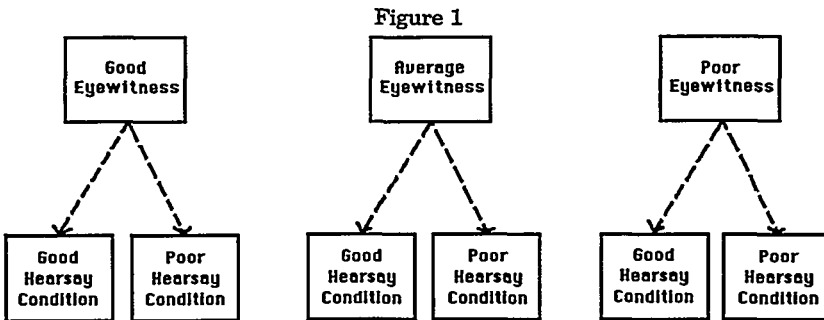
21. The graduate students were instructed to pretend they were having a conversation with a friend who is a law clerk while they were watching the videotape. Each of the hearsay witnesses viewed one of the eyewitnesses' responses to general questions about the two meetings. A schematic representing the pairing of eyewitnesses and hearsay witnesses during the production of stimulus materials is presented in Figure 1. See Figure 1, *infra* note 22.

The hearsay witnesses were shown the eyewitnesses' responses only to the more general questions because it would be virtually impossible for the hearsay witnesses to have the requisite prior knowledge that would enable them to ask about the details of the meeting unless they too had observed the meeting.

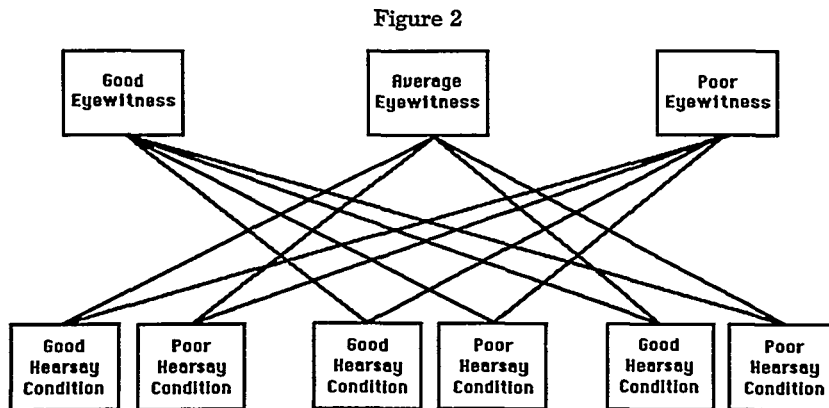
swered. The researchers also recorded their interrogations of the hearsay witnesses on videotape, removed the portion of the interrogation that consisted of specific questions, and coded the answers in the same manner they had done for the eyewitnesses' answers.<sup>22</sup> The responses were coded for their accuracy in representing the actual event, not the account they heard from the eyewitness.

Thirty-two subjects saw only a simple eyewitness's testimony.<sup>23</sup> The remaining subjects saw a simple eyewitness and a simple hearsay witness testify.<sup>24</sup> Fifteen conditions resulted: subjects in three conditions saw only an eyewitness, subjects in six conditions saw an eyewitness paired with a hearsay witness

22. Figure 1 is a schematic representing the pairing of eyewitnesses and hearsay witnesses during the production of stimulus materials.



23. Figure 2 is a schematic representing the pairing of eyewitnesses and hearsay witnesses in each experimental condition.



24. The researchers never paired testimony of a hearsay witness with the testimony of the eyewitness who served as the declarant for that hearsay witness's testimony.



who testified after a relatively short delay, and subjects in the remaining six conditions viewed an eyewitness in conjunction with a hearsay witness who testified after a relatively long delay.<sup>25</sup>

After watching the videotaped testimony, participants reported a verdict and indicated their confidence in that verdict. The subjects also rated the eyewitnesses' testimony and, where applicable, the hearsay witnesses' testimony in terms of their confidence in the testimony's accuracy. Finally, in order to test the participants' knowledge of the trial facts, the researchers asked the subjects to respond to the same questions about the two meetings that the witnesses had answered.<sup>26</sup>

### C. EVALUATIONS OF WITNESS TESTIMONY

The researchers evaluated the mock jurors' responses to videotaped testimony by analyzing the subjects' questionnaire responses.<sup>27</sup> The analysis identified the subjects' reactions to the eyewitness and hearsay witness testimony, measured their recall of trial facts, and distilled their primary judgments about the case.

