

EYEWITNESS IDENTIFICATION TESTIMONY AND THE NEED FOR CAUTIONARY JURY INSTRUCTIONS IN CRIMINAL CASES

*[I]nnocent people will be imprisoned, and many of the guilty will remain free.*¹

In recent decades psychologists have demonstrated that eyewitness identification testimony is an inherently unreliable type of evidence.² Its unreliability is due to normal deficiencies in the human memory process.³ Because eyewitness identification testimony is often the sole or major evidence of guilt in criminal cases,⁴ the danger of misidentification inherent in such testimony poses a serious threat to the American ideal that no innocent person shall be convicted.⁵ When an

1. Jonakait, *Reliable Identification: Could the Supreme Court Tell in Manson v. Brathwaite?*, 52 U. COLO. L. REV. 511, 528 (1981). This is the dual result that occurs when an innocent defendant is convicted on the basis of a mistaken eyewitness identification. See *infra* note 6 and accompanying text.

2. See *infra* notes 24-36 and accompanying text.

3. See *infra* notes 26-34 and accompanying text.

4. See *infra* notes 15-23 and accompanying text.

5. See *United States v. Greer*, 538 F.2d 437 (D.C. Cir. 1976). In *Greer*, Chief Judge Bazelon stated:

It is a cardinal principal of Anglo-American jurisprudence that, in Blackstone's immortal words, better ten guilty persons should go free than one innocent person be convicted. Implicit in this principle is a recognition that in any system some innocent persons unavoidably will be convicted. But no one wants to see an innocent person suffer, and all are anguished when confronted with an unjust verdict of guilty.

Id. at 441 (citing 4 W. BLACKSTONE, COMMENTARIES * 358). See also *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("a fundamental value determination of our society [is] that it is far worse to convict an innocent man than to let a guilty man go free"); *United States v. Hodges*, 515 F.2d 650, 653 (7th Cir. 1975) (a "goal" of the courts is to guard against the "injustice" of convicting an innocent man); McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 238 (1970) (an American "ideal [is] that no innocent man shall be punished").

Several manifestations of this ideal exist in the American system of criminal justice. One such manifestation is the burden of proof placed on the Government. See *United States v. Barber*, 442 F.2d 517 (3d Cir. 1971), *cert. denied*, 404 U.S. 958 (1972). In *Barber*, the court stated:

Balancing the liberal admissibility of identification evidence is the commensurately heavy burden placed upon the prosecution of proving the identity of the criminal actor by proof beyond a reasonable doubt. Where identity is placed in issue, the trial court is required to charge the jury on this high degree of proof.

Id. at 527 n.16 (citations omitted). See also *In re Winship*, 397 U.S. 358, 364 (1970). In *Winship*, the Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof [of guilt] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*

Other manifestations include the presumption of innocence and the adversary system itself. In

innocent individual is mistakenly convicted two injustices occur—the individual is wrongfully deprived of his freedom, or even life, and society's interests remain unprotected as the true criminal remains free.⁶

Psychologists and legal commentators advocate various reforms to preserve this American ideal and to prevent these evils, but none has received widespread acceptance by the courts.⁷ One suggested reform requires that juries sitting in criminal cases in which eyewitness identification testimony plays an important role be given special cautionary instructions regarding the danger of misidentification and the factors that they should consider in assessing the reliability of eyewitness testimony.⁸ This reform is the focus of this Note.

Commentators have given little attention to the possibility of providing special cautionary jury instructions to protect a defendant from the risks of misidentification and wrongful conviction.⁹ During the past

United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), the court stated that the presumption of innocence and the adversary system in the Anglo-American system of criminal justice are "safeguards which dilute the danger of conviction of the innocent, a problem that concerns every civilized system of justice." *Id.* at 554. See also Taylor v. Kentucky, 436 U.S. 478, 483 (1978); Estelle v. Williams, 425 U.S. 501, 503 (1976); Coffin v. United States, 156 U.S. 432, 453 (1895).

6. See Manson v. Brathwaite, 432 U.S. 98 (1977) (Marshall, J., dissenting). Justice Marshall stated:

[I]f the police and public erroneously conclude, on the basis of an unnecessarily suggestive confrontation, that the right man has been caught and convicted, the real out-law must still remain at large. Law enforcement has failed in its primary function and has left society unprotected from the depredations of an active criminal.

Id. at 127. See also Brigham, *The Accuracy of Eyewitness Evidence: How Do Attorneys See It?*, 55 FLA. B.J. 714, 714 (1981); Jonakait, *supra* note 1, at 511 n.2; Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 969 n.2 (1977).

7. Generally the only reforms available, other than special cautionary jury instructions, are complete exclusion of eyewitness identification testimony, abolition of the one-witness rule, and introduction of expert psychological testimony on eyewitness identifications. See *infra* notes 61-66 and accompanying text.

8. For an example of the kind of cautionary instructions under consideration herein, see *infra* note 94.

9. See Woocher, *supra* note 6, at 1005 n.170 ("To date, few published studies have addressed the efficacy of jury instructions."). Most commentators who have addressed the issue have done so briefly and in the context of advocating the admission of expert psychological testimony on eyewitness identifications. See, e.g., E. LOFTUS, EYEWITNESS TESTIMONY (1979); Cunningham & Tyrrell, *Eyewitness Credibility: Adjusting the Sights of the Judiciary*, 37 ALA. LAW. 563 (1976); Loftus, *Eyewitness Testimony: Psychological Research and Legal Thought*, in M. TONRY & N. MORRIS, CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH (1981) [hereinafter cited as *Eyewitness Testimony*]; Loftus, *The Eyewitness on Trial*, 16 TRIAL 30 (Oct. 1980); Starkman, *The Use of Eyewitness Identification Evidence in Criminal Trials*, 21 CRIM. L.Q. 361 (1978-79); Woocher, *supra* note 6.

decade, however, several courts have opted for this reform.¹⁰ A few jurisdictions have even held that it is reversible error for a trial court to refuse to give special cautionary instructions on eyewitness identifications to the jury.¹¹ Although one commentator characterized this development as a "growing national trend,"¹² this characterization is questionable considering that a majority of jurisdictions still refuse to mandate or even allow¹³ such instructions.¹⁴

10. See, e.g., *United States v. Greene*, 591 F.2d 471 (8th Cir. 1979); *United States v. Hodges*, 515 F.2d 650 (7th Cir. 1975); *United States v. Holley*, 502 F.2d 273 (4th Cir. 1974); *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972); *United States v. Barber*, 442 F.2d 517 (3d Cir. 1971), cert. denied, 404 U.S. 958 (1972); *State v. Warren*, 230 Kan. 385, 635 P.2d 1236 (1981); *Commonwealth v. Bowden*, 379 Mass. 472, 399 N.E.2d 482 (1980); *State v. Payne*, 280 S.E.2d 72 (W. Va. 1981).

11. See, e.g., *United States v. Greene*, 591 F.2d 471 (8th Cir. 1979); *United States v. Hodges*, 515 F.2d 650 (7th Cir. 1975); *United States v. Holley*, 502 F.2d 273 (4th Cir. 1974); *Brooks v. State*, 380 So. 2d 1012 (Ala. Crim. App. 1980); *People v. Guzman*, 47 Cal. App. 3d 380, 121 Cal. Rptr. 69 (1975); *Freeman v. State*, 371 So. 2d 114 (Fla. Dist. Ct. App. 1978), vacated, 380 So. 2d 1288 (Fla. 1980); *State v. Warren*, 230 Kan. 385, 635 P.2d 1236 (1981); *Commonwealth v. Bowden*, 379 Mass. 472, 399 N.E.2d 482 (1980); *Commonwealth v. Rodriguez*, 378 Mass. 296, 391 N.E.2d 889 (1979); *State v. Payne*, 280 S.E.2d 72 (W. Va. 1981).

12. Burke, *Eyewitness Testimony: How Reliable? (Instructions to Jurors Get Tougher)*, NAT'L L.J., Nov. 30, 1981, at 12, col. 1.

13. There is a significant distinction between the terms "mandate" and "allow" in this context. "Mandate" refers to cases in which an appellate court holds a trial court's failure or refusal to give special cautionary instructions on eyewitnesses to be reversible error. Most appellate courts, however, hold that use of such instructions is within the discretion of the trial court. See, e.g., *United States v. Field*, 625 F.2d 862 (9th Cir. 1980); *United States v. Montelbano*, 605 F.2d 56 (2d Cir. 1979); *United States v. Scott*, 578 F.2d 1186 (6th Cir.), cert. denied, 439 U.S. 870 (1978); *United States v. Kavanagh*, 572 F.2d 9 (1st Cir. 1978); *United States v. Sambrano*, 505 F.2d 284 (9th Cir. 1974); *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); *United States v. Evans*, 484 F.2d 1178 (2d Cir. 1973); *Smith v. United States*, 343 A.2d 40 (D.C. 1975); *People v. Hurley*, 95 Cal. App. 3d 899, 157 Cal. Rptr. 364 (1979); *People v. Reynolds*, 38 Colo. App. 260, 559 P.2d 714 (1976); *State v. Thomas*, 541 S.W.2d 775 (Mo. Ct. App. 1976); *Sparks v. State*, 96 Nev. 26, 604 P.2d 802 (1980); *State v. Williamson*, 84 Wis. 2d 370, 267 N.W.2d 337 (1978), rev'd on other grounds sub nom. *Manson v. State*, 101 Wis. 2d 413, 304 N.W.2d 729 (1981).

"Allow," on the other hand, refers to situations in which an appellate court holds that it is not only proper for a trial judge to fail or refuse to give special cautionary instructions on eyewitnesses, but that use of such instructions would be improper. Most appellate courts that refuse to allow the giving of cautionary instructions hold that they constitute improper comment on evidence. See, e.g., *State v. Valencia*, 118 Ariz. 136, 575 P.2d 335 (Ct. App. 1977); *Conley v. State*, 270 Ark. 886, 607 S.W.2d 328 (1980); *State v. Classen*, 31 Or. App. 683, 571 P.2d 527 (1977), rev'd on other grounds, 285 Or. 221, 590 P.2d 1198 (1979); *State v. Robinson*, 274 S.C. 198, 262 S.E.2d 729 (1980). For a discussion of prohibition of judicial comment on evidence, see *infra* notes 248-69 and accompanying text.

14. The conflict among the jurisdictions is particularly troublesome considering that the inherent unreliability of eyewitness identification testimony is an inevitable result of human nature—no one is immune from the normal limitations of his mnemonic capacities. See *infra* notes 24-36 and accompanying text. Hence, while eyewitness identification testimony is not more inher-

This Note divides into three parts the examination of special cautionary jury instructions as a safeguard against conviction of innocent individuals. Part I will briefly survey the deficiencies of eyewitness identification testimony and the steps taken by the United States Supreme Court to minimize these deficiencies. In addition, Part I will consider alternative reforms. Part II will identify the various positions on giving special cautionary instructions, and the rationales behind these positions, through an examination of both state and federal caselaw. Finally, Part III will evaluate these rationales and determine whether courts should mandate the giving of special cautionary jury instructions in situations involving eyewitness identification testimony. Specifically, this Note will consider (1) whether there is a need for special cautionary instructions on eyewitness identification testimony; (2) whether giving special cautionary jury instructions is the optimal approach in comparison with other possibilities; (3) whether such instructions can effectively protect a defendant from the risks of misidentification and wrongful conviction; and (4) whether prohibitions against comment on evidence are an insurmountable obstacle to this alternative. The Note concludes that this precautionary measure should become a national trend.

I. BACKGROUND

Eyewitness identification testimony plays a crucial role in the determination of identity¹⁵ and the concomitant determination of guilt.¹⁶ In most violent crimes, such as assault, rape, and robbery, victims or bystanders usually have an opportunity to see the individual committing the crime.¹⁷ Without eyewitnesses' testimony about their out-of-court

ently unreliable in one jurisdiction than in another, criminal defendants receive less protection against the risks of misidentification in some jurisdictions, *see supra* note 13 and accompanying text, than in others, *see supra* notes 10 & 11 and accompanying text. The Supreme Court has yet to resolve this conflict.

15. "Identity" was defined by Professor Wigmore as: "the quality of *sameness with another person or thing*. The essential assumption is that two persons or things are first thought of as existing, and then, because of common features, the one is alleged, to be the same as the other." 2 J. WIGMORE, EVIDENCE § 411, at 478 (Chadbourn rev. 1979) (emphasis in original).

16. *See* Brigham, *supra* note 6, at 714. *See also* Quinn, *In the Wake of Wade: The Dimensions of Eyewitness Identification Cases*, 42 U. COLO. L. REV. 135, 135 (1970) (author argues that eyewitness identification testimony is the major cause of wrongful convictions).

17. *See* N. SOBEL, EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS 4-5 (Supp. 1972 & 1976) (many cases of rape and robbery go to jury on the uncorroborated testimony of one eyewitness, and such cases make up 5% of all crimes). *See also* Neil v. Biggers, 409 U.S.

or in-court identifications of the defendant, the prosecution would often fail to meet its burden of proof. Moreover, psychologists demonstrate that eyewitness identification testimony is particularly persuasive in the minds of most lay jurors, even when contradicted by evidence of innocence.¹⁸

The importance of eyewitness identification testimony is at its apogee when a case proceeds to the jury under the "one-witness" rule.¹⁹ This

188, 200 (1972) ("In the nature of the crime, there are rarely witnesses to a rape other than the victim").

18. A leading authority in the field of eyewitness identifications is Dr. Elizabeth F. Loftus. In a recent study, Dr. Loftus gave a group of subjects a description of a crime and found that only 18% of the subjects would convict on the basis of circumstantial evidence; 72% of them would convict on the basis of the same evidence when an eyewitness identification is added. Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 8 PSYCHOLOGY TODAY 116 (Dec. 1974). Other studies by psychologists, demonstrating that eyewitness identification testimony has a tremendous impact on jurors, were recently surveyed by Dr. Loftus and include the following: Lindsay, Wells, & Rumpel, *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOLOGY 79 (1981); Wells, Lindsay, & Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOLOGY 440 (1979); *Eyewitness Testimony*, *supra* note 9, at 128-32. See E. LOFTUS, *supra* note 9. Summarizing the psychological research in this area, Dr. Loftus stated: "All the evidence points rather strikingly to the conclusion that 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!'" *Id.* at 19. In addition, Dr. Loftus observed that "[j]urors have been known to accept eyewitness testimony pointing to guilt even when it is far outweighed by evidence of innocence." *Id.* at 9 (emphasis in original). See also P. WALL, *EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 19-23* (1965):

[J]uries are unduly receptive to identification evidence and are not sufficiently aware of its dangers. It has been said that "positive recognition by well intended uninterested persons is commonly accepted unless the alibi is convincing," and that evidence of identification however untrustworthy, is "taken by the average juror as absolute proof."

Id. at 19 (footnotes omitted).

For judicial recognition of the impact of eyewitness identification testimony, see, for example, *Watkins v. Sowders*, 449 U.S. 341, 352-53 (1981) (Brennan, J., dissenting) ("[t]he powerful impact that much eyewitness identification evidence has on juries, regardless of its reliability . . ."); *Manson v. Brathwaite*, 432 U.S. 98, 120 (1977) (Marshall, J., dissenting) ("juries unfortunately are often unduly receptive to [eyewitness identification testimony]"); *United States v. Greene*, 591 F.2d 471, 475 (8th Cir. 1979) ("the in-court testimony of an eyewitness can be devastatingly persuasive").

See generally Brigham, *supra* note 6, at 714; Cunningham & Tyrrell, *supra* note 9, at 568; Loftus, *The Eyewitness on Trial*, 16 TRIAL 30, 31 (Oct. 1980); Pulaski, Neil v. Biggers: *The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097, 1097 (1974); Woocher, *supra* note 6, at 970.

19. See *People v. Lawrence*, 111 Misc. 2d 1027, 1031, 447 N.Y.S.2d 793, 796 (App. Term 1981):

A more serious threat to the rights of the people . . . occurs in cases of "pure" identification, i.e., when no corroborative evidence is presented to support the testimony of a single eyewitness who forcefully states that the accused person committed a criminal act upon

rule, adhered to by a majority of jurisdictions in the United States,²⁰ sustains a conviction upon the uncorroborated identification testimony of a single eyewitness.²¹ Implicit in the one-witness rule is the traditional view of both the judiciary and the general public that eyewitness identification testimony is reliable as evidence²²—reliable enough to form the sole foundation for a conviction.²³

her person. . . . In such . . . situations, justice requires that the Judge caution the jury concerning the physical and psychological limitations of the human perceptions.

See also Cunningham & Tyrrell, *supra* note 9, at 564 n.3 (“The consequences of erroneous identification are most acute in those cases where no other corroborating evidence exists and the conviction must stand solely on the testimony and identification by the eyewitness, who is often also the victim.”); Thoresby, *A Turnaround in the Use of Identification Evidence*, 62 A.B.A.J. 1343, 1343 (1976) (“in cases that depend wholly or mainly on eyewitness evidence of identification there is a special risk of wrongful conviction”).

For an extensive discussion of the history of the one-witness rule in Anglo-American jurisprudence, see 7 J. WIGMORE, *supra* note 15, §§ 2030-2034. The antithesis of the one-witness rule is a rule requiring the introduction of the testimony of more than one witness or corroboration evidence before allowing a case to go to the jury. Such a requirement is common in sex crimes. *See* United States v. Telfaire, 469 F.2d 552, 554 (D.C. Cir. 1972).

20. *See* United States v. Holley, 502 F.2d 273 (4th Cir. 1974). In *Holley*, the court stated:

It is now well settled beyond argument that the identification of a criminal actor by one person is itself evidence sufficient to go to the jury and support a guilty verdict and that application of this rule is not so fundamentally unfair as to be per se a denial of due process.

Id. at 274 (citing *Neil v. Biggers*, 409 U.S. 188 (1972)). *See* *Stanley v. Cox*, 486 F.2d 48 (4th Cir. 1973), *cert. denied sub nom. Stanley v. Slayton*, 416 U.S. 958 (1974); *United States v. Levi*, 405 F.2d 380 (4th Cir. 1968). *See also* *United States v. Butler*, 636 F.2d 727, 734 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 1019 (1981); *United States v. Smith*, 563 F.2d 1361, 1363 (9th Cir. 1977), *cert. denied*, 434 U.S. 1021 (1978); *United States v. Sanders*, 547 F.2d 1037, 1040 (8th Cir. 1976), *cert. denied*, 431 U.S. 956 (1977); *United States v. Dodge*, 538 F.2d 770, 783 (8th Cir. 1976), *cert. denied sub nom. Cooper v. United States*, 429 U.S. 1099 (1977); *United States v. Telfaire*, 469 F.2d 552, 554 (D.C. Cir. 1972); *Berryman v. United States*, 378 A.2d 1317, 1321 (D.C. 1977); *Smith v. United States*, 315 A.2d 163, 167 (D.C.), *cert. denied sub nom. Jeffries v. United States*, 419 U.S. 896 (1974); *Goodyear v. State*, 12 Del. 174, 177, 348 A.2d 174, 177 (1975); *People v. Tice*, 45 Ill. App. 3d 639, 642, 359 N.E.2d 1228, 1230 (1976); *People v. Burnett*, 74 Ill. App. 3d 990, 999, 394 N.E.2d 456, 463 (1979); *State v. Thomas*, 541 S.W.2d 775, 776 (Mo. Ct. App. 1976); *State v. Johnson*, 12 Wash. App. 40, 45, 527 P.2d 1324, 1328 (1975).

21. *See generally* 7 J. WIGMORE, *supra* note 15, § 2034, at 343.

