Confirmation Bias in Criminal Trials

Moa Lidén

Law Faculty, Uppsala University
Department of Security and Crime Science,
University College London

UCL DEPARTMENT OF SECURITY AND CRIME SCIENCE

Confirmation Bias

A tendency to selectively search for and interpret information in a way that confirms a predetermined conclusion/hypothesis

Contradicting information is ignored or interpreted in a way that does not threaten the predetermined conclusion/hypothesis

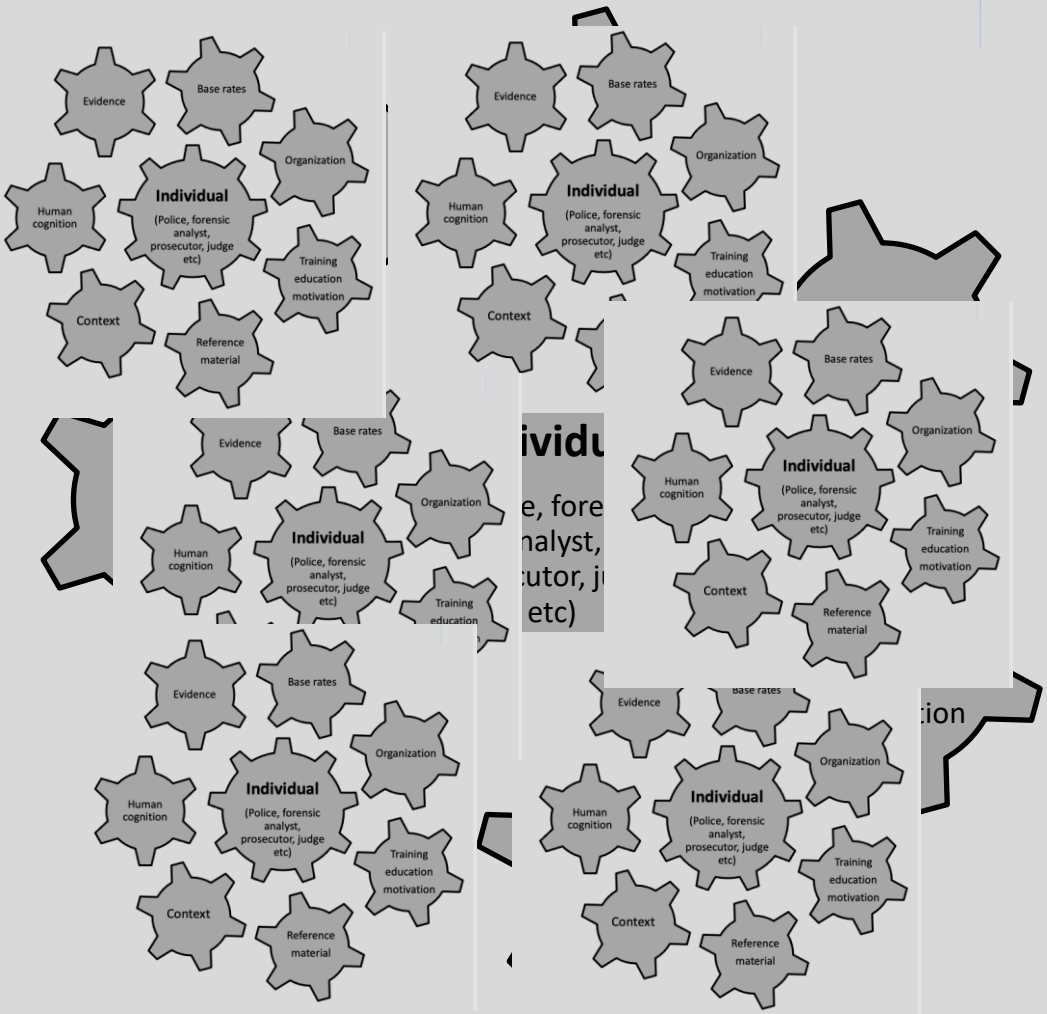
More or less subconcious

(Nickerson, 1998)

Confirmation Bias

Not the evidence, but the *human* who evaluates, produces or interacts with the evidence

Not ”bad apples” but *competent* and *motivated* individuals (experts)



Confirmation Bias in Criminal Cases

Overall manifestations

- Suspect driven investigations
- Asymmetrical scepticism

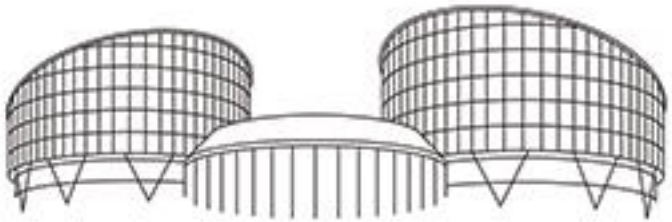
In specific situations

- Suspect, witness and plaintiff interviews
- Suspect line ups
- Crime scene investigations
- Forensic analysis (e.g. fingerprints, DNA, digital evidence)
- Pathologists' decision making (cause of death, origin of injury)
- Prosecution decisions
- Judges' decisions about pre-trial detention and guilt