Researchers first averaged jurors' responses to questions relating to eyewitness testimony.<sup>28</sup> The subjects' responses reflected their evaluations of the completeness of the testimony, their confidence in the eyewitness's memory of the meetings, the perceptiveness of the witness's observations, the quality of the witness's memory, and the witness's confidence and effectiveness. Raters also averaged the subjects' responses reflecting their impressions of the witness's character, including characteristics such as believability, sincerity and honesty.<sup>29</sup> Raters then created scales to measure the mock jurors' perceptions of the eyewitness's overall accuracy of memory,<sup>30</sup> the usefulness of the eyewitness testimony,<sup>31</sup> the witness's motivation to dis-

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25. See Figure 2, *supra* note 23.

26. The most general questions (i.e., those that merely asked respondents to describe everything they could about the two meetings) were not used because researchers believed that subjects would provide little information in response to this type of question on a written survey.

27. Separate principal component analyses with varimax rotation were conducted on items about the eyewitness, the hearsay witness, and the case in general.

28. Cronbach's alpha = .9341.

29. Alpha = .7669.

30. Alpha = .7607.

31. Alpha = .7269.

tort their testimony,<sup>32</sup> and the eyewitness's likability.<sup>33</sup>

Researchers also created scales to assess subjects' perceptions of the hearsay witnesses and their testimony. As with the eyewitness testimony, researchers evaluated the testimony's quality<sup>34</sup> and usefulness.<sup>35</sup> The researchers assessed perceptions of the accuracy of the witnesses' memory,<sup>36</sup> motivation to distort testimony,<sup>37</sup> character,<sup>38</sup> and likability.<sup>39</sup> Finally, the researchers evaluated the subjects' responses to determine whether they felt that they received enough information to gauge the credibility, accuracy and honesty of the eyewitness<sup>40</sup> and the hearsay witness.<sup>41</sup>

Raters also coded the mock jurors' answers to the recall questions about events at the meetings to determine which events the subjects recalled correctly, and identify the subjects' errors of omission and commission. They asked subjects general questions about the topics discussed at the meetings, specific questions about the particular events of the meetings, and general questions about events at the two meetings (taking into account overlap between information provided in response to the general and specific questions). Additionally, graduate students rated the events of the two meetings to determine their relative importance in determining the guilt or innocence of the defendant.<sup>42</sup> The researchers used the weights to create a scale to assess the amount of information the mock jurors recalled correctly.<sup>43</sup>

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32. Alpha = .6345.

33. Alpha = .6047.

34. Alpha = .9603.

35. Alpha = .7722.

36. Alpha = .7959.

37. Alpha = .6252.

38. Alpha = .7913.

39. Alpha = .7030.

40. Alpha = .8698.

41. Alpha = .8723.

42. Weights representing the importance of each event were computed by averaging the ratings for each item. These weights were used to compute measures of the total number of events recalled correctly and errors of omission and commission.

43. The scale consisted of the sum of the number of events recalled correctly and a reverse coding of the number of events omitted when general and specific questions were asked, the total number of events that were recalled and a weighted measure of the total number of recalled events. Alpha = .8528. Errors of commission committed when general and specific questions were asked, the total errors of commission and the total errors of commission weighted for the importance of the events incorrectly recalled were summed to create a scale measuring the errors of commission made by the mock jurors' in their recall of the evidence. Alpha = .6624.

#### D. PRIMARY JUDGMENTS ABOUT THE CASE

Researchers created three scales that measured the jurors' evaluations of the evidence. The first of these scales reflected the jurors' assessment of the sufficiency of the evidence provided by the eyewitness and consisted of the averaged responses to three items which ask the subject whether they have sufficient evidence to gauge the credibility, accuracy, and honesty of the eyewitness.<sup>44</sup>

The second scale gauged jurors' assessment of the sufficiency of the evidence proffered by the hearsay witness.<sup>45</sup> This scale averaged responses to three items asking for judgments about the sufficiency of the evidence in evaluating the credibility, accuracy, and honesty of the hearsay witness.