22. *See, e.g.*, *United States v. Smith*, 563 F.2d 1361, 1365 (9th Cir. 1977) (Hufstедler, J., concurring) (“the premise of the rule is that such eyewitness identifications are generally reliable”), *cert. denied*, 434 U.S. 1021 (1978). In addition to this premise, the one-witness rule is justified on the ground of public policy. *See* *United States v. Telfaire*, 469 F.2d 552, 554 (D.C. Cir. 1972). In *Telfaire*, the court stated: “The one-witness rule recognizes that certain crimes are solitary, and as to such crimes both the deterrence of punishment and the rehabilitation of offenders are proper concerns of the state.” *Id.*

23. The continued validity of this rationale is doubtful in light of the psychological evidence, *see infra* notes 24-36 and accompanying text, suggesting that eyewitness identifications are inherently unreliable. In *United States v. Smith*, 563 F.2d 1361 (9th Cir. 1977), *cert. denied*, 434 U.S.

Since the turn of the century,²⁴ however, psychologists and researchers have mounted convincing proof that eyewitness identifications are not as trustworthy as the courts and the average juror assume.²⁵ Eyewitness identifications are a product of the human memory. Experimental psychologists have discovered that the memory process can be broken down into three stages: perception, storage, and retrieval.²⁶

1021 (1978), the sole evidence against the defendant was the uncorroborated identification testimony of one eyewitness. While concurring in the affirmation of the conviction under the one-witness rule, Circuit Judge Hufstедler qualified her position by "suggesting the need for reconsideration of the one-witness principle" because the premise of the rule, *see supra* note 22, "is . . . highly dubious, given the extensive empirical evidence that eyewitness identifications are not reliable." 563 F.2d at 1365 (Hufstедler, J., concurring). *See also* United States v. Butler, 636 F.2d 727 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 1019 (1981), in which Chief Judge Bazelon dissented from the court's affirmation of a conviction under the one-witness rule. Chief Judge Bazelon proposed adoption of a requirement for corroboration, "where corroborating evidence can be acquired with reasonable effort." *Id.* at 735 (Bazelon, C.J., dissenting). He argued that to do otherwise "may so inexcusably flirt with the danger of mistaken identification as to be a violation of due process." *Id.* (Bazelon, C.J., dissenting). *Cf.* McGowan, *supra* note 5, at 238 ("one-eyewitness" identifications represent "conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished").

Courts are not likely to abolish the one-witness rule, however, due to its public policy rationale, *see supra* note 22. *See also infra* notes 193-98 and accompanying text. *See generally* Starkman, *supra* note 9, at 361, 372-74 (position in Canada); Williams, *Evidence of Identification: The Devlin Report*, 1976 CRIM. L. REV. 407, 410-13 (position in Great Britain); Woocher, *supra* note 6, at 1001-02 (position in United States).

24. One of the earliest experimental psychologists to apply psychology to the courtroom was Hugo Munsterberg. Munsterberg utilized "simulated 'crimes'" to demonstrate the high rate of fallibility that "can occur when people perceive and attempt to recall" what they saw. *See* H. MUNSTERBERG, ON THE WITNESS STAND (1908), *discussed in Eyewitness Testimony, supra* note 9, at 105-07. For a comprehensive compilation of other early studies in "legal psychology," *see* Woocher, *supra* note 6, at 974 n.12.

25. *See* State v. Warren, 230 Kan. 385, 392, 635 P.2d 1236, 1241 (1981) ("many judges have assumed that an 'eyeball' witness, who identifies the accused as the criminal, is the most reliable of witnesses"); Woocher, *supra* note 6, at 970 ("most juries, and even some judges, are unaware of the sources of error in eyewitness testimony and consequently place undue faith in its veracity").

For examples of recent major works in this field, *see* B. CLIFFORD & R. BULL, THE PSYCHOLOGY OF PERSON IDENTIFICATION (1948); E. LOFTUS, *supra* note 9; N. SOBEL, *supra* note 17; P. WALL, *supra* note 18; A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY (1979). *See also* United States v. Wade, 388 U.S. 218, 228 n.6 (1967) (provides bibliography of psychological sources).

26. *See Eyewitness Testimony, supra* note 9, at 110-24; Woocher, *supra* note 6, at 974-89. Dr. Loftus explains:

When we experience an important event, a complex process occurs. Nearly all the theoretical analyses of the process divide it into three stages. First, there is the *acquisition* stage—the perception of the original event—in which information enters a person's memory system. Second, there is the *retention* stage, the period between the event and the eventual recollection of a particular piece of information. Third, there is the *retrieval* stage, during which a person recalls stored information. Numerous factors in each of these stages can effect the accuracy and completeness of an eyewitness account.

Their studies and experiments lead to the conclusion that the accuracy of an eyewitness' identification of another human being is often impaired by several factors at each stage of the memory process.²⁷ For instance, at the perception stage,²⁸ memory is affected by the conditions surrounding the observation²⁹ as well as the stressful or traumatic nature of the encounter;³⁰ at storage,³¹ by the amount of time lapsed since

Eyewitness Testimony, *supra* note 9, at 110 (emphasis in original) (references omitted). *See also* Cunningham & Tyrrell, *supra* note 9, at 575-82. Cunningham and Tyrrell explain that *articulation* is a fourth element of the memory process and that "even if the witness perceived the entire event accurately and was . . . able to remember the perceived facts in full, he may not be capable of recounting the details thereof or may do so in an inaccurate or misleading manner." *Id.* at 582.

27. *See Eyewitness Testimony*, *supra* note 9, at 110, Table 1. The net effect of this conclusion is that the popular notion of a "photographic memory" is nothing more than a myth. *See* Woocher, *supra* note 6, at 976. Woocher explains that "psychological research emphatically has demonstrated the invalidity of this conception and has revealed that the 'videotape recorder' analogy is misleading. . ." *Id.* *See also* United States v. Butler, 636 F.2d 727, 733 (D.C. Cir. 1980) (Bazelon, C.J., dissenting), *cert. denied*, 451 U.S. 1019 (1981); Cunningham & Tyrrell, *supra* note 9, at 575-78.

28. The factors which affect the reliability of eyewitness identifications at the acquisition or perception stage can be divided into two classifications: event factors and witness factors. *See Eyewitness Testimony*, *supra* note 9, at 110, table 1. Event factors include factors that inhere in the event, such as the duration of the event, the frequency of viewing opportunities, the complexity of the encounter, the violent nature of the event, and the seriousness of the event. *Id.* Witness factors are those inherent in the individual, such as any stress or fear experienced during the event, the age of the witness, the sex of the witness, prior training to notice details, the expectations or attitudes of the witness, and personality characteristics. *Id.* In sum, Dr. Loftus states:

Witnesses are more accurate under the following circumstances:

1. Exposure time is longer rather than shorter.
2. Events are less rather than more violent.
3. Witnesses are not undergoing extreme stress or fright.
4. Witnesses are generally free from biased expectations.
5. Witnesses are young adults rather than children.
6. Witnesses are asked to report on salient aspects of an event rather than peripheral aspects.

Id. at 115-16. *See also* Cunningham & Tyrrell, *supra* note 9, at 578-80; Woocher, *supra* note 6, at 976-82.

29. *See* Woocher, *supra* note 6, at 978. Observation conditions that can decrease reliability at the perception stage include the "duration of the observation period," "poor or rapidly changing lighting conditions," and "distracting noises or other activity." *Id.*

30. *See id.* at 979-80. Woocher points out that "[a]lthough judges and juries often may be convinced by the victim's assertion that 'I was so frightened that his face is etched in my memory forever,' psychological research demonstrates that perceptual abilities actually *decrease* significantly when the observer is in a fearful or anxiety-provoking situation." *Id.* at 979 (emphasis in original). Anxiety decreases reliability at the perception stage because it produces a variety of physiological and mental effects that interfere with the witness' mnemonic capacities. *Id.* at 978-80. *See also* Loftus, *supra* note 9, at 32 ("[s]tress or fear disrupts perception and, therefore, memory").

31. The retention or storage stage factors include, in addition to time lapse, any change in the appearance of the person observed, intervening photographs, and new information about the

the encounter;³² and at retrieval,³³ by the suggestive nature of the identification procedure.³⁴ These studies suggest that even under optimal conditions, eyewitness identifications are highly unreliable³⁵—so unreliable that many modern commentators view eyewitness identification

event. See *Eyewitness Testimony*, *supra* note 9, at 110, table 1. See also Cunningham & Tyrrell, *supra* note 9, at 580-82; Loftus, *supra* note 9, at 32-33; Woocher, *supra* note 6, at 982-85. Woocher also points out that during the retention stage, "because of a psychological need to reduce uncertainty and eliminate inconsistencies, witnesses have a tendency not only to fill any gaps in memory by adding extraneous details but also to change mental representations unconsciously so that they 'all make sense.'" *Id.* at 983.

32. Psychologists have shown that the capacity to remember decreases as the amount of time since the event increases. See *Eyewitness Testimony*, *supra* note 9, at 119; Woocher, *supra* note 6, at 982. Woocher explains that: "memory begins to decay within minutes of the event, so that considerable memory loss probably occurs during the many days—and often months—that typically elapse between the offense and an eyewitness identification of the suspect in a criminal case."

33. In the identification context, the recall or retrieval stage is that moment subsequent to the event when the witness "remembers" that the person he presently sees is the same person he observed committing the crime. Recall usually occurs in the setting of a police lineup and in-court testimony. Psychological research demonstrates that memory is affected at the recall stage by the method of questioning, the procedures utilized in the identification, the status of the questioner, and any nonverbal communication. See *Eyewitness Testimony*, *supra* note 9, at 110, table 1. Dr. Loftus explains that there is a consensus among psychologists on the following:

1. Witnesses produce the most accurate and complete accounts when they are first asked to recall in their own words, and then to answer specific questions about an event.
2. Biasing words in a question . . . can contaminate a witness's recollection.
3. Instructions given to witnesses when they attempt to recollect a prior experience can influence the quality of the recollection. Lax instructions result in more errors than do strict instructions. . . .
4. Returning a witness to a state that is similar to the one in which the witness had the original experience enhances the recollection.

Id. at 123-24. See also Cunningham & Tyrrell, *supra* note 9, at 580-82; Woocher, *supra* note 6, at 985-89.

34. Psychologists have shown that suggestive conduct on the part of police—such as telling the witness to take another look at a particular individual in a lineup or composing a lineup of five white men and one black man when the witness has described the criminal as being black—can contaminate an eyewitness' memory and cause him to identify the wrong person. See *Eyewitness Testimony*, *supra* note 9, at 120-21; Loftus, *supra* note 9, at 33-34; Woocher, *supra* note 6, at 986-88. The United States Supreme Court has held that the due process clauses of the fifth and fourteenth amendments provide a defendant with protection against the use of identification evidence obtained by unduly suggestive procedures. See *infra* notes 43 & 46 and accompanying text.

35. Dr. Loftus explains that this is true because "[t]o be mistaken about details is not the result of a bad memory, but of the normal functioning of human memory." Loftus, *supra* note 9, at 31. In addition, Cunningham and Tyrrell argue that psychological research proves that the inherent deficiencies of the human memory process are actually exacerbated by the circumstances surrounding eyewitness identifications of alleged criminals. See Cunningham & Tyrrell, *supra* note 9, at 582-85. They explain:

The reasons for such results center on those factors common to the general observer. The legal circumstances surrounding eyewitness testimony and identification only serve to amplify these factors. The lineup, or similar identification practices, with its formal-

testimony as "inherently suspect."³⁶

The judiciary gradually has become aware of the case against the reliability of eyewitness identifications.³⁷ This awareness is partially attributable to the numerous publicized accounts of miscarriages of justice resulting from misidentifications³⁸ and the research of experimental psychologists.³⁹ The United States Supreme Court has expressed its concern in decisions dealing with the admissibility of out-of-court and in-court identifications as well as in cases concerning due process limitations on the suggestiveness of identification procedures.⁴⁰

In the *Wade*⁴¹-*Gilbert*⁴²-*Stovall*⁴³ trilogy of cases, decided in 1967,

ity, its authority figures, and its potential for reinforcing the witness and the police towards "solving the case," encourages identification, mistaken or not.

Id. at 584.

36. *Watkins v. Sowders*, 449 U.S. 341, 350 (1981) (Brennan, J., dissenting). See generally Cunningham & Tyrell, *supra* note 9, at 563-66; Loftus, *Eyewitness Testimony*, *supra* note 9, at 105-09; Woocher, *supra* note 6, at 969-71; authorities cited *supra* note 25.

37. See *infra* notes 41-57 and accompanying text. In a recent decision, the Kansas Supreme Court acknowledged that judicial recognition of the problems with eyewitness testimony has developed slowly:

In spite of the great volume of articles on the subject of eyewitness testimony by legal writers and the great deal of scientific research by psychologists in recent years, the courts in this country have been slow to take the problem seriously and, until recently, have not taken effective steps to confront it.

State v. Warren, 230 Kan. 385, 392, 635 P.2d 1236, 1241 (1981).

38. See, e.g., E. BLOCK, *THE VINDICATORS* (1963); E. BORCHARD, *CONVICTING THE INNOCENT* (1932); J. FRANK & B. FRANK, *NOT GUILTY* (1957); F. FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* (1927); E. GARDNER, *THE COURT OF LAST RESORT* (1952); M. HOUTS, *FROM EVIDENCE TO PROOF* (1956); G. WILLIAMS, *THE PROOF OF GUILT* (3d ed. 1963); O'Connor, "That's the Man:" *A Sobering Study of Eyewitness Identifications and the Polygraph*, 49 ST. JOHN'S L. REV. 1 (1974).

39. See *supra* notes 24-36 and accompanying text. See also *United States v. Wade*, 388 U.S. 218, 228 n.6 (1967) (recognition of results of psychological research); *State v. Warren*, 230 Kan. 385, 390-92, 635 P.2d 1236, 1239-41 (1981) (same).

40. See, e.g., *Watkins v. Sowders*, 449 U.S. 341 (1981); *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *Kirby v. Illinois*, 406 U.S. 682 (1972); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Foster v. California*, 394 U.S. 440 (1969); *Simmons v. United States*, 390 U.S. 377 (1968); *Stovall v. Denno*, 388 U.S. 293 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

41. *United States v. Wade*, 388 U.S. 218 (1967). Wade was convicted of bank robbery on the basis of identification evidence. Prior to trial, but subsequent to indictment, Wade had been positively identified by two witnesses at a lineup. He did not have counsel present at the lineup. At trial the prosecution presented the in-court identification testimony of the two witnesses, and Wade's counsel elicited testimony on cross-examination as to the pretrial lineup identifications. The Court held that a pretrial lineup is a critical stage of the criminal process and that the sixth amendment right to counsel entitled Wade to have his attorney present during the confrontation. *Id.* at 227-39. Because Wade did not have counsel present at the pretrial lineup, the in-court identification testimony was inadmissible if based solely upon the unlawful out-of-court identifi-

the Court recognized the “dangers inherent in eyewitness identification”⁴⁴ and created several safeguards. This trilogy prospectively established both a right to counsel in certain pretrial identification confrontations⁴⁵ and a due process standard for evaluating the suggestiveness of out-of-court identifications.⁴⁶ The sanction for failure to

cation. The Court observed, however, that the in-court identification testimony might still be admissible if the prosecution could prove it had indicia of reliability independent of the illegal out-of-court identification, and accordingly remanded the case for a hearing on that issue. *Id.* at 242-43. The Court established the following five criteria to determine if an in-court identification satisfies the “independent origins” test:

the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant’s actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

Id. at 241. See generally E. LOFTUS, *supra* note 9, at 180-82; Cunningham & Tyrrell, *supra* note 9, at 569-71; Woocher, *supra* note 6, at 990-91.

42. *Gilbert v. California*, 388 U.S. 263 (1967). In *Gilbert*, like *Wade*, see *supra* note 41, the defendant had been subjected to a lineup confrontation without the presence of counsel. *Id.* at 269. As in *Wade*, the witness in *Gilbert* made an in-court identification of the defendant. *Id.* at 270. Unlike *Wade*, however, the prosecution in *Gilbert* introduced the witness’ testimony as to the prior illegal lineup identification. *Id.* at 272-73. The Court held that a hearing on whether the in-court identification had an independent basis would not be adequate, because the illegal lineup had been introduced, and therefore the defendant was entitled to a new trial. *Id.* at 273-74. See generally E. LOFTUS, *supra* note 9, at 182-83; Cunningham & Tyrrell, *supra* note 9, at 570-71; Woocher, *supra* note 6, at 990-91.

43. *Stovall v. Denno*, 388 U.S. 293 (1967). In *Stovall*, the defendant was subjected to a showup (one-on-one identification by a witness). The Supreme Court indicated that due process could be violated if identification procedures are “unnecessarily suggestive and conducive to irreparable mistaken identification.” *Id.* at 302. The Court also indicated that a showup is inherently suggestive. *Id.* The Court, however, held there was no error in using a showup procedure in the present case because the fact that the eyewitness/victim was in the hospital and was in danger of dying justified its use. Hence, the suggestive procedure was necessary. *Id.* See generally E. LOFTUS, *supra* note 9, at 183-84; Cunningham & Tyrrell, *supra* note 9, at 572-74; Woocher, *supra* note 6, at 992-93.

44. *United States v. Wade*, 388 U.S. 218, 235 (1967).

45. See *supra* notes 41-42 and accompanying text. The Court stated that the assistance of counsel would be necessary to assure fairness in the identification procedure and to prevent police coverups of the witness’ failure to identify the defendant. 388 U.S. at 235. See E. LOFTUS, *supra* note 9, at 181. The Supreme Court has subsequently narrowed this protection to *post*-indictment lineups or showups. See *infra* notes 49-50 and accompanying text. The right-to-counsel protection afforded by *Wade* is not very far-reaching, however, because, even if a postindictment lineup identification can be excluded due to the absence of counsel, the witness may still make an in-court identification if the latter identification has an “independent origin.” See *supra* note 41.

46. The due process standard of *Stovall*, see *supra* note 43, is whether in the “totality of the circumstances,” the identification procedure is “unnecessarily suggestive and conducive to irreparable mistaken identification.” *Stovall v. Denno*, 388 U.S. 293, 302 (1967). Suggestive identification procedures are not “unnecessarily suggestive,” and hence not violative of due process, if there are exigent circumstances for using the procedure. See *supra* note 43. In addition, subsequent

comply with the rules established by these three decisions is the complete exclusion of the tainted identification evidence.⁴⁷

Subsequent Supreme Court decisions, however, have narrowed and restricted the protections afforded by the *Wade* trilogy.⁴⁸ A decade ago, in *Kirby v. Illinois*,⁴⁹ the Court held that a right to counsel during a pretrial identification procedure does not exist until the defendant has been indicted or arraigned.⁵⁰ In the same year, in *Neil v. Biggers*,⁵¹ the Court retreated from the due process analysis announced in *Stovall*,⁵² when it focused on the reliability of the in-court identification rather than the fairness of procedures followed during the out-of-court identification to determine the admissibility of the in-court identification.⁵³ The *Biggers* Court established five criteria for determining reliability:

opinions of the Court have replaced a due process evaluation of identification procedures with a reliability standard. See *infra* notes 51-57 and accompanying text. See also *Simmons v. United States*, 390 U.S. 377 (1968) (photographic pretrial identifications upheld for investigatory purposes despite inherent dangers).

47. *Gilbert v. California*, 388 U.S. 263, 272-73 (1967).

48. See generally E. LOFTUS, *supra* note 9; Cunningham & Tyrrell, *supra* note 9; Decker, Moriarty & Albert, *The Demise of Procedural Protections in Lay-Witness Identifications in Federal Court: Who is the Culprit?*, 9 LOY. U. CHI. L.J. 335 (1978); Jonakait, *supra* note 1; Levine & Tapp, *The Psychology of Criminal Identification: The Gap From Wade to Kirby*, 121 U. PA. L. REV. 1079 (1973); Pulaski, *supra* note 18; Salisbury, *Eyewitness Identifications: A New Perspective On Old Law*, 15 TULSA L.J. 38 (1979); Woocher, *supra* note 6; Note, *Manson v. Brathwaite: Looking for the Silver Lining in the Area of Eyewitness Identifications*, 25 WASH. & LEE L. REV. 1079 (1978).