Pre-trial Detention and Guilt

Hauschildt v. Denmark

(ECHR, Judgement of 24th of May 1989)



EUROPEAN COURT OF HUMAN RIGHTS

COUR EUROPÉENNE DES DROITS DE L'HOMME

Pre-trial Detention and Guilt

Hauschildt v. Denmark

Danish standards of proof

Beyond all reasonable doubt (BARD)
(Conviction)

Particularly confirmed suspicion
”Saarligt bestyrkt misstanke” (Danish)
(Pre-trial detention)

Swedish standards of proof

Beyond all reasonable doubt (BARD)
(Conviction)

Probable cause
”Sannolika skäl” (Swedish)
(Pre-trial detention)

Pre-trial Detention and Guilt

Detention hearing
Judge 1

Main hearing
Judge 1

Total evidence stronger

Defendant's statement less reliable

More often conviction

The odds of a conviction were 2.79 times higher when the same judge decided about both pre-trial detention and guilt

Social Explanations of Confirmation Bias

Confirmation bias is stronger in relation to **self-generated hypoteses** than hypotheses generated by others
(Dunbar & Klahr, 1989: Schunn & Klahr, 2013, Liden, Grans & Juslin, 2018a,b)

We are not necessarily interested in the truth but more in convincing others that we are right
(Mercier, 2016; Mercier & Sperber, 2011)

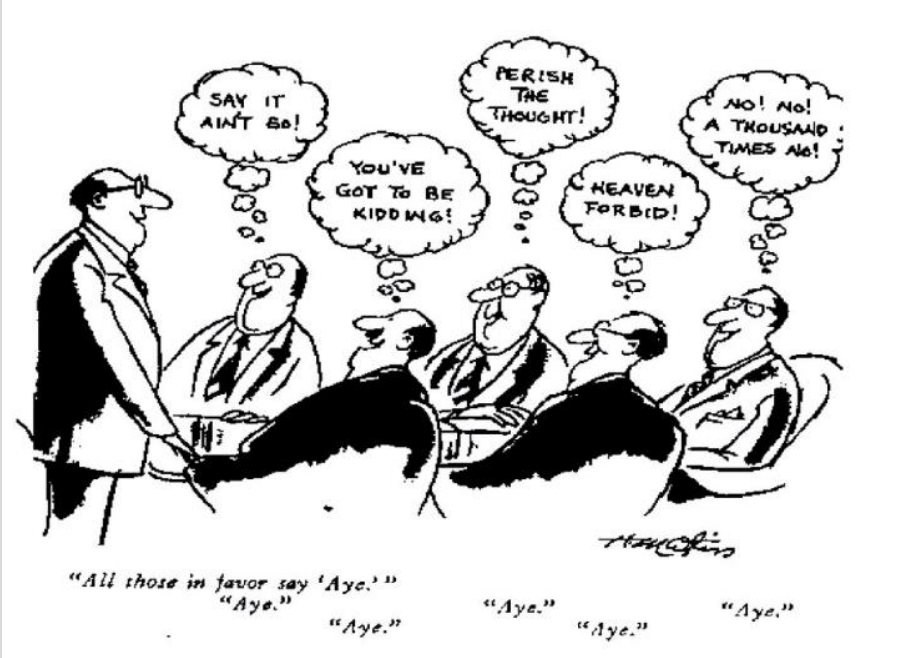
Bias blind spot: we are able to see bias in the reasoning/judgments of others but not in our own
(Pronin, Lin & Ross, 2002: Jones, Crozier & Strange, 2018)

Conclusion: change decision maker (presiding judge) between e.g. detention and main hearing