The third scale assessed the mock jurors' general satisfaction with the evidence. The scale was created by averaging responses to four items reflecting the jurors' assessment of whether they received sufficient evidence to make a judgment, whether the evidence they received was appropriate for the case, whether they received all the evidence that was available, and whether they were satisfied with the evidence that they received.<sup>46</sup> Subjects also rendered a verdict and indicated their confidence in the accuracy of their verdict.<sup>47</sup> All of the scales listed above are shown in Table 1.

### IV. RESULTS

#### A. ACCURACY OF THE WITNESSES

The study found that the eyewitness testimony's accuracy was directly related to the length of the delay between the observation and the recall of the events. Raters coded the eyewitnesses' responses to reflect the number of events and statements from the two meetings that the eyewitnesses correctly recalled. They also scored the witnesses' responses to assess the number of errors of omission and commission that the witnesses made. These scores showed that the responses to general questions provided by the witness after a one-day delay<sup>48</sup>

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44. Alpha = .8698. Scale values ranged from one to nine, with higher scores indicating greater sufficiency of the evidence.

45. Alpha = .8723.

46. Scale values range from one to nine, with higher numbers indicating greater satisfaction with the evidence. Alpha = .8767.

47. This rating occurred on a nine-point Likert-type scale.

48. The scores after a one day delay were 30 correct, 27 omissions, and no commissions.

were more accurate than the testimony of witnesses who testified after a longer delay. Similarly, the responses of the witnesses who testified two days after viewing the meetings were more accurate than the responses of witnesses who testified after a one-week delay.<sup>49</sup> Hearsay witnesses who testified after one day were more accurate than the hearsay witnesses who testified after one week.<sup>50</sup>

#### B. EVALUATIONS OF EYEWITNESSES

The mock jurors' perceptions of the eyewitness's likability were affected by the specific eyewitness.<sup>51</sup> A post-hoc comparison of mean differences indicated that subjects liked a good eyewitness better than an average eyewitness.<sup>52</sup> In contrast, eyewitnesses, the quality of hearsay witnessing conditions, eyewitnesses' witnessing condition interactions and individual hearsay witnesses did not help explain the subjects' evaluations of the quality of the eyewitnesses' testimony, the accuracy of the eyewitnesses' testimony, the eyewitnesses' character, the usefulness of the eyewitnesses' testimony or the eyewitnesses'

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49. Those testifying two days after viewing scored 20 correct as opposed to 11 correct for those testifying one week after viewing; those testifying after two days committed 34 omissions as opposed to 46 for those testifying after one week; and those testifying after two days committed three commissions as opposed to one for those testifying after one week.

50. Here, those testifying one day after viewing scored 13 correct as opposed to 4.67 correct for those testifying one week after viewing; those testifying after one day committed 43 omissions as opposed to 52.67 for those testifying after one week; and those testifying after one day committed one commission as opposed to 1.67 for those testifying after one week.

51.  $F(2,159) = 3.26, p = .04$ . Hierarchical regressions were conducted on the eyewitness scales with two variables coded for the three eyewitnesses (good, average, poor) entered first, two variables coded for the quality of hearsay witnessing conditions (good, poor, none) entered second, four variables coded for the interactions between the eyewitness and the hearsay witnessing conditions variables were entered third and finally, six variables coded to represent the six different hearsay witnesses or the absence of a hearsay witness were entered last. The effects of the individual hearsay witnesses on jurors' judgments are not of theoretical interest but were entered last to see how much variance in jurors' judgments is accounted for by individual differences in witnesses, over and above other variables.

