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Christian Sheehan
christian.sheehan@bc.edu

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MAKING THE JURORS THE “EXPERTS”: THE CASE FOR EYEWITNESS IDENTIFICATION JURY INSTRUCTIONS

Abstract: Although courts and scholars have long recognized the weaknesses of eyewitness testimony, the legal system has yet to find a satisfactory mechanism for educating jurors—who are generally unaware of the complex psychological processes that affect eyewitness accuracy—about the inherent fallibility of such testimony. Many scholars argue that the best option is to allow an expert witness to testify to the factors that can affect an eyewitness’s ability to perceive and remember. Yet eyewitness expert testimony presents several practical and equitable concerns, and even in jurisdictions that allow eyewitness experts, trial courts have been far from consistent in their admission of such testimony. Cautionary jury instructions avoid many of the same pitfalls and, in fact, carry several inherent advantages. Many of the eyewitness instructions now given by judges, however, are ineffective: they contain ambiguous and confusing language, they are given at the end of trial as part of a long list of other legal instructions, and in many cases, they reinforce jurors’ erroneous assumptions about eyewitnesses. This Note argues that eyewitness instructions should be provided before the eyewitness testifies, thus alerting jurors in advance to the factors they should consider in evaluating the testimony. The Note also proposes a model instruction, which attempts to convey the relevant scientific and legal principles in a way that will be meaningful and understandable to lay jurors.

INTRODUCTION

At 8:30 p.m. on November 30, 1987, a Caucasian woman in Marcus Lyons’s apartment complex was raped in her apartment.¹ She described her attacker as a two-hundred-pound black male, with a “large belly and hips.”² At 165 pounds and in good physical condition, Lyons bore very little resemblance (other than race) to the victim’s description of her attacker.³ Nevertheless, Lyons was not surprised when police wanted to question him about the rape.⁴ The attacker was a black male

¹ *Know the Cases: Marcus Lyons*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Marcus_Lyons.php (last visited Mar. 8, 2011).

² Gerry Smith, *Rape Conviction Gone, Stigma Isn’t*, CHI. TRIB., Oct. 22, 2007, at 1.

³ See *Know the Cases: Marcus Lyons*, *supra* note 1.

⁴ Smith, *supra* note 2.

and Lyons was the only black male in the complex.⁵ Although he maintained that he was home at the time of the incident, police put his photograph into a photo array and showed it to the victim, who identified Lyons as the assailant.⁶ The other five photographs were mug shots, whereas the picture of Lyons showed him in a shirt and tie.⁷ Five days later, police conducted a live lineup, in which Lyons was the only member repeated from the photo lineup.⁸ He was again identified as the attacker, but only after the victim requested to view the lineup a second time.⁹ The victim would also later identify him at trial.¹⁰ Lyons was convicted and sentenced to six years in prison, despite a lack of any other substantial evidence against him.¹¹

In 2007, after three years in prison and sixteen years on parole as a registered sex offender, Marcus Lyons was exonerated by DNA evidence.¹² He was granted clemency and his record was expunged.¹³ He also received a small amount of compensation from the state.¹⁴ Despite the success of his petition, Lyons is still haunted by his time in prison and believes that that no amount of compensation will return to him what he lost.¹⁵ "You never forget the sound of a cell door closing on you," he said.¹⁶

Marcus Lyons's story is not unique.¹⁷ Mistaken eyewitness identification is the leading cause of erroneous convictions in the United States, playing a role in more than seventy-five percent of convictions overturned by DNA evidence.¹⁸ But those who are exonerated are the

⁵ *Id.*

⁶ *Id.*; *Know the Cases: Marcus Lyons*, *supra* note 1.

⁷ *Know the Cases: Marcus Lyons*, *supra* note 1. Police had to use a picture from Lyons's work identification badge because he had no criminal record. *Id.*

⁸ *Id.*

⁹ Smith, *supra* note 2; *Know the Cases: Marcus Lyons*, *supra* note 1.

¹⁰ *Know the Cases: Marcus Lyons*, *supra* note 1.

¹¹ *Id.*; see Smith, *supra* note 2.

¹² *Know the Cases: Marcus Lyons*, *supra* note 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Smith, *supra* note 2.

¹⁶ *Id.*

¹⁷ See, e.g., Steve McGonigle & Jennifer Emily, *A Blind Faith in Eyewitnesses: 18 Dallas County Cases Overturned by DNA Relied Heavily on Eyewitness Testimony*, DALL. MORNING NEWS, Oct. 12, 2008, at 1A; Joe Swickard, *After Nearly 26 Years in Prison, Man to Go Free in Rape Case*, DETRIOT FREE PRESS, May 20, 2008, at 1.

¹⁸ *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Mar. 8, 2011).

lucky few.¹⁹ Although it is difficult to know the frequency with which innocent people are convicted on the basis of faulty eyewitness evidence, researchers estimate approximately 4500 such convictions occur every year.²⁰

Despite growing proof of the inaccuracy of traditional eyewitness identifications, eyewitnesses remain powerful tools for law enforcement as nearly 80,000 suspects are targeted each year based on eyewitness reports.²¹ For a prosecutor, a confident eyewitness provides invaluable evidence.²² As the U.S. Supreme Court has noted, “There is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant and says, ‘That’s the one.’”²³ Thus, although eyewitness testimony may be among the least reliable forms of evidence, it is often the most compelling.²⁴ Jurors are generally unaware of the weaknesses of eyewitness testimony and tend to believe it even in the face of other more credible evidence.²⁵

Recognizing that eyewitness identifications are especially susceptible to error, the legal system has attempted to address the problem in several ways.²⁶ The Supreme Court has held that the Fifth and Sixth Amendments to the U.S. Constitution afford criminal defendants certain protections against unfairly suggestive police lineup procedures.²⁷ Many inaccurate identifications are caused not by any police actions, however, but rather by psychological factors that affect perception and memory.²⁸ The Supreme Court’s decisions in the criminal procedure

¹⁹ See Kathy Pezdek, *Expert Testimony on Eyewitness Memory and Identification*, in *EXPERT PSYCHOLOGICAL TESTIMONY FOR THE COURTS* 99, 99 (Mark Costanzo et al. eds., 2007).

²⁰ See *id.*

²¹ See A.G. Goldstein et al., *Frequency of Eyewitness Identification in Criminal Cases: A Survey of Prosecutors*, 27 *BULL. PSYCHONOMIC SOC’Y* 71, 73 (1989).

²² See McGonigle & Emily, *supra* note 17 (quoting Dallas Assistant District Attorney Kevin Brooks, “Eyewitness testimony was gold. If a witness said they saw it, they saw it.”).

²³ See *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (quoting *ELIZABETH LOFTUS, EYEWITNESS TESTIMONY* 19 (1979)).

²⁴ See *United States v. Wade*, 388 U.S. 218, 228 (1967) (stating that stranger identifications are “proverbially untrustworthy”); McGonigle & Emily, *supra* note 17.

²⁵ See Jennifer Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 2 *PSYCHOL. PUB. POL’Y & L.* 338, 347 (1997); *infra* notes 119–123 and accompanying text.

²⁶ See *infra* notes 102–187 and accompanying text.

²⁷ See *Stovall v. Denno*, 388 U.S. 293, 301–02 (1967) (holding that the Due Process Clause of the Fifth and Fourteenth Amendments prevents the introduction of an identification that is the result of suggestive police procedures); *Wade*, 388 U.S. at 236–37 (determining that the defendant has a right to have his counsel present at a post-indictment lineup).

²⁸ See *infra* notes 51–78 and accompanying text.

area do little to address the challenge of communicating to the jury the problems with eyewitness testimony generally.²⁹ Thus, courts have recognized the need to use other evidentiary and procedural mechanisms.³⁰

The two principal methods used are expert testimony and cautionary jury instructions.³¹ Although the use of expert testimony is becoming more prevalent, the admissibility of such testimony remains within the discretion of the trial court and courts have been far from consistent.³² Furthermore, there are serious administrability and fairness concerns regarding the use of eyewitness experts.³³ Most courts now allow some form of cautionary jury instructions on eyewitness evidence, the majority of which are modeled after the instruction set forth by the U.S. Court of Appeals for the District of Columbia Circuit in the 1972 case of *United States v. Telfaire*.³⁴ As with expert testimony, appellate courts rarely disturb trial courts' determinations as to whether and how to give eyewitness jury instructions.³⁵ Given that appellate courts show such a high level of deference to trial courts in this area, it is important that the approaches trial courts take are effective, because absent the discovery of new evidence, the trial is the last chance most defendants will have to prove their innocence.³⁶

This Note critiques the common approaches courts currently employ in educating jurors about the fallibility of eyewitness identifications and proposes a new approach.³⁷ Part I outlines the factors that can affect the accuracy of eyewitnesses.³⁸ It discusses psychological factors affecting memory and perception and systematic factors that can create bias and lead to inaccuracy.³⁹ Part II explains the legal system's re-

²⁹ See *infra* notes 115–127 and accompanying text.

³⁰ See, e.g., *United States v. Telfaire*, 469 F.2d 552, 556, 558–59 (D.C. Cir. 1972) (proposing model eyewitness jury instruction); *State v. Chapple*, 660 P.2d 1208, 1221–23, 1224 (Ariz. 1983) (holding that it may be reversible error for a trial judge to refuse to admit eyewitness expert testimony).

³¹ See *infra* notes 128–187 and accompanying text.

³² See *infra* notes 128–158 and accompanying text.

³³ See *infra* notes 195–228 and accompanying text.

³⁴ See *Telfaire*, 469 F.2d at 558–59; see also *infra* notes 181–187 and accompanying text.

³⁵ See *infra* notes 165–180 and accompanying text. This Note uses the terms “eyewitness instructions” and “eyewitness jury instructions” as shorthand for “cautionary jury instructions on eyewitness evidence.”

³⁶ See generally Smith, *supra* note 2 (describing the rare circumstance where a defendant is later exonerated by DNA evidence); see also *infra* notes 115–187 and accompanying text.

³⁷ See *infra* notes 188–331 and accompanying text.

³⁸ See *infra* notes 47–96 and accompanying text.

³⁹ See *infra* notes 51–96 and accompanying text.

sponse to the problem.⁴⁰ It looks at the constitutional protections afforded to criminal defendants and then delves more deeply into evidentiary mechanisms—expert testimony and jury instructions.⁴¹ Part III argues that jury instructions are preferable to expert testimony because they do not significantly increase the length and cost of trial, they minimize prejudice, and unlike expert testimony, they do not discriminate against indigent defendants.⁴² Part IV looks at the current use of jury instructions and explains why the instructions currently in common use are ineffective.⁴³ It focuses on three flaws: the failure of current instructions to dispel erroneous assumptions; the inadequate and confusing content of common eyewitness instructions; and the timing of the instructions.⁴⁴ Part V proposes a new approach.⁴⁵ It argues that cautionary eyewitness jury instructions should be given before evidence is presented and proposes a model instruction that courts can adopt.⁴⁶

I. FACTORS AFFECTING THE ACCURACY OF EYEWITNESSES

An eyewitness's memory of an event is not stored like an image or videotape that can simply be replayed upon request to produce a precise account of an event.⁴⁷ Instead, the witness must reconstruct the event from memory, a process which involves numerous psychological processes.⁴⁸ Section A of this Part discusses the impact of these various processes on eyewitness accuracy.⁴⁹ Section B of this Part considers the effect of systematic factors on eyewitness reliability, focusing on the ways in which administration of lineups can, and often does create bias.⁵⁰

⁴⁰ See *infra* notes 97–187 and accompanying text.

⁴¹ See *infra* notes 97–187 and accompanying text.

⁴² See *infra* notes 188–228 and accompanying text.

⁴³ See *infra* notes 229–262 and accompanying text.

⁴⁴ See *infra* notes 229–262 and accompanying text.

⁴⁵ See *infra* notes 263–331 and accompanying text. Although scholars have proposed model eyewitness jury instructions, the charge proposed in this Note is unique, and this Note urges judges to give the instruction prior to the testimony of the eyewitness. See, e.g., David E. Aaronson, *Cross-Racial Identification of Defendants in Criminal Cases*, CRIM. JUST., Spring 2008, at 4, 6.

⁴⁶ See *infra* notes 263–331 and accompanying text; *infra* app.

⁴⁷ See Richard Wise et al., *How to Analyze the Accuracy of Eyewitnesses in a Criminal Case*, 42 CONN. L. REV. 435, 455 (2009).

⁴⁸ See *infra* notes 51–78 and accompanying text.

⁴⁹ See *infra* notes 51–78 and accompanying text.

⁵⁰ See *infra* notes 79–96 and accompanying text.

A. Psychological Factors Affecting Perception and Memory

I. Perception

A witness's perception is influenced both by the circumstances surrounding the event observed (event factors) and peculiar characteristics of the eyewitness, including physical limitations on senses and personal background or biases (witness factors).⁵¹

Event factors include basic considerations such as lighting conditions, duration of the event, and physical proximity to the event.⁵² The degree of arousal and stress,⁵³ the significance attributed to the event by the witness, and the level of violence involved can also significantly impact perception and subsequent memory retention of the event.⁵⁴ Generally, when a witness fails to perceive that a significant event is transpiring, the witness's attention is likely not focused on the event.⁵⁵ Conversely, when a person appreciates the significance of the event, the person is likely to pay closer attention and is more apt to give an accurate description when asked to recall the event.⁵⁶ As a result, in the criminal context, accuracy of identification increases with the severity of the crime, so long as the crime is non-violent.⁵⁷

⁵¹ See Henry Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1, 9 (2007). The amount of sensory stimulation at the time of the initial observation can also impact the accuracy of subsequent identifications. *Id.* at 5. When an individual is exposed to a significant amount of information at once, he or she may experience "sensory overload," which could impact the individual's ability to perceive the events transpiring. *Id.* at 7. In fact, sensory overload could lead to so many gaps in perception that a witness could create or substitute false memories down the line to fill in those gaps. *Id.*

⁵² See *id.* at 9.