49. 406 U.S. 682 (1972). In *Kirby*, the defendants were identified by the victim shortly after they were arrested. *Id.* at 684. The defendants did not have an attorney present at the identification, but the victim was later allowed to make in-court identifications during their trial. *Id.* at 684-86. The Supreme Court affirmed the convictions, holding that there is no sixth amendment right to counsel until after "adversary judicial criminal proceedings" have started. *Id.* at 689.

50. Dr. Loftus observes that the result of *Kirby* is that "the police now often delay formal charges until after the identification has been made." E. LOFTUS, *supra* note 9, at 185 (footnotes omitted).

51. 409 U.S. 188 (1972). In *Biggers*, the defendant, who was convicted of rape, was identified by the victim in a showup procedure and evidence of the identification was introduced at trial. *Id.* at 189. Even though there were no exigent circumstances as in *Stovall*, see *supra* notes 43 & 46, the Court affirmed, holding that "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." 409 U.S. at 199.

52. See *supra* notes 43 & 46.

53. The *Biggers* Court explained this apparent shift in focus by arguing that "[i]t is the likelihood of misidentification which violates a defendant's right to due process . . ." and this likelihood turns on reliability. 409 U.S. at 198-99. Dr. Loftus explains:

The Court agreed that the confrontation was suggestive, that no circumstance such as the need for a prompt identification justified it, but still decided that the identification testimony was admissible. It placed almost exclusive emphasis on the reliability of the identification and retreated from the right to due process afforded by the earlier cases.

E. LOFTUS, *supra* note 9, at 185.

(1) the witness' chance to see the criminal at the time of the crime; (2) the witness' degree of attention; (3) the degree of similarity between the witness' prior description of the criminal and the defendant; (4) the witness' level of confidence in the correctness of the identification demonstrated by the witness at the confrontation; and (5) the time lapse between the crime and the confrontation.⁵⁴ Most recently, in *Manson v. Brathwaite*,⁵⁵ the Court completed its retreat from a due process evaluation of identification procedures when it stated that "reliability is the linchpin in determining the admissibility of identification testimony"⁵⁶ and that the *Biggers* factors are to be considered in measuring reliability.⁵⁷

The general rule that has evolved is that eyewitness identification evidence will not be excluded unless the identification procedures are so suggestive and the eyewitness' identification is so unreliable that a "very substantial likelihood" of misidentification exists.⁵⁸ Courts rarely find such a risk to exist.⁵⁹ Once the evidence is admitted at trial,

54. 409 U.S. at 199-200. The *Biggers* factors, which are a variation of the *Wade* "independent origins" test, see *supra* note 41, have formed the basis of several special cautionary jury instructions. See, e.g., *United States v. Telfaire*, 469 F.2d 552, 558 (D.C. Cir. 1972); *State v. Warren*, 230 Kan. 385, 398-99, 635 P.2d 1236, 1244-45. See also *infra* note 155 and accompanying text.

55. 432 U.S. 98 (1976). In *Manson*, the defendant was convicted of possession and sale of heroin. At trial, evidence of an identification by an undercover agent/eyewitness from a single photograph was admitted as the only evidence of defendant's guilt. *Id.* at 107. The defendant argued that the procedure was suggestive because only one photograph was used and that it was unnecessary because there were no exigent circumstances. *Id.* The Court, however, affirmed, reasoning that the identification was reliable as tested by the *Biggers* factors. *Id.* at 117. See *infra* notes 56 & 57 and accompanying text.

56. 432 U.S. at 114.

57. *Id.* See also *Watkins v. Sowders*, 449 U.S. 341 (1981). In *Watkins*, the defendant argued that due process requires the admissibility of pretrial identification evidence be determined in a hearing out of the jury's presence. *Id.* at 346. The defendant analogized to confession evidence, the admissibility and voluntariness of which must be determined in a separate hearing. *Id.* The *Watkins* Court adhered to the reliability standard for admissibility of identification evidence but rejected the defendant's assertion. *Id.* at 347. The Court stated that while such a hearing "may often be advisable," *id.* at 349, it was not constitutionally required because "[w]here identification evidence is at issue . . . no . . . special considerations justify a departure from the presumption that juries will follow instructions" to disregard the evidence, should it be found inadmissible. *Id.* at 347. In addition, the Court argued that a defendant can be adequately protected by the "time-honored process of cross-examination," *id.* at 349, and closing argument, when the jury hears identification evidence that is later held inadmissible. *But see id.* at 349-60 (Brennan, J., dissenting).

58. *Simmons v. United States*, 390 U.S. 377, 384 (1968). In making this determination courts generally apply the five *Biggers* factors. See *supra* notes 51-54 and accompanying text. Eyewitness evidence is admissible by statute in federal courts. See 18 U.S.C. § 3502 (1976).

59. To date the Supreme Court has held out-of-court identification procedures to be violative

the issue becomes whether the inherent unreliability of eyewitness identification testimony necessitates any additional safeguards against misidentification.

The traditional position of the courts is that no additional protections are necessary.⁶⁰ Nevertheless, defense attorneys and commentators have attempted to persuade the courts to accept various safeguards. These include complete exclusion of eyewitness identification testimony,⁶¹ abolition of the one-witness rule,⁶² admission of expert psychological testimony,⁶³ and special cautionary jury instructions.⁶⁴

of due process, and hence inadmissible, in only one case, *Foster v. California*, 394 U.S. 440 (1969). The reluctance of trial courts to exclude eyewitness identification testimony on general grounds of unreliability is attributable to the fact that in many cases the potential prejudice of such evidence is outweighed by its probative value. Woocher explains that:

As a practical matter, in many cases eyewitness evidence provides the only means of linking the defendant to the crime; even an unreliable identification may be completely accurate and would seem preferable to none at all in these situations. In other cases, additional evidence of the defendant's guilt may exist that, taken alone, would not dispose of the case but, in conjunction with an eyewitness identification, would lead a jury to convict.

Woocher, *supra* note 6, at 1001.

60. In general, courts view the postadmission problem as one of the weight and credibility to be assigned to the identification testimony. *See infra* notes 118 & 144 and accompanying text. This is traditionally a function within the province of the jury, and courts, as a rule, are reluctant to usurp any of the jury's functions. *See Watkins v. Sowders*, 449 U.S. 341, 347 (1981). One reason for this reluctance is the fear of tipping the scale too heavily in favor of either the defendant or the prosecution. *See infra* note 207 and accompanying text. Another reason is the view, shared by a majority of jurisdictions, that matters of weight and credibility of evidence are better left to the advocacy of counsel during cross-examination and closing arguments. *See infra* notes 118 & 143 and accompanying text. Despite their awareness of the intrinsic deficiencies of eyewitness identification testimony, *see supra* notes 37-57 and accompanying text, members of the judiciary are very reluctant to take an active role, beyond determining admissibility, in reducing the risk of wrongful conviction created by such deficiencies. *See infra* notes 67-71 and accompanying text.

61. *See generally* E. LOFTUS, *supra* note 9, at 187-88; Woocher, *supra* note 6, at 1000-01.

62. Abolition of the one-witness rule, *see supra* notes 19-23 and accompanying text, would mean mandating a rule that a defendant cannot be convicted unless there is more than one eyewitness who identifies the defendant or there is evidence to corroborate an identification by one eyewitness. *See generally* M. HOUTS, *supra* note 38, at 26; E. LOFTUS, *supra* note 9, at 188-89; P. WALL, *supra* note 18, at 182-93; Cunningham & Tyrrell, *supra* note 9, at 588-89; Woocher, *supra* note 6, at 1001-02.

63. Introduction of expert psychological testimony on the inherent deficiencies of eyewitness identifications and the factors affecting the reliability of such identifications is a reform that commentators in both the legal profession and the field of psychology have given a great deal of attention and support. *See generally* E. LOFTUS, *supra* note 9, at 191-203; Cunningham & Tyrrell, *supra* note 9, at 586-88; Katz & Reid, *Expert Testimony on the Fallibility of Eyewitness Identification*, 1 CRIM. JUST. J. 177, 197-206 (1977); *Eyewitness Testimony*, *supra* note 9, at 134-38; Loftus, *supra* note 9, at 34-35; Starkman, *supra* note 9, at 377-85; Woocher, *supra* note 6, at 1005-30. For

Courts are entirely unreceptive to the first two solutions.⁶⁵ Some courts tolerate the third solution, but no court mandates it.⁶⁶ The fourth solu-

an example of this type of testimony, see E. LOFTUS, *supra* note 9, at 217-35 (transcript of testimony given in actual case).

64. See generally E. LOFTUS, *supra* note 9, at 189-90; Cunningham & Tyrrell, *supra* note 9, at 588; *Eyewitness Testimony*, *supra* note 9, at 133-34; Starkman, *supra* note 9, at 375-77; Woocher, *supra* note 6, at 1002-05.

65. Both of these solutions are unacceptable due to policy considerations. Woocher, *supra* note 6, observes that complete exclusion of eyewitness evidence is objectionable because it "would prevent conviction of the truly guilty." *Id.* at 1001. He explains:

As a practical matter, in many cases eyewitness evidence provides the only means of linking the defendant to the crime; even an unreliable identification may be completely accurate and would seem preferable to none at all in these situations. In other cases, additional evidence of the defendant's guilt may exist that, taken alone, would not dispose of the case but, in conjunction with an eyewitness identification, would lead a jury to convict.

Id. Hence, eyewitness identification testimony is regularly admitted in criminal trials. See *supra* notes 58-60 and accompanying text. For a further discussion of these policy considerations, see *infra* notes 187-92 and accompanying text.

Abolition of the one-witness rule is unacceptable to courts for similar policy reasons. Woocher explains that this solution "would allow a guilty defendant to escape conviction despite a highly reliable, if uncorroborated, identification." Woocher, *supra* note 6, at 1002. Reversal of a conviction for failure to give special cautionary jury instructions, however, has occurred most frequently in situations in which the case went to the jury under the one-witness rule. See, e.g., *United States v. Greene*, 591 F.2d 471 (8th Cir. 1979); *United States v. Holley*, 502 F.2d 273 (4th Cir. 1974); *State v. Warren*, 230 Kan. 385, 635 P.2d 1236 (1981); *State v. Green*, 86 N.J. 281, 430 A.2d 914 (1981); *State v. Payne*, 280 S.E.2d 72 (W. Va. 1981). For a further discussion of the policy considerations involved, see *infra* notes 193-98 and accompanying text. See also *supra* note 23 (judicial doubts of the validity of one-witness rule). See generally *supra* notes 19-23 and accompanying text.

66. The majority rule in the United States is either that expert psychological testimony on eyewitness identifications is inadmissible or that a trial court does not abuse its discretion by refusing to admit it. See, e.g., *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982); *United States v. Sims*, 617 F.2d 1371 (9th Cir. 1980); *United States v. Fosher*, 590 F.2d 381 (1st Cir. 1979); *United States v. Watson*, 587 F.2d 365 (7th Cir. 1978), *cert. denied sub nom. Davis v. United States*, 439 U.S. 1132 (1979); *United States v. Brown*, 540 F.2d 1048 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977); *United States v. Brown*, 501 F.2d 146 (9th Cir. 1974), *rev'd on other grounds sub nom. United States v. Nobles*, 422 U.S. 225 (1975); *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); *State v. Valencia*, 118 Ariz. App. 136, 575 P.2d 335 (1977); *Dyas v. United States*, 376 A.2d 827 (D.C. 1977); *State v. Warren*, 230 Kan. 385, 635 P.2d 1236 (1981); *State v. Galloway*, 275 N.W.2d 736 (Iowa 1979); *State v. Helterbridle*, 301 N.W.2d 545 (Minn. 1980); *Hampton v. State*, 92 Wis. 2d 450, 285 N.W.2d 868 (1979). No case has ever held it reversible error for a trial court to refuse to admit expert psychological testimony on eyewitnesses. See *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980).

The objections to such testimony, as Dr. Loftus explains, are:

that it invades the province of the jury, that it will have undue influence on the jury, that it is well within the common knowledge of the jury, or that it will lead to a battle of the experts that will detract from the real issues of the case.

Eyewitness Testimony, *supra* note 9, at 134. For further discussion of this solution, see *infra* notes 199-207 and accompanying text.

tion is the subject of the remainder of this Note.

II. THE CASE LAW

A. *Before United States v. Telfaire*

Prior to 1972⁶⁷ most courts in the United States refused to recognize the inherent unreliability of eyewitness identification testimony.⁶⁸ Although courts frequently scrutinized pretrial identification procedures to prevent suggestive conduct on the part of law enforcement officials⁶⁹ and required that eyewitness identifications have some indicia of reliability before admission during trial,⁷⁰ nearly all jurisdictions refused to mandate special cautionary instructions to the jury on eyewitness identifications.⁷¹

In response to the Supreme Court's recognition of the unreliability of eyewitness identifications in the *Wade* trilogy,⁷² however, the United

67. *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), was decided in 1972. *Telfaire* was not necessarily the first case to approve of special cautionary instructions on eyewitnesses, see *infra* notes 74-82 and accompanying text, but the "Model Instructions" that it articulated have become the standard type of instructions. See *infra* notes 83-98 and accompanying text.

68. See *supra* note 37 and accompanying text.

69. See *supra* notes 40-59 and accompanying text.

70. *Id.* For an argument that the requirements for admissibility of eyewitness identification testimony are not adequate to "guard against misidentification and the conviction of the innocent," see *United States v. Holley*, 502 F.2d 273, 275 (4th Cir. 1974).

71. See *United States v. Barber*, 442 F.2d 517 (3d Cir.), *cert. denied*, 404 U.S. 958 (1971). In *Barber*, the court stated:

The trial court relied on formidable precedential authority which holds that it is necessary neither to instruct the jury that they should receive certain identification testimony with caution, nor to suggest to them the inherent unreliability of certain eye-witness identification. In *United States v. Moss*, 410 F.2d 386 (3d Cir. 1969), for example, we said: "the trial judge was under no obligation to give . . . a special instruction" on the uncertainty and unreliability of identification testimony. In *Cullen v. United States*, 408 F.2d 1178 (8 Cir. 1969), the trial court was requested to charge "that testimony tending to prove identity is to be scrutinized with extreme care," and that "no class of testimony is more uncertain and less to be relied upon than that of identity;" on appeal the court held the instructor properly refused because the trial court fairly instructed the jury as to the government's burden of proof and the facts to be considered by them before rendering a verdict. See also *Barber v. United States*, 412 F.2d 775 (5 Cir. 1969); *McGee v. United States*, 402 F.2d 434, 436 (10 Cir. 1968).

442 F.2d at 526. See also *United States v. Hessler*, 469 F.2d 1294 (7th Cir.), *cert. denied*, 409 U.S. 989 (1972); *United States v. Shelvy*, 458 F.2d 823 (D.C. Cir. 1972); *United States v. Cole*, 453 F.2d 902 (8th Cir.), *cert. denied*, 406 U.S. 922 (1972); *United States v. Allen*, 449 F.2d 346 (9th Cir. 1971); *Kaneshiro v. United States*, 445 F.2d 1266 (9th Cir. 1971); *United States v. Hall*, 437 F.2d 248 (3d Cir.), *cert. denied*, 402 U.S. 976 (1971); *United States v. Perez*, 431 F.2d 941 (9th Cir. 1970); *United States v. Carter*, 422 F.2d 519 (6th Cir. 1970); *United States v. Levi*, 405 F.2d 380 (4th Cir. 1968); *Jones v. United States*, 358 F.2d 383 (8th Cir. 1966).

72. See *supra* notes 41-47 and accompanying text.

States Court of Appeals for the District of Columbia⁷³ realized the need for a special instruction relating identity to the reasonable doubt standard.⁷⁴ In 1969, in *Macklin v. United States*,⁷⁵ the District of Columbia Circuit prospectively promulgated a rule requiring that such an instruction be given where identification is a major issue, but held that in the case before it the general instructions were adequate.⁷⁶

Shortly thereafter, the Third Circuit, in *United States v. Barber*,⁷⁷

73. Interestingly, the District of Columbia Circuit recognized the dangers of eyewitness identification testimony and the need for special instructions to the jury as early as 1942. *See McKenzie v. United States*, 126 F.2d 533 (D.C. Cir. 1942).

74. *See, e.g.*, *United States v. Shely*, 458 F.2d 823 (D.C. Cir. 1972); *Macklin v. United States*, 409 F.2d 174 (D.C. Cir. 1969); *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966); *Salley v. United States*, 353 F.2d 897 (D.C. Cir. 1965). In *United States v. Telfaire*, 469 F.2d 552, 555 (D.C. Cir. 1972), the court stated that "[t]hese opinions sought to take into account the traditional recognition that identification testimony presents special problems of reliability by stressing the importance of an identification instruction even in cases meeting the Constitutional threshold of admissibility."

75. 409 F.2d 174 (D.C. Cir. 1969).

76. The *Macklin* court stated:

We think that now, after the Supreme Court has focused on identification problems in its 1967 *Wade-Gilbert-Stovall* trilogy, it is even more imperative that trial courts should include, as a matter of routine, an identification instruction. In cases where identification is a major issue the judge should not rely on defense counsel to request so important a charge.

Id. at 178. The *Macklin* rule was held nonretroactive in *United States v. Washington*, 413 F.2d 409 (D.C. Cir. 1969).

The *Macklin* court was not concerned with informing the jurors of the dangers of eyewitness identification testimony or of the appropriate factors to consider in evaluating the reliability of such testimony, but rather with assuring that the jury was aware that it had to find the identification of the defendant as the criminal beyond a reasonable doubt. 409 F.2d at 177-78. The following is an example of an instruction relating identity to reasonable doubt:

The evidence in this case raises the question of whether the defendant was in fact the criminal actor and necessitates your resolving any conflict or uncertainty in testimony on that issue.

The burden of proof is on the prosecution with reference to every element of the crime charged and this burden includes the burden of proving beyond reasonable doubt the identity of the defendant as the perpetrator of the crime charged.

1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 11.32 (2d ed. 1970).

77. 442 F.2d 517 (3d Cir.), *cert. denied*, 404 U.S. 958 (1971). In *Barber*, several defendants had been convicted of assaulting two FBI agents and helping a prisoner in the agents' custody to escape. The defendants requested that instructions be given to the jury on the inherent unreliability of identification testimony and the caution with which such testimony should be approached. The trial court refused and in lieu thereof gave a general instruction on the credibility of witnesses and an instruction relating identification to the reasonable doubt standard, *see id.* at 525. On appeal the defendants argued that "the entangled circumstances of this case compelled a more exacting charge to underscore the critical nature of the identification issue—that the commingling of participants and passersby in the vortex of a sudden mob scene rendered arduous and crucial

went a step beyond *Macklin* and approved the use of a model instruction on identification.⁷⁸ The model directs the judge to instruct the jury to treat the identification as a "statement of fact"⁷⁹ if the court finds four conditions of reliability to exist.⁸⁰ If any one of the conditions are absent, the judge instructs the jury that the testimony "must be received with caution and scrutinized with care."⁸¹ The *Barber* court, however, approved its model instruction for prospective use only and found no error in the general instructions given by the trial court in that particular case.⁸²

the task of determining who did what to whom." *Id.* at 525. The *Barber* court agreed that additional instructions might have been proper, but held that there was no reversible error in the trial court's refusal because the trial court's conduct was supported by "formidable precedential authority." *Id.* at 526. *See also supra* note 71.