52.  $\mu$ s: good = 5.8, average = 5.27, poor = 5.6.

motivation to distort their testimony. Table 1 summarizes differences in jurors' perceptions of the eyewitnesses.<sup>53</sup>

### C. EVALUATIONS OF HEARSAY WITNESS

Several of the mock jurors' evaluations of the hearsay witnesses were significantly affected by the quality of the hearsay witnessing conditions, over and above contributions made by the three eyewitnesses.<sup>54</sup> For example, the jurors' evaluations of the quality of the hearsay witness's testimony varied depend-

53. Table 1  
Summary of the effects of independent variables on jurors' perceptions of eyewitness and hearsay witness testimony, general trial judgments, and recall measures\*

	Eyewitness	Hearsay Witness Conditions	Eyewitness X Witness Conditions	Individual Hearsay Witness
<u>Eyewitness Judgments</u>				
Quality	—	—	—	—
Accuracy	—	—	—	—
Character	—	—	—	—
Usefulness	—	—	—	—
Likeable	.04	—	—	—
Motivation to Distort	—	—	—	—
<u>Hearsay Witness Judgments</u>				
Quality	—	.18	—	.14
Accuracy	—	.13	—	.08
Character	—	.08	—	—
Usefulness	—	.14	—	—
Likeable	.07	.07	—	—
Motivation to Distort	—	—	—	—
<u>Evidence Judgments</u>				
Satisfaction	—	.05	—	—
Sufficiency of eyewitness	—	—	—	—
Sufficiency of hearsay	—	—	—	—
Verdict confidence	—	—	—	.10
<u>Recall Measures</u>				
Recall/Trial facts	.07	.04	—	—
Errors of commission	—	—	—	—

\* Numbers in the table represent the change in R-squared with the addition of the new predictors. R-squared change is reported only when it is statistically significant at  $p < .05$

54. Hierarchical regressions were conducted on the hearsay witness scales with two variables coded for the three eyewitnesses (good, average, poor) entered first, one variable coded for the quality of hearsay witnessing conditions (good, poor) entered second, two variables coded for the interactions between the eyewitness and the hearsay conditions variables were entered third and finally, five variables coded for the six different hearsay witnesses were entered last. Table 1, *supra* note 53, summarizes the differences in the jurors' ratings of the hearsay witnesses.

ing on the hearsay witnessing conditions.<sup>55</sup> The jurors perceived the quality of the testimony proffered by hearsay witnesses one day after their initial exposure to the information as being superior to the testimony provided by the witnesses who were asked to recall the information after longer retention intervals.<sup>56</sup> Additionally, the quality of the hearsay witnessing conditions affected the subjects' perceptions of the accuracy of the hearsay witness's memory.<sup>57</sup> Subjects rated the hearsay witnesses who testified under good witnessing conditions as having more accurate memories than the hearsay witnesses who testified after one week.<sup>58</sup>

The subjects' evaluations of the hearsay witnesses' character were similarly affected by the hearsay witnessing conditions.<sup>59</sup> Subjects perceived that witnesses who testified after a short interval had a better character than hearsay witnesses who testified after a longer interval.<sup>60</sup> Finally, the quality of the hearsay witnessing conditions affected the usefulness of the hearsay witnesses' testimony over and above the eyewitnesses' contributions.<sup>61</sup> Subjects who viewed the hearsay testimony offered after a shorter interval perceived the testimony to be more useful than those subjects who viewed the hearsay witnesses who testified after a longer interval.<sup>62</sup>

The subjects' evaluations of the hearsay witnesses' testimony were affected by the individual hearsay witness.<sup>63</sup> The

55.  $F(3,124) = 11.652, p < .0001$ .

56.  $t(126) = 5.31, p < .0001$  ( $\mu$ s: good = 4.62, poor = 3.07).

57.  $F(3,125) = 18.702, p < .0001$ .

58.  $t(127) = 4.35, p < .0001$  ( $\mu$ s: good = 4.69, poor = 3.54).

59.  $F(3,126) = 10.947, p = .0012$ .

60.  $t(128) = 3.36, p = .001$  ( $\mu$ s: good = 6.0, poor = 5.21).

61.  $F(3, 126) = 22.304, p < .0001$ .

62.  $t(128) = 4.75, p < .0001$  ( $\mu$ s: good = 4.78, poor = 3.43).