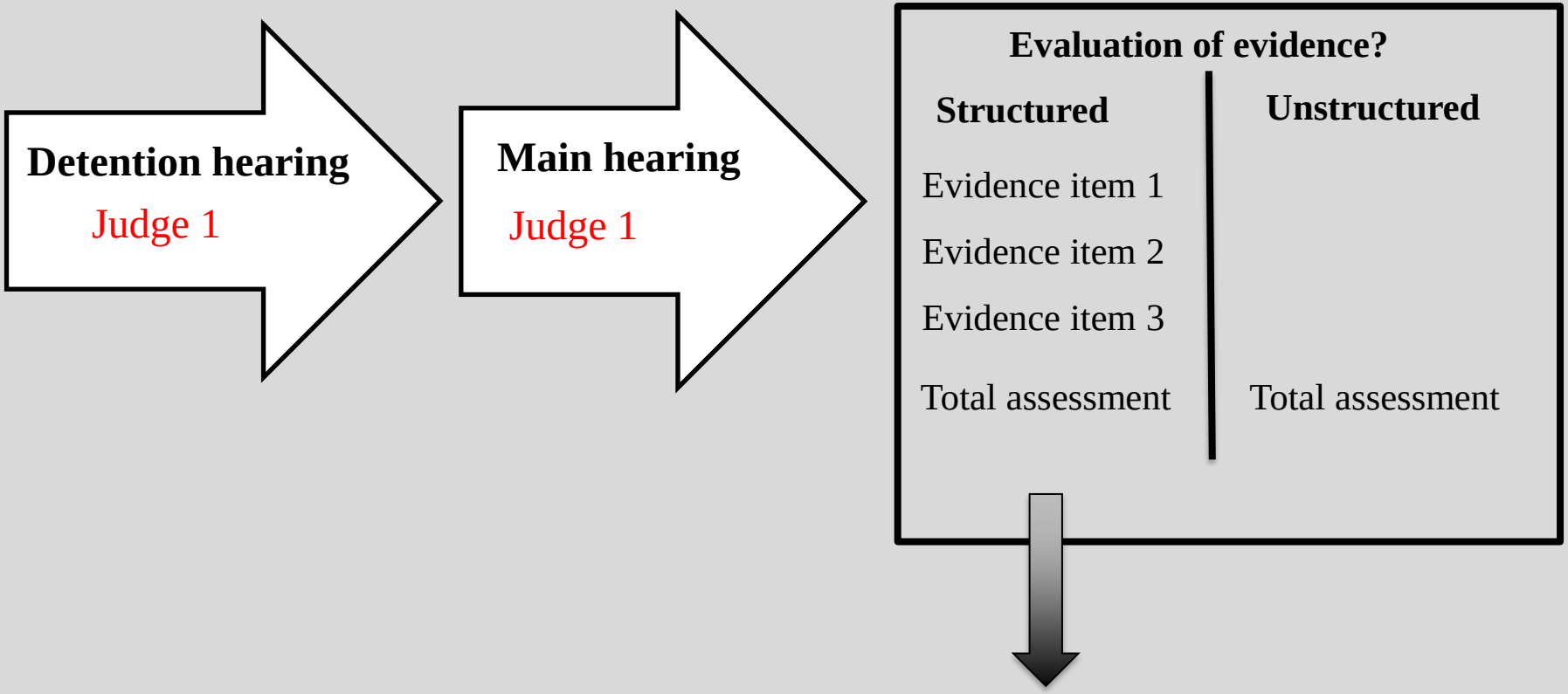
Social Explanations of Confirmation Bias

Group psychology

Group think: the will to reach consensus is stronger than the motivation to use rational decision making procedures (Janis, 1972)



Pre-trial Detention and Guilt



Reduced risk of confirmation bias

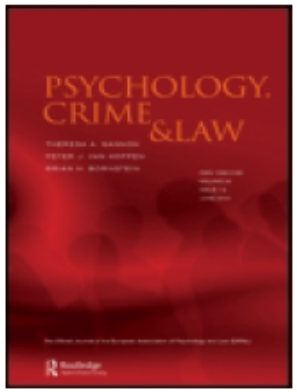
Cognitive Explanations of Confirmation Bias

Our limited cognitive resources (attention, working memory, long term memory) makes it difficult for us to seriously consider more than one hypothesis at the time

Confirmation bias is stronger in relation to cognitively more demanding tasks
(Carrasco, 2011; Mynatt, 1990; Mynatt, Doherty, & Dragan, 1993;
Mynatt, Doherty, & Sullivan, 1991; Rajsic, Wilson, & Pratt, 2015)

Cognitive Explanations of Confirmation Bias

Yuo cna porbalby raed tihs esaliy desptie the msispeillgns

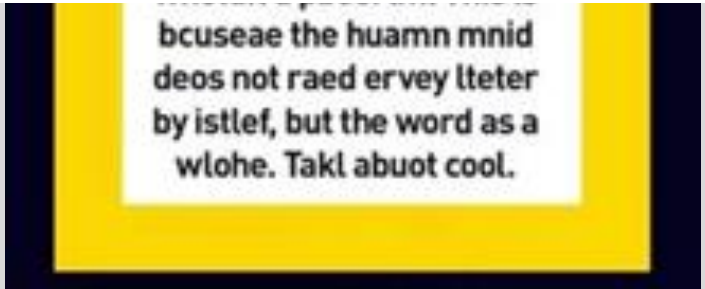


Routledge
Taylor & Francis Group

Psychology, Crime & Law

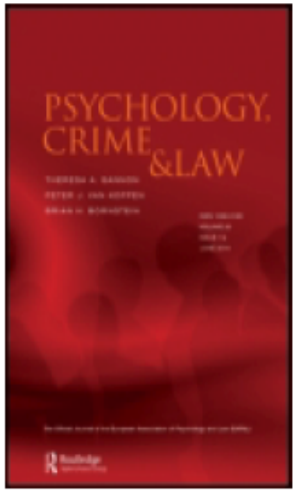
ISSN: 1068-316X (Print) 1477-2744 (Online) Journal homepage: http://www.tandfonline.com/loi/gpcl20