78. The *Barber* court characterized eyewitness identification testimony as "an expression of a belief or impression by the witness." 442 F.2d at 527. The *Barber* instruction, however, allows the jury to treat the testimony as a "statement of fact" if its four indicia of reliability are present, but only as an "expression of opinion" if any one of the four are absent. The full text of the court's instruction is as follows:

In any case raising the question whether the defendant was in fact the criminal actor, the jury will be instructed to resolve any conflict on uncertainty on the issue of identification. The jury will be instructed that identification may be made through the perception of any of the witness' senses, and that it is not essential that the witness himself be free from doubt as to the correctness of his opinion. The identification testimony may be treated by the jury as a *statement of fact* by the witness: (1) if the witness had the opportunity to observe the accused; (2) if the witness is positive in his identification; (3) if the witness' identification is not weakened by prior failure to identify or by prior inconsistent identification; and (4) if, after cross-examination, his testimony remains positive and unqualified. In the absence of any one of these four conditions, however, the jury will be admonished by the court that the witness' testimony as to identity must be *received with caution and scrutinized with care*. The burden of proof on the prosecution extends to every element of the crime charged, including the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime for which he stands charged.

Id. at 528 (emphasis added). The court indicated that in adopting this instruction it was following the decisions of Pennsylvania courts. *Id.* *See* Commonwealth v. Kloiber, 378 Pa. 412, 106 A.2d 820 (1954), *cert. denied*, 348 U.S. 875 (1954); Commonwealth v. Wilkerson, 204 Pa. Super. Ct. 213, 203 A.2d 235 (1964).

79. United States v. Barber, 442 F.2d 517, 528 (3d Cir.), *cert. denied*, 404 U.S. 958 (1971). For the full text of the *Barber* instruction, see *supra* note 78.

80. *See supra* note 78. In regard to condition numbers (2) and (4), psychological research suggests that there is actually an inverse relationship between the eyewitness' "positiveness" on direct and cross-examination, and the reliability of the identification testimony. *See, e.g.*, E. LOFTUS, *supra* note 9, at 100-01; *Eyewitness Testimony*, *supra* note 9, at 123; Woocher, *supra* note 6, at 985.

81. United States v. Barber, 442 F.2d 517, 528 (3d Cir.), *cert. denied*, 404 U.S. 958 (1971). For the full text of the *Barber* instruction, see *supra* note 78.

82. United States v. Barber, 442 F.2d 517, 528 (3d Cir.), *cert. denied*, 404 U.S. 958 (1971). *See supra* note 77.

B. United States v. Telfaire

In 1972 the United States Court of Appeals for the District of Columbia decided the pioneer⁸³ case of *United States v. Telfaire*.⁸⁴ A jury convicted Melvin Telfaire of robbing Mr. Peregory of ten dollars in a poorly lighted portion of a hotel.⁸⁵ The only evidence against Telfaire was Mr. Peregory's eyewitness identification testimony.⁸⁶ Telfaire's defense was alibi,⁸⁷ and on appeal he argued that the trial judge committed reversible error by failing to give a special instruction on identification *sua sponte*.⁸⁸

The District of Columbia Circuit held that this omission was not prejudicial for two reasons. First, Mr. Peregory's identification possessed indicia of reliability, because he had an "adequate opportunity to observe"⁸⁹ and made a "spontaneous identification"⁹⁰ of the defendant at the crime scene within an hour after the commission of the crime. Second, because the jury's attention was "significantly focused on the issue of identity,"⁹¹ the trial judge's general instructions on the prosecution's burden of proof and the defense of alibi were sufficient.⁹² Telfaire's conviction was therefore upheld.⁹³

83. State v. Warren, 230 Kan. 385, 396, 635 P.2d 1236, 1243 (1981). See also Woocher, *supra* note 6, at 1003 ("The leading decision in this area is *United States v. Telfaire*"). *Telfaire*, however, is not the first decision to approve of the use of special cautionary jury instructions on eyewitnesses. See *supra* notes 73-82 and accompanying text.

84. 469 F.2d 552 (D.C. Cir. 1972).

85. *Id.* at 554 n.4.

86. *Id.*

87. *Id.*

88. *Id.* at 554. Dicta in *Macklin v. United States*, 409 F.2d 174, 178 (D.C. Cir. 1969), see *supra* note 76 and accompanying text, indicated that a defendant is entitled to an identification instruction even absent a request from defense counsel. Black's Law Dictionary defines "sua sponte" as being "of his or its own will or motion; voluntarily; without prompting or suggestion." BLACK'S LAW DICTIONARY 1277 (rev. 5th ed. 1979). No court has ever reversed a conviction for a trial court's failure to give a special identification instruction *sua sponte*. But see *infra* note 212.

89. 469 F.2d at 556.

90. *Id.*

91. *Id.*

92. The trial court's instructions are reprinted at *id.* n.13.

93. *Id.* at 552. In reaching this conclusion the *Telfaire* court explained:

We do not qualify in any particular the importance of and need for a special identification instruction. But in evaluating the prejudice inherent in the failure of the trial court to offer one, we have taken into account that in the circumstances of a particular case, the proof, contentions and general instructions may have so shaped the case as to convince us that in any real sense the minds of the jury were plainly focused on the need for finding the identification of the defendant as the offender proved beyond a reasonable doubt.

In addition to affirming the defendant's conviction, the *Telfaire* court articulated a set of Model Special Instructions on Identification.⁹⁴ Although these special cautionary instructions were not set forth in

Id. at 555-56 (footnotes omitted). Thus, it is apparent that the *Telfaire* court was primarily concerned with assuring that the jury was aware that the reasonable doubt standard applied to the issue of identity. This is a concern which is distinct from informing the jury of the dangers inherent in eyewitness identifications and the factors that should be considered in evaluating such evidence. See *infra* note 165 and accompanying text. See also Woocher, *supra* note 6, at 1004.

94. 469 F.2d at 558-59. The text of the instruction is as follows:

One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of providing identity, beyond a reasonable doubt. It is not essential that the witness himself be free from doubt as to the correctness of his statement. However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.

In appraising the identification testimony of a witness, you should consider the following:

(1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the offenders at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

[In general, a witness bases any identification he makes on his perception through the use of his senses. Usually the witness identifies an offender by the sense of sight—but this is not necessarily so, and he may use other senses.]

(2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his recollection? You may take into account both the strength of the identification, and the circumstances under which the identification was made.

If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

[You may also take into account that an identification made by picking the defendant out of a group of similar individuals is generally more reliable than one which results from the presentation of the defendant alone to the witness.]

[(3) You make [sic] take into account any occasions in which the witness failed to make an identification of defendant, or make an identification that was inconsistent with his identification at trial.]

(4) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in this testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which he stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty.

mandatory terms, the court did indicate that failure to use the model in the future would create a danger that should not be overlooked except on a showing of good cause.⁹⁵ The model instructs that identity is an issue in the case, that the prosecution has the burden of proving identity beyond a reasonable doubt, and that certain enumerated factors should be considered in assessing the identification testimony.⁹⁶ These factors, which are similar to those set forth by the Supreme Court in *Neil v. Biggers*,⁹⁷ include the capacity and opportunity of the eyewitness to observe the criminal, the suggestiveness of circumstances existing during any identification subsequent to the crime, any prior failure of the eyewitness to identify the defendant, and the general credibility of the eyewitness' testimony.⁹⁸

C. *Telfaire-Type Instructions in the Federal Circuits*

The advocacy of *Telfaire*-type special cautionary jury instructions has met with varying degrees of success in the United States Courts of Appeals.⁹⁹ Although the District of Columbia Circuit initially took the lead¹⁰⁰ in championing such instructions to minimize the dangers of eyewitness identifications, that circuit has yet to impose a strict requirement for giving the instructions.¹⁰¹ The court has held that the instruc-

Id. The three bracketed passages are "to be used only if appropriate" with "[i]nstructions to be inserted or modified as appropriate to the proof and contentions." *Id.* at 558 n*.

95. *Id.* at 557.

96. For the text of the instruction, see *supra* note 94.

97. 409 U.S. 188, 199-200 (1972). See *supra* notes 51-54 and accompanying text. As noted by Woocher, *supra* note 6, at 1003 n.161, these factors are also similar to the *Wade* "independent origins" test. See *supra* notes 41-46 and accompanying text.

98. For the text of the instruction, see *supra* note 94. See also Woocher, *supra* note 6, at 1003. In a concurring opinion to *Telfaire*, Chief Judge Bazelon argued that the model instruction should also inform the jury that "members of one race have greater difficulty in accurately identifying members of a different race." 469 F.2d at 559 (Bazelon, C.J., concurring). Most courts have rejected this modification. See, e.g., *United States v. Ingram*, 600 F.2d 260 (10th Cir. 1979); *Abney v. United States*, 347 A.2d 403 (D.C. 1975); *State v. Allen*, 301 N.C. 489, 272 S.E.2d 116 (1980). But see *United States v. Smith*, No. 81-3069 (6th Cir., Aug. 17, 1981) (trial court warned jury concerning the fact that defendant was the only black person in the courtroom). For an argument opposing Chief Judge Bazelon's modification, see *United States v. Telfaire*, 469 F.2d 552, 561-63 (D.C. Cir. 1972) (Leventhal, J., concurring).

99. See generally *Cunningham & Tyrrell*, *supra* note 9, at 588 n.145; Woocher, *supra* note 6, at 1003-04 nn. 162-65. For a discussion of the use of cautionary jury instructions on identifications in other countries, see generally *Starkman*, *supra* note 9, at 375-77 (Canada); *Thoresby*, *supra* note 19, at 1343-44 (Great Britain); *Williams*, *supra* note 23, at 410-15 (Great Britain).

100. See *supra* notes 73-76 and accompanying text.

101. See, e.g., *United States v. Thomas*, 485 F.2d 1012 (D.C. Cir. 1973) (*Telfaire* instructions

tions need be given only in cases applying the one-witness rule.¹⁰² Moreover, where the rule does apply, a trial court's failure to give the *Telfaire* instructions sua sponte is not error if the identification appears reliable.¹⁰³ The District of Columbia Circuit has never reversed a conviction for failure to give *Telfaire*-type instructions.¹⁰⁴

Several other circuits have approved using cautionary instructions on eyewitness identifications as a safeguard against misidentification.¹⁰⁵ The First,¹⁰⁶ Second,¹⁰⁷ Third,¹⁰⁸ Sixth,¹⁰⁹ Ninth,¹¹⁰ and Tenth¹¹¹ Cir-

need not be given verbatim). See also *supra* note 94 (text of *Telfaire* instruction). Cf. *United States v. Butler*, 636 F.2d 727, 729 (D.C. Cir. 1980) (trial judge properly gave "a version of the 'Telfaire instruction' tailored to fit the facts of this case.")

102. *United States v. Jackson*, 509 F.2d 499 (D.C. Cir. 1974). In *Jackson*, a great deal of corroborating evidence accompanied the victim's identification of the defendant. In affirming the defendant's conviction for armed robbery the court stated that "[t]he problem of witness-competence is accentuated in cases wherein the guilt of the accused is sought to be rested on an uncorroborated identification by a single witness." *Id.* at 507.

103. *United States v. Garner*, 499 F.2d 536 (D.C. Cir. 1974). In *Garner*, the defendant's conviction for distribution of heroin was founded solely on the testimony of an undercover agent who saw and dealt with the defendant on six occasions during a two-week period. The trial court instructed the jury only that identification was in issue and that it was an essential element of the government's burden of proof, but the defense neither objected to the court's instructions nor requested *Telfaire*-type instructions. On appeal, the court held there was no error because "[t]he instruction suggested in the *Telfaire* case does not focus on identifications of this sort, although it may be appropriate when a witness to a robbery or homicide has identified some stranger to him as the perpetrator of the crime." *Id.* at 538.

104. *But see United States v. Greer*, 538 F.2d 437 (D.C. Cir. 1976). In *Greer*, the court granted a new trial, at the request of the trial judge, for a defendant convicted of armed robbery and assault with a dangerous weapon. Eyewitness identification testimony of the victim was the sole prosecution evidence and the defendant had presented much alibi evidence. The opinion does not indicate whether *Telfaire*-type instructions were given to the jury, but the appellate court agreed with the trial judge that the victim's "identification is suspect and that 'the interest of justice' demands a new trial," *id.* at 441, even though the victim's testimony "indicated that all the indicia of reliability to which this court has repeatedly looked were present," *id.* at 443.

105. See, e.g., *United States v. Cain*, 616 F.2d 1056, 1058 (8th Cir. 1980); *United States v. Scott*, 578 F.2d 1186, 1191 (6th Cir. 1978); *United States v. Kavanagh*, 572 F.2d 9, 12 (1st Cir. 1978); *United States v. Lewis*, 565 F.2d 1248, 1253 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978); *United States v. Roundtree*, 527 F.2d 16, 19 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976); *United States v. Hodges*, 515 F.2d 650, 652-53 (7th Cir. 1975); *United States v. Holley*, 502 F.2d 273, 275 (4th Cir. 1974); *United States v. O'Neal*, 496 F.2d 368, 373 (6th Cir. 1974); *United States v. Fernandez*, 456 F.2d 638, 643-44 (2d Cir. 1972); *United States v. Barber*, 442 F.2d 517, 528 (3d Cir.), *cert. denied*, 404 U.S. 958 (1971). The Fifth Circuit has not ruled on the issue to date.

106. See, e.g., *United States v. Kavanagh*, 572 F.2d 9 (1st Cir. 1978). In *Kavanagh*, the trial court refused to give the *Barber* instructions. See *supra* notes 77-82 and accompanying text. The government's case consisted of one eyewitness' identification and circumstantial corroborating evidence. The defense elicited prior inconsistent identifications by the government's eyewitness and two other eyewitnesses who were not called to testify. While approving of the requested instruction, the court nevertheless held that "the failure to give it is not reversible error." 572 F.2d at 12.

The court found this result justified in light of the "skillful cross-examination," the general instructions to the jury, and because the case against the defendant was not "identification testimony alone." *Id.* at 12-13. The court also refused to mandate a model instruction. *Id.* at 13.

107. *See, e.g.,* United States v. Montelbano, 605 F.2d 56 (2d Cir. 1979); United States v. Marchand, 564 F.2d 983 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); United States v. Gentile, 530 F.2d 461 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976); United States v. Evans, 484 F.2d 1178 (2d Cir. 1973); United States v. Fernandez, 456 F.2d 628 (2d Cir. 1972); Willin v. Ajello, 496 F. Supp. 804 (D. Conn. 1980), *aff'd*, 652 F.2d 55 (2d Cir. 1981). In *United States v. Montelbano*, the court held that the trial court's refusal to give a "cautionary instruction concerning the reliability of eyewitness identification testimony," was not reversible error because there was substantial corroboration evidence and the "usual instructions regarding the credibility of witnesses" were adequate. 605 F.2d 56, 56 (2d Cir. 1979). The Second Circuit has not yet mandated a model instruction on identifications. *But see id.* at 60 (Feinberg, J., concurring).

108. United States v. Wilford, 493 F.2d 730 (3d Cir.), *cert. denied*, 419 U.S. 851 (1974); United States v. Barber, 442 F.2d 517 (3d Cir. 1971), *cert. denied*, 404 U.S. 958 (1972). For a discussion of *Barber*, see *supra* notes 77-82 and accompanying text. In *Wilford*, the defendant was convicted on the basis of eyewitness identifications by an informer and an undercover agent. The informer met the four conditions of the *Barber* instruction and the jury was permitted to treat his identification as a statement of fact. The undercover agent, on the other hand, did not meet the four conditions, but the trial court did not give a cautionary instruction and defense counsel did not request one. Nevertheless, the court did not find the trial court's failure to give the instruction *sua sponte* reversible error. The court argued that the facts of *Barber* were distinguishable from the present case in that the undercover agent's identification was not crucial. 493 F.2d at 735. In a strong dissent, however, Judge Adams argued that the trial court's failure to give a *Telfaire*-type instruction *sua sponte* was "prejudicial to the defendant's ability to secure an adequately informed determination of his innocence of guilt." *id.* at 736 (Adams, J., dissenting), and therefore required reversal.

109. *See, e.g.,* United States v. Smith, No. 81-3069 (6th Cir., Aug. 17, 1981); United States v. Boyd, 620 F.2d 129 (6th Cir.), *cert. denied*, 449 U.S. 855 (1980); United States v. Scott, 578 F.2d 1186 (6th Cir.), *cert. denied*, 439 U.S. 870 (1978); United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974). In *Scott*, the trial court gave an instruction relating identity to the reasonable doubt standard, see *supra* note 76, but refused to give a *Telfaire*-type instruction. The court interpreted *Telfaire*, and decisions in other circuits, to stand for the rule that "the model instruction need be given only when the issue of identity is crucial, i.e., either where no corroboration of the testimony exists, or where the witness' memory has faded by the time of trial, or where there was a limited opportunity for observation." 578 F.2d at 1191. Because none of these elements was present in *Scott*, the trial court's refusal did not deprive the defendant of his "right to a fair trial." *Id.*

110. The Ninth Circuit has been the least receptive to mandating the use of cautionary jury instructions on identification as a safeguard against the risks of misidentification. *See, e.g.,* United States v. Trejo, 501 F.2d 138, 140 (9th Cir. 1974) ("Moreover, even if requested, the trial court would have acted properly in refusing to give such an instruction."). *See also* United States v. Collins, 559 F.2d 561, 566 (9th Cir.), *cert. denied*, 434 U.S. 907 (1977). In all of the cases that have come before the Ninth Circuit, however, there has either been corroborating evidence, see, e.g., United States v. Sambrano, 505 F.2d 284 (9th Cir. 1974); United States v. Trejo, 501 F.2d 138 (9th Cir. 1974), or the trial court had given some kind of abbreviated cautionary identification instruction, see, e.g., United States v. Field, 625 F.2d 862 (9th Cir. 1980); United States v. Cassassa, 588 F.2d 282 (9th Cir. 1978), *cert. denied*, 441 U.S. 909 (1979), or both, see, e.g., United States v. Thompson, 559 F.2d 552 (9th Cir.), *cert. denied*, 434 U.S. 973 (1977); United States v. Collins, 559

cuits, like the District of Columbia Circuit,¹¹² however, have never held that the failure of a trial court to give such instructions—either sua sponte¹¹³ or in denying a defendant's request¹¹⁴—is a ground for reversal.¹¹⁵ Moreover, only the Third Circuit has followed the *Telfaire* court by prospectively mandating the use of model instructions.¹¹⁶ Generally, these circuits hold that giving instructions on identification testimony lies within the discretion of the trial judge¹¹⁷ and that justice is

F.2d 561 (9th Cir.), *cert. denied*, 434 U.S. 907 (1977); *United States v. Masterson*, 529 F.2d 30 (9th Cir.), *cert. denied*, 426 U.S. 908 (1976).

In *United States v. Smith*, 563 F.2d 1361 (9th Cir. 1977), *cert. denied*, 434 U.S. 1021 (1978), the court was faced with a conviction based upon one eyewitness' identification, with little or no corroboration. The defendant did not request a cautionary identification instruction at trial and did not argue on appeal that one should have been given sua sponte. The defendant, however, did request, and the trial court refused to give, the following instruction: "Henry Albert Smith contends that the eyewitness to the crime had insufficient opportunity to observe the robber, and that her identification of him as the robber is not correct." *Id.* at 1363-64. *Smith* held that this was not an instruction; rather, it was an argument and was properly refused. *Id.* at 1364.

111. *See, e.g.*, *United States v. Cueto*, 628 F.2d 1273 (10th Cir. 1980) (no error to refuse *Telfaire*-type instructions where there is corroboration and two eyewitnesses). *See also United States v. Ingram*, 600 F.2d 260 (10th Cir. 1979) (no error for trial court to refuse instruction on interracial identification).

112. *See supra* notes 83-104 and accompanying text. *See also supra* notes 73-76 and accompanying text.