63. Specifically, the individual hearsay witness affected the perceived quality of the hearsay testimony.  $F(9,118) = 6.869, p = .0001$ . Subjects evaluated the hearsay witness who viewed an average eyewitness under poor hearsay witnessing conditions differently from all the other hearsay witnesses except the witness who viewed a good eyewitness under poor hearsay witnessing conditions. In addition, the subjects' evaluations indicated that they were able to distinguish between the "good eyewitness-poor conditions" hearsay witness and the "poor eyewitness-poor conditions," "good eyewitness-good conditions" and "poor eyewitness-good conditions" hearsay witnesses. ( $p < .05$  ( $\mu$ s: good eyewitness-good conditions = 4.76; good eyewitness-poor conditions = 2.69; average eyewitness-good conditions = 3.97; average eyewitness-poor conditions = 2.19; poor eyewitness-good conditions = 5.13; poor eyewitness-poor conditions = 4.38)).

Moreover, the specific hearsay witness affected subjects' perceptions about the accuracy of the hearsay witnesses' testimony.  $F(9,119) = 2.928, p = .0238$ . Subjects rated the "average eyewitness-poor conditions" hearsay witness dif-

quality of the hearsay witnessing conditions significantly affected jurors' perceptions of the likability of the hearsay witness.<sup>64</sup> Subjects liked hearsay witnesses who testified under good witnessing conditions better than hearsay witnesses who testified under poor conditions.<sup>65</sup>

The different eyewitnesses that the hearsay witness viewed affected mock jurors' perceptions of the likability of the hearsay witnesses.<sup>66</sup> Hearsay witnesses who saw the good eyewitness were not liked as well as the hearsay witnesses who saw the poor eyewitness.<sup>67</sup> Eyewitnesses, the quality of hearsay witnessing conditions, the combination of eyewitness with witnessing conditions, and individual hearsay witnesses did not affect the subjects' evaluations of the hearsay witnesses' motivation to distort their testimony. Table 1 depicts a summary of the differences in jurors' ratings of the hearsay witnesses.<sup>68</sup>

#### D. RECALL OF TRIAL FACTS

The study also indicates that the eyewitnesses contribute to the mock jurors' ability to recall accurately the events of the two meetings as related at the trial.<sup>69</sup> Subjects who viewed the good eyewitnesses recalled trial events more accurately than the subjects who saw either of the other two eyewitnesses.<sup>70</sup> The quality of hearsay witnessing conditions also contributed, over and above the contribution of the eyewitnesses, to the accuracy of subjects' recall of trial events.<sup>71</sup> However, there were no differences between subjects who viewed hearsay witnesses who testified following good witnessing conditions as opposed to hearsay witnesses who testified under poor witnessing conditions. Nor did researchers identify a recall difference between subjects who viewed the testimony of a hearsay witness and those who did not.<sup>72</sup>

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ferently from witnesses who testified under good witnessing conditions ( $p < .05$ ), irrespective of the quality of the eyewitness's testimony that they heard. ( $\mu$ s: good eyewitness-good conditions = 4.37; good eyewitness-poor conditions = 3.52; average eyewitness-good conditions = 4.89; average eyewitness-poor conditions = 2.92; poor eyewitness-good conditions = 4.85; poor eyewitness-poor conditions = 4.21)

64.  $F(3,125) = 10.775, p = .0013$ .

65.  $t(127) = 3.29, p = .001$  ( $\mu$ s: good = 6.29, poor = 4.49).

66.  $F(2,126) = 4.513, p = .0128$ .

67.  $p < .05$  ( $\mu$ s: good=4.43, average=6.00, poor=6.32).

68. See Table 1, *supra* note 53.

69.  $F(2,157) = 5.969, p = .0032$ .

70.  $\mu$ s: good = 363.21, average = 330.81, poor = 325.45.

71.  $F(4,155) = 3.134, p = .0463$ .

72.  $\mu$ s: good = 353.70, poor = 331.34, none = 328.76.

The individual hearsay witnesses significantly affected the number of errors of commission made by the mock jurors during their recall of the events,<sup>73</sup> although the eyewitnesses, the hearsay witnessing conditions, and the interaction of the eyewitnesses and the hearsay witnessing conditions did not.<sup>74</sup> Table 1 summarizes these effects.<sup>75</sup>

#### E. PRIMARY JUDGMENTS ABOUT THE CASE

Individual eyewitnesses, the quality of hearsay witnessing conditions, interactions between eyewitness and hearsay witnessing conditions, and individual hearsay witnesses did not affect jurors' perceptions of the sufficiency of the evidence to gauge the credibility, accuracy and honesty of the eyewitnesses or the hearsay witnesses or their ultimate verdicts. The results from these analyses are reported in Table 1.<sup>76</sup>