'Guilty, no doubt': detention provoking confirmation bias in judges' guilt assessments and debiasing techniques



Conclusion: reduce cognitive load e.g. through structured evaluations of evidence (divide and conquer)

Prosecution decisions



Routledge
Taylor & Francis Group

Psychology, Crime & Law

ISSN: 1068-316X (Print) 1477-2744 (Online) Journal homepage: http://www.tandfonline.com/loi/gpcl20

From devil's advocate to crime fighter: confirmation bias and debiasing techniques in prosecutorial decision-making

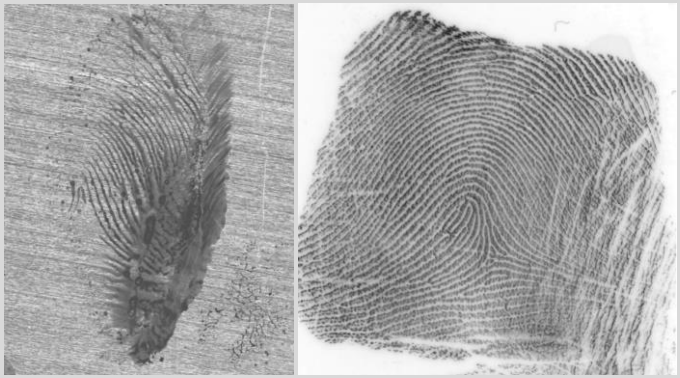
23 kap. 4 § (investigation)
45 kap. 3a § (trial)

Forensic analysis

Fingerprints

Match?

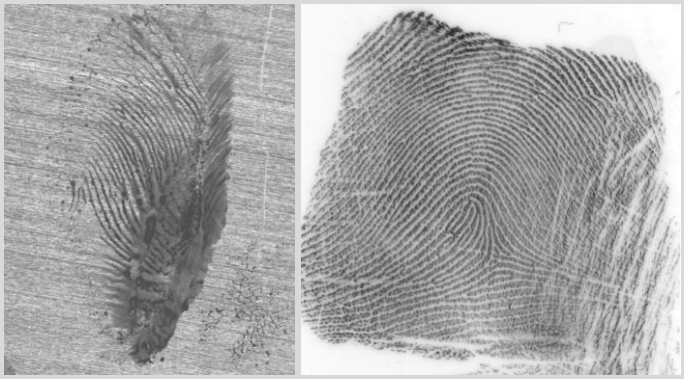
Identifications
from previous criminal cases



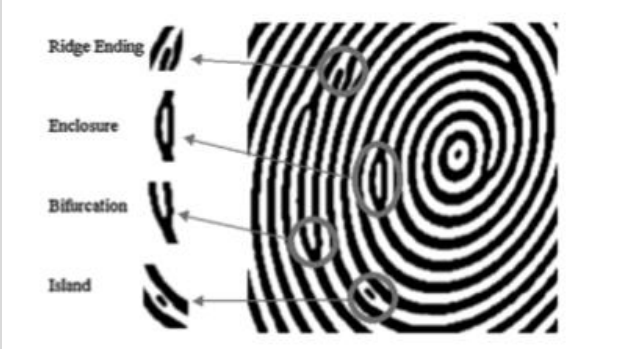
100 % match

12 months
time lapse

Contextual information:
Wrongful identification by the FBI in the 'Madri
bomber case'



80 % not a match



Other Examples of Bias in Judges' Decision Making

Criminal cases

Joined (rather than severed) charges

Tanford, S., Penrod, S. & Collins, R. (1985). Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions, Law and Human Behavior

Other types of cases

Employment law, contract law, bankruptcy law

Rachlinski, J.J. & Wistrich, A.J. (2018). Gains, Losses and Judges: Framing and the Judiciary, Notre Dame Law Review

Migration law, environmental law

Wistrich, A.J., Rachlinski, J.J. & Guthrie, C. (2015). Hear Versus Head: Do Judges Follow the Law or Follow Their Feelings? Texas Law review

E-mail

m.liden@ucl.ac.uk

moa.liden@jur.uu.se