113. *See, e.g.*, *United States v. Gentile*, 530 F.2d 461, 469 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976); *United States v. Trejo*, 501 F.2d 138, 140 (9th Cir. 1974); *United States v. O'Neal*, 496 F.2d 368, 373 (6th Cir. 1974); *United States v. Wilford*, 493 F.2d 730, 735 (3d Cir.), *cert. denied*, 419 U.S. 851 (1974); *United States v. Amaral*, 488 F.2d 1148, 1151 (9th Cir. 1973). For a definition of sua sponte, *see supra* note 88. *See also infra* note 115.

114. *See, e.g.*, *United States v. Cueto*, 628 F.2d 1273, 1276 (10th Cir. 1980); *United States v. Montelbano*, 605 F.2d 56, 59 (2d Cir. 1979); *United States v. Cassassa*, 588 F.2d 282, 285 (9th Cir. 1978), *cert. denied*, 441 U.S. 909 (1979); *United States v. Scott*, 578 F.2d 1186, 1191 (6th Cir.), *cert. denied*, 439 U.S. 870 (1978); *United States v. Kavanagh*, 572 F.2d 9, 13 (1st Cir. 1978); *United States v. Thompson*, 559 F.2d 552, 553 (9th Cir.), *cert. denied*, 434 U.S. 973 (1977); *United States v. Collins*, 559 F.2d 561, 572 (9th Cir.), *cert. denied*, 434 U.S. 907 (1977); *United States v. Masterson*, 529 F.2d 30, 32 (9th Cir.), *cert. denied*, 426 U.S. 908 (1976); *United States v. Sambrano*, 505 F.2d 284, 287 (9th Cir. 1974); *United States v. Evans*, 484 F.2d 1178, 1187 (2d Cir. 1973).

115. A well-accepted rule mandates that a conviction will not be reversed for the failure of the trial court to instruct the jury sua sponte, unless this omission amounts to "clear error affecting the substantial rights of the defendant." *United States v. Trejo*, 501 F.2d 138, 140 (9th Cir. 1974). *See, e.g.*, *United States v. Revels*, 575 F.2d 74, 76 (4th Cir. 1978); *United States v. Roundtree*, 527 F.2d 16, 19 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976); *United States v. Wilford*, 493 F.2d 730, 734 (3d Cir.), *cert. denied*, 419 U.S. 851 (1974); *United States v. Evans*, 484 F.2d 1178, 1188 (2d Cir. 1973). *See also* FED. R. CRIM. P. 52(b). *See generally* Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF. L. REV. 731, 748-51 (1981).

116. *See supra* notes 77-82 and accompanying text.

117. *See, e.g.*, *United States v. Cueto*, 628 F.2d 1273, 1276 (10th Cir. 1980); *United States v. Field*, 625 F.2d 862, 872 (9th Cir. 1980); *United States v. Cassassa*, 588 F.2d 282, 285 (9th Cir. 1978), *cert. denied*, 441, U.S. 909 (1979); *United States v. Collins*, 559 F.2d 561, 566 (9th Cir.), *cert.*

served so long as the jury's attention is focused on the issue of identity.¹¹⁸ Significantly, of all the cases decided in these circuits, none involved a conviction based on the one-witness rule.¹¹⁹

The Fourth,¹²⁰ Seventh¹²¹ and Eighth¹²² Circuits, in contrast, have

denied, 434 U.S. 907 (1977); *United States v. Masterson*, 529 F.2d 30, 32 (9th Cir.), *cert. denied*, 426 U.S. 908 (1976); *United States v. Sambrano*, 505 F.2d 284, 286 (9th Cir. 1974); *United States v. Trejo*, 501 F.2d 138, 140 (9th Cir. 1974); *United States v. Amaral*, 488 F.2d 1148, 1151 (9th Cir. 1973); *United States v. Evans*, 484 F.2d 1178, 1188 (2d Cir. 1973); *United States v. Barber*, 442 F.2d 517, 528 (3d Cir. 1971).

118. *See, e.g.*, *United States v. Sambrano*, 505 F.2d 284, 287 (9th Cir. 1974) ("The court's instructions . . . were fully adequate and made sure that the jury's attention was focused on the issue of the defendant's identity.") Closing arguments and cross-examination can achieve this focus, *see, e.g.*, *United States v. Kavanagh*, 572 F.2d 9, 12 (1st Cir. 1978); *United States v. Dodge*, 538 F.2d 770, 789 (8th Cir. 1976) (Webster, J., concurring), *cert. denied sub nom. Escamilla v. United States*, 429 U.S. 1099 (1977); *United States v. Roundtree*, 527 F.2d 16, 19 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976); *United States v. Zeiler*, 470 F.2d 717, 720 (3d Cir. 1972), as well as general jury instructions on the Government's burden of proof and assessing the credibility of witnesses, *see, e.g.*, *United States v. Montelbano*, 605 F.2d 56, 59 (2d Cir. 1979); *United States v. Scott*, 578 F.2d 1186, 1190-91 (6th Cir.), *cert. denied*, 439 U.S. 870 (1978); *United States v. Kavanagh*, 572 F.2d 9, 12 (1st Cir. 1978); *United States v. Thompson*, 559 F.2d 552, 553 (9th Cir.), *cert. denied*, 434 U.S. 973 (1977); *United States v. Gentile*, 530 F.2d 461, 469 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976); *United States v. Sambrano*, 505 F.2d 284, 287 (9th Cir. 1974). *But see* *United States v. Wilford*, 493 F.2d 730, 739 (3d Cir.) (Adams, J., dissenting) ("the general instructions given here were not as likely to focus the jury's attention on the identification issue as those in *Telfaire*"), *cert. denied*, 419 U.S. 851 (1974).

119. *See, e.g.*, *United States v. Masterson*, 529 F.2d 30 (9th Cir.), *cert. denied*, 426 U.S. 908 (1976). In *Masterson*, the court distinguished *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), *see supra* notes 83-98 and accompanying text, and *United States v. Holley*, 502 F.2d 273 (4th Cir. 1974), *see infra* notes 123-24 and accompanying text, as cases in which "a single eyewitness was the only incriminating evidence against the defendant." 529 F.2d at 32. *See also* *United States v. Montelbano*, 605 F.2d 56, 59 (2d Cir. 1979) ("the conviction here did not rest alone on eyewitness identification testimony"); *United States v. Scott*, 578 F.2d 1186, 1191 (6th Cir.) ("[i]n the present case, however, the identification . . . was not uncorroborated"), *cert. denied*, 439 U.S. 870 (1978); *United States v. Kavanagh*, 572 F.2d 9, 13 (1st Cir. 1978) ("the government's case against this defendant did not hinge on possibly mistaken identification testimony alone"); *United States v. Marchand*, 564 F.2d 983, 997 (2d Cir. 1977) ("[t]he identifications were only part of the case"), *cert. denied*, 434 U.S. 1015 (1978).

120. Prior to *United States v. Holley*, 502 F.2d 273 (4th Cir. 1974), *see infra* notes 123-24 and accompanying text, the use of identification instructions in the Fourth Circuit was governed by *United States v. Levi*, 405 F.2d 380 (4th Cir. 1968), which merely required the trial court to give an instruction relating the issue of identity to the reasonable doubt standard. 405 F.2d at 382-83.

121. *See, e.g.*, *United States v. Hodges*, 515 F.2d 650, 653 (7th Cir. 1975). *See also infra* notes 125-26 and accompanying text.

122. The Eighth Circuit has considered the issue several times. In *United States v. Roundtree*, 527 F.2d 16 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976), the court held that the trial court's failure to give *Telfaire*-type instructions sua sponte was not reversible error, even though the only evidence against the defendant was the eyewitness identification by one undercover agent. Although it approved of the *Telfaire* instructions, their omission was not plain error because the

taken the problems inherent in eyewitness identification testimony and the solution of special cautionary instructions more seriously. In *United States v. Holley*,¹²³ the Fourth Circuit reversed a bank robbery conviction because of the inadequacy of the trial court's instructions on identification, and prospectively mandated the use of *Telfaire*-type instructions.¹²⁴ Similarly, in *United States v. Hodges*,¹²⁵ the Seventh Circuit reversed a conviction for possession of a stolen check because the trial court had refused to give the jury the defendant's requested in-

defense counsel's cross-examination and closing arguments, as well as the court's general instructions to the jury, "sufficiently alerted the jury of the fact that they should carefully and critically evaluate the strength of the eyewitness testimony." *Id.* at 19. See also *United States v. Chrysler*, 533 F.2d 1055, 1057 (8th Cir. 1976).

In *United States v. Dodge*, 538 F.2d 770 (8th Cir. 1976), *cert. denied sub nom. Escamilla v. United States*, 429 U.S. 1099 (1977), the court upheld the defendant's conviction, which rested upon uncorroborated identification testimony by a single eyewitness, even though the trial court refused to give defendant's proposed identification instructions (patterned after the *Barber* instructions, see *supra* notes 77-82 and accompanying text). The trial court had instructed that the prosecution had to prove identity beyond a reasonable doubt and that the jury should study carefully the witnesses' credibility and ability to observe. 538 F.2d at 783-84. The *Dodge* court distinguished *Holley*, see *infra* notes 123-24 and accompanying text, as involving a highly suspect identification, and *Hodges*, see *infra* notes 125-26 and accompanying text, as involving the trial court's complete failure to specifically instruct on identification. 538 F.2d at 784. There was no reversible error in *Dodge* because the identification was reliable and the trial court did instruct on identity, but the court warned: "we will view with grave concern the failure to give specific and detailed instructions on identification in future cases where identification of the defendant is based solely or substantially on eyewitness testimony." *Id.* See also *Durns v. United States*, 562 F.2d 542, 550 (8th Cir.) (no error to delete first and last paragraphs of *Telfaire* instructions when there is substantial circumstantial evidence in addition to eyewitness testimony), *cert. denied*, 434 U.S. 959 (1977); *Osborne v. United States*, 542 F.2d 1015, 1019 (8th Cir. 1976) (no error in refusing a "superfluous" instruction where identification was by two eyewitnesses and there was substantial corroborative evidence). The Eighth Circuit acted on its *Dodge* warning in *United States v. Greene*, 591 F.2d 471, 477 (8th Cir. 1979). See *infra* notes 127-28 and accompanying text.

123. 502 F.2d 273 (4th Cir. 1974).

124. The Government's entire case in *Holley* was the uncorroborated identification testimony of a single eyewitness which was "so lacking in positiveness as to strongly suggest the 'likelihood of irreparable misidentification.'" *Id.* at 276. The trial court had instructed in accordance with *United States v. Levi*, 405 F.2d 380 (4th Cir. 1968). See *supra* note 120. This instruction was inadequate because it failed to "specifically" instruct the jury "to consider the possibility of misidentification." 502 F.2d at 276. The court expressly mandated the use of *Telfaire* instructions, *id.* at 277, with the qualification that they need not be given verbatim, because "[d]ifferent factual situations . . . call for different degrees of particularity." *Id.* But see *United States v. Revels*, 575 F.2d 74 (4th Cir. 1978) (failure of trial court to give *Telfaire* instructions sua sponte not plain error where identification appeared reliable and there was corroborating evidence); *United States v. Johnson*, 495 F.2d 377 (4th Cir. 1974) (failure of trial court to give *Telfaire* instructions not reversible error where there were "circumstances greatly reducing the possibility of misidentification").

125. 515 F.2d 650 (7th Cir. 1975).

structions on eyewitness identifications.¹²⁶ Finally, in *United States v. Greene*,¹²⁷ the Eighth Circuit reversed a conviction for perjury where the trial court had refused to give *Telfaire*-type instructions.¹²⁸ *Hodges* is presently the most liberal decision of the federal courts because the conviction was based on identification testimony by three eyewitnesses and corroboration testimony by the arresting officer.¹²⁹ Both *Holley* and *Greene*, in contrast, involved convictions based on the one-witness rule.¹³⁰

Although the First, Second, Third, Sixth, Ninth and Tenth Circuits have never reversed a conviction on the ground of the inadequacy of identification instructions,¹³¹ these circuits might be compelled to fol-

126. In *Hodges*, the Seventh Circuit viewed the refusal as error because the most important issue in the trial was identification. The court argued that cross-examination, closing arguments, and general instructions on burden of proof and credibility of witnesses were insufficient safeguards against the "dangers of misidentification which are inherent in eyewitness testimony." *Id.* at 653. The court therefore reversed and mandated the giving of *Telfaire*-type instructions whenever identification is the primary issue and the instructions are requested by counsel. *Id.* As indicated by *United States v. Kimbrough*, 528 F.2d 1242, 1248 (7th Cir. 1976), however, *Telfaire* instructions need not be given verbatim and minor deletions and variations are permissible. See *infra* note 129.

127. 591 F.2d 471 (8th Cir. 1979). *Greene* relied on the Eighth Circuit's earlier decision in *United States v. Dodge*, 538 F.2d 770 (8th Cir. 1976), *cert. denied sub nom. Escamilla v. United States*, 429 U.S. 1099 (1977), see *supra* note 122. 591 F.2d at 475-77. Interestingly, the *Greene* court distinguished *Dodge* because it was not a case in which "the eyewitness identification [was] the sole basis for the conviction." *Id.* at 477. Because the one-witness rule was applied in *Greene*, the court apparently felt that this distinction was sufficient reason to affirm in *Dodge*, while reversing in *Greene*. The distinction is erroneous, however, because the *Dodge* court stated that there was only one witness identifying the defendant, and even found it necessary to discuss the one-witness rule. 538 F.2d at 783.

128. The court argued that because the Government's case rested solely on the doubtful identification by a single eyewitness, the trial court's refusal was error. The instructions given were inadequate because they "never called the jury's attention to the fact that there was a crucial eyewitness identification involved or elaborated as to any of the dangers of misidentification." 591 F.2d at 476-77.

129. 515 F.2d at 652. In *United States v. Cowsen*, 530 F.2d 734 (7th Cir.), *cert. denied*, 422 U.S. 906 (1976), however, the Seventh Circuit seemed to retreat from its liberal position in *Hodges*. In *Cowsen*, the trial court, two weeks after *Hodges* was decided, refused to instruct the jury that identification was in issue or that the reasonable doubt standard applied to that issue. *Id.* at 738. The evidence against the defendant was the identification testimony of two undercover agents. Defendant's conviction for distributing heroin was affirmed. The appellate court reasoned that *Hodges* required *Telfaire* instructions be given upon request, and that because the instructions requested were not *Telfaire* instructions, it was not error to refuse them. In contrast to *Hodges*, see *supra* note 126, the *Cowsen* court attached significant weight to the effectiveness of the closing arguments of counsel and the general instructions on credibility of witnesses. 530 F.2d at 739.

130. See *supra* notes 124 & 128.

131. See *supra* notes 105-15 and accompanying text.

low the example of the Fourth and Eighth Circuits given an analogous factual situation.¹³² These circuits are not likely to go as far as the Seventh Circuit in *Hodges*, however, because of their extreme reluctance to reverse convictions for failure of the trial judge to give identification instructions.¹³³ In sum, most circuits would affirm a conviction based on eyewitness identification testimony, even absent *Telfaire*-type instructions, if the court could find sufficient indicia of reliability.¹³⁴

D. *Telfaire-Type Instructions in the State Courts*

Mandatory *Telfaire*-type instructions have met with only limited success in state courts as well. One reason is that in most states trial judges are prohibited from commenting on evidence in their instructions to juries.¹³⁵ Several state courts that have confronted the issue have specifically held that *Telfaire*-type instructions violate the prohibition against judicial comment on evidence.¹³⁶ Other states have held *Telfaire*-type instructions objectionable for their lack of simplicity, impartiality, and brevity.¹³⁷ Thus, several jurisdictions expressly disallow special cautionary instructions on eyewitness identification testimony.

Moreover, many states that do not formally object to *Telfaire*-type instructions have held that a trial court does not commit error or abuse its discretion by refusing to give such instructions either at a defendant's request¹³⁸ or sua sponte.¹³⁹ This is true even when a case pro-

132. Such a factual situation might be a case where the one-witness rule applies. See *supra* note 119 and accompanying text.

133. See *supra* notes 101-18 and accompanying text.

134. These indicia include appearances of reliability as well as corroboration or circumstantial evidence. See *supra* note 124.

135. H. KALVEN, JR. & H. ZEISEL, *THE AMERICAN JURY* 420, table 104 (1966). Thirty-nine states have such prohibitions. *Id.* The federal courts and the following eleven states allow judicial comment on evidence: California, Connecticut, Michigan, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont and Wisconsin. *Id.* See generally *infra* notes 248-69 and accompanying text.

136. See, e.g., *State v. Valencia*, 118 Ariz. 136, 575 P.2d 335 (1977); *Conley v. State*, 270 Ark. 886, 607 S.W.2d 328 (1980); *State v. Ollison*, 16 Or. App. 544, 519 P.2d 393 (1974); *State v. Robinson*, 274 S.C. 198, 262 S.E.2d 729 (1980); *State v. Jordan*, 17 Wash. App. 542, 564 P.2d 340 (1977).

137. See, e.g., *People v. Robinson*, 75 Ill. App. 3d 112, 394 N.E.2d 13 (1979); *People v. Burnett*, 74 Ill. App. 3d 990, 394 N.E.2d 456 (1979); *State v. Higgins*, 592 S.W.2d 151 (Mo. en banc 1979), *appeal dismissed*, 446 U.S. 902 (1980); *State v. White*, 617 S.W.2d 596 (Mo. Ct. App. 1981); *State v. Sloan*, 575 S.W.2d 836 (Mo. Ct. App. 1978).

138. See, e.g., *Vincent v. State*, 399 So. 2d 923 (Ala. Crim. App. 1981); *Shields v. State*, 397 So. 2d 184 (Ala. Crim. App.), *cert. denied*, 397 So. 2d 189 (1981); *People v. Hurley*, 95 Cal. App. 3d 895, 157 Cal. Rptr. 364 (1979); *People v. Reynolds*, 38 Colo. App. 258, 559 P.2d 714 (1976); *State v. Harden*, 175 Conn. 315, 398 A.2d 1169 (1978); *Wilkerson v. United States*, 427 A.2d 923 (D.C.

ceeds to the jury under the one-witness rule.¹⁴⁰ The justification behind these decisions is that a defendant is adequately protected against misidentification if the jury's attention is focused on the issue of identity¹⁴¹ and if the identification is apparently reliable.¹⁴²

Several state courts have observed that cross-examination of eyewitnesses and closing arguments,¹⁴³ as well as general instructions on the prosecution's burden of proof and the assessment of witnesses' credibil-

1975), *cert. denied*, 454 U.S. 852 (1981); *Nelson v. State*, 362 So. 2d 1017 (Fla. Dist. Ct. App. 1978); *Sapp v. State*, 155 Ga. App. 485, 271 S.E.2d 19 (1980); *State v. Padilla*, 57 Hawaii 150, 552 P.2d 357 (1976); *Brock v. Commonwealth*, 627 S.W.2d 42 (Ky. Ct. App. 1981), *cert. denied*, 102 S. Ct. 2302 (1982); *State v. Monroe*, 397 So. 2d 1258 (La. 1981); *Sparks v. State*, 96 Nev. 26, 604 P.2d 802 (1980); *State v. Burke*, ___ N.H. ___, 448 A.2d 962 (1982); *State v. Mazurek*, 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975); *State v. Guster*, 66 Oh. St. 2d 266, 421 N.E.2d 157 (1981); *State v. Christian*, 35 Or. App. 339, 581 P.2d 132 (1978), *cert. denied*, 444 U.S. 845 (1979); *State v. Classen*, 31 Or. App. 683, 571 P.2d 527 (1977); *State v. Robinson*, 274 S.C. 198, 262 S.E.2d 729 (1980); *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979); *State v. Motes*, 264 S.C. 317, 215 S.E.2d 190 (1975); *State v. Lewis*, 628 S.W.2d 750 (Tenn. Crim. App. 1981); *Holt v. State*, 591 S.W.2d 785 (Tenn. Crim. App. 1979); *State v. Kasper*, 137 Vt. 184, 404 A.2d 85 (1979); *State v. Jordan*, 17 Wash. App. 542, 564 P.2d 340 (1977); *Hampton v. State*, 92 Wis. 2d 450, 285 N.W.2d 868 (1979).