⁵³ The Yerkes-Dodson Law posits that when stress levels are too low, people do not pay sufficient attention, and when stress levels are too high, the ability to concentrate and perceive are negatively affected. See Robert Yerkes & John Dodson, *The Relation of Strength of Stimulus to Rapidity of Habit Formation*, 18 J. COMP. NEUROLOGY & PSYCHOL. 459, 481 (1908). As a result, perception and acquisition function most accurately when the witness is exposed to a moderate level of stress. See *id.*

⁵⁴ See Michael Leippe et al., *Crime Seriousness as a Determinant of Accuracy in Eyewitness Identification*, 63 J. APPLIED PSYCHOL. 345, 349, 350-51 (1978); Elizabeth Loftus, *Ten Years in the Life of an Expert Witness*, 10 LAW & HUM. BEHAV. 241, 254 (1986); Charles A. Morgan et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J.L. & PSYCHIATRY 265, 275, 276, 277 (2004); Frederick Chemay, Note, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721, 728 (1985).

⁵⁵ See Chemay, *supra* note 54, at 728.

⁵⁶ See Leippe et al., *supra* note 54, at 349.

⁵⁷ See *id.*; Loftus, *supra* note 54, at 254.

If the crime involves violence, however, the witness's ability to concentrate and perceive can be negatively affected.⁵⁸ When an observer is concerned about personal safety, which is likely for a witness to a violent event, the observer tends to focus attention on the details perceived as most directly affecting the observer's safety, such as "blood, masks, weapons, and other aggressive actions."⁵⁹ In this context, an observer generally pays less attention to other details of the crime scene, including the physical characteristics of the perpetrator.⁶⁰

An individual's perception can also be influenced by the individual's own background and any expectations or stereotypes the individual may have.⁶¹ Cultural biases, personal prejudices, education, training, and prior experiences all affect how an individual processes sensory data.⁶² Evidence suggests that some people may actually incorporate their stereotype of a "criminal" into their identifications of suspects.⁶³ Along similar lines, a witness is much more likely to accurately identify someone of the same race than someone of a different race.⁶⁴

2. Retention and Retrieval

The accuracy of an identification can also be negatively impacted during the retention and retrieval phases of memory.⁶⁵ With regard to the retention phase, in which the witness commits the information to

⁵⁸ See Fradella, *supra* note 51, at 11.

⁵⁹ See CURT R. BARTOL & ANNE M. BARTOL, *PSYCHOLOGY AND LAW* 233 (3d ed. 2004).

⁶⁰ See Fradella, *supra* note 51, at 12.

⁶¹ See Chemay, *supra* note 54, at 726–27.

⁶² See *id.*

⁶³ See ELIZABETH LOFTUS, *EYEWITNESS TESTIMONY* 37–38 (1996); Fradella, *supra* note 51, at 12–13. In one experiment, a "semidramatic" photograph was shown to a wide variety of subjects. LOFTUS, *supra*, at 37–38. The photograph showed several people sitting in a subway car, with a black man standing and conversing with a white man, who was also standing, but holding a razor. *Id.* Over half of the subjects reported that the black man had been holding the razor and several described the man as "brandishing it wildly." *Id.*

⁶⁴ See generally Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 *CORNELL L. REV.* 934 (1984) (explaining that witnesses in criminal trials will make more errors in cross-racial identifications than in same-race identifications); Roy Malpass & Jerome Kravitz, *Recognition of Faces of Own and Other Race*, 13 *J. PERSONALITY & SOC. PSYCHOL.* 330 (1969). Roy Malpass and Jerome Kravitz compared recognition and memory of identification of other persons among students at Howard University and the University of Illinois. Malpass & Kravitz, *supra*, at 330–31. Photographs of black and white males were shown to the students. *Id.* Subjects recognized faces of their own race better than faces of the other race. See *id.* at 332–33. Interestingly, white students were far more likely to misidentify black students, than were blacks to misidentify whites. See *id.* at 332, 333.

⁶⁵ See Fradella, *supra* note 51, at 7–8.

memory, the amount of data to be retained and the retention interval⁶⁶ are two leading factors that can disrupt accuracy.⁶⁷ Another less obvious factor is the effect of post-event misinformation.⁶⁸ A witness's exposure to newly released information can dramatically affect memory and lead a witness to falsely accept misinformation.⁶⁹ Not only can such exposure cause a witness to enhance existing memories, but it can also change a witness's memory and cause non-existent details to become incorporated into that memory.⁷⁰

In the retrieval phase, when the witness describes what he or she observed to police or a court, a phenomenon known as "unconscious transference"⁷¹ can occur, in which different memory images become combined with one another.⁷² As a result, the witness confuses a person observed in an unrelated instance with the person seen at the event in question, leading the witness to mistakenly identify an innocent individual as the perpetrator.⁷³

3. The Relationship Between Eyewitness Confidence and Accuracy

Perhaps most troubling for the criminal justice system is that there is very little correlation between an eyewitness's expressed confidence in an identification and its actual accuracy.⁷⁴ People generally tend to overestimate the accuracy of their own observations and memories and

⁶⁶ Retention interval refers to the time that passes between acquisition of the information and retrieval. *Id.* at 7.

⁶⁷ *See id.*

⁶⁸ *See* Peter Cohen, *How Shall They Be Known?* Daubert v. Merrell Dow Pharmaceuticals and Eyewitness Identification, 16 PACE L. REV. 237, 246 (1996); Felicity Jenkins & Graham Davies, *Contamination of Facial Memory Through Exposure to Misleading Composite Pictures*, 70 J. APPLIED PSYCHOL. 164, 173 (1985).

⁶⁹ *See* Fradella, *supra* note 51, at 8. For example, a person who witnesses a traffic accident may subsequently read a newspaper article stating that police believed that the operator of the vehicle was intoxicated. *See* Cohen, *supra* note 68, at 246.

⁷⁰ *See* Cohen, *supra* note 68, at 246 (citing LOFTUS, *supra* note 63, at 55).

⁷¹ *See* Elizabeth Loftus, *Unconscious Transference*, 2 LAW & PSYCHOL. REV. 93, 97 (1976).

⁷² *See id.*

⁷³ *See, e.g.*, Andrew Wolfson, *Grand Jury Clears Man of 3 Bank Robberies*, LOUISVILLE COURIER-JOURNAL, Dec. 14, 2002, at 1A. Troy Rufra was charged with four bank robberies of supermarket bank branches. *Id.* He was implicated after a teller at one of the branches saw him at the supermarket and identified him as the man who had robbed her three weeks earlier. *Id.* Rufra's case was dismissed for lack of evidence. *Id.* He patronized the supermarket one or two times a week and used the bank for occasional business, leading experts to believe that the teller may have remembered Rufra's face from those previous encounters. *See id.*

⁷⁴ *See* Saul Kassin et al., *Déjà Vu All Over Again: Elliot's Critique of Eyewitness Experts*, 18 LAW & HUM. BEHAV. 203, 206 (1994); Michael Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL'Y & L. 909, 926-27 (1995).

are susceptible to having their confidence inflated by outside influences.⁷⁵ As a result, certain interactions throughout the criminal justice process can actually serve to increase an eyewitness's confidence without affecting the accuracy of the memory.⁷⁶ For example, if after making an identification, an eyewitness is provided with feedback that he or she is a good witness and has picked out the "right guy," the witness's confidence will be artificially inflated.⁷⁷ Eyewitnesses are usually unaware that their confidence has been inflated and will report at trial that they have always held a high level of confidence in the identification.⁷⁸

B. Systematic Factors: The Effect of Lineup Procedures

The ways in which lineups and showups are administered can, and often do, create biases.⁷⁹ Although a number of states have promulgated guidelines recommending the implementation of standardized identification procedures, lineup administration remains far from uniform.⁸⁰ Thus, although many jurisdictions have taken steps toward ensuring lineup fairness, three types of bias remain common: foil bias, instruction bias, and presentation bias.⁸¹

In a corporeal lineup, foil bias occurs when the other members share very few physical characteristics with the suspect, thus causing the suspect to stand out.⁸² Generally, the other participants in the lineup should be of the same race, should be similarly dressed, should be of similar height and weight, and should not have otherwise distinctive

⁷⁵ See Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 627 (1998); Wise et al., *supra* note 47, at 458.

⁷⁶ See Wise et al., *supra* note 47, at 458–59; see also *infra* notes 79–96 and accompanying text.

⁷⁷ See Gary L. Wells & Amy L. Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 374 (1998); Wise et al., *supra* note 47, at 458–59.

⁷⁸ See Wells & Bradfield, *supra* note 77, at 373, 374.

⁷⁹ See Devenport et al., *supra* note 25, at 344; Fradella, *supra* note 51, at 15–18. The difference between a lineup and a showup is that a showup involves one-on-one confrontation. See BLACK'S LAW DICTIONARY 1506 (9th ed. 2009).

⁸⁰ See Scott Ehlers, *Eyewitness Identification: State Law Reform*, CHAMPION, Apr. 2005, at 34. Problematically, courts have been reluctant to consider whether such guidelines were followed. See, e.g., *Davis v. State*, No. 2-04-519-CR, 2006 Tex. App. LEXIS 2111, at *6 (App. Mar. 16, 2006) (rejecting a claim of error where police did not follow the U.S. Department of Justice's guidelines on identification procedures because the defendant presented no authority showing that such techniques are required, rather than merely suggested).

⁸¹ See *infra* notes 82–96 and accompanying text.

⁸² See Devenport et al., *supra* note 25, at 344; Fradella, *supra* note 51, at 16.

features.⁸³ They should all have similar hair styles and facial hair, and either all or none should have distinguishing tattoos.⁸⁴

Bias can also arise when the officer in charge of the identification procedure gives instructions to the witness.⁸⁵ In an unbiased lineup instruction, the officer would explicitly inform the witness that the suspect may or may not be in the lineup, thereby reducing the risk that the witness would pick the individual who most closely resembles the culprit relative to others in the lineup.⁸⁶ The officer would further instruct the witness that regardless of whether an identification is made, the witness should not speak to other witnesses regarding the lineup.⁸⁷ If the witness makes an identification, the officer should not provide any feedback as to whether the identified individual was, in fact, the suspect.⁸⁸ In an ideal identification procedure, the officer administering the lineup or photo array would not know which individual was the suspect.⁸⁹ Such a “double-blind” procedure would eliminate the risk of suggestive questioning of, or feedback to, the witness.⁹⁰

⁸³ See Fradella, *supra* note 51, at 16; Gary Wells & Eric Seclau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL’Y & L. 765, 771 (1995).

⁸⁴ See Donald Judges, *Two Cheers for the Department of Justice’s Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 278 (2000).

⁸⁵ Leippe, *supra* note 74, at 916; Wells & Seclau, *supra* note 83, at 769.

⁸⁶ See Wells & Seclau, *supra* note 83, at 769; see also NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, EYEWITNESS EVIDENCE: A TRAINER’S MANUAL FOR LAW ENFORCEMENT 32 (2003), available at <http://www.ncjrs.org/nij/eyewitness/188678.pdf> (setting forth model instructions to be given by the officer administering the lineup, including advising the witness that the person who committed the crime may or may not be present in the group of individuals).

⁸⁷ See NAT’L INST. OF JUSTICE, *supra* note 86, at 34.

⁸⁸ See *id.* at 33.

⁸⁹ See Wells & Seclau, *supra* note 83, at 775.

⁹⁰ See Fradella, *supra* note 51, at 17; see also Steven Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 18 CRIM. JUST. 36, 45 (2003) (explaining that a double-blind procedure would eliminate the possibility that officers can intentionally or unintentionally communicate something to a witness about which member of a lineup is the suspect). Although courts have generally declined to order new line-up methodologies, one trial court, acknowledging the risk of bias when police officers know which lineup member is the suspect, ordered a lineup to be held sequentially and “double-blind.” See *In re Investigation of Rahim Thomas*, 733 N.Y.S.2d 591, 597 (Crim Ct. 2001); Jules Epstein, *The Great Engine That Couldn’t: Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 751 n.98 (2007); see also *State v. Ledbetter*, 881 A.2d 290, 318 (Conn. 2005) (requiring a jury instruction warning of the danger of misidentification if police failed to instruct the eyewitness prior to administration of the lineup that the suspect “might or might not be present” in the lineup).

Presentation bias occurs when lineup members are presented to the witness in a suggestive manner.⁹¹ Routine police practice is to present all lineup members to the witness at the same time.⁹² This, however, creates a risk that the witness will make a relative decision by selecting the lineup member who best resembles the perpetrator, at least in relation to the others in the lineup.⁹³ Studies suggest that the better practice would be to present the participants sequentially.⁹⁴ The witness would be asked to make a decision after viewing each individual, would not be allowed to go back to view a lineup member who had already been presented, and would not be told how many individuals would be presented.⁹⁵ This sequential procedure would require the witness to perform a more recall-oriented task, comparing each individual solely with his or her memory, without the interference of the relative comparison to others in the lineup.⁹⁶

II. THE LEGAL SYSTEM'S RESPONSE

The legal system has attempted to address the risks presented by eyewitness testimony in several ways.⁹⁷ Section A of this Part discusses constitutional protections for criminal defendants, specifically the right to the presence of counsel at post-indictment lineups and the inadmissibility at trial of identifications that were the result of unnecessarily suggestive police procedures.⁹⁸ Section B of this Part discusses the use of evidentiary mechanisms to educate jurors about the potential weaknesses of eyewitness testimony.⁹⁹ It first looks at the admission of expert witnesses to testify about factors that can affect eyewitness perception and memory.¹⁰⁰ Section B then discusses the use of special and model jury instructions on eyewitness identifications.¹⁰¹

⁹¹ See Devenport et al., *supra* note 25, at 345; Fradella, *supra* note 51, at 17.