The quality of the hearsay witnessing conditions affected mock jurors' satisfaction with the testimony that they received.<sup>77</sup> Jurors were more satisfied with the evidence when they viewed hearsay witnesses who testified under good conditions than when they viewed hearsay witnesses who testified under poor conditions.<sup>78</sup> In contrast, subjects who did not view any hearsay testimony were no more or less satisfied with the evidence that they received than those subjects who viewed hearsay testimony.<sup>79</sup> Individual hearsay witnesses did, however, affect jurors' confidence in their verdict.<sup>80</sup>

73.  $F(12,147) = 2.887, p = .0245$ .

74. Post hoc analyses indicate that there were no significant differences among the means ( $\mu$ s: no hearsay witness = 85.43; good eyewitness-good conditions = 89.75; good eyewitness-poor conditions = 71.40; average eyewitness-good conditions = 88.80; average eyewitness-poor conditions = 74.05; poor eyewitness-good conditions = 85.06; poor eyewitness-poor conditions = 93.93).

75. See Table 1, *supra* note 53.

76. *Id.*

77.  $F(4, 157) = 3.874, p = .0228$ . A series of hierarchical regression analyses were also conducted on the scales that assessed jurors' satisfaction with the evidence as well as their verdict and verdict confidence.

78. ( $\mu$ s: good = 4.11, poor = 3.24, none = 4.02).

79. On the other hand, eyewitnesses, the quality of hearsay witnessing conditions, the combination of eyewitness with witnessing conditions, and individual hearsay witnesses did not help predict scale values for jurors' perceptions of the sufficiency of the evidence to gauge the credibility, accuracy, and honesty of the hearsay witnesses or eyewitnesses.

80.  $F(12,147) = 4.396, p = .0022$ . Subjects who viewed the "good eyewitness-poor conditions" hearsay witness's testimony were significantly less confident in their verdicts than were the subjects who viewed the "poor eyewitness-poor conditions" hearsay witness's testimony. ( $\mu$ s: no hearsay witness = 6.06; good eyewitness-good conditions = 5.68; good eyewitness-poor conditions =



## F. COMPARISON OF EYEWITNESSES AND HEARSAY WITNESSES

The effects of the source of the testimony and the quality of the combined testimony of the eyewitness and hearsay witness on jurors' perceptions of the eyewitnesses and the hearsay witnesses were also of interest.<sup>81</sup>

Subjects' evaluations of the witnesses and their testimony often differed depending on whether they saw an eyewitness or a hearsay witness. Jurors rated eyewitnesses and their testimony more positively than hearsay witnesses and their testimony. Table 2 displays the means of each scale as a function of testimony source which led researchers to this conclusion.<sup>82</sup>

Mock jurors' ratings of the quality of a witness's testimony differed depending on the source of the testimony.<sup>83</sup> Subjects felt that the quality of the eyewitness testimony was higher than the quality of hearsay testimony.<sup>84</sup> Additionally, subjects' perceptions of the accuracy of a witness's testimony depended on whether the witness experienced the event first-hand.<sup>85</sup> Subjects rated the accuracy of eyewitnesses' testimony higher than hearsay witnesses.<sup>86</sup> Jurors' ratings of a witness's character,<sup>87</sup> usefulness of a witness's testimony,<sup>88</sup> and the sufficiency of the evidence a witness provided,<sup>89</sup> were also more positive

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4.74; average eyewitness-good conditions = 6.15; average eyewitness-poor conditions = 5.86; poor eyewitness-good conditions = 5.76; poor eyewitness-poor conditions = 6.63.).

81. In order to assess these effects, an analysis of variance (ANOVA) with the source of the testimony as a within-subject variable and combined testimonial quality as a between-subjects factor, was conducted on jurors' ratings of the quality of a witness's testimony, accuracy of a witness's memory, a witness's character, the usefulness of a witness's testimony, the likableness of a witness, the sufficiency of the evidence provided by a witness and a witness's motivation to distort his/her testimony. Because the experimental design employed in this study was not a fully crossed factorial design, a repeated measures ANOVA could not be conducted on the entire data set. Only those cells in which subjects viewed a good or poor eyewitness, and a hearsay witness who testified to the account given by a good or poor eyewitness were included in the analyses.