139. *See, e.g.*, *State v. Benjamin*, 33 Conn. Supp. 586, 363 A.2d 762 (Super. Ct. 1976); *Smith v. United States*, 343 A.2d 40 (D.C. 1975); *State v. Thomas*, 541 S.W.2d 775 (Mo. Ct. App. 1976); *Commonwealth v. Moffett*, ___ Mass. ___, 418 N.E.2d 585 (1981); *State v. Lang*, 46 N.C. App. 138, 264 S.E.2d 821 (1980); *State v. Stinson*, 88 S.D. 592, 226 N.W.2d 155 (1975). *State v. Malmrose*, 649 P.2d 56 (Utah 1982).

140. *See, e.g.*, *Smith v. United States*, 343 A.2d 40 (D.C. 1975); *Nelson v. State*, 362 So. 2d 1017 (Fla. Dist. Ct. App. 1978); *State v. McFarland*, 604 S.W.2d 613 (Mo. Ct. App. 1980); *State v. Thomas*, 541 S.W.2d 775 (Mo. Ct. App. 1976); *State v. Todd*, 537 S.W.2d 865 (Mo. Ct. App. 1976); *State v. Guster*, 66 Ohio St. 2d 266, 421 N.E.2d 157 (1981); *State v. Johnson*, 12 Wash. App. 40, 527 P.2d 1324 (1974). *Cf.* *State v. Schaffer*, 638 P.2d 1185 (Utah 1981) (although sole evidence was identifications by two eyewitnesses, it was not error to refuse to give *Telfaire*-type instruction to jury).

141. *See, e.g.*, *State v. Benjamin*, 33 Conn. Supp. 586, 363 A.2d 762 (Super. Ct. 1976); *State v. Lang*, 46 N.C. App. 138, 264 S.E.2d 821 (1980); *State v. Christian*, 35 Or. App. 339, 581 P.2d 132 (1978), *cert. denied*, 444 U.S. 845 (1979); *State v. Motes*, 264 S.C. 317, 215 S.E.2d 190 (1975).

142. *See, e.g.*, *Shields v. State*, 397 So. 2d 184 (Ala. Crim. App. 1981); *State v. Harden*, 175 Conn. 315, 398 A.2d 1169 (1978); *State v. Benjamin*, 33 Conn. Supp. 586, 363 A.2d 762 (Super. Ct. 1976); *Wilkerson v. United States*, 427 A.2d 923 (D.C.), *cert. denied*, 454 U.S. 852 (1981); *State v. Padilla*, 57 Hawaii 150, 552 P.2d 357 (1976); *Brock v. Commonwealth*, 627 S.W.2d 42 (Ky. Ct. App. 1981), *cert. denied*, 102 S. Ct. 2302 (1982); *State v. Lang*, 46 N.C. App. 138, 264 S.E.2d 821 (1980); *State v. Guster*, 66 Ohio St. 2d 266, 421 N.E.2d 157 (1981); *State v. Motes*, 264 S.C. 317, 215 S.E.2d 190 (1975).

143. *See, e.g.*, *Conley v. State*, 270 Ark. 886, 607 S.W.2d 328 (1980); *Smith v. United States*, 343 A.2d 40 (D.C. 1975); *State v. Padilla*, 57 Hawaii 150, 552 P.2d 357 (1976); *People v. Benson*, 71 Ill. App. 3d 591, 390 N.E.2d 113 (1979); *People v. Hefner*, 70 Ill. App. 3d 693, 388 N.E.2d 1059 (1979); *State v. Higgins*, 592 S.W.2d 151 (Mo. 1979); *State v. Thomas*, 541 S.W.2d 775 (Mo. Ct. App. 1976); *State v. Burke*, ___ N.H. ___, 448 A.2d 962 (1982); *State v. Ollison*, 16 Or. App. 544, 519 P.2d 393 (1974); *State v. Kasper*, 137 Vt. 184, 404 A.2d 85 (1979); *State v. Edwards*, 23 Wash. App. 893, 600 P.2d 566 (1979).

ity,¹⁴⁴ can achieve this focus. Other courts have held that it can be achieved only through jury instructions stating that identity is in issue and that the prosecution bears the burden of proof on that issue.¹⁴⁵ These states, however, fail to address the inherent unreliability of eyewitness identifications or the factors affecting the reliability of such evidence.¹⁴⁶

144. *See, e.g.*, *State v. Valencia*, 118 Ariz. 136, 575 P.2d 335 (Ct. App. 1977); *Conley v. State*, 270 Ark. 886, 607 S.W.2d 328 (1980); *People v. Hurley*, 95 Cal. App. 3d 895, 157 Cal. Rptr. 364 (1979); *People v. Reynolds*, 38 Colo. App. 258, 559 P.2d 714 (1976); *Nelson v. State*, 362 So. 2d 1017 (Fla. Dist. Ct. App. 1978); *State v. Padilla*, 57 Hawaii 150, 552 P.2d 357 (1976); *State v. Thomas*, 541 S.W.2d 775 (Mo. Ct. App. 1976); *Sparks v. State*, 96 Nev. 26, 604 P.2d 802 (1980); *State v. Ollison*, 16 Or. App. 544, 519 P.2d 393 (1974); *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979); *State v. Lewis*, 628 S.W.2d 750 (Tenn. Crim. App. 1981); *State v. Schaffer*, 638 P.2d 1185 (Utah 1981); *State v. Kasper*, 137 Vt. 184, 404 A.2d 85 (1979); *State v. Edwards*, 23 Wash. App. 893, 600 P.2d 566 (1979).

145. *See, e.g.*, *People v. Guzman*, 47 Cal. App. 3d 380, 121 Cal. Rptr. 69 (1975); *People v. Smith*, 67 Cal. App. 3d 45, 136 Cal. Rptr. 387 (1977); *State v. Harden*, 175 Conn. 315, 398 A.2d 1169 (1978); *Freeman v. State*, 371 So. 2d 114 (Fla. Dist. Ct. App. 1978); *State v. Green*, 86 N.J. 281, 430 A.2d 914 (1981); *State v. Guster*, 66 Ohio St. 2d 266, 421 N.E.2d 157 (1981); *Holt v. State*, 591 S.W.2d 785 (Tenn. Crim. App. 1979); *Hampton v. State*, 92 Wis. 2d 450, 285 N.W.2d 868 (1979). *But see, e.g.*, *People v. Benson*, 71 Ill. App. 3d 591, 390 N.E.2d 113 (1979); *State v. Lang*, 46 N.C. App. 138, 264 S.E.2d 821 (1980).

In *Freeman v. State*, 371 So. 2d 114 (Fla. Dist. Ct. App. 1978), a Florida court reversed a conviction for robbery where the only evidence against the defendant was a single eyewitness' identification testimony and where the trial judge had failed to instruct the jury "as to the existence of the issue and the burden of proof of the state to prove the issue." *Id.* at 118. The *Freeman* court explained that reversal was necessary because the "issue of identification is paramount" and because "neither summation of counsel at the close of the evidence . . . nor cross-examination as to the matter of identification by defense counsel adequately protects a defendant against the dangers of misidentification which are inherent in eyewitness testimony." *Id.* at 117. The *Freeman* court held, however, that a defendant was not entitled to more than an instruction connecting identity to reasonable doubt and disapproved of *Telfaire* instructions. *Id.* at 118.

A California lower court adopted a similar position in *People v. Guzman*, 47 Cal. App. 3d 380, 121 Cal. Rptr. 69 (1975), where the trial court had refused to give an instruction "relating identification to reasonable doubt." *Id.* at 387, 121 Cal. Rptr. at 73. In reversing, the *Guzman* court held that this alone was not reversible error, but "when coupled with other errors . . . may have contributed to defendant's prejudice." *Id.* Other California appellate courts, however, probably would not have found any error in the trial court's refusal to give the instruction requested in *Guzman*. *See, e.g.*, *People v. Hurley*, 95 Cal. App. 3d 895, 157 Cal. Rptr. 364 (1979).

In *State v. Green*, 86 N.J. 281, 430 A.2d 914 (1981), the New Jersey Supreme Court reversed a conviction for rape where the trial court's instructions to the jury had failed to emphasize that the issue of identity had to be resolved against defendant, beyond a reasonable doubt, before the jury could convict. *Id.* at 293, 430 A.2d at 920. The court also set forth a model instruction for use in the future. *Id.*

For a discussion of the distinction between *Telfaire* instructions and identity/reasonable doubt instructions, see *State v. Guster*, 66 Ohio St. 2d 266, 272-73, 421 N.E.2d 157, 160 (1981). *See also infra* note 165 and accompanying text.

146. This is because the inherent unreliability of eyewitness identification is either "within the

Only a handful of states have held that it is error for a trial court to refuse to give *Telfaire*-type instructions.¹⁴⁷ In *State v. Payne*,¹⁴⁸ for example, the Supreme Court of Appeals of West Virginia reversed a statutory rape conviction that was based on the one-witness rule, holding the trial court in error for refusing to instruct the jury to scrutinize the eyewitness testimony carefully.¹⁴⁹ The *Payne* court approved of *Telfaire* instructions in one-eyewitness cases, but refused to set forth a mandatory rule.¹⁵⁰ The Supreme Judicial Court of Massachusetts reached similar results in *Commonwealth v. Rodriguez*¹⁵¹ and *Commonwealth v. Bowden*.¹⁵²

ordinary experience of jurors," *Nelson v. State*, 362 So. 2d 1017, 1021 (Fla. Dist. Ct. App. 1978), or "more properly tested by examination and cross-examination, and any weaknesses in eyewitness identification may be exposed by counsel in argument to the jury." *State v. Edwards*, 23 Wash. App. 893, 896-97, 600 P.2d 566, 569 (1979). This is contrary to the findings of psychologists. See *supra* note 18 and accompanying text.

147. These states are Kansas, Massachusetts, New York, and West Virginia. New York has reversed many convictions for the failure of the trial court to properly instruct the jury on how to evaluate eyewitness identification testimony. See, e.g., *People v. Hall*, 82 A.D.2d 840, 439 N.Y.S.2d 661 (1981); *People v. Gaines*, 80 A.D.2d 561, 435 N.Y.S.2d 346 (1981); *People v. Merriam*, 79 A.D.2d 619, 433 N.Y.S.2d 475 (1980); *People v. Bruno*, 77 A.D.2d 922, 431 N.Y.S.2d 106 (1980); *People v. Rothaar*, 75 A.D.2d 652, 427 N.Y.S.2d 272 (1980); *People v. Best*, 73 A.D.2d 651, 422 N.Y.S.2d 478 (1979); *People v. Anthony P.*, 72 A.D.2d 525, 420 N.Y.S.2d 907 (1979); *People v. Fludd*, 68 A.D.2d 409, 417 N.Y.S.2d 283 (1979); *People v. Goins*, 64 A.D.2d 905, 407 N.Y.S.2d 891 (1978); *People v. Rodriguez*, 61 A.D.2d 914, 402 N.Y.S.2d 843 (1978); *People v. Byrdsong*, 58 A.D.2d 877, 396 N.Y.S.2d 485 (1977). The Supreme Court of New Hampshire recently indicated that in the future it would "view with grave concern" the failure to give a *Telfaire*-type instruction in cases in which "eyewitness identification is essential to support a conviction." *State v. Burke*, — N.H. —, 448 A.2d 962, 966 (1982). Cf. *State v. Malmrose*, 649 P.2d 56, 62-66 (Utah 1982) (Stewart, J., dissenting) (special eyewitness cautionary instruction should be given sua sponte where identification is a major issue).

148. 280 S.E.2d 72 (W. Va. 1981).

149. *Id.* at 78. In *Payne*, the testimony of the eyewitness/victim was uncorroborated and uncontradicted. *Id.* The court determined that the facts fell "squarely between" those of two prior cases, *State v. Perry*, 41 W. Va. 641, 24 S.E. 634 (1896), and *State v. Garten*, 131 W. Va. 641, 49 S.E.2d 561 (1948). *Perry* involved uncorroborated and contradicted testimony, whereas *Garten* involved corroborated and uncontradicted testimony. 280 S.E.2d at 77. The *Perry* court held that the trial court's refusal to instruct that the testimony should be scrutinized "with care and caution" was in error. *Id.* The *Payne* court found *Perry* controlling and therefore reversed. *Id.* at 78.

150. 280 S.E.2d at 78-79.

151. 378 Mass. 296, 391 N.E.2d 889 (1979). In *Rodriguez*, the trial court's refusal to give defendant's instructions constituted error, because the instructions "failed entirely to mention that the victim might honestly have been mistaken in her identification of the defendant." *Id.* at 302, 391 N.E.2d at 893. The court set out and approved the use of *Telfaire* instructions. *Id.* at 310-11, 391 N.E.2d at 897-98. The court reversed, but because there were other errors, it is not apparent whether the inadequacy of the instructions given was alone sufficient cause for reversal.

152. 379 Mass. 472, 399 N.E.2d 482 (1980). *Bowden* noted with approval the "substantial precedent favoring an instruction concerning identification testimony where the issue is fairly

In *State v. Warren*,¹⁵³ the Kansas Supreme Court strongly supported the use of *Telfaire*-type instructions. In *Warren*, a jury had convicted the defendant on the identification testimony of a single eyewitness and the trial court had refused to give the defendant's requested instructions on the factors affecting the reliability of such testimony.¹⁵⁴ The *Warren* court reversed the conviction and held that in criminal cases where eyewitness identification is a crucial component of the prosecution's case and the identification is arguably unreliable, the trial court should give a cautionary instruction advising the jury which factors to consider in determining whether the eyewitness identification testimony is credible.¹⁵⁵ The court argued that, without such an instruction,¹⁵⁶ the jury might infer from the admission of the testimony that the trial court warranted its reliability.¹⁵⁷

raised" and concluded that "the defendant in the case at bar was entitled to such an instruction." *Id.* at 484, 399 N.E.2d at 490. The court reversed, but, as in *Rodriguez*, there were other errors present.

Subsequent decisions in Massachusetts indicate that the *Rodriguez* rule will not be applied with complete vigor. See, e.g., *Commonwealth v. Moffett*, ___ Mass. ___, 418 N.E.2d 585 (1981) (omission of portions of *Telfaire* instructions not plain error); *Commonwealth v. Napolitano*, 378 Mass. 599, 393 N.E.2d 338 (1979) (trial court instructions held adequate); *Commonwealth v. Cole*, 13 Mass. App. Ct. 908, 429 N.E.2d 1029 (1982) (not error for trial court to refuse to give *Rodriguez-Telfaire* instruction where identification was not the crucial issue and defendant himself corroborated the identification testimony of several witnesses); *Commonwealth v. Simmons*, ___ Mass. App. Ct. ___, 414 N.E.2d 623 (1981) (instructions given adequately suggested possibility of mistaken identification); *Commonwealth v. Durant*, ___ Mass. App. Ct. ___, 412 N.E.2d 1276 (1980) (refusal to give *Telfaire* instructions harmless error); *Commonwealth v. Stokes*, ___ Mass. App. Ct. ___, 408 N.E.2d 887 (1980) (failure to give *Telfaire* instructions verbatim sua sponte harmless error); *Commonwealth v. Alleyne*, ___ Mass. App. Ct. ___, 405 N.E.2d 171 (1980) (refusal to give *Telfaire* instructions in full not reversible error).

153. 230 Kan. 385, 635 P.2d 1236 (1981).

154. Justice Prager, writing for the majority, thoroughly surveyed the literature discussing the problems of eyewitness identifications and the available solutions. *Id.* at 390-92, 635 P.2d at 1240-41. He also noted decisions in Kansas rejecting the need for *Telfaire*-type instructions, as well as cases in the federal circuits and in a few states "holding that it is error not to give a cautionary instruction on eyewitness testimony where the facts of the case require it." *Id.* at 396, 635 P.2d at 1243.

155. *Id.* at 397, 635 P.2d at 1244. The defendant's requested instructions basically covered the five *Biggers* factors, see *supra* note 54 and accompanying text. The court argued that "[i]f [the *Biggers* 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." *Id.* at 397, 635 P.2d at 1244 (emphasis in original). There was a strong dissent. See *id.* at 400-03, 635 P.2d at 1246-48 (Fromme, J., dissenting).

156. For the text of the instructions defendant requested to be given to the jury, see *id.* at 398-99, 635 P.2d at 1244-45.

157. *Id.* at 397, 635 P.2d at 1244.

In *Warren* the trial court's instructions were held inadequate, not because they failed to focus on the *issue* of identification,¹⁵⁸ but rather because they failed to focus the jury's attention on the dangers of identification testimony.¹⁵⁹ The court concluded that the trial court should have given the defendant's requested instructions so that the jury could have intelligently and fairly weighed the eyewitness identification testimony in order to prevent "potential injustice."¹⁶⁰

Although the Kansas Supreme Court rationalized that it was following the more recent decisions,¹⁶¹ a survey of the case law indicates that it actually adopted a more liberal position on the issue. As in the federal circuits,¹⁶² very few states would reverse a *Warren*-type conviction on the issue of identification instructions, and still fewer would require that *Telfaire*-type instructions be given. A small minority of states, however, is strongly in favor of mandating cautionary instructions on eyewitness identification testimony.¹⁶³

III. ANALYSIS: SHOULD COURTS REQUIRE SPECIAL CAUTIONARY INSTRUCTIONS ON EYEWITNESS IDENTIFICATION TESTIMONY?

The purpose of this Part is to determine whether appellate courts should require special cautionary jury instructions on eyewitness identification testimony to minimize the risks and deficiencies inherent in such testimony. At the outset it must be emphasized that the instructions being considered are *Telfaire*-type instructions,¹⁶⁴ rather than instructions that merely relate the issue of identity to the prosecution's burden of proof or that highlight the fact that identity is in issue.¹⁶⁵

158. See *supra* notes 141-46 and accompanying text.

159. 230 Kan. at 399, 635 P.2d at 1245.

160. *Id.* at 397, 635 P.2d at 1244. In *State v. Bagby*, 231 Kan. 176, 642 P.2d 993 (1982), however, the Supreme Court of Kansas declined to extend the rule stated in *Warren*. In *Bagby*, the defendant was convicted of aggravated burglary, attempted rape, and aggravated sodomy on the basis of identification testimony by the victim and a witness. The court affirmed defendant's conviction, stating: "[w]e find no serious question about the reliability of either identification; therefore no cautionary instruction under *Warren* was required. We note also that no cautionary instruction was requested by counsel for appellant at the trial in this case." *Id.* at 180, 642 P.2d at 997.

161. 230 Kan. at 396, 635 P.2d at 1243.

162. See *supra* notes 105-19 and accompanying text.

163. See *supra* notes 147-61 and accompanying text.

164. For the text of the *Telfaire* instructions, see *supra* note 94.

165. See *supra* note 118 and accompanying text. See also *supra* note 145 and accompanying

A. *Is There a Need for Telfaire-Type Instructions?*

The examination of the case law in Part II revealed that a common ground for the refusal of appellate courts to mandate special cautionary instructions on eyewitnesses is the belief that such instructions are unnecessary. This belief is founded on the argument that general jury instructions,¹⁶⁶ together with skillful cross-examination and closing arguments of defense counsel,¹⁶⁷ are adequate protections against any inherent risks of misidentification. This argument is flawed for several reasons.

1. *General Instructions Are Inadequate*

The view that general instructions regarding the prosecution's burden of proof and the assessment of witnesses' credibility are adequate is a corollary to the belief that focusing the jury's attention on the issue of identity or the possibility of misidentification shields a defendant against any prejudicial risk of misidentification.¹⁶⁸ Such a belief fails to consider the nature of the risks inherent in admitting eyewitness identification testimony at a criminal trial.