⁹² See *In re Investigation of Rahim Thomas*, 733 N.Y.S.2d at 593; Fradella, *supra* note 51, at 17.

⁹³ See Devenport et al., *supra* note 25, at 345; Wells & Seelau, *supra* note 83, at 772.

⁹⁴ See Fradella, *supra* note 51, at 17; see also Memorandum from John J. Farmer, Jr., N.J. Att'y Gen., to All Cnty. Prosecutors et al. 1 (Apr. 18, 2001), available at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf> (specifying sequential lineups as a measure police should take to minimize potential bias).

⁹⁵ See Devenport et al., *supra* note 25, at 344.

⁹⁶ See *id.* at 345; Fradella, *supra* note 51, at 17.

⁹⁷ See *infra* notes 102–187 and accompanying text.

⁹⁸ See *infra* notes 102–114 and accompanying text.

⁹⁹ See *infra* notes 115–187 and accompanying text.

¹⁰⁰ See *infra* notes 128–158 and accompanying text.

¹⁰¹ See *infra* notes 159–187 and accompanying text.

A. *Constitutional Protections for Criminal Defendants:
Right to Counsel and Due Process*

Recognizing that unfairly suggestive police procedures can lead to erroneous identifications, the U.S. Supreme Court has articulated, in light of modern police procedures, two constitutional protections for criminal suspects.¹⁰² First, the Court held in 1967 in *United States v. Wade*, that a defendant has the right to the presence of counsel at a post-indictment lineup.¹⁰³ The Court reasoned that because a lineup is a critical stage of the prosecution and is thus something that could affect the outcome of trial, the Sixth Amendment protects a defendant's right to have counsel present.¹⁰⁴ The attorney's presence helps to serve two purposes: preventing intentional or incidental prejudice to the suspect during the lineup, and ensuring that any irregularities that occurred during the lineup procedure can be reconstructed at trial in order to mount a meaningful cross-examination of the eyewitness.¹⁰⁵ The exclusionary rule¹⁰⁶ applies to violations of this right and makes inadmissible a post-indictment identification made without counsel present.¹⁰⁷ The Court has subsequently put significant limitations on the right articulated in *Wade*.¹⁰⁸ A suspect has no right to counsel at a pre-indictment lineup and no right to counsel when a witness is shown a photo array.¹⁰⁹ Because many lineups take place early in the process—during the investigative stage—and police often use photo arrays

¹⁰² See *Stovall v. Denno*, 388 U.S. 293, 301–02 (1967); *United States v. Wade*, 388 U.S. 218, 236–37 (1967).

¹⁰³ 388 U.S. at 236–37.

¹⁰⁴ *Id.*

¹⁰⁵ See *id.* at 230–31, 236.

¹⁰⁶ The “exclusionary rule” states that evidence obtained in violation of the Constitution is inadmissible against a defendant in a criminal trial. See *Mapp v. Ohio*, 367 U.S. 643, 648 (1961).

¹⁰⁷ *Wade*, 388 U.S. at 240. The Court also held, however, that even if a pretrial identification is suppressed, the witness may be able to take the stand and testify at trial. *Id.* at 241. If the prosecution can establish that the in-court identification was independently based on another source, such as original observations made at the time of the crime, it is admissible. See *id.* This ignores the very real possibility that the witness is no longer recalling the defendant from her memory of the incident, but rather identifying the defendant as the perpetrator because he is who she identified at the lineup or showup. See *id.*

¹⁰⁸ See *United States v. Ash*, 413 U.S. 300, 321 (1973); *Illinois v. Kirby*, 406 U.S. 682, 690 (1972).

¹⁰⁹ *Ash*, 413 U.S. at 321 (no right to counsel at photo array); *Kirby*, 406 U.S. at 690 (no right to counsel at pre-indictment lineup).

before assembling a lineup at all, the *Wade* doctrine is of limited value to criminal suspects.¹¹⁰

Second, criminal defendants also receive protection with regard to identifications under the Due Process Clause of the U.S. Constitution.¹¹¹ The Supreme Court has held that unnecessarily suggestive procedures violate a criminal defendant's right to due process of law guaranteed by the Fifth and Fourteenth Amendments.¹¹² In 1967 in *Stovall v. Denno*, the Court stated that an identification that is the result of suggestive police procedures is inadmissible unless the circumstances necessitated such a procedure.¹¹³ The Court has since retreated from a firm application of the rule, holding that even if an identification is the result of unnecessarily suggestive procedures, it may still be admissible if it possesses certain indicia of reliability that reduce the possibility of mistaken identification.¹¹⁴

B. Evidentiary Mechanisms: Expert Testimony and Jury Instructions

Although *Wade* and *Stovall*¹¹⁵ may have provided some protections to criminal defendants when mistaken identifications are the result of coercive or suggestive police procedures, those decisions did little to address the challenge of communicating to the jury the weaknesses of eyewitness testimony generally.¹¹⁶ Many inaccurate identifications are not so because of any actions of the police, but rather are influenced by psychological factors that affect perception and memory.¹¹⁷ Because such identifications are not excluded under *Wade*, the eyewitness is put

¹¹⁰ See *Ash*, 413 U.S. at 321; *Kirby*, 406 U.S. at 690; see also *Kirby*, 406 U.S. at 699 (Brennan, J., dissenting) (pointing out that police conduct pre-indictment lineups to ensure that the suspect is, in fact, the offender).

¹¹¹ See *Stovall*, 388 U.S. at 301–02.

¹¹² *Id.* at 302.

¹¹³ *Id.* at 295, 302 (ruling that a procedure in which a handcuffed suspect was brought into a potential victim's hospital room by police and the victim was asked if the defendant was "the man" was not unnecessarily suggestive because the police were not sure whether the victim was going to survive and had to act quickly to obtain the identification).

¹¹⁴ See *Manson v. Braithwaite*, 432 U.S. 98, 111–14 (1977). In *Neil v. Biggers* in 1972, the Court articulated several factors to be considered in assessing the reliability of the identification: (1) the opportunity of the witness to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated at the confrontation; and (5) the elapsed time between the crime and the confrontation. 409 U.S. 188, 199–200 (1972).

¹¹⁵ *Wade*, 388 U.S. at 218; *Stovall*, 388 U.S. at 293. A third case decided along with *Wade* and *Stovall* in 1967, *Gilbert v. California*, is often included in what is referred to as the "Wade trilogy." *Gilbert v. California*, 388 U.S. 263 (1967).

¹¹⁶ See *infra* notes 117–127 and accompanying text.

¹¹⁷ See *supra* notes 51–78 and accompanying text.

before the jury for its evaluation.¹¹⁸ Unfortunately, there are strong indications that the average juror tends to believe eyewitness testimony even in the face of other more credible evidence.¹¹⁹ In fact, although eyewitness testimony may be the least reliable type of evidence, it is often the most compelling.¹²⁰ Because much of the scientific knowledge regarding eyewitness accuracy is counterintuitive, lay jurors usually lack the capacity to effectively evaluate the eyewitness's testimony.¹²¹ Evidence suggests that jurors are especially unaware of the effect of crime seriousness on perception ability, the inherent unreliability of cross-racial identifications, and that there is little correlation between witness confidence and accuracy.¹²² In fact, studies have shown that eyewitness confidence, poor predictor as it is of accuracy, is often the most important factor that the jury relies on when evaluating the eyewitness testimony.¹²³

Thus, the challenge for the legal system is to find a way to educate jurors and enable them to make more informed decisions without creating prejudice that will cause them to disregard accurate and reliable

¹¹⁸ See *Wade*, 388 U.S. at 240.

¹¹⁹ See Devenport et al., *supra* note 25, at 346–53 (discussing numerous psychological studies that examined juror sensitivities to witnessing factors). In juror surveys, respondents appeared to be somewhat sensitive to the influence of cross-racial problems and prior photo array bias, but were less sensitive to the detrimental effects of age and retention interval. *Id.* at 346. Also, in contrast with psychological findings, most respondents believed that there was a correlation between a witness's confidence and her accuracy. *Id.* at 347. Mock trial research further suggests that jurors are poor at differentiating accurate and inaccurate eyewitness. *Id.* at 348. In one study, among jurors exposed to non-leading cross-examination of the witness, 76% correctly identified accurate eyewitnesses, but only 14% correctly determined which eyewitnesses were inaccurate; among jurors exposed to leading cross-examination, 84% correctly identified accurate eyewitnesses and 27% correctly determined which witnesses were inaccurate. *Id.* (citing Gary Wells et al., *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOL. 440, 440–48 (1979)).

¹²⁰ See *Watkins v. Sowders*, 449 U.S. 341, 351 (1981); *Wade*, 388 U.S. at 228.

¹²¹ See Devenport et al., *supra* note 25, at 347–48, 349; Fradella, *supra* note 51, at 24.

¹²² See Devenport et al., *supra* note 25, at 347–48. Problematically, some courts have allowed testimony that emphasizes witness confidence and suggests that it is a good predictor of the accuracy of the identification. See *Jones v. State*, 539 S.E.2d 143, 148 (Ga. 2000) (permitting eyewitnesses to testify that they were certain in their identification of the defendant, because the scientific research suggesting that there was no correlation between confidence and accuracy did not demonstrate that every eyewitness's confidence as to accuracy was misplaced, and emphasizing that eyewitness confidence has always been deemed a relevant factor in considering an eyewitness's testimony); *Nero v. State*, 798 A.2d 5, 18, 19 (Md. Ct. Spec. App. 2002) (allowing a detective to testify that the victim and eyewitness were certain of their identification of the defendant in photo arrays).

¹²³ See Wells et al., *supra* note 75, at 620.

eyewitnesses.¹²⁴ There is a growing recognition that existing safeguards, especially cross-examination, are inadequate to reveal the influence of specific psychological factors that affect perception and memory.¹²⁵ Although a skillful cross-examination may be effective in exposing a dishonest or biased witness, a cross-examining lawyer is ill equipped to confront an honest but mistaken witness who, because she is giving testimony she believes to be true, will not display the demeanor of someone who is lying.¹²⁶ The two mechanisms most frequently suggested to educate jurors about the underlying psychology are expert scientific testimony and jury instructions.¹²⁷

1. Expert Testimony

One option that a number of states have deployed to educate jurors about the fallibility of eyewitnesses is to permit an expert psychologist to testify as to the factors that affect accuracy.¹²⁸ Commentators have long urged courts to move in this direction and, in the 1980s, some courts began to admit eyewitness experts.¹²⁹ In the 1983 case of *State v. Chapple*, the Arizona Supreme Court made what was, at the time, the strongest endorsement of this form of expert testimony, holding that it could be reversible error for a trial judge to refuse to admit eyewitness expert testimony.¹³⁰ The court pointed out that, although eyewitness weakness in general might be a matter of common knowledge, the expert would have provided a specific explanation of particular variables relevant to the case.¹³¹ The court explained that by providing this

¹²⁴ See *infra* notes 128–187 and accompanying text.

¹²⁵ See Epstein, *supra* note 90, at 766, 774–80.

¹²⁶ See *id.* at 766.

¹²⁷ See *infra* notes 128–187 and accompanying text.

¹²⁸ See *infra* notes 129–158 and accompanying text.

¹²⁹ See *State v. Chapple*, 660 P.2d 1208, 1224 (Ariz. 1983); *People v. McDonald*, 690 P.2d 709, 726 (Cal. 1984).

¹³⁰ See 660 P.2d at 1224.

¹³¹ *Id.* at 1220–21. The expert would have testified regarding the following factors: (1) the “forgetting” curve due to the delay in identification and because one witness had earlier indicated someone else was the culprit; (2) the effect of stress upon accuracy; (3) unconscious transference; (4) the tendency to assimilate post-event information, where information gained after the event is factored into an identification to make it “fit”; (5) the “feedback factor,” which could occur when witnesses have discussed their observations; and (6) that there is no relationship between a witness’s confidence in the identification and the accuracy of the identification. *Id.*

information to the jury, the expert would assist jurors in making an informed and fair decision.¹³²

At the time *Chapple* was decided, federal courts still followed the general rule that eyewitness expert testimony is usually inadmissible because the unreliability of eyewitnesses is not outside the understanding of the common juror.¹³³ In 1985, however, the U.S. Court of Appeals for the Third Circuit revisited the issue in *United States v. Downing* and held that in appropriate cases, an eyewitness expert can indeed assist the trier of fact, and thus the expert's testimony is admissible under the Federal Rules of Evidence.¹³⁴ The court noted that the Federal Rules' basic approach to opinion testimony is one of "helpfulness."¹³⁵ An expert would be helpful to the jury, the court determined, because many of the factors the expert would testify to went beyond common knowledge and some actually directly contradicted common sense.¹³⁶ The court further observed that the expert might be able to refute jurors' erroneous assumptions about eyewitness reliability.¹³⁷ Advocates contend that such "social framework" expert testimony, in which an expert provides a context for evaluating the information in an eyewitness report, is the best way to ensure that jurors are receiving all of the information they need to make an informed decision.¹³⁸

Although the use of expert testimony is becoming more prevalent, the admissibility decision remains discretionary and courts have been far from consistent in their admission of such evidence.¹³⁹ Appellate

¹³² *Id.* at 1221. Just two years later, however, the Arizona Supreme Court remained true to its warning in *Chapple* that it did not intend to "open the gates to a flood of expert evidence on the subject" and would continue to support trial courts' discretionary rulings unless presented with a case where expert testimony was needed by upholding the exclusion of expert testimony where there was substantial other evidence in the state's case. *See State v. Poland*, 698 P.2d 183, 194 (Ariz. 1985); *cf. Chapple*, 660 P.2d at 1224.

