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Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony

Derek Simmonsen

Comments

TEACH YOUR JURORS WELL: USING JURY INSTRUCTIONS TO EDUCATE JURORS ABOUT FACTORS AFFECTING THE ACCURACY OF EYEWITNESS TESTIMONY

DEREK SIMMONSEN*

The case against Kirk Bloodsworth was strong. Five eyewitnesses recalled seeing him near the location where a young girl was raped and murdered, and they testified against him at his trial.[1] It was enough for two different Maryland juries to convict him of murder, and for one judge to sentence Bloodsworth to death.[2]

The problem is that Bloodsworth did not do it.[3] DNA evidence exonerated him, leading the State to release him from prison and later convict another man of committing the crime.[4] According to one recent study, erroneous eyewitness testimony is the single largest

* Derek Simmonsen is a second-year student at the University of Maryland School of Law, where he is a staff member on the *Maryland Law Review*. The author would like to thank Professor Amanda Pustilnik and Adjunct Professor Marc DeSimone for their advice early in the research process. He also thanks the editors of the *Maryland Law Review*, particularly Notes and Comments Editor Lauren Genvert and Executive Notes and Comments Editor Stephanie Bignon, for their insightful edits. Finally, the author thanks his wife, Rachel, for her continuing support and encouragement.

1. TIM JUNKIN, BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA 4, 208–09, 219 (2004).

2. *Id.* at 164–66, 219–20. Indeed, it is well established that the availability of an eyewitness can change how jurors view evidence in a crime. *See* Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1022 (1995) ("[M]ost jurors simply assume that eyewitness identifications are infallible."). For instance, one study provided simulated juries with three different sets of facts surrounding a robbery. *Id.* at 1023–24. In the first scenario, there was no eyewitness to place the defendant at the scene, only circumstantial evidence. *Id.* About eighteen percent of jurors voted to convict in this scenario. *Id.* at 1024. A second simulated jury was given the same facts, except that a store clerk identified the defendant as the culprit; about seventy-two percent of jurors voted for conviction in that scenario. *Id.* The last jury received the same facts, except jurors learned the store clerk had very poor vision and was not wearing his glasses at the time; despite this information, sixty-eight percent of jurors still voted to convict the defendant. *Id.*

3. JUNKIN, *supra* note 1, at 257–58. R

4. *Id.* at 257–58, 281. Ironically, the man ultimately convicted of the crime, Kimberly Ruffner, spent time in prison with Bloodsworth, and the two were acquaintances. *Id.* at 276, 282. Bloodsworth had "spotted weights" for Ruffner and "[b]rought him library books." *Id.* at 276 (internal quotation marks omitted). Investigators confirmed Ruffner was the murderer after they matched DNA from the crime scene with Ruffner's DNA pro-

cause of wrongful convictions in capital cases.[5] Far from being an issue that only affects the wrongfully accused, victims of crime who incorrectly identify their attackers can be traumatized by both the guilt of putting an innocent person in prison and the uncertainty that comes with knowing their attacker is still loose.[6]

Although *Bloodsworth v State*[7] became widely known because it involved the first death row inmate exonerated by DNA,[8] the case is significant within Maryland for another reason. For decades, the legal decision overturning Bloodsworth's original conviction set the standard in Maryland for when courts could decide to allow expert testimony on eyewitness identification.[9] Experts could testify regarding social science research into how memory works and what factors impact it only so long as it was of "appreciable help" to the jury.[10] The Court of Appeals of Maryland's skepticism about this type of evidence was apparent from the negative tone used in the opinion.[11]

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file on a national database. *Id.* Ruffner pleaded guilty to the crime and was sentenced to