Experimental psychologists have demonstrated that the notion of a "photographic memory" is a myth¹⁶⁹ and that many factors between

text. These latter instructions are inadequate for the same reasons that general jury instructions are inadequate. *See infra* notes 168-78 and accompanying text. The Supreme Court of Ohio, in *State v. Guster*, 66 Ohio St. 2d 266, 421 N.E.2d 157 (1981), perceptively noted the difference between general instructions or identity/reasonable doubt instructions, and *Telfaire* instructions:

Obviously, this charge instructs the jury that it must direct its attention to the identity of the accused as the perpetrator of the crime, and therefore to the evidence offered in proof thereof, and decide that issue beyond a reasonable doubt before it may find the defendant guilty. This is, however, at some distance from the real objective of the requested instruction: to direct the jurors' attention not to the issue of identity, as such, but rather to the potential unreliability of the eyewitness evidence supporting the issue of identity. Similarly, the court's instruction to the jury as to its role in determining the credibility of witnesses, while correct and complete as far as it went, did not specifically address the question of the inherent unreliability of eyewitness testimony.

Id. at 270, 421 N.E.2d at 160 (footnote omitted). *See also supra* notes 158-59 and accompanying text.

166. *See supra* note 118 and accompanying text. *See also supra* note 144 and accompanying text.

167. *See supra* note 118 and accompanying text. *See also supra* note 143 and accompanying text.

168. *See supra* note 118 and accompanying text. *See also supra* note 141 and accompanying text.

169. *See supra* note 27 and accompanying text. *See also supra* notes 24-36 and accompanying text.

the time of perception—the encounter—and the time of recall—“that’s him”—can contaminate a person’s recollection of another human being.¹⁷⁰ These findings render suspect the natural tendency of jurors to give great weight to eyewitness identification testimony—a tendency that psychologists have shown occurs notwithstanding the presence of evidence of the unreliability of the testimony.¹⁷¹ This tendency can be explained by the fact that the inherent unreliability of eyewitness identifications is simply not a matter of common knowledge.¹⁷² General jury instructions are inadequate because they fail to suggest to jurors that their “common-sense assumptions about identifications are incorrect”¹⁷³ or to instruct jurors on what factors influence the reliability of eyewitness identification testimony.

Associate Justice Hopper, in his dissent in *People v. Hurley*,¹⁷⁴ observed that sending a case involving eyewitness identification testimony to the jury with only general instructions permits the jury to enter deliberations “blind and unknowledgeable” of the crucial factors which could, and should, be revealed to them in special cautionary identification instructions.¹⁷⁵ Even instructions relating the issue of identity to the prosecution’s burden of proof,¹⁷⁶ or admonishing the jury to consider identification testimony carefully,¹⁷⁷ do not begin to provide ju-

170. See *supra* notes 24-36 and accompanying text.

171. See *supra* note 18 and accompanying text.

172. See *supra* note 18 and accompanying text. See also *People v. Hurley*, 95 Cal. App. 3d 895, 903, 157 Cal. Rptr. 364, 368 (1979) (Hopper, A.J., dissenting). See generally E. LOFTUS, *supra* note 9, at 171-77; Woocher, *supra* note 6, at 970.

173. Jonakait, *supra* note 1, at 528.

174. 95 Cal. App. 3d 895, 157 Cal. Rptr. 364 (1979).

175. *Id.* at 904, 157 Cal. Rptr. at 369 (Hopper, A.J., dissenting). See also *State v. Schaffer*, 638 P.2d 1185, 1187-89 (Utah 1981) (Stewart, J., dissenting). In *Schaffer*, Justice Stewart, of the Utah Supreme Court, argued in dissent that a conviction for aggravated robbery should have been reversed where the sole evidence of guilt was the identification testimony of two eyewitnesses and the trial court refused to give defendant’s requested *Telfaire*-type instruction to the jury. Justice Stewart argued that the general instructions on burden of proof and credibility of witnesses were inadequate because

[t]he instructions given referred neither to the inherent problems of eyewitness testimony and the care with which it should be viewed nor defendant’s theory that he was not present. . . . [T]he instructions are nothing more than boilerplate statements concerning burden of proof which do not deal with the problem at all. . . . The general burden of proof instruction clearly did not direct the jury’s attention to the issue of mistaken identity.

638 P.2d at 1188-89.

176. See *supra* note 118 and accompanying text. See also *supra* note 145 and accompanying text.

177. See *supra* notes 77-82 and accompanying text.

rors with the factors essential to assess the reliability of an eyewitness identification.¹⁷⁸

2. *Cross-Examination and Closing Arguments Are Inadequate*

Cross-examination and closing arguments of counsel also inadequately protect criminal defendants from misidentification in cases in which eyewitness identification testimony is important. Concededly, counsel may successfully expose and emphasize factors suggesting that a particular eyewitness' identification is unreliable.¹⁷⁹ Jurors, however, are aware that the defense attorney, as adversary, is obligated to defend his client vigorously. For this reason, the jury is likely to discount any attacks the defense makes on the reliability of an identification as being motivated by his partisan desire to win. In addition, the generally acknowledged natural inclination of jurors to afford great credence to eyewitness identifications¹⁸⁰ also diminishes the effectiveness of cross-examination and closing arguments in minimizing the risks of misidentification.¹⁸¹ Because the trial judge is a neutral officer of the court, a jury is likely to be more receptive to his nonpartisan instructions which enumerate the factors that tend to render an eyewitness identification

178. See *supra* notes 158-60 and accompanying text. See also *supra* note 165.

179. Cf. *Watkins v. Sowders*, 449 U.S. 341, 356-57 (1981) (Brennan, J., dissenting) (cross-examination not effective check on unreliability of identification testimony). In *Watkins*, Justice Brennan argued that cross-examination was ineffective to purge "inadmissible identification evidence from the jurors' minds." *Id.* at 356. A pretrial hearing out of the jury's presence on the admissibility of such evidence was therefore necessary in Justice Brennan's view. Justice Brennan argued that because eyewitness identification testimony has such a great impact on jurors, "the jury is likely to give the erroneously admitted evidence substantial weight, however skillful the cross-examination." *Id.* at 357. Accord *United States v. Wade*, 388 U.S. 218, 235 (1967) ("even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability").

180. See *supra* note 18 and accompanying text.

181. See *supra* notes 126 & 145. The Supreme Court recently, in *Watkins v. Sowders*, 449 U.S. 341 (1981), placed great emphasis upon the "time-honored procedure of cross-examination as the device best suited to determine the trustworthiness of testimonial." *Id.* at 349. The Court made this statement, however, in rejecting the assertion that due process requires a pretrial hearing on the admissibility of eyewitness identification evidence, out of the jury's presence. See generally *supra* note 57. In addition, the Court placed equal, if not greater, weight on the importance of the jury and jury instructions, and it is therefore unlikely that the Supreme Court would consider cross-examination adequate in the absence of proper jury instructions. See 449 U.S. at 347. The Court's emphasis on the role of the jury in *Watkins*, see *id.*, suggests that the Court may someday be receptive to the argument that in cases where eyewitness identification testimony is crucial, due process demands that the jury be given instructions similar to those in *Telfaire*. See *id.* at 349-60 (Brennan, J., dissenting).

unreliable.¹⁸²

B. Comparison to Other Reforms: Do Telfaire-Type Instructions Provide The Optimal Alternative?

The comparison between the giving of special cautionary instructions and other available reforms¹⁸³ demonstrates that *Telfaire*-type instructions optimally diminish the problems inherent in eyewitness identification testimony. At the hub of this comparison are often-overlooked public policy considerations.

There is more involved in this issue than simply implementing the findings of experimental psychologists. The criminal justice system is charged with the duty of protecting society from criminals by convicting them, as well as preserving a defendant's right to a fair trial. Any attempt to protect a defendant from a mistaken eyewitness identification should consider the cost that society must shoulder in furnishing that protection. The optimal goal is to effectively furnish an accused with the protection desired while minimizing the concomitant cost to society.

Beyond giving special cautionary jury instructions, the most plausible reforms are excluding eyewitness identification testimony entirely,¹⁸⁴ abolishing the one-witness rule,¹⁸⁵ and introducing expert psychological testimony.¹⁸⁶

Complete exclusion of eyewitness identification testimony, on the ground that its probative value is outweighed by its inherent unreliability and prejudicial impact, has not been seriously advocated by any modern commentator.¹⁸⁷ This is because in many criminal cases in which the defendant is obviously guilty the state cannot carry its burden of proof without eyewitness identification testimony.¹⁸⁸ Hence, the cost to society of excluding such testimony would be the state's inability

182. In addition, one court has even suggested that, in the absence of special cautionary instructions from the bench, the jury may receive the impression that the judge "vouches" for the reliability of the testimony by admitting it into evidence. *State v. Warren*, 230 Kan. 385, 397, 635 P.2d 1236, 1244 (1981).

183. See *supra* notes 61-66 and accompanying text.

184. See *supra* note 61 and accompanying text. See also *supra* note 65 and accompanying text.

185. See *supra* notes 62 & 65 and accompanying text. See also *supra* notes 19-23 and accompanying text.

186. See *supra* notes 63 & 66 and accompanying text.

187. See generally Woocher, *supra* note 6, at 1000-01.

188. See *supra* notes 15-17 and accompanying text.

to obtain convictions in cases resting upon eyewitness identifications with some probative value.¹⁸⁹

Experimental psychologists do not suggest that all eyewitness identifications are so unreliable that they should be completely inadmissible.¹⁹⁰ Rather, they argue that jurors cannot accurately assess the reliability of identifications by eyewitnesses without knowledge of the factors that affect reliability.¹⁹¹ Excluding eyewitness identification testimony therefore gives the defendant more protection than is necessary at a cost to society that is far from acceptable.¹⁹²

Abolition of the one-witness rule,¹⁹³ by requiring corroboration or circumstantial evidence of guilt before sustaining a conviction resting upon eyewitness identification, has received serious consideration in Great Britain¹⁹⁴ and Canada,¹⁹⁵ but not in the United States.¹⁹⁶ As with complete exclusion of eyewitness identification testimony, adoption of this alternative would prevent perpetrators of those crimes in which the sole evidence of guilt is a single person's eyewitness identification from being brought to justice.¹⁹⁷ Again, this solution provides the defendant with more protection than is necessary at too high a cost to society.¹⁹⁸

The reform that psychologists¹⁹⁹ and legal commentators²⁰⁰ have supported most heavily is the admission of expert psychological testimony on the inherent deficiencies of eyewitness identifications and the

189. See *supra* note 65.

190. See generally Woocher, *supra* note 6, at 1001 ("[A] jury *can* render a proper verdict only if allowed to hear all the information needed to reach that decision") (emphasis added).

191. *Id.* See also E. LOFTUS, *supra* note 9, at 188.

192. See E. LOFTUS, *supra* note 9, at 188 ("Excluding all eyewitness evidence that might be deemed unreliable would certainly cause some decrease in the number of justified convictions").

193. See generally *supra* notes 19-23 and accompanying text.

194. See Woocher, *supra* note 6, at 1001-02 n.151.

195. See Starkman, *supra* note 9, at 372-74.

196. See *supra* note 65 and accompanying text.

197. This would be especially true in crimes of rape or robbery, where often the only evidence of guilt is the victim's eyewitness identification of the offender. See *supra* note 17 and accompanying text.

198. In addition, commentators have urged that determining what constitutes sufficient corroboration or circumstantial evidence of guilt is so difficult that this solution is impracticable. See Woocher, *supra* note 6, at 1002. See also F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, CRIMINAL PROCEDURE 1273 (2d ed. 1980).

199. See, e.g., E. LOFTUS, *supra* note 9, at 191-203.

200. See, e.g., Cunningham & Tyrrell, *supra* note 9, at 586-88; Woocher, *supra* note 6, at 1005-30.

factors to consider in evaluating the reliability of such identification.²⁰¹ Although this possibility has met with limited success,²⁰² the weight of authority in the United States and abroad is that admission of expert psychological testimony for this purpose is, if not improper, at best within the broad discretion of the trial court.²⁰³ Opponents of this reform argue that it violates the jury's function as factfinder, that it unduly discredits eyewitness testimony, and that it results in a "battle of experts" that will confuse the jury.²⁰⁴ Although a thorough analysis of these objections is beyond the scope of this Note, it is sufficient to say that courts recognize the merit behind these objections.²⁰⁵

For present purposes, however, the most serious objection is that expert psychological testimony overemphasizes the unreliability of eyewitness identifications.²⁰⁶ A recent study by two psychologists at Johns Hopkins University concluded that expert psychological testimony "may make an already doubtful jury too skeptical" of an otherwise reliable eyewitness, and hence overly reluctant to convict.²⁰⁷ The likeli-

201. See generally *supra* notes 63 & 66 and accompanying text.

202. See *State v. Warren*, 230 Kan. 385, 395, 635 P.2d 1236, 1243 (1981).

We note that in the case before us, when the expert testimony of Dr. Loftus was proffered by the defense, her affidavit stated she had personally been allowed to testify before judges and juries in more than 34 cases in various states and that another expert, Dr. Robert Buckhout, had been permitted to testify in more than 20 state trials on the subject of eyewitness identification testimony and its inherent unreliability.

Id.

203. See *supra* note 66 and accompanying text. See also Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated With The Absence of Evidence*, 66 CALIF. L. REV. 1011, 1057-59 (1978) (few courts admit expert evidence on unreliability of eyewitnesses).

204. *Eyewitness Testimony*, *supra* note 9, at 134.

205. See *supra* note 66 and accompanying text. See also Saltzburg, *supra* note 203, at 1059 ("rule requiring admission of expert evidence [on eyewitness identification unreliability] would present new problems that may be more serious than those it attempts to solve").

206. This is the most serious objection, in terms of a cost-benefit analysis, because it implies that expert testimony on eyewitnesses overcompensates for the jurors' naivete about the unreliability of eyewitnesses.

207. *Eyewitnesses: Jurors' Opinions*, Nat'l L.J., Feb. 1, 1982, at 24, col. 4. The article describes recent studies by Dr. Howard Egerth and Michael McCloskey, professors in the Psychology Department of Johns Hopkins University. The professors "are concerned that a growing trend toward wariness of eyewitness testimony may be going too far" and "their work suggests that courts should be wary of allowing expert psychological testimony to attack eyewitness accounts." *Id.* Moreover, "[t]hey argue that while psychologists are qualified to testify about the specific capacities of witnesses . . . they cannot aid a jury by describing ways in which an eyewitness can be mistaken in general terms." *Id.* They also assert, according to the article, that "[j]urors may not hold eyewitness testimony as sacred as most lawyers and judges think. . . ." *Id.* But see *supra* note 18 and accompanying text. This kind of evidence and controversy emanating from the psychology field itself provides good reasons to doubt that expert psychological testimony is the

hood of tipping the scale too far in a defendant's favor renders this alternative less than optimal.

The giving of *Telfaire*-type instructions to the jury, on the other hand, suffers from none of the defects of these alternative approaches. Jurisdictions mandating the use of special cautionary instructions, for example, could continue to convict in cases in which eyewitness identification testimony is the only or the most probative evidence of guilt. Similarly, scientific data pertaining to misidentifications would not overwhelm or make the jury overly skeptical of eyewitness identification testimony. In addition, the *Telfaire*-type instructions would admonish the jury to consider such testimony carefully in light of the factors that can render an eyewitness identification more or less reliable. Thus, this reform guarantees the defendant adequate protection against the inherent deficiencies of eyewitness identification testimony—especially if the improvements suggested below are implemented²⁰⁸—while simultaneously safeguarding society's interest in convicting the guilty. It is a reasonable, balanced approach.²⁰⁹

C. *Are Telfaire-Type Instructions Effective?*

Most commentators who have considered the issue, while agreeing that special cautionary instructions represent a movement in the right direction, nevertheless contend that such instructions fail to provide adequate protection against misidentification.²¹⁰ Their criticisms of the effectiveness of *Telfaire*-type instructions are two-pronged: the content of *Telfaire*-type instructions is inadequate,²¹¹ and jury comprehension of such instructions is inadequate.²¹²

optimal solution to the problems inherent in eyewitness identifications. *See also* Suarez, *A Critique of the Psychiatrist's Role as an Expert Witness*, 12 J. FORENSIC SCI. 172 (1967) (suggests that psychiatrists are too unfamiliar with procedures of law for their research to have any effective, heuristic value).

208. *See infra* notes 220 & 242-47 and accompanying text.

209. Moreover, the Kansas Supreme Court observed in *State v. Warren* that this reform is also relatively simple: "The giving of such an instruction will take only a couple of minutes in trial time and will be well worth it, if some future injustices can be avoided." 230 Kan. 385, 397, 635 P.2d 1236, 1244 (1981). *See also* Saltzburg, *supra* note 203, at 1059-60.

210. *See* Woocher, *supra* note 6, at 1004 ("[a]lthough special cautionary jury instructions . . . take a step in the right direction, they probably do not provide much protection against conviction of the innocent"). *See also* E. LOFTUS, *supra* note 9, at 189-90; Cunningham & Tyrrell, *supra* note 9, at 588; *Eyewitness Testimony*, *supra* note 9, at 133-34; Starkman, *supra* note 9, at 375-77.

211. *See supra* note 210 and accompanying text.

212. *See infra* notes 221-247 and accompanying text.

1. *The Content of Telfaire-Type Instructions*

The first criticism is that instructions such as those in *Telfaire*, which set forth factors that the jury should consider in assessing the reliability of eyewitness identification evidence,²¹³ are inadequate because they merely get the jury to focus on the identification rather than supply the jury with “data or information” that would emphasize the inherent unreliability of identification testimony and assist the jury in determining whether a particular witness’ identification is reliable.²¹⁴ Most of the literature criticizing *Telfaire*-type instructions in this manner advocates psychological expert testimony on eyewitness identifications as the most effective solution.²¹⁵

According to one leading commentator, the expert testimony of a psychologist would consist of a survey of the pertinent psychological research and a statement of the factors affecting the reliability of eyewitness identifications.²¹⁶ The “data or information” that is lacking in *Telfaire*-type instructions, as opposed to psychological expert testimony, is the survey of psychological research and experiments on eyewitness identifications.²¹⁷ In terms of suggesting the factors that jurors should consider in assessing the reliability of eyewitness identification testimony, however, *Telfaire*-type instructions are equivalent, if not superior, to expert psychological testimony. Although the “data or information” that an expert psychologist’s testimony would provide might be more effective in persuading the jury to give little or no weight to eyewitness identification testimony, such is not a desirable or realistic result in terms of society’s interests.²¹⁸ The desired result is that jurors

213. See *supra* note 94 and accompanying text. See also *State v. Warren*, 230 Kan. 385, 398-99, 635 P.2d 1236, 1244-45 (1981) (defendant’s requested instructions).

214. Woocher, *supra* note 6, at 1004. See also E. LOFTUS, *supra* note 9, at 189-90 (“instructions do not supply the jury with any information that it can use in the task of evaluating the reliability of any particular eyewitness account”) (emphasis added).

215. See, e.g., E. LOFTUS, *supra* note 9, at 191-203; Cunningham & Tyrrell, *supra* note 9, at 586-88; *Eyewitness Testimony*, *supra* note 9, at 134-38; Woocher, *supra* note 6, at 1005-30. For a discussion of psychological research that takes a contrary view, see *Eyewitness: Jurors’ Opinions*, Nat’l L.J., Feb. 2, 1982, at 24, col. 4.

216. See Woocher, *supra* note 6, at 1020. For an example of actual expert psychological testimony on eyewitness identifications by Dr. Loftus, see E. LOFTUS, *supra* note 9, at 217-35.

217. One study indicates that presenting this kind of scientific evidence on the reliability of eyewitnesses may cause jurors to exaggerate the unreliability of such evidence. See *Eyewitnesses: Jurors’ Opinions*, Nat’l L.J., Feb. 2, 1982, at 24, col. 4. See also *supra* notes 206-07 and accompanying text.