82. See Table 2, *infra* note 90.

83.  $F(1,37) = 11.28, p = .002$ .

84.  $\mu$ s: eyewitness = 5.27, hearsay witness = 4.05.

85.  $F(1,39) = 21.72, p < .001$ .

86.  $\mu$ s: eyewitness = 5.36, hearsay witness = 4.19.

87.  $F(1,39) = 12.51, p = .001$  ( $\mu$ s: eyewitness = 6.59, hearsay witness = 5.63).

88.  $F(1,38) = 79.79, p < .001$  ( $\mu$ s: eyewitness = 6.42, hearsay witness = 4.0).

89.  $F(1,39) = 11.55, p = .002$  ( $\mu$ s: eyewitness = 4.19, hearsay witness = 3.47).

for eyewitnesses than hearsay witnesses.<sup>90</sup>

The overall quality of the testimony received, and the interaction of the source and combined testimonial quality had no significant effects on jurors' perceptions of the witnesses and their testimony. Finally, jurors' perceptions of a witness's motivation to distort their testimony in favor of the prosecution or the defense were not significantly different as a function of the source of the testimony.

## V. DISCUSSION

The present study extends previous findings that juries rely more heavily on eyewitness testimony than hearsay testimony.<sup>91</sup> Jurors' evaluations of the quality of the witness's testimony, the accuracy and the usefulness of that testimony, the character of the witness and the sufficiency of the evidence provided by that witness suggest that jurors are more skeptical of the value and reliability of hearsay testimony than of eyewitness testimony.

This study also replicates previously documented findings that subjects cannot differentiate between good eyewitnesses and poor eyewitnesses.<sup>92</sup> Even though subjects viewed eyewitness testimony that differed objectively in accuracy their ratings of the eyewitness testimony's quality, accuracy and usefulness did not differ. More interestingly, this study sug-

	Eyewitness	Hearsay witness
Quality*	5.27	4.05
Accuracy*	5.36	4.19
Character**	6.59	5.63
Usefulness*	5.67	5.91
Likeable	5.67	5.91
Motivation to Distort	3.85	3.37
Evidence Sufficiency*	4.19	3.47

\* indicates that means are significantly different at  $p \leq .002$ .

91. See, e.g., Miene et al., *supra* note 14.

92. See generally Lindsay et al., *Test of Metamemory Hypotheses*, *supra* note 18 (illustrating that poor witnessing conditions failed to significantly influence jurors' evaluations of an eyewitness); Wells & Leippe, *Memory for Peripheral Detail*, *supra* note 18 (suggesting that jurors' reliance on eyewitnesses' memories of peripheral detail leads to inaccurate perceptions of accuracy); Wells et al., *Effects of Expert Psychological Testimony*, *supra* note 18 (reviewing recent research concluding that jurors are overly willing to believe in the accuracy of eyewitness testimony); Cutler et al., *supra* note 18 (concluding that lay people are insensitive to factors that influence eyewitness testimony).

gests that people are sensitive to the quality and accuracy of hearsay testimony. Subjects in this study were sensitive to the differences in accuracy of hearsay testimony despite not being informed about the differences in witnessing conditions for the hearsay witnesses.

This study's data do not address issues of process, but it is conceivable that jurors scrutinize hearsay testimony more rigorously than eyewitness testimony because they distrust hearsay testimony inherently. The findings that jurors are insensitive to the quality of eyewitness testimony, yet are sensitive to the relative accuracy of hearsay evidence, challenge the legal assumption that jurors can accurately judge the validity of eyewitness testimony but are incapable of judging the reliability of hearsay testimony.