¹³³ *See, e.g., United States v. Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973). The court articulated a four-prong test for the admission of expert testimony regarding eyewitness identifications: (1) qualified expert; (2) testifies on a proper subject, that is, about affairs not within the understanding of the average man; (3) by means of a generally accepted explanatory theory; and (4) probative value of testimony must outweigh prejudicial effect. *Id.* In holding the testimony inadmissible, the court expressed concerns about the negative impact of expert testimony on the jury. *See id.* at 1152. This concern remains one of the core reasons trial courts cite for excluding expert testimony today. *See infra* notes 142–147 and accompanying text.

¹³⁴ 753 F.2d 1224, 1231 (3rd Cir. 1985); *see* FED. R. EVID. 702.

¹³⁵ FED. R. EVID. 702 advisory committee's note; *Downing*, 753 F.2d at 1229.

¹³⁶ *Downing*, 753 F.2d at 1230–31.

¹³⁷ *Id.* at 1231 (quoting *United States v. Smith*, 736 F.2d 1103, 1106 (6th Cir. 1984)).

¹³⁸ *See* Fradella, *supra* note 51, at 24; Leippe, *supra* note 74, at 909, 948–49.

¹³⁹ *Compare* *United States v. Rodriguez-Berrios*, 573 F.3d 55, 72 (1st Cir. 2009) (upholding an exclusion of testimony on the basis that it would involve a credibility determina-

courts have tried to articulate factors for trial courts to consider when determining whether to admit eyewitness expert testimony, but judges often reach different conclusions as to admissibility in cases presenting relatively similar factual scenarios.¹⁴⁰ Underlying this inconsistency seems to be a general hostility on the part of judges toward allowing a witness to comment on the reliability of eyewitness testimony, something that has been the touchstone of the criminal justice system throughout its history.¹⁴¹

Courts have cited several rationales for excluding expert testimony on eyewitness reliability.¹⁴² The most commonly asserted reason is that the testimony would usurp the role of the jury as the sole arbiter of the credibility of witnesses.¹⁴³ Courts often rule that because a reliability determination is to be made by jurors, using their common sense and experience, it is an improper subject for expert testimony.¹⁴⁴ The Pennsylvania Supreme Court articulated this view succinctly, holding that expert testimony purporting to educate jurors on the possible factors

tion), *with Ex parte Williams*, 594 So. 2d 1225, 1227 (Ala. 1992) (upholding an exclusion of similar testimony on different grounds—that the expert was not familiar with the specific facts of the case); *compare Bomas v. State*, 956 A.2d 215, 218 (Md. Ct. Spec. App. 2008) (explaining that the trial court excluded eyewitness expert testimony because the testimony failed the U.S. Supreme Court’s test for admission of scientific evidence), *with People v. LeGrand*, 867 N.E.2d 374, 378 (N.Y. 2007) (reversing the trial court’s exclusion of eyewitness expert testimony and concluding that the proffered testimony satisfied the Supreme Court’s scientific evidence test). A majority of states and federal courts leave the decision of whether to admit expert testimony within the discretion of the trial court. *See, e.g., Rodriguez-Berrios*, 573 F.3d at 72; *Ex parte Williams*, 594 So. 2d at 1227; *Bomas*, 956 A.2d at 218. Most courts vested with such discretion, however, generally exclude the evidence. *See, e.g., State v. Kemp*, 507 A.2d 1387, 1390 (Conn. 1986); *McMullen v. State*, 714 So. 2d 368, 371 (Fla. 1998); *State v. Ammons*, 305 N.W.2d 812, 814–15 (Neb. 1981).

¹⁴⁰ *See LeGrand*, 867 N.E.2d at 378 (suggesting that a judge’s determination as to whether a case turns entirely on identification is a key inquiry); *State v. Cheatam*, 81 P.3d 830, 842 (Wash. 2003) (outlining factors to be considered by the trial court).

¹⁴¹ *See State v. Nordstrom*, 25 P.3d 717, 730–31 (Ariz. 2001) (upholding a trial court’s decision to prohibit an expert from commenting on an eyewitness’s testimony or addressing specifics of the case); *see also United States v. Bellamy*, 26 F. App’x 250, 259 (4th Cir. 2002) (remarking that an expert’s testimony was particularly objectionable because it was based on a mistaken assumption about the identification procedure).

¹⁴² *See infra* notes 143–155 and accompanying text.

¹⁴³ *See, e.g., Johnson v. State*, 519 S.E.2d 221, 229 (Ga. 1999); *People v. Kelley*, 631 N.Y.S.2d 926, 926 (App. Div. 1995); *State v. Butterfield*, 27 P.3d 1133, 1146 (Utah 2001).

¹⁴⁴ *See Johnson*, 519 S.E.2d at 229. Some commentators even argue that not only does expert testimony usurp the role of the jury as the judge of credibility, but that it is inconsistent with the objectives of the jury system as it undermines the jury function of community representation. Steven Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 173–74, 217 (1990). Professor Steven Friedland argues that the jury system is the “backbone of the American criminal process” and that system relies heavily on juror common sense for its continued validity. *Id.* at 170, 176–77.

that may affect a person's perception is improper as it would intrude upon the jury's basic function of deciding credibility.¹⁴⁵ The court explained that an ordinary juror was able to assess credibility and give appropriate weight to the testimony.¹⁴⁶ A court is especially likely to disallow an expert's testimony if it appears that the expert is commenting on the reliability of a specific witness in the case.¹⁴⁷

A second reason often cited by courts in declining to admit an eyewitness expert is that the prejudicial effect of the testimony would outweigh its probative value.¹⁴⁸ The concern is that the testimony could be misleading and cause jurors to give disproportionate weight to the expert's testimony at the expense of the eyewitness's testimony.¹⁴⁹

A third reason commonly advanced by courts for declining to admit eyewitness experts is that traditional devices, such as cross-examination and attorney argument, are sufficient to expose weaknesses in eyewitness identifications.¹⁵⁰ Cross-examination specifically has long been lauded for its ability to expose untruths.¹⁵¹ Thus, in excluding expert testimony, courts often note that defendants who wish to attack the reliability of eyewitness perception, memory, and recollection are free to use the "powerful tool of cross-examination to do so."¹⁵² Commentators

¹⁴⁵ Commonwealth v. Simmons, 662 A.2d 621, 630–31 (Pa. 1995).

¹⁴⁶ *Id.* at 631.

¹⁴⁷ See *LaPointe v. State*, 214 P.3d 684, 695 (Kan. Ct. App. 2009) (holding that an expert's proffered testimony was improper because he sought to tell a jury that a good eyewitness would promptly pick a suspect from a photo lineup (the witness in the case did not) and that observations under stress are always less accurate than observations not under stress, rather than explaining that studies show stress has the ability to negatively affect a person's ability to perceive); see also *Farris v. State*, 818 N.E.2d 63, 67 (Ind. Ct. App. 2004) (excluding defense-proffered expert testimony where the expert sought to testify that in [his] opinion, "there [were] enough potential sources of error . . . to make [him] question the veracity of [the witness's] statements").

¹⁴⁸ See, e.g., *Rodriguez-Berrios*, 573 F.3d at 72; *State v. Cole*, 556 S.E.2d 666, 670 (N.C. Ct. App. 2001).

¹⁴⁹ See *Rodriguez-Berrios*, 573 F.3d at 72. Critics, however, argue that evidentiary rules speak only to "unfair prejudice" and, although expert testimony would undoubtedly create prejudice in that it would provide jurors with more information than they previously had, the resulting prejudice is not only fair and reasonable, but desirable. See *Leippe*, *supra* note 74, at 922.

¹⁵⁰ See *infra* notes 151–153 and accompanying text.

¹⁵¹ See *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (explaining that cross-examination exposes falsehoods and elicits the truth of a criminal case). According to Jeremy Bentham, the "grand security" against erroneous testimony is cross-examination. 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE SPECIFICALLY APPLIED TO ENGLISH PRACTICE 212 (London, Hunt & Clark 1827).

¹⁵² See, e.g., *United States v. Smith*, 122 F.3d 1355, 1359 (11th Cir. 1997). In *State v. Shomberg* in 2006, the Wisconsin Supreme Court ruled that the expert had been properly excluded because defense counsel was able to adequately explore the factors influencing

have sharply criticized such judicial reasoning, arguing that tools designed to expose a witness's bias and dishonesty cannot expose the risk of inaccuracy of a witness who testifies honestly but is mistaken.¹⁵³

Finally, courts have expressed concerns about the effect that a parade of experts would have on both the individual trial and the justice system more broadly.¹⁵⁴ Although not often explicitly stated, a concern about high costs is likely implicit in many courts' decisions to exclude the testimony.¹⁵⁵

Appellate courts show tremendous deference to trial judges in determining admissibility of experts and will rarely find that the exclusion of eyewitness expert testimony constitutes reversible error.¹⁵⁶ Where appellate courts do reverse a trial court's exclusion of such expert testimony, most or all of the following circumstances are generally present: the identification of the defendant was a critical issue in the state's case; there was little or no other evidence corroborating the eyewitness testimony and thus the case turned largely on the credibility of the eyewitness; there was evidence that a specific factor was at play in the case (for example, cross-racial identification); and the expert provided a particularized explanation that would assist the jury in sorting out the

the reliability of eyewitness identifications by cross-examining a testifying witness and delivering effective opening statements and closing arguments. 709 N.W.2d 370, 375 (Wis. 2006). The defendant requested that the expert be allowed to testify as to the "relative reliability of sequential versus simultaneous lineups," unconscious transference, and the absence of a relationship between confidence and accuracy, and to provide examples of people wrongly convicted based on mistaken identifications. *Id.* The trial court rejected defense counsel's argument that cross-examination and closing arguments could not explain the significance of such factors. *See id.* at 375–76.

¹⁵³ *See* Epstein, *supra* note 90, at 766. Professor Jules Epstein explains that the inaccuracy of cross-racial identifications cannot be effectively explored because witnesses are likely to think, when confronted with the question, that they are being accused of prejudice against members of another race and will deny that they are less able to identify members of that race. *See id.* at 775–76. Similarly, it is difficult to elicit the negative effect of stress, violence, or the presence of a weapon, because the witness is likely to insist that because of the violence or stress involved, he or she will never forget the observed event. *See id.* at 778. As a result, questioning on the subject can actually increase the perceived accuracy of the eyewitness's testimony. *Id.* at 776–78.

¹⁵⁴ *See, e.g.,* Hampton v. State, 285 N.W.2d 868, 873 (Wis. 1979).

¹⁵⁵ *See id.*

¹⁵⁶ *See, e.g.,* *Rodriguez-Berrios*, 573 F.3d at 71 (stating that admission of eyewitness expert testimony is a matter of case-by-case discretion); *Bomas*, 956 A.2d at 218 (explaining that the determination of whether to admit expert testimony concerning the reliability of eyewitness testimony "lies within the sound discretion of the trial court" and will not be disturbed on appeal absent a clear abuse of discretion).

facts.¹⁵⁷ Absent these circumstances, an appellate court will likely uphold a trial court's refusal to admit an eyewitness expert.¹⁵⁸

2. Jury Instructions

Another way to educate jurors about the inherent unreliability of eyewitness identifications is to provide a jury instruction on the topic.¹⁵⁹ Courts have articulated several reasons for requiring, or at least permitting, model or special jury instructions about eyewitness identification.¹⁶⁰ Courts often point out that jurors are unaware of many factors affecting the reliability of eyewitnesses and that general credibility instructions do not educate the jury as to many key factors that make eyewitness testimony vulnerable.¹⁶¹ In 1972, in *United States v. Telfaire*, the U.S. Court of Appeals for the District of Columbia Circuit explained that the special difficulties often presented by identification testimony may require that additional information be given to focus the jury's attention on the issue of identity.¹⁶² Failure to give an instruction in appropriate cases, the court said, would present a serious risk of wrongful convictions based on erroneous identifications.¹⁶³ Furthermore, courts instruct jurors on special precautions they should take in

¹⁵⁷ See *LeGrand*, 867 N.E.2d at 378 (holding that the trial court should weigh the defendant's request to admit expert testimony against factors "such as the centrality of the identification issue and the existence of corroborating evidence"); *Weatherred v. State*, 985 S.W.2d 234, 238–39 (Tex. Crim. App. 1999) (finding reversible error where the identity of the defendant as the perpetrator was seriously contested, no other evidence was available to the defense to rebut the testimony of the state's eyewitnesses, and the scientific testimony would include theories that had been scientifically tested and would be presented in a way that was not startling or spectacular); *Jordan v. State*, 928 S.W.2d 550, 555 (Tex. Crim. App. 1996) (noting that the psychologist answered questions about specific facts of the case and how they might be affected by factors as to which he testified); *Cheatam*, 81 P.3d at 842 (explaining that a trial court must consider whether the case involves a specific subject to which the testimony relates, such as whether the victim and the defendant are of the same race, whether the defendant displayed a weapon, and the effect of stress).

¹⁵⁸ See *LeGrand*, 867 N.E.2d at 378; *Weatherred*, 985 S.W.2d at 238–39; *Jordan*, 928 S.W.2d at 555; *Cheatam*, 81 P.3d at 842.

¹⁵⁹ See *United States v. Telfaire*, 469 F.2d 552, 557, 558–59 (D.C. Cir. 1972).

¹⁶⁰ See *infra* notes 161–164 and accompanying text.

¹⁶¹ See *United States v. Hall*, 165 F.3d 1095, 1118 (7th Cir. 1999) (Easterbrook, J., concurring); *Telfaire*, 469 F.2d at 556 (noting that an additional eyewitness instruction may sometimes be warranted).

¹⁶² 469 F.2d at 556; see also *People v. Hall*, 616 P.2d 826, 835 (Cal. 1980) (holding that a court should give an instruction requested by the defendant that directs attention to evidence from which a reasonable doubt of guilt could be engendered, including eyewitness identification).