218. See *supra* notes 183-209 and accompanying text. See also *supra* note 217.

will evaluate the probative worth of eyewitness identification testimony cognizant of the factors that undermine the reliability of such testimony.²¹⁹ *Telfaire*-type instructions achieve this result.

Moreover, improving upon the content of *Telfaire*-type instructions can increase their effectiveness. Courts can accomplish this by enumerating more of the factors affecting reliability of eyewitness identifications and by making the language of the instructions clearer and more concise.²²⁰

2. Jury Comprehension of *Telfaire*-Type Instructions

The second major criticism of special cautionary jury instructions is that they will not have sufficient impact to overcome a juror's natural tendency to give eyewitness identification testimony undue weight.²²¹ The argument is not only that jurors are inattentive to jury instructions, but also that they do not hear the instructions until after the eyewitness testimony has been presented.²²² The commentators argue that *Telfaire*-type instructions cannot therefore effectively ensure that the identification testimony receives the close scrutiny it deserves.²²³

Jurors, like eyewitnesses, have been the subjects of psychological research which has resulted in several movements for jury reform.²²⁴

219. See *State v. Warren*, 230 Kan. 385, 635 P.2d 1236 (1981). In *Warren*, the court stated: Such an instruction, coupled with vigorous cross-examination and persuasive argument by defense counsel dealing realistically with the shortcomings and trouble spots of the identification process, should protect the rights of the defendant and at the same time enable the courts to avoid the problems involved in the admission of expert testimony on this subject.

Id. at 395, 635 P.2d at 1243.

220. See *Eyewitness Testimony*, *supra* note 9, at 110, table 1 (list of factors). See also Buckhout, *Psychology and Eyewitness Identification*, 2 L. & PSYCH. REV. 75, 77-88 (1976) (sixteen sources of unreliability). Perhaps experimental psychologists and drafters of pattern jury instructions could collaborate to improve upon the current *Telfaire* instructions. See the Michigan State Bar Association's recent modification of the *Telfaire* instructions, reprinted in E. LOFTUS, *supra* note 9, at 189. Compare Saltzburg's response to the "data or information" criticism of *Telfaire*-type instructions: "[T]his comment focuses on a particular instruction, that required by *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972). There is no reason why data could not be incorporated in jury instructions. Indeed, courts now take judicial notice of 'legislative facts.' Such facts easily could be conveyed to the jury." Saltzburg, *supra* note 203, at 1059 n.187 (citation omitted).

221. See, e.g., E. LOFTUS, *supra* note 9, at 189-90; *Eyewitness Testimony*, *supra* note 9, at 133-34; Loftus, *supra* note 9, at 34; Starkman, *supra* note 9, at 376-77; Woocher, *supra* note 6, at 1005.

222. Woocher, *supra* note 6, at 1005.

223. *Id.*

224. See, e.g., Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976). See generally Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF.

The research indicates that jurors do not comprehend the law even after instructions are given,²²⁵ that jurors often ignore jury instructions,²²⁶ and that external factors greatly influence jurors' decisions.²²⁷

As a criticism of the effectiveness of special cautionary instructions on identifications, however, these arguments prove too much.²²⁸ Trial by jury is not likely to be abolished.²²⁹ Juries are presently accorded the function of deciding whether an eyewitness identification is accurate and will probably retain that function for some time to come.²³⁰ Admittedly, some jurors, even after hearing *Telfaire*-type instructions, will not scrutinize eyewitness identification testimony as carefully as psychologists argue they should. The criminal justice system, however, is inevitably less ideal than a psychologist's controlled experiment. Errors do, and will, occur.²³¹

L. REV. 731, 740-43 (1981); Vinson, *Juries: Perception and the Decision-Making Process*, 18 TRIAL 52, 52-54 (Mar. 1982); Note, *Memory, Magic, and Myth: The Timing of Jury Instructions*, 59 OR. L. REV. 451, 452-61 (1981); Note, *Jury Instructions v. Jury Charges*, 82 W. VA. L. REV. 555, 556-62 (1980).

225. See Strawn & Buchanan, *supra* note 224, at 480.

226. *Id.* at 480-81.

227. See Note, *Memory, Magic, and Myth: The Timing of Jury Instructions*, 59 OR. L. REV. 451, 452-53 (1981). These "extralegal factors" include "physical characteristics of the parties, emotional display by the defendant, and the juror's own personality traits." *Id.* One commentator sums up the results of the research on jury performance by stating that "some of our cherished but simplistic assumptions about our juries may give way before modern communication and behavioral knowledge." Strawn & Buchanan, *supra* note 224, at 479. See also Schwarzer, *supra* note 224, at 731, 742 ("jury's capacity to serve as the repository of the people's sense of justice, reason, and fair play is being questioned"; "large proportion of jurors do not understand the instructions they receive and do not follow them").

228. See *Watkins v. Sowders*, 449 U.S. 341, 347 (1981) ("where identification evidence is at issue . . . no . . . special considerations justify a departure from the presumption that juries will follow instructions").

229. Trial by jury is a cornerstone of the Anglo-American system of criminal justice and is guaranteed by article III of the Constitution. See Note, *Jury Instructions v. Jury Charges*, *supra* note 224, at 557. See also U.S. CONST. art. III, § 2. See generally Strawn & Buchanan, *supra* note 224, at 483; Note, *supra* note 227, at 472.

230. See *Watkins v. Sowders*, 449 U.S. 341 (1981). In *Watkins*, the Court stated: "[T]he proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform. Indeed . . . the *only* duty of a jury in cases in which identification evidence has been admitted will often be to assess the reliability of that evidence." *Id.* at 347 (emphasis in original).

231. As Justice Harlan stated in his concurring opinion in *In re Winship*, 397 U.S. 358 (1970): "[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what probably happened." *Id.* at 370 (Harlan, J., concurring). Justice Harlan also stated that "the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions." *Id.* (Harlan, J., concurring).

That psychologists do not view special cautionary instructions as the most effective reform is not reason to reject that alternative. A defendant whose guilt is implicated by eyewitness identification testimony is more effectively protected against any inherent risk of misidentification if the jury is instructed as to the variables that psychologists have proven may render such testimony more or less reliable, than if no such instructions are given.²³² In addition, a defendant has the benefit of whatever effectiveness cross-examination and closing arguments of counsel can add.²³³

A comparison of the problems presented by accomplice testimony and eyewitness identification testimony further illustrates that *Telfaire*-type instructions can effectively curb the risk of misidentification. In most jurisdictions either type of testimony alone provides sufficient evidence to sustain a conviction.²³⁴ The danger of accomplice testimony is that the accomplice may have a motive to give willfully testimony which is both false and prejudicial to the defendant.²³⁵ The risk of using eyewitness identification testimony is that even the most honest and conscientious eyewitness can make an erroneous identification due to the inherent deficiencies of the human memory process.²³⁶ Many jurisdictions counteract the dangers of accomplice testimony by mandating that a defendant, on request, is entitled to an instruction cautioning the jury to assess accomplice testimony carefully.²³⁷ If courts consider

232. Cf. Brigham, *supra* note 6, at 721 (“[s]ince jurors are apparently unable to distinguish between accurate and inaccurate eyewitnesses, any increase in care and attention given to all evidence would seem to be of benefit to everyone in the system, prosecution and defense alike”).

233. See *supra* note 219.

234. Eyewitness identification testimony: see *supra* notes 19-23 and accompanying text. Accomplice testimony: see, e.g., *Caminetti v. United States*, 242 U.S. 470 (1917); *Toles v. United States*, 308 F.2d 590 (9th Cir. 1962), cert. denied, 375 U.S. 836 (1963); *United States v. Karavias*, 170 F.2d 968 (7th Cir. 1948); *State v. Brewer*, 110 Ariz. 12, 514 P.2d 1008 (1973); *People v. Williams*, 19 Ill. 2d 171, 166 N.E.2d 568 (1960); *State v. Zwillman*, 112 N.J. Super. 6, 270 A.2d 284 (1970). Several states, however, have abolished the one-witness rule for accomplice testimony and thus require independent corroboration. See, e.g., *Stein v. New York*, 346 U.S. 156 (1953); *State v. Howard*, 97 Ariz. 399, 400 P.2d 332 (1965); *People v. MacEwing*, 45 Cal. 2d 218, 288 P.2d 257 (1955); *State v. Baker*, 161 Minn. 1, 200 N.W. 815 (1924).

235. See *United States v. Projansky*, 465 F.2d 123 (2d Cir.), cert. denied, 409 U.S. 1006 (1972). In *Projansky*, the court recognized that “a human being may color his testimony in the hope that some Judge may give him recognition for such cooperation,” *id.* at 136 n.22, and that “accomplices may be motivated to place the responsibilities on others than themselves,” *id.* at 139 n.25. See generally 7 J. WIGMORE, *supra* note 15, at §§ 2056-2062.

236. See *supra* notes 24-36 and accompanying text.

237. See, e.g., *United States v. Windom*, 510 F.2d 989 (5th Cir.), cert. denied, 423 U.S. 863 (1975); *United States v. Leonard*, 494 F.2d 955 (D.C. Cir. 1974); *United States v. Santana*, 503

such an instruction adequate to minimize the dangers of accomplice testimony,²³⁸ then courts should wholeheartedly adopt *Telfaire*-type instructions which do much more than merely direct the jury to evaluate carefully eyewitness identification testimony²³⁹ as a means of limiting the risks of identification testimony.²⁴⁰

In addition, just as *Telfaire*-type instructions can be improved upon in terms of their content,²⁴¹ they can also be improved upon in terms of their comprehension by the jury. Courts can accomplish this by giving *Telfaire*-type instructions *before* the trial begins, as well as following the closing arguments.²⁴²

Recently, several commentators have advocated pretrial jury instruc-

F.2d 710 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974), *cert. denied sub nom.* Quinones v. United States, 420 U.S. 963, *cert. denied sub nom.* Rivera v. United States, 420 U.S. 1006 (1975); United States v. Owens, 460 F.2d 268 (10th Cir. 1972); United States v. Brown, 454 F.2d 397 (9th Cir.), *cert. denied*, 406 U.S. 959 (1972); McMillen v. United States, 386 F.2d 29 (1st Cir. 1967), *cert. denied*, 390 U.S. 1031 (1968); Williamson v. United States, 332 F.2d 123 (5th Cir. 1964); People v. Berardi, 332 Ill. 295, 163 N.E. 668 (1928). See generally F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL & G. STARKMAN, *supra* note 198, at 1273. An example of an accomplice cautionary instruction is as follows:

An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice, by the jury, may be received in evidence and considered by the jury, even though not corroborated by other evidence, and given such weight as the jury feels it should have. The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care.

(You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.)

1 E. DEVITT & C. BLACKMAR, *supra* note 76, at § 17.06.

238. See *supra* note 235 and accompanying text.

239. See *supra* note 94 and accompanying text.

240. This argument that jury instructions can be effective to protect a defendant against possible misidentification is further supported by analogy to the problem in *Watkins v. Sowders*, 449 U.S. 341 (1981). In *Watkins*, the Court held that due process does not require a pretrial hearing out of the presence of the jury to determine the admissibility of identification evidence because jury instructions and cross-examination are adequate to protect the defendant against any prejudice that might occur when the jury hears identification evidence that is later held inadmissible. *Id.* at 347-49. *But see id.* at 349-60 (Brennan, J., dissenting).

241. See *supra* note 220 and accompanying text.

242. One commentator has stated that cautionary jury instructions on identifications are an ineffective solution because "[j]urors do not hear such instructions until the conclusion of the trial," and by then it is "difficult to counter the impact of the eyewitness testimony." Woocher, *supra* note 6, at 1005. Pretrial jury instructions do not suffer from such defects. See *infra* notes 243-47 and accompanying text.

tions as a method of jury reform.²⁴³ They argue that this tool will improve jury performance and comprehension by providing jurors with "a cohesive structure" within which they can "organize trial events" in a manner that will enable them to "attend to and better remember relevant facts."²⁴⁴ For example, if jurors are instructed prior to the trial as to the pertinent factors for assessing the reliability of eyewitness identification testimony, then they are more likely to be attentive to the existence of these factors in a particular eyewitness' identification.²⁴⁵ Thus, pretrial *Telfaire*-type instructions tend to dilute the persuasive effect of eyewitness identification testimony²⁴⁶ by increasing jurors' comprehension of the instructions.²⁴⁷

D. Are Prohibitions Against Comment on Evidence Insurmountable Obstacles to the Use of Telfaire-Type Instructions in Some States?

Thirty-nine states²⁴⁸ prohibit trial judges from commenting on evidence in their instructions to juries.²⁴⁹ Some of these jurisdictions have held that special cautionary instructions on eyewitness identification testimony constitute improper comment upon evidence.²⁵⁰

At common law, a trial judge not only was permitted to comment on evidence, but also could express his opinion about the facts, so long as he made it clear to the jury that his opinion was not binding.²⁵¹ Abuses of this privilege, however, prompted many states to prohibit trial judges from commenting on evidence, thus limiting them to instructing the jury only on the law.²⁵² The objective of these prohibitions was to prevent judicial infringement on the jury's role as fact-finder and to give

243. See, e.g., Schwarger, *supra* note 224; Note, *supra* note 227; Note, *Jury Instructions v. Jury Charges*, *supra* note 224.

244. Note, *supra* note 227, at 452. See also Schwarger, *supra* note 224, at 755-56.

245. Hence, the issue is ensured of receiving more careful consideration. Woocher, *supra* note 6, at 1005.

246. This is true because jurors hear the instructions before the eyewitness identification testimony has had its tremendous impact upon them. See *supra* note 18 and accompanying text.

247. The jurors' comprehension is inevitably increased because they hear the instructions twice. See Note, *Jury Instructions v. Jury Charges*, *supra* note 224, at 574 ("repetition can only enhance jury comprehension").

248. See *supra* note 135 and accompanying text.

249. Federal courts, on the other hand, do not prohibit comment on evidence in jury instructions. See 75 AM. JUR. 2D *Trial* § 658 (1974).

250. See *supra* note 136 and accompanying text.

251. See 75 AM. JUR. 2D *Trial* § 657 (1974).

252. *Id.* § 663.

fuller protection to a defendant's right to a trial by an impartial jury.²⁵³ Because these prohibitions are in derogation of the common law, they are usually strictly construed.²⁵⁴

The definition of comment on evidence varies from state to state, but the general rule is that a trial judge may not emphasize particular testimony,²⁵⁵ comment on the weight to be given to particular evidence,²⁵⁶ or instruct the jury how to evaluate the credibility of witnesses.²⁵⁷ In short, a trial judge may only instruct on the law.²⁵⁸ *Telfaire*-type instructions violate these prohibitions because they emphasize eyewitness identification testimony and direct jurors on the manner in which they should evaluate the credibility of such testimony.²⁵⁹ Arguably, then, the use of *Telfaire*-type instructions is not an available alternative in states that prevent judicial comment on evidence, as some courts have already held.²⁶⁰

Special cautionary instructions on eyewitness identifications, however, should not be held objectionable even in these jurisdictions. As stated above, the rationale offered for prohibiting judicial comment on evidence is protection of the jury's province as fact-finder.²⁶¹ While preclusion of *Telfaire*-type instructions on the basis that they constitute improper comment on evidence advances this rationale, it simultaneously poses a much more serious danger.²⁶² Allowing a jury to decide the accuracy of eyewitness identification testimony without the benefit of knowledge of the factors that affect reliability subjects a defendant to an intolerable risk of misidentification.²⁶³ This is far worse than the possible prejudice occasioned by an invasion of the jury's province as

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* § 665.

257. *Id.* § 671.

258. *Id.* § 663.

259. *See supra* note 136 and accompanying text.

260. *Id.*

261. *See supra* note 253 and accompanying text.

262. *See supra* note 5 and accompanying text.

263. *See supra* notes 35-36 and accompanying text. This is true because psychologists have shown that jurors give unwarranted weight to identifications by eyewitnesses, *see supra* note 18 and accompanying text, and are often unaware of the inherent unreliability or the factors that affect the reliability of such identifications, *see supra* notes 27-36 and accompanying text. Yet courts admit eyewitness identification testimony, *see supra* notes 58-59 and accompanying text, and may refuse to admit expert psychological testimony on identifications, *see supra* note 66 and accompanying text.

fact-finder possibly resulting from giving *Telfaire*-type instructions.²⁶⁴

According to the United States Supreme Court,²⁶⁵ a trial judge should consider the five factors enumerated in *Neil v. Biggers*²⁶⁶ in deciding whether to admit identification evidence. Paradoxically, however, jurisdictions prohibiting comment on evidence preclude the jury from using those same five factors in evaluating the probative value of identification testimony.²⁶⁷ Thus, the protection that the trial judge affords the defendant by considering the *Neil v. Biggers* factors is lost when the jury deliberates in ignorance of these factors or their significance.²⁶⁸

For these reasons courts should not view *Telfaire*-type instructions as repugnant to prohibitions against judicial comment on evidence. If states reject this conclusion, however, the only means of protecting an innocent defendant from the consequences of inaccurate eyewitness testimony is to amend prohibitions against comment to accommodate special cautionary instructions on eyewitness identifications.²⁶⁹

IV. CONCLUSION: A PROPOSAL FOR REFORM

A criminal defendant is not adequately protected against the inherent problems of eyewitness identification testimony absent special cautionary jury instructions.²⁷⁰ *Telfaire*-type instructions can effectively²⁷¹ provide this protection at a minimal cost to society's interests and needs. For these reasons all jurisdictions in the United States should mandate the use of such instructions in appropriate cases.²⁷² Jurisdictions that refuse to do so ignore the wealth of evidence suggesting that

264. See *supra* notes 5-6 and accompanying text.

265. See *supra* notes 51-57 and accompanying text.

266. 409 U.S. 188 (1972).

267. See *supra* note 155 and accompanying text.

268. See *supra* note 160 and accompanying text.

269. This alternative may seem radical, but it is warranted by the dangers to be avoided, see *supra* note 6 and accompanying text, and the values to be advanced—namely, preventing the conviction of innocent individuals. See *supra* note 5 and accompanying text.

270. See *supra* notes 166-82 and accompanying text.

271. See *supra* notes 210-47 and accompanying text.

272. There remains the problem of what constitutes an appropriate case and how such instructions should be mandated. A court can mandate a rule prospectively, but to ensure enforcement of the rule it may be necessary to reverse a conviction and remand for a new trial with appropriate identification instructions to be given at the new trial. The reform proposed in this Note should therefore be implemented in terms of when the absence of *Telfaire*-type instructions should be held as reversible error. Two important distinctions can form the parameters of a workable rule:

eyewitness identification testimony is inherently unreliable.²⁷³ The net effect of this refusal is inadequate protection to innocent persons mistakenly identified and to society when the true offender remains free.²⁷⁴ This consequence is contrary to fundamental notions of justice²⁷⁵ and is intolerable.

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whether the case is one in which the one-witness rule applies, and whether the instructions were requested by defense counsel at trial.

Because cases involving the one-witness rule present special dangers, *see supra* notes 19-23 and accompanying text, the absence of *Telfaire*-type instructions in such cases demands reversal and a new trial, whether or not defense counsel requested such instructions. In other words, failure to give *Telfaire*-type cautionary instructions sua sponte in one-witness rule cases should be reversible error.

Because cases in which there is corroborating or circumstantial evidence of guilt do not present as great a danger or misidentification as do cases based upon the one-witness rule, a less stringent cautionary jury instruction standard should apply. In this situation, a defendant should be entitled to *Telfaire*-type instructions, if eyewitness identification testimony is important to the state's case, upon request. It should therefore be reversible error for a trial court to refuse to give such instructions when requested by the defendant, but not so if the defendant fails to request them.

273. *See supra* notes 24-36 and accompanying text.

274. *See supra* note 6 and accompanying text.

275. *See supra* note 5 and accompanying text.