Finally, Landsman and Rakos hypothesize that even if jurors can accurately assess the quality of a hearsay witness's testimony, courts should restrict hearsay evidence at trial because the trial participants may question the legal proceeding's fairness if the declarant is unavailable for cross-examination.<sup>93</sup> Psychological research further suggests that if participants perceive trial proceedings to be unfair, they will not be satisfied that justice has been served.<sup>94</sup> This study's results suggest that this concern may be unwarranted. The jurors' satisfaction with the evidence did not differ between jurors who saw hearsay testimony offered under good witnessing conditions and jurors who saw only the testimony of an eyewitness. Jurors were less satisfied with the evidence when they heard the hearsay testimony offered under poor witnessing conditions. This decrease in the level of juror satisfaction, however, appears to be linked to the inadequacy of the hearsay evidence presented in these conditions. If decreased satisfaction in the evidence was the result of the introduction of any hearsay testimony, irrespective of its quality, one would expect to see a decrease in juror satisfaction whenever they are exposed to hearsay evidence. This pattern of results did not emerge. This study therefore addresses the question raised by Landsman and Rakos about whether jurors' perceptions of procedural fairness are adversely affected by the introduction of hearsay evidence.<sup>95</sup>

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93. Landsman & Rakos, *supra* note 2, at 79-80.

94. JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 73-76 (1975) (concluding that mock jurors are more satisfied with an adversarial procedure than a inquisitory procedure in part because they perceive it to be more fair).

95. Landsman & Rakos, *supra* note 2, at 79-80.

There are several limitations on the external validity of the research reported herein. First, the eyewitness and hearsay evidence were not presented in the context of a full trial. However, to the extent that the hearsay evidence is more salient in our study than it might be in the context of a full trial, jurors would probably give more weight to the hearsay testimony in the absence of other evidence. To the contrary, jurors consistently evaluated hearsay testimony more negatively than eyewitness testimony. Additionally, the salience of the hearsay testimony in this study should provide a strong test of the proposition that the introduction of hearsay evidence will reduce satisfaction with the trial proceedings. In fact, this study's findings indicate that jurors' satisfaction with the trial evidence decreased with the introduction of hearsay evidence only when that evidence was of poor quality.

Second, attorneys did not subject the eyewitness or the hearsay witness to rigorous cross-examination. Although legal scholars' objections to the admissibility of hearsay have often rested on the inability of the attorney to cross-examine the declarant and the relative ineffectiveness of the cross-examination of a hearsay witness,<sup>96</sup> subjects in this study were skeptical of hearsay testimony despite the absence of cross-examination. If attorneys had cross-examined the hearsay witness, that interrogation should decrease jurors' evaluations of the usefulness and quality of the hearsay testimony. Further research should examine whether an opponent's cross-examination may further improve jurors' abilities to determine the probative value of hearsay evidence.<sup>97</sup>

An additional limitation of this study is the absence of the cautionary instructions that often accompany hearsay testimony. Were hearsay freely admitted, judges would provide jurors with cautionary instructions about the unreliability of hearsay testimony. These cautionary instructions would be designed to make jurors more skeptical of hearsay testimony. Despite the lack of instructions, jurors in our study were already skeptical of hearsay testimony. The addition of cautionary instructions should increase the difference in jurors' perceptions of the quality and usefulness of eyewitness and hearsay testimony. Finally, this study did not contain all as-

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96. Park, *supra* note 3, at 56 (discussing the advantages provided by cross-examination of a declarant and the disadvantages of being unable to cross-examine hearsay declarants).

97. See, e.g., Cutler et al., *supra* note 18 (concluding that lay people are insensitive to factors that influence eyewitness testimony).

pects of a realistic trial simulation. Nonetheless, the missing trial components would have further reduced the jurors' reliance on hearsay testimony and, therefore, pose little threat to the validity of our findings.

This Article addresses only one of many issues underlying calls for hearsay reform. For example, this Article does not address whether the exclusion of hearsay evidence produces beneficial effects in some police investigation techniques. Nor does it address the juror's ability to evaluate hearsay over the entire spectrum of criminal and civil issues. The jurors' evaluation of hearsay might differ, for example, in a case with a great deal of emotional appeal.

Nevertheless, this study's results suggest that, in general, jurors are skeptical of the quality and usefulness of hearsay testimony. More specifically, jurors in this study were able to differentiate among accurate and inaccurate hearsay witnesses. In contrast, jurors in this and other studies failed to make similar distinctions among eyewitnesses. This research further suggests that jurors' satisfaction with the evidence and the trial proceedings is not diminished with the admission of hearsay evidence of good quality. These findings provide some empirical support for the notion that the legal system should provide jurors with any information that may assist them in resolving the case, including hearsay evidence.