¹⁶³ *Telfaire*, 469 F.2d at 557.

evaluating the credibility of accomplices, informants, alibi witnesses, and immunized witnesses, and some courts have found that “out of a sense of fairness, attention should also be drawn to the possible unreliability of eyewitness testimony.”¹⁶⁴

Although most courts now allow some form of eyewitness instruction, a minority still decline to give such a charge.¹⁶⁵ Many of these courts have expressed a concern that a judge may be invading the province of the jury by singling out a particular type of testimony and telling jurors to consider it with skepticism.¹⁶⁶ It is argued that, once eyewitness testimony is singled out, it would be very difficult for the prosecution to win cases that depend entirely on such testimony.¹⁶⁷ This would particularly impact the government’s ability to successfully prosecute rapes and sexual assaults.¹⁶⁸

Courts have articulated several general approaches in deciding whether to require a trial court to give an eyewitness identification instruction.¹⁶⁹ One view is that cautionary instructions that deal “realistically with the shortcomings and trouble-spots of the identification process” are necessary in appropriate cases, particularly where the circumstances raise doubts about the legitimacy of the identification or where the case turns largely on the credibility of the eyewitness.¹⁷⁰ In jurisdictions that have adopted an eyewitness instruction as part of their model instructions, courts have been willing to defer to the judicial or legislative assessment that guidance to the jury on the topic is warranted and thus, have generally given the instruction.¹⁷¹ Nevertheless, even in jurisdictions that regularly instruct the jury as to the factors affecting eyewitness reliability, such an instruction will generally only be

¹⁶⁴ See *People v. Whalen*, 451 N.E.2d 212, 214–15 (N.Y. 1983).

¹⁶⁵ See, e.g., *Conley v. State* 607 S.W.2d 328, 330 (Ark. 1980); *Lewis v. State*, 363 N.E.2d 1230, 1231 (Ind. 1977); *Waller v. State*, 581 S.W.2d 483, 484 (Tex. Crim. App. 1979).

¹⁶⁶ See *Conley*, 607 S.W.2d at 330; *Waller*, 581 S.W.2d at 484.

¹⁶⁷ See WILLIAM CARROLL & MICHAEL SENG, *Jury Instructions, in EYEWITNESS TESTIMONY: STRATEGY AND TACTICS* § 9:5 (2d ed. 2009), available at Westlaw EYEWITTEST.

¹⁶⁸ See *id.*

¹⁶⁹ See *infra* notes 170–173 and accompanying text.

¹⁷⁰ See *Brooks v. State*, 380 So. 2d 1012, 1014 (Ala. Crim. App. 1980); *Commonwealth v. Rodriguez*, 391 N.E.2d 889, 893 (Mass. 1979); see also *State v. Cotto*, 865 A.2d 660, 665 (N.J. 2005) (holding that failure to give an instruction on identification may constitute plain error).

¹⁷¹ See, e.g., *Brodes v. State*, 614 S.E.2d 766, 769 (Ga. 2005).

given upon request.¹⁷² Almost all courts have held that the trial court does not have to issue an instruction *sua sponte*.¹⁷³

Courts that have found cautionary identification instructions unnecessary have done so for several reasons.¹⁷⁴ First, some courts have held that an instruction is not necessary where the jury is adequately instructed concerning the credibility of witnesses generally.¹⁷⁵ Second, a number of courts have found instructions unnecessary where the identification was corroborated or alternatively where the eyewitness testimony was “so equivocal as to make its fallibility self-evident.”¹⁷⁶ Courts have found there to be sufficient corroboration where other witnesses were able to place the defendant at the scene of the crime;¹⁷⁷ the identity of the defendant as the perpetrator was supported by his or her arrest in the geographic proximity of the place of offense shortly after its commission;¹⁷⁸ and the prosecution’s case also involved testimony of an accomplice.¹⁷⁹ Courts have sometimes even found corroboration to be unnecessary when the case involves an identification that is not “dubious” and presents no significant risk of misidentification.¹⁸⁰

¹⁷² See *State v. Benjamin*, 363 A.2d 762, 764 (Conn. Super. Ct. 1976).

¹⁷³ See *id.* But see *State v. Green*, 430 A.2d 914, 919 (N.J. 1981) (ruling that the defendant was entitled to an eyewitness identification instruction even though no instruction was formally requested by counsel, where counsel adequately raised the issue in an objection to the court’s instructions as given); *People v. Hall*, 439 N.Y.S.2d 661, 663 (App. Div. 1981) (emphasizing the appellate court’s interest in ensuring justice and holding that, under the circumstances, the trial court’s failure to give an identification jury charge was reversible error, even though defense counsel did not request such an instruction).

¹⁷⁴ See *infra* notes 175–180 and accompanying text.

¹⁷⁵ See *Nelson v. State*, 362 So. 2d 1017, 1022 (Fla. Dist. Ct. App. 1978). Even in cases where the facts seem to lend themselves to a special instruction, courts have held no such instruction necessary where the jury was instructed to weigh the evidence and credibility in light of their observations and experience. See *Lenoir v. State*, 72 S.W.3d 899, 903, 905 (Ark. Ct. App. 2002). In *Lenoir*, the case involved a Caucasian witness, who identified the defendant as the murder perpetrator, and described him as a light-complected black male, roughly five feet nine inches tall, with short hair. *Id.* at 903. The defendant was actually five feet six inches tall and claimed not to have had short hair at the time the crime was committed. *Id.* The court nevertheless held that a special identification instruction (including a cross-racial instruction) was not required because the jury was instructed as to evaluating the credibility of witnesses generally. *Id.* at 905.

¹⁷⁶ See *United States v. Gentile*, 530 F.2d 461, 467–68, 469 (2nd Cir. 1976) (holding no cautionary instruction required where an eyewitness could not pick the defendant out of a lineup before trial and recognized the defendant only after seeing him outside the courtroom while the witness was waiting to testify because the unreliability of this identification would be “self-evident” to jurors).

¹⁷⁷ See *Shields v. State*, 397 So. 2d 184, 187 (Ala. Crim. App. 1981).

¹⁷⁸ See *Taylor v. State*, 276 S.E.2d 691, 692 (Ga. Ct. App. 1981).

¹⁷⁹ See *United States v. Patterson*, 150 F.3d 382, 388 (4th Cir. 1998).

¹⁸⁰ See *United States v. Montelbano*, 605 F.2d 56, 59 (2nd Cir. 1979) (reasoning that no special instruction was necessary because the eyewitness sat next to the defendant in a

The content of existing model identification instructions does not vary significantly from jurisdiction to jurisdiction.¹⁸¹ Most courts follow some version of the model set forth by the D.C. Circuit in *Telfaire*, which instructs jurors to take into account: (1) the witness's capacity and opportunity to view the offender; (2) the strength of the identification and the circumstances under which the defendant was presented to the witness for identification; (3) any instances where the witness failed to make an identification; and (4) other aspects of credibility as would be considered relevant for any other witness.¹⁸² Other jurisdictions have developed more detailed instructions.¹⁸³ For example, in California, the model instruction advises jurors to consider such additional factors as whether the witness was under stress at the time of the observation, whether the witness and the defendant are of different races, how closely the witness was paying attention, and the method of lineup used (photo array or physical lineup).¹⁸⁴ The commentary, however, makes clear that the judge should not suggest that identifications are inherently unreliable because that would improperly single out the testimony as suspect.¹⁸⁵ A few courts have gone even further, actually telling jurors that scientific studies have demonstrated the dangers of mistake in human perception and identification.¹⁸⁶ Such instructions are generally given as special instructions and are not derived from model instructions.¹⁸⁷

truck for a five hour period on the day of the crime and the defendant did nothing to disguise his identity).

¹⁸¹ See *infra* notes 182–187 and accompanying text.

¹⁸² See 469 F.2d at 558–59.

¹⁸³ See, e.g., ADVISORY COMM. ON CRIMINAL JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS no. 315 (2010) [hereinafter CAL. CRIMINAL JURY INSTRUCTIONS], available at http://www.courtinfo.ca.gov/jury/criminaljuryinstructions/calcrim_juryins.pdf.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.* (citing *People v. Wright*, 755 P.2d 1049, 1058 (Cal. 1988)).

¹⁸⁶ See *United States v. Burrous*, 934 F. Supp. 525, 530 (E.D.N.Y. 1996). The instruction given in *Burrous* is, in part, reproduced below:

I want to caution you, first, that the kind of identification testimony you heard in this case must be scrutinized carefully. Scientific studies have amply demonstrated the dangers of mistake in human perception and identification. Of course, this does not mean that the identification in this case is incorrect. I merely tell you this so that you understand the importance of carefully evaluating the evidence here.

Id.

¹⁸⁷ See *id.* at 527, 530–31.

III. JURY INSTRUCTIONS: A BETTER TOOL THAN EXPERT TESTIMONY

Although expert testimony is widely touted as the best device to combat the problem of mistaken identifications, it is not without significant weaknesses and, in fact, can create new problems for the administration of justice.¹⁸⁸ Jury instructions, on the other hand, although by no means perfect, avoid many of the same pitfalls.¹⁸⁹ In fact, jury instructions carry several inherent advantages.¹⁹⁰ This Part discusses those advantages.¹⁹¹ Section A considers the burden that regular use of eyewitness expert testimony places on the courts by increasing the length and cost of criminal trials.¹⁹² Section B discusses the ways in which the availability of expert testimony disproportionately benefits affluent defendants, while providing little aid to those who are indigent.¹⁹³ Finally, Section C reviews the potential prejudicial effects of expert testimony and argues that jury instructions do not present such a risk.¹⁹⁴

A. Efficiency: Length and Cost of Trial

Expert testimony increases the length and cost of trials in a way that jury instructions do not.¹⁹⁵ Expert testimony can cost thousands of dollars and, because of the complexity of the science, can take up significant amounts of time.¹⁹⁶ Thus, regular admission of eyewitness expert testimony significantly increases the length and cost of trials.¹⁹⁷ Jury instructions present no such problem.¹⁹⁸ An instruction can be

¹⁸⁸ See *infra* notes 195–228 and accompanying text.

¹⁸⁹ See *infra* notes 195–228 and accompanying text.

¹⁹⁰ See *infra* notes 195–228 and accompanying text.

¹⁹¹ See *infra* notes 195–228 and accompanying text.

¹⁹² See *infra* notes 195–205 and accompanying text.

¹⁹³ See *infra* notes 206–212 and accompanying text.

¹⁹⁴ See *infra* notes 213–228 and accompanying text.

¹⁹⁵ See *Hampton v. State*, 285 N.W.2d 868, 873 (Wis. 1979); Roger Park, *Eyewitness Identification: Expert Witnesses Are Not the Only Solution*, 2 L., PROBABILITY & RISK 305, 307 (2003).

¹⁹⁶ See Park, *supra* note 195, at 307; Douglas Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 375 (1995) (stating that eyewitness identification specialists cost at least \$500 per day for courtroom testimony and \$100 per hour for consultation). See generally ALEX BABITSKY ET AL., SEAK, INC., SEAK NATIONAL GUIDE TO EXPERT WITNESS FEES AND BILLING PROCEDURES (2009) (finding that in-court testimony by non-medical experts can reach hourly rates in the thousands of dollars).

¹⁹⁷ See *Hampton*, 285 N.W.2d at 873 (noting that the fact that expert testimony could increase the length and costs of trials is a legitimate factor for trial courts to take into consideration when deciding whether to admit the testimony).

¹⁹⁸ See *United States v. Telfaire*, 469 F.2d 552, 558–59 (D.C. Cir. 1972) (proposing an instruction that is several paragraphs long).

given in a matter of minutes and thus does not prolong the trial in any meaningful way.¹⁹⁹ Furthermore, if a model instruction is adopted, judges will not be forced to wade through the scientific research of the proffered expert in the case to determine the validity of the expert's methodology under the U.S. Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals*.²⁰⁰ Judge Easterbrook of the U.S. Court of Appeals for the Seventh Circuit echoed this sentiment in his 1999 concurrence in *United States v. Hall*, acknowledging that jurors need to be made aware of the relevant social science research, but expressing a concern that every proffer of expert testimony would require a "trial about the process of trials," which would divert attention from the real issues in the case.²⁰¹ He asserted that properly devised jury instructions could improve the accuracy of trial verdicts without the delays caused by expert testimony.²⁰²

Courts have also expressed the legitimate concern that liberal admission of eyewitness experts could lead to a "battle of the experts," in which jurors may be inclined to choose between experts based on the experts' demeanors and respective credentials rather than relying on their own sensitivities to the factors affecting the reliability of identifications in the case.²⁰³ If a court relied on jury instructions instead, there would be no experts between which a "battle" could ensue.²⁰⁴ Jurors' attention would thus be more squarely focused on the eyewitness evi-

¹⁹⁹ See *id.*; see also Larry Heuer & Steven Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUM. BEHAV. 409, 422–23 (1989) (reporting that a survey of judges revealed that judges did not believe even providing written jury instructions placed excessive demands on the judge or strains on the court).

²⁰⁰ See 509 U.S. 579, 592–94 (1993) (laying out the criteria under the Federal Rules of Evidence for determining the reliability of the expert's methodology: (1) whether the theory can be tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate and the existence and maintenance of standards controlling its operation; and (4) whether it has attracted widespread acceptance within a relevant scientific community). See generally David S. Caudill & Lewis H. LaRue, *Why Judges Applying the Daubert Trilogy Need to Know About the Social, Institutional, and Rhetorical—And Not Just the Methodological—Aspects of Science*, 45 B.C. L. REV. 1 (2003) (explaining that when trial judges lack a sufficient understanding of underlying scientific principles, reliable scientific evidence may be excluded under *Daubert*).

²⁰¹ 165 F.3d 1095, 1118–19 (7th Cir. 1999) (Easterbrook, J., concurring); accord *United States v. Jones*, No. 09-10048, 2010 WL 5475651, at *6 (D. Mass. Dec. 30, 2010).

²⁰² See *Hall*, 165 F.3d at 1120.

²⁰³ See *Barefoot v. Estelle*, 463 U.S. 880, 934–35 (1983) (Blackmun, J., dissenting); Park, *supra* note 195, at 306–07.

²⁰⁴ See *Hall*, 165 F.3d at 1120 (Easterbrook, J., concurring).

dence, which—with a properly-formed jury instruction—they would be better able to evaluate.²⁰⁵

B. *Expert Eyewitness Testimony Disproportionately Benefits
Affluent Defendants*

The high cost of expert testimony places it beyond the reach of the overwhelming majority of the 77,000 suspects who are arrested each year based on an eyewitness identification.²⁰⁶ Nevertheless, courts have consistently held that there is no need to provide government funds for a defense expert, even in the case of an indigent defendant.²⁰⁷ Observers report that, as a result, no more than five-hundred cases per year include eyewitnesses experts.²⁰⁸ This illustrates that although eyewitness expert testimony might be impactful, it is rarely used.²⁰⁹ Unless courts are prepared to hold (and they seem unlikely to do so) that states are constitutionally required to provide funding for an eyewitness expert, some other mechanism must be employed.²¹⁰ The legal system must find a way to ensure that jurors in all criminal trials—not just those involving affluent defendants—are made aware of the factors that can affect the accuracy of identifications.²¹¹ Jury instructions provide such a mechanism.²¹²

²⁰⁵ See *id.*; *Jones*, 2010 WL 5475651, at *6 (explaining that “lessons from social science” may be best incorporated into the trial process through jury instructions); *Park*, *supra* note 195, at 306–07; see also *infra* notes 310–331 and accompanying text.

²⁰⁶ See Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Un corroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1515–16 (2008).

²⁰⁷ See, e.g., *Jackson v. Ylst*, 921 F.2d 882, 886 (9th Cir. 1990) (holding that the state was not required to appoint and pay for an expert to testify regarding the reliability of eyewitness testimony because cross-examination is sufficient to alert the jury to eyewitness reliability issues); *State v. Broom*, 533 N.E.2d 682, 691 (Ohio 1988) (ruling that the trial court’s refusal to appoint an eyewitness identification expert for an indigent defendant did not deny him due process where the defendant did not establish that denial of such expert assistance would result in an unfair trial).

²⁰⁸ See Thompson, *supra* note 206, at 1516 (citing Wells et al., *supra* note 75, at 603, 609).

²⁰⁹ See *id.*

²¹⁰ See, e.g., *Ylst*, 921 F.2d at 886; *Broom*, 533 N.E.2d at 691.

²¹¹ See Thompson, *supra* note 206, at 1515–16.

²¹² See *Telfaire*, 469 F.2d at 558–59; CAL. CRIMINAL JURY INSTRUCTIONS, *supra* note 183, no. 315.

C. Minimizing Prejudice

Jury instructions help to avoid any prejudice that may result from jurors giving inordinate weight to the testimony of an expert.²¹³ Courts have long expressed the concern that experts will “dazzle the jurors with [their] aura of expertise,” thus making jurors skeptical of any eyewitness.²¹⁴ Because of an expert’s credentials and stature in the scientific or psychological community, jurors may very well defer to the expert’s judgment, rather than independently evaluate the eyewitness evidence, using as a guide the information provided in the expert’s testimony.²¹⁵ Furthermore, courts have found that because of the nature of eyewitness identification research, experts are often unable to articulate the bases for their conclusions in a fashion understandable to lay jurors.²¹⁶ As a result, jurors are often required to accept the expert’s assertions as to the accuracy of his or her conclusions without having the relied-upon data.²¹⁷ In such a situation, where jurors can neither examine the data upon which the expert relied nor be given a satisfactorily clear explanation, they are likely to believe the expert and accord the testimony extra weight.²¹⁸ Additionally, although advocates of expert testimony contend that they are merely providing “social framework” testimony, jurors likely understand that the expert is being called by the defense and that the testimony is intended to push them toward doubting or disbelieving the witness.²¹⁹

²¹³ See *infra* notes 214–228 and accompanying text.

²¹⁴ See J.M. Doyle, *Legal Issues in Eyewitness Evidence*, in *PSYCHOLOGICAL METHODS IN CRIMINAL INVESTIGATION AND EVIDENCE* 125, 139 (David C. Raskin ed., 1989).

²¹⁵ See *United States v. Rodriguez-Berrios*, 573 F.3d 55, 72 (1st Cir. 2009). The district court in *Rodriguez-Berrios*, in refusing to admit eyewitness expert testimony stated, “[w]hile often invaluable to the search for truth, [eyewitness] experts’ testimony carries a great deal of inherent reliability, which jurors can often confuse for infallibility” because of the credentials and stature of the source. *Id.*

²¹⁶ *United States v. Nguyen*, 793 F. Supp. 497, 512 (D.N.J. 1992). In a pretrial hearing to determine the admissibility of his testimony, the defense-proffered expert testified as to the low correlation between confidence and accuracy. *Id.* He stated that there was a “.27 correlation” between confidence and accuracy in a study he conducted. *Id.* When asked to explain his findings, the expert drew a crude diagram, but could not clearly articulate how his conclusion was derived. *Id.* The court reasoned that if the proffered testimony was put to the jury, there was a strong likelihood that the jury would be misled or confused. *Id.* at 513.

²¹⁷ See *id.* at 512.

²¹⁸ See *Rodriguez-Berrios*, 573 F.3d at 72; *Nguyen*, 793 F. Supp. at 512.

²¹⁹ See Leippe, *supra* note 74, at 910.

Jury instructions, on the other hand, present far fewer dangers of prejudice.²²⁰ First, rather than being proffered by one party (the defense), the information is coming from the judge, who brings an aura of impartiality.²²¹ Thus, there is no need to evaluate the testimonial infirmities of the witness relaying the information.²²² As such, jurors can concentrate on applying the information they receive from the judge to the evidence they have heard (or will hear), including the eyewitness testimony.²²³ Jurors are not being asked to evaluate additional evidence.²²⁴

Additionally, jury instructions can be drafted so as to minimize confusion on the part of jurors by using precise and clear language.²²⁵ The instruction can concisely lay out both the scientific findings regarding psychological processes and, if necessary, the bases for those findings.²²⁶ It is important that any instruction be a model instruction that can be applied, with slight modifications depending on the facts of the case, in all cases involving eyewitnesses.²²⁷ Judges are generally insufficiently sophisticated in psychology to present cogent information about eyewitness perception and memory, and thus it should not be their responsibility to craft such an instruction.²²⁸

²²⁰ See *infra* notes 221–226 and accompanying text. It must be acknowledged that courts have expressed the concern that a judge may indeed be prejudicing the jury by singling out a piece of evidence and telling jurors to consider it with skepticism. See, e.g., *Conley v. State*, 607 S.W.2d 328, 330 (Ark. 1980) (holding it improper for a trial judge to give an instruction listing factors to be considered by the jury in evaluating the eyewitness's testimony because such instruction constituted an impermissible comment on the weight of the evidence). Similarly, commentators have warned that instructions to carefully scrutinize the eyewitness testimony might imply to some jurors that the judge wants them to discount the testimony. See Leippe, *supra* note 74, at 949. This danger can be minimized by using a carefully crafted jury instruction, designed to merely illuminate psychological processes and phenomena—not tell jurors how to apply them to the case. See *infra* notes 310–331 and accompanying text; *infra* app.

²²¹ See *Hall*, 469 F.3d at 1120 (Easterbrook, J., concurring).

²²² See *Park*, *supra* note 195, at 306–07; see also Laurence H. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958 (1974) (describing the four testimonial infirmities: perception, memory, ambiguity, and insincerity).

²²³ See *Estelle*, 463 U.S. at 934–35 (Blackmun, J., dissenting); *Telfaire*, 469 F.2d at 558–59.

²²⁴ See *Estelle*, 463 U.S. at 934–35 (Blackmun, J., dissenting); *Telfaire*, 469 F.2d at 558–59.

²²⁵ See *infra* notes 310–331 and accompanying text.

²²⁶ See *infra* notes 310–331 and accompanying text; *infra* app.

²²⁷ See *Telfaire*, 469 F.2d at 556; CAL. CRIMINAL JURY INSTRUCTIONS, *supra* note 183, at xxiii.

²²⁸ See Devenport et al., *supra* note 25, at 345; Leippe, *supra* note 74, at 949.

IV. SHORTCOMINGS OF COMMON EYEWITNESS JURY INSTRUCTIONS

Many of the instructions now given by judges are ineffective at apprising jurors of the factors that can negatively affect eyewitness accuracy.²²⁹ This Part discusses the various ways in which eyewitness identification jury instructions fail to accomplish their purpose.²³⁰ Section A argues that general credibility instructions and some model instructions aggravate error by focusing jurors' attention on factors that are poor indicia of reliability.²³¹ Section B contends that the content of most existing instructions is at best inadequate and quite often confusing.²³² Finally, Section C explains that eyewitness jury instructions are unlikely to be effective when given at the end of trial as part of a lengthy, legalistic list of instructions.²³³

A. Aggravation of Error: Reinforcing Erroneous Assumptions

Many general credibility instructions and even some model eyewitness instructions focus jurors' attentions on factors that are poor indicia of reliability.²³⁴ As a result, the instructions can aggravate error by reinforcing erroneous assumptions about eyewitnesses.²³⁵ A common general credibility instruction tells jurors to use their own knowledge and life experiences to evaluate a witness's testimony.²³⁶ In the context

²²⁹ See *infra* notes 234–262 and accompanying text.

²³⁰ See *infra* notes 234–262 and accompanying text.

²³¹ See *infra* notes 234–238 and accompanying text.

²³² See *infra* notes 239–252 and accompanying text.

²³³ See *infra* notes 253–262 and accompanying text.

²³⁴ See *Commonwealth v. Santoli*, 680 N.E.2d 1116, 1121 (Mass. 1997) (holding that language regarding witness confidence in a standard eyewitness instruction should be removed).

²³⁵ See *id.*; Wells et al., *supra* note 75, at 620 (stating that witness confidence is often the most important factor in a juror's evaluation of an eyewitness).

²³⁶ See, e.g., *State v. Warren*, 635 P.2d 1236, 1245 (Kan. 1981). The following is a typical credibility instruction, taken from *Warren*:

It is for you to determine the weight and credit to be given to the testimony of each witness. You have a right to use that knowledge and experience which you possess in common with men in general in considering the testimony of each witness. You also may take the following factors into consideration when weighing a witness's testimony: a) The witness's ability and opportunity to observe and know the things about which he had testified; b) The clarity and accuracy of the witness's memory; c) The witness's manner and conduct while testifying; d) Any interest the witness may have in the result of the trial; and e) The reasonableness of the witness's testimony when considered in light of all the evidence in the case; and f) Any bias, interest, prejudice, or motive the witness may have.

of an eyewitness, such an instruction does nothing to dispel the misconception that confidence is a good predictor of accuracy.²³⁷ Worse still, some courts that give eyewitness instructions explicitly state that confidence is a legitimate factor for the jury to consider in its assessment of the eyewitness.²³⁸

B. *The Content of Existing Instructions Is Inadequate and Confusing*

The most widely used jury instruction concerning eyewitness testimony is the *United States v. Telfaire* instruction, proposed by the U.S. Court of Appeals for the District of Columbia in 1972.²³⁹ The instruction suffers from several flaws.²⁴⁰ Most model instructions that have been developed are insufficient because, although they list some factors that contribute to misidentifications, they do not explain the impact those factors can have on the accuracy of an eyewitness's perception and memory.²⁴¹

Studies involving the *Telfaire* instruction have shown that, as a result, the instruction does not increase jurors' sensitivities to witnessing and identification conditions.²⁴² Without any background in science or psychology, most jurors are unable to assess the impact of various psy-

Id.

²³⁷ See *id.*

²³⁸ See *People v. Sullivan*, 59 Cal. Rptr. 3d 876, 908–09 (Ct. App. 2007); *State v. Uhls*, No. 102,771, 2011 WL 135021, at *8 (Kan. Ct. App. Jan. 7, 2011) (acknowledging the dangers of instructing jurors to consider an eyewitness's certainty but declining to rule that inclusion of a witness certainty instruction was reversible error). But see *Santoli*, 680 N.E.2d at 1121 (holding that the judge should not instruct the jury that they may take into account the certainty of an eyewitness because evidence suggests that there is no correlation between a witness's confidence and the accuracy of the identification). Courts that model their eyewitness instructions after the factors set forth by the U.S. Supreme Court for determining admissibility of identifications, one of which is witness certainty at the confrontation, make the same mistake, calling jurors' attention to a factor that is a poor indicator of reliability. See *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972); cf. *Warren*, 635 P.2d at 1244 (holding that if the five factors should be considered in determining the admissibility of the testimony, it would seem even more appropriate to require the jury to consider the same factors in weighing the credibility of the eyewitness identification testimony); *supra* note 114 (stating the five *Biggers* factors).

²³⁹ See *United States v. Telfaire*, 469 F.2d 552, 558–59 (D.C. Cir. 1972). Courts in many other jurisdictions have used the *Telfaire* instruction as a model, either adopting it exactly or modifying it slightly. See, e.g., *United States v. Greene*, 591 F.2d 471, 476–77 (8th Cir. 1979); *State v. Burke*, 448 A.2d 962, 966 (N.H. 1982) (suggesting that trial courts be guided by the *Telfaire* instruction).

²⁴⁰ See *infra* notes 242–249 and accompanying text.

²⁴¹ See *Telfaire*, 409 F.2d at 558–59.

²⁴² See Gabriella Ramirez et al., *Judges' Cautionary Instructions on Eyewitness Testimony*, 14 AM. J. FORENSIC PSYCHOL. 31, 45 (1996).

chological factors on the accuracy of the eyewitness.²⁴³ Chief Judge David L. Bazelon expressed a similar concern in his concurrence in *Telfaire*, proposing an additional cross-racial identification instruction that would not only instruct jurors that the accuracy of an identification may be affected if the witness and suspect are of different races, but would give jurors sufficient information regarding the way in which the presence of that factor can affect reliability.²⁴⁴ Such guidance is essential if jury instructions are to be effective.²⁴⁵

Additionally, although the *Telfaire* instruction attempts to alert jurors to some of the possible problems with perception, it does not purport to instruct them about important aspects of the memory process.²⁴⁶ The instruction tells jurors to consider the witness's opportunity to view the offender, including the length of time available, distance between the witness and the offender, and lighting conditions.²⁴⁷ It makes no mention of the psychological processes, such as unconscious transference and substitution of false memories, which can have equally significant effects on eyewitness accuracy.²⁴⁸ Moreover, the *Telfaire* instruction fails to alert jurors to the lack of any positive relationship between witness confidence and identification accuracy.²⁴⁹

Furthermore, studies indicate that jurors often find the content of existing instructions confusing and thus rely on their prior knowledge and beliefs anyway.²⁵⁰ This is especially the case if the instructions conflict with those beliefs, which they often do.²⁵¹ If jury instructions are ever to effectively educate jurors about the presence and impact of factors affecting eyewitness accuracy, they must be written in a far more clear and concise fashion.²⁵²

C. Timing

One of the primary reasons jury instructions are ineffective is that they are generally given at the end of trial, as part of a long list of legal

²⁴³ See *id.* at 33.

²⁴⁴ *Telfaire*, 469 F.2d at 560–61 (Bazelon, C.J., concurring).

²⁴⁵ See Ramirez et al., *supra* note 242, at 45.

²⁴⁶ See *Telfaire*, 469 F.2d at 558–59.

²⁴⁷ *Id.*

²⁴⁸ See *id.*

²⁴⁹ See *id.*

²⁵⁰ See Ramirez et al., *supra* note 242, at 57.

²⁵¹ See *id.*

²⁵² See *id.*; see also *infra* notes 310–331 and accompanying text; *infra* app.

instructions.²⁵³ Jurors currently receive little guidance as to how they should evaluate and interpret the evidence before that point.²⁵⁴ Instructions given days or weeks after the eyewitness testifies do little to dispel erroneous assumptions that jurors bring with them.²⁵⁵

Studies have shown that jurors usually form firm opinions about evidence (and the defendant's guilt) before the close of trial.²⁵⁶ This is especially the case where the trial involves an eyewitness.²⁵⁷ As evidence is presented, jurors begin to construct a story of what happened.²⁵⁸ Research suggests that at the close of trial, jurors attempt to match the features of their story to the verdict categories presented to them.²⁵⁹ Generally presented in narrative form itself, eyewitness testimony is often salient and dramatic.²⁶⁰ Not only is the testimony itself memorable, but it can work to color jurors' perceptions of the rest of the evidence.²⁶¹ Thus, failure to alert jurors to the fallibility of the eyewitness's testimony at the time of the testimony not only hampers jurors' ability to accurately evaluate the eyewitness testimony, but also potentially affects other evidence in the trial.²⁶²

V. JURY INSTRUCTIONS RECONSIDERED: PROPOSALS FOR CHANGES IN PRESENTATION AND CONTENT

Courts must change the content and mode of presentation of eyewitness identification jury instructions.²⁶³ The current practice of providing confusing and often misleading instructions at the end of trial

²⁵³ See Leippe, *supra* note 74, at 949; see also E. Barrett Prettyman, *Jury Instructions—First or Last?*, 14 A.B.A. J. 1066, 1066 (1960) (“What manner of mind can go back over a stream of conflicting statements of alleged facts . . . and retrospectively fit all these recollections into a pattern of evaluation and judgment given him for the first time after the events? The human mind cannot do so.”).

²⁵⁴ See, e.g., *United States v. Burrous*, 934 F. Supp. 525, 530 (E.D.N.Y. 1996) (declining to admit eyewitness expert testimony but providing an end-of-trial jury instruction).

²⁵⁵ See *supra* notes 119–123 and accompanying text. *But see* Ramirez et al., *supra* note 242, at 45, 46 (concluding that presenting instructions at the end of trial reduced the jurors' sensitivity to the eyewitness evidence and led them to vote not guilty regardless of the nature of the eyewitness, because jurors concluded that they must have missed something about the eyewitness and became skeptical).

²⁵⁶ See Ramirez et al., *supra* note 242, at 36 (citing HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* (1987)).

²⁵⁷ See Leippe, *supra* note 74, at 931; Ramirez et al., *supra* note 242, at 36.

²⁵⁸ See Leippe, *supra* note 74, at 931.

²⁵⁹ See *id.*

²⁶⁰ See *id.* at 930.

²⁶¹ See *id.* at 931.

²⁶² See *id.*

²⁶³ See *infra* notes 267–331 and accompanying text.

has been ineffective.²⁶⁴ Section A of this Part argues that the instructions should be given before evidence is presented and Section B proposes a new model instruction to be given at the outset of criminal trials that involve eyewitness identifications.²⁶⁵ The Appendix to this Note includes the full text of the proposed instruction.²⁶⁶

A. *Timing: Eyewitness Instructions Before the Presentation of Evidence*

Eyewitness instructions should be provided before the eyewitness ever takes the stand.²⁶⁷ Given at that point, the instructions would alert jurors to the factors they should consider in evaluating the eyewitness's testimony.²⁶⁸ The instructions could further help to dispel jurors' erroneous assumptions in advance.²⁶⁹ This Section discusses the benefits of such a charge and the legal basis for providing a preliminary or preemptive eyewitness jury instruction.²⁷⁰

1. Rationale and Empirical Basis

Unless jurors are told about the factors that can affect eyewitness accuracy before hearing the testimony, they will have little guidance as to how to evaluate the testimony.²⁷¹ Thus, they are likely to rely on preconceived notions and biases, which might interfere with an objective analysis of the evidence.²⁷² Although there are mixed results on the effects of end-of-trial jury instructions on actual conviction rates, it is clear that such instructions do not increase juror sensitivity to eyewitness evidence.²⁷³

In contrast, studies suggest that instructions given before the presentation of evidence are more effective at alerting jurors to certain fac-

²⁶⁴ See *supra* notes 229–262 and accompanying text.

²⁶⁵ See *infra* notes 267–331 and accompanying text.

²⁶⁶ See *infra* app.

²⁶⁷ See *United States v. Ruppell*, 666 F.2d 261, 274 (5th Cir. 1982); see also *Prettyman*, *supra* note 253, at 1066 (noting the flaws in a system where instructions are given only at the end of trial).

²⁶⁸ See *Amiram Elwork et al., Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 *LAW & HUM. BEHAV.* 163, 177 (1977); *Ramirez et al., supra* note 242, at 45.

²⁶⁹ See *Leippe, supra* note 74, at 925.

²⁷⁰ See *infra* notes 271–309 and accompanying text.

²⁷¹ See B. Michael Dann & George Logan, *Jury Reform: The Arizona Experience*, 79 *JUDICATURE* 280, 281 (1996) (describing the recommendation of a jury reform committee that courts provide preliminary instructions); Nancy Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 *NOTRE DAME L. REV.* 449, 498 (2006).

²⁷² See *Heuer & Penrod, supra* note 199, at 413–14.

²⁷³ See *Ramirez et al., supra* note 242, at 45.

tors that can affect eyewitness perception and memory.²⁷⁴ There appear to be four advantages of pretrial instructions.²⁷⁵ First, jurors given preliminary instructions are more likely than jurors instructed at the end of trial to focus on relevant evidence and remember it in their deliberations.²⁷⁶ The former group are more likely to rely on their recollection of the quality of the eyewitness evidence and to discriminate between good and poor witnessing conditions.²⁷⁷ Second, preliminary instructions provide jurors with a framework within which they can organize the evidence.²⁷⁸ Research has demonstrated that recall for information is improved when it is part of some overall organization or scheme.²⁷⁹ Third, preliminary instructions can help jurors address questions of credibility and inference as they arise, rather than retrospectively.²⁸⁰ Finally, when revised eyewitness instructions are provided only before the evidence, jurors' sensitivity to four crucial witnessing factors— lineup fairness, cross-racial identification, stress, and eyewitness confidence—is significantly improved.²⁸¹

2. Legal Basis

Although it has long been the practice for the judge to instruct jurors on procedural issues, requirements of proof, and relevant substantive law at the end of trial,²⁸² the wisdom of this practice has been repeatedly questioned.²⁸³ The rules of evidence and of criminal proce-

²⁷⁴ See Elwork et al., *supra* note 268, at 177; Saul Kassin & Lawrence Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instructions and Mock Juror Verdicts*, 37 J. PERSONALITY & SOC. PSYCHOL. 1877, 1884 (1979); Ramirez et al., *supra* note 242, at 45.

²⁷⁵ See *infra* notes 276–281 and accompanying text.

²⁷⁶ See Heuer & Penrod, *supra* note 199, at 413.

²⁷⁷ See Ramirez et al., *supra* note 242, at 46. Gabriella Ramirez and her colleagues also found, however, that the discrimination, at least with the *Telfaire* instructions, was not better than that observed without any cautionary instructions. See *id.*

²⁷⁸ See Heuer & Penrod, *supra* note 199, at 413.

²⁷⁹ See *id.*

²⁸⁰ See William Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119, 130.

²⁸¹ See Ramirez et al., *supra* note 242, at 58. If instructions are presented before the evidence, they should not then be repeated fully after the evidence. See *id.* at 45. Research suggests that such an approach leads jurors to vote guilty regardless of the nature of the eyewitness evidence because it overemphasizes the role of the eyewitness, who jurors tend to believe even under poor witnessing conditions. See *id.* at 45, 46. *But cf.* Margery Malkin Koosed, *Reforming Eyewitness Identification Law and Practices to Protect the Innocent*, 42 CREIGHTON L. REV. 595, 621 (2009) (proposing eyewitness jury instructions at the opening of trial, before and after an eyewitness testifies, and at the close of trial).

²⁸² See, e.g., *Dodson v. United States*, 23 F.2d 401, 403 (4th Cir. 1928).

²⁸³ See Prettyman, *supra* note 253, at 1066; Ramirez et al., *supra* note 242, at 36–37.

dures do not prohibit substantive preliminary instructions.²⁸⁴ Some courts have recognized the benefits of pretrial instructions and several states have revised their rules of civil and criminal procedure to make explicit provisions for preliminary instructions.²⁸⁵ Furthermore, research and practice do not support the contention that pretrial instructions would be impractical or otherwise place excessive demands on the court.²⁸⁶

Pretrial instruction is permitted by the Federal Rules of Criminal Procedure.²⁸⁷ Under Rule 30(c), a judge may instruct the jury before or after the arguments are completed or both.²⁸⁸ Many states have similar provisions, as many states' rules of procedure are modeled after the federal rules.²⁸⁹ Additionally, the American Bar Association guidelines suggest that judges give preliminary instructions explaining the jury's role, trial procedures, the nature of evidence and its evaluation, the issues to be addressed, and basic relevant legal principles.²⁹⁰ The guidelines also call for judges to instruct jurors when it is "necessary to the jurors' proper understanding of the proceedings."²⁹¹

Courts have recognized the benefits of pretrial instructions, noting that it is the better practice to instruct the jury on the fundamentals of a criminal trial before taking any evidence.²⁹² Those courts explain that once the jury is sworn and the trial has begun, ideally, the judge should explain to the jurors their function as arbiters of the facts, the presumption of innocence, the burden of reasonable doubt, and other matters that are necessary to guide them through the trial.²⁹³ Courts have further noted that pretrial instruction gives jurors "some advance understanding of the applicable principles of law so that they will not receive the evidence and arguments in a vacuum."²⁹⁴ A preliminary in-

²⁸⁴ See FED. R. CRIM. P. 30(a)–(c); see, e.g., ARIZ. R. CRIM. P. 18.6(c) (providing an example of a state approach that provides for preliminary instructions to prepare the jury for trial and instruct them on basic legal principles).

²⁸⁵ See *infra* notes 300–303 and accompanying text.

²⁸⁶ See *infra* notes 305–307 and accompanying text.

²⁸⁷ See FED. R. CRIM. P. 30(a)–(c).

²⁸⁸ See *id.* 30(c).

²⁸⁹ See Wayne R. LaFare et al., *State Reliance on the Federal Model*, 1 CRIM. PROC. § 1.3(e) (3d ed. Nov. 2009), available at Westlaw CRIMPROC (stating that roughly half of the states have court rules of criminal procedure that borrow heavily from the Federal Rules).

²⁹⁰ See AM. JURY PROJECT, AM. BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS princ. 6.C.1 (2005), available at <http://www.abanet.org/juryprojectstandards/principles.pdf>.

²⁹¹ See *id.* princ. 13.D.2.

²⁹² See *Ruppell*, 666 F.2d at 274.

²⁹³ See *id.*

²⁹⁴ *People v. Valenzuela*, 142 Cal. Rptr. 655 (Ct. App. 1977).

struction on the factors that affect eyewitness accuracy would provide similar guidance to jurors.²⁹⁵

Furthermore, courts frequently instruct jurors on special precautions they should take in evaluating the credibility of accomplices, informants, alibi witnesses, and immunized witnesses, in anticipation of those witnesses' testimony.²⁹⁶ Cautionary instructions are permitted on certain types of testimony due to the specific dangers they present to the truth-seeking process.²⁹⁷ Eyewitness testimony—because of the pervasive misconceptions of jurors—presents similar risks.²⁹⁸ Thus, eyewitness instructions should be given in advance of the testimony to provide jurors with the necessary background information to effectively evaluate the testimony of the eyewitness.²⁹⁹

Recognizing the wisdom of including some instructions at the beginning of trial, several states have made explicit provisions in their rules of civil and criminal procedure for preliminary instructions.³⁰⁰ In the 1990s, Arizona reformed its rules of procedure, urging judges to provide preliminary instructions about the relevant substantive law or standards of proof, as well as other matters that might be relevant in the case.³⁰¹ Arizona implemented the new rule with the goal of assisting jurors "in organizing and understanding the evidence as they hear it" and improving their recall.³⁰² Similarly, under Kansas law, a judge may, after opening statements, instruct the jury "on such matters as in the judge's opinion will assist the jury in considering the evidence as it is presented."³⁰³ Eyewitness instructions given at the outset of trial would help jurors to better organize and understand the eyewitness' testimony and the witnessing conditions and psychological factors that could impact the witness's testimony and identification of the defendant.³⁰⁴

A frequent criticism of pretrial instructions is that they would be impractical because the judge does not know what evidence will be pre-

²⁹⁵ *See id.*

²⁹⁶ *See, e.g.,* United States v. Goines, 988 F.2d 750, 733 (7th Cir. 1993) (describing trial court's preliminary instruction, in which it told jurors to consider the testimony of informants with "great care"); State v. Piaskowski, 587 N.W.2d 213 (Wis. Ct. App. 1998) (including an accomplice credibility instruction in preliminary instructions to jury).

²⁹⁷ *See* People v. Whalen, 451 N.E.2d 212, 214–15 (N.Y. 1983).

²⁹⁸ *See supra* notes 119–123 and accompanying text.

²⁹⁹ *See Whalen*, 451 N.E.2d at 215.

³⁰⁰ *See, e.g.,* ARIZ. R. CIV. P. 51(a); ARIZ. R. CRIM. P. 18.6(c).

³⁰¹ *See* Dann & Logan, *supra* note 271, at 281.

³⁰² *See id.*

³⁰³ *See* KAN. R. CIV. P. 60-251(a).

³⁰⁴ *See* Heuer & Penrod, *supra* note 199, at 413.

sented at trial.³⁰⁵ Research, however, does not support that contention.³⁰⁶ In fact, a survey of judges who provided jury instructions before actual trials found that those judges disagreed with the proposition, finding the practice neither impractical nor overly cumbersome.³⁰⁷ Furthermore, jurisdictions that encourage preliminary instructions recognize the need for flexibility.³⁰⁸ Many commentators echo that sentiment and suggest that jurors be told that any instructions given prior to the presentation of evidence are subject to change depending on the developments at trial.³⁰⁹

B. A “Plain Language” Eyewitness Identification Instruction

Merely changing the point during trial at which eyewitness identification jury instructions are given is insufficient.³¹⁰ A new model instruction should be developed that would make the scientific principles meaningful and understandable to lay people, but still accurately convey the information.³¹¹ This Section proposes a new model eyewitness identification jury instruction.³¹²

The proposed eyewitness identification instruction was crafted with four basic goals in mind.³¹³ First, eyewitness instructions need to be simplified.³¹⁴ By using plain language, the proposed instruction attempts to convey complex scientific principles using relatively common terms.³¹⁵

³⁰⁵ See Ramirez et al., *supra* note 242, at 37.

³⁰⁶ See Heuer & Penrod, *supra* note 199, at 426.

³⁰⁷ See *id.*

³⁰⁸ See, e.g., PA. R. CRIM. P. 647(D). The Pennsylvania rule states that a

judge may give instructions at any time during the trial as the judge deems necessary and appropriate . . . for instance, if a specific defense is raised by evidence presented during trial, judge may want to instruct on elements of defense immediately after it is presented to enable jury to properly evaluate the evidence.

Id.; see also Valenzuela, 142 Cal. Rptr. at 655 (noting that judges must be aware of the fact that they may have to rearticulate correct rules of law at the end of trial if it appears that attorneys have “befuddled” the jury).

³⁰⁹ See Marder, *supra* note 271, at 498.

³¹⁰ See *supra* notes 267–309 and accompanying text; *infra* notes 311–331 and accompanying text.

³¹¹ See *infra* notes 313–331 and accompanying text; *infra* app.

³¹² See *infra* notes 313–331 and accompanying text; *infra* app.

³¹³ See *infra* notes 314–331 and accompanying text.

³¹⁴ See Ramirez et al., *supra* note 242, at 44 (finding that subject-jurors generally found the *Telfaire* instructions (when given with other jury instructions) to be “too long, boring, repetitious, confusing, and hard to remember”).

³¹⁵ See *infra* app.

It dispenses with psychological and legal jargon, wherever possible, and uses words understandable to lay jurors.³¹⁶ It also inserts concrete examples where helpful to explain certain psychological phenomena.³¹⁷

Second, it is important to alert jurors to the factors that affect eyewitness accuracy, but to do so in a balanced way.³¹⁸ Failing to present the information in a neutral way would be highly prejudicial, likely causing jurors to view the eyewitness with extreme skepticism.³¹⁹ The proposed instruction attempts to strike a balance, generally stating that the factors described “can” or “may” have a certain effect, not that they “do” or “did.”³²⁰ Additionally, the instruction discusses factors that can increase accuracy as well as those that can decrease accuracy.³²¹

The proposed instruction would likely be criticized by some as defense-biased and rejected for requiring a judge to provide information likely to help one side.³²² Admittedly, the instruction lists numerous factors that can contribute to eyewitness inaccuracy, and if one of those is present in the case, the jury may be more likely to acquit.³²³ The point of providing the instruction, however, is not to increase the number of “not guilty” verdicts; it is to increase the number of correct verdicts.³²⁴ Thus, the proposed instruction also lays out factors that can increase reliability and emphasizes that eyewitness evidence can be extraordinarily valuable.³²⁵ It calls attention to circumstances that can increase a witness’s ability to perceive, including distance and lighting, and states that, although many people have decreased capacities to observe while under stress, others are made more alert.³²⁶ Additionally, although the instruction explicitly mentions that eyewitness confidence is not necessarily indicative of accuracy, it also reminds jurors that they

³¹⁶ See *infra* app.; see also AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 176–77 (1982) (suggesting that drafters of jury instructions should try to use common words instead of legal jargon); Laurence Severance et al., *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 233 (1984) (stating that simplified language and organized presentation of concepts can help jurors).

³¹⁷ See *infra* app.; see also ELWORK ET AL., *supra* note 316, at 177–78 (proposing that jury instructions should use concrete words that are easily visualized and, if abstract words must be used, they should be followed with concrete illustrations).

³¹⁸ See Ramirez et al., *supra* note 242, at 56.

³¹⁹ See *id.* at 56, 60–62.

³²⁰ See *infra* app.

³²¹ See *infra* app.

³²² See *infra* app.

³²³ See *infra* app.

³²⁴ See *infra* app.

³²⁵ See *infra* app.

³²⁶ See *infra* app.

can accept an identification even if the witness is not entirely confident.³²⁷

Third, the instruction attempts to refute common erroneous assumptions.³²⁸ It directly addresses some of the most misunderstood concepts concerning eyewitness identifications, including eyewitness confidence, the effect of stress and a weapon, and cross-racial identification.³²⁹

Finally, the instruction has been written in such a way as to allow a judge to delete and add supplemental instructions without affecting the rest of the instructions.³³⁰ Several sections of the instruction will only be relevant in cases presenting certain circumstances.³³¹

CONCLUSION

The frequent inaccuracy of eyewitnesses presents a significant problem for the administration of justice. Courts must employ some mechanism to educate jurors about the psychological and systematic factors that impact eyewitness accuracy. Although admitting expert psychological testimony is certainly better than providing no guidance at all, it is not without significant weaknesses and can in fact present new problems. Jury instructions, on the other hand, are without many of these pitfalls and thus provide a better alternative. Problematically, however, many of the instructions now given by courts are ineffective at apprising jurors of the factors that can affect eyewitness accuracy. Thus, the content and presentation of eyewitness instructions must be changed in such a way as to increase their effectiveness. The judge should instruct jurors on the factors that affect an eyewitness's ability to perceive and remember at the beginning of trial, before evidence is presented. But merely moving the current instructions to the beginning of trial is insufficient—psychological research should also be included in language understandable to lay jurors. If courts give the pro-

³²⁷ See *infra* app.

³²⁸ See *infra* app.; see also Ramirez et al., *supra* note 242, at 57–58 (discussing a study that showed instruction on the legal definition of a crime was most effective when a supplementary instruction provided a “feature-by-feature attack on jurors’ mistaken prior beliefs”).

³²⁹ See *infra* app.

³³⁰ See *infra* app.; see also ELWORK ET AL., *supra* note 316, at 167 (stating that jury instructions should be written in such a way as to allow judges to delete and add instructions without affecting the meaning or effectiveness of the rest of the instructions); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court’s Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1, 20–21 (2009) (emphasizing the importance of tailoring an eyewitness instruction to the facts of the case).

³³¹ See *infra* app.

posed model instruction before eyewitness evidence is presented, jurors will be better able to evaluate the testimony they will hear.

CHRISTIAN SHEEHAN

APPENDIX³³²

One of the issues in this case is the identification of [defendant's name] as the person who committed the crime. It is the Assistant District Attorney's [or Assistant U.S. Attorney's] job to prove to you that [defendant's name] is the one who committed the crime. If you are not convinced, beyond a reasonable doubt that [defendant's name] committed the crime, you must find [him or her] not guilty.

You will hear testimony from someone who says [he or she] witnessed the event. A witness's testimony is a reflection of [his or her] perception and memory. It is not necessarily an expression of fact. As a result, the witness's perception may or may not be accurate.

I am going to ask you to pay close attention to the eyewitness's testimony. Shortly, I will tell you about a number of factors you should think about when considering the testimony. This is very important because some of this information may contradict your current beliefs. Keep in mind that eyewitness testimony can be extraordinarily valuable evidence and I am in no way telling you whether to believe or disbelieve the witness's testimony. I am just giving you some background information to help you in your assessment. Ultimately, you, and you alone, must decide whether the witness has convinced you that the person [he or she] saw was [defendant's name]. It is not essential that the witness [himself or herself] be one-hundred percent convinced about the accuracy of [his or her] identification, as long as you are satisfied that the Assistant District Attorney [or Assistant U.S. Attorney] has met [his or her] burden of proof. On the other hand, even if the witness seems positive of [his or her] identification, this does not relieve you of your duty to carefully consider [his or her] testimony. This is especially true if you find that it is the only evidence that directly supports the claim that [defendant's name] committed the crime.

There are two types of factors you should consider: factors at the time of the crime and factors that come into play after the crime.

I will first talk to you about factors that may have an impact on the witness's perception at the time of the crime. You should ask yourself: Did the witness have an opportunity to observe the person who committed the crime? Think about the length of time the witness had for observation and how close the witness was to the person [he or she] claims was [defendant's name]. You may also consider the quality of

³³² This Appendix sets forth the full text of the instruction proposed in Part V.B of this Note. The bracketed text represents case-specific instructions.

lighting in the area. A witness is more likely to make an accurate identification if [he or she] has a good opportunity to view the events.

You may also consider whether the witness was under stress. High levels of stress sometimes make identifying a person more difficult. If a witness is afraid or distracted, [his or her] capacity to observe and remember may be reduced, although this is not always the case; sometimes, a person becomes more alert and perceptive under stress. On the other hand, if the witness did not think the event was important at the time, [he or she] might not have been paying close attention.

[The Assistant District Attorney [or Assistant U.S. Attorney] alleges that a weapon was used by [defendant's name]. When a weapon is present, witnesses sometimes concentrate on the weapon instead of the person holding the weapon. This might make them less likely to remember the person's face].

You may also consider whether the witness knows [defendant's name] or whether [he or she] saw [defendant's name] before. Sometimes, prior exposure helps an eyewitness to recognize a person. But sometimes, it leads to a mistaken identification when a witness confuses people seen at different times. For example, if a witness got off of a bus before witnessing the crime, [he or she] might mistakenly remember another passenger on the bus when asked to identify the perpetrator of the crime. It is for you to decide whether prior contact between the witness and [defendant's name], if there was any, makes the identification in this case more credible, less credible, or had no effect.

I am now going to talk to you about factors that can affect an eyewitness's memory after the crime. You should consider: How much time passed between the crime and the witness's identification? Memory loss increases over time. Therefore, the sooner the identification is made, the more likely it is that the witness will remember the person accurately.

[You will hear that the witness in this case identified [defendant's name] at a police lineup. Pay close attention to testimony about the circumstances of the lineup. You must make sure that the witness made the identification on [his or her] own and was not influenced by outside factors, such as hints by the police. You may consider whether [defendant's name] was picked out of a lineup made up of similar-looking individuals. If [he or she] was, the identification may be more reliable than if [he or she] had stood out from others in the lineup].

You may also consider whether the initial identification was conducted fairly. If the witness felt that [he or she] was forced to choose someone, the identification might be less reliable. Also think about whether the witness might have been influenced by what others told

[him or her] or other information—such as reading about the crime in a newspaper—after the crime.

You should also consider whether the witness was unable to make an identification on a prior occasion or if [he or she] identified another person before [defendant's name].

People sometimes have trouble identifying members of another race. This is something you may want to think about when listening to the witness's testimony.

Finally, although you may always consider a witness's demeanor, keep in mind that the confidence displayed by a witness does not necessarily mean that [he or she] is accurate. A witness tends to become more confident in [his or her] identification over time, regardless of its initial accuracy. It is possible for a witness to be confident and still be wrong. On the other hand, a witness may be unsure and still be correct in [his or her] identification.

Keep in mind that the factors I have just outlined for you are merely guidelines for you to use in evaluating the eyewitness. You are the sole judges of the evidence you will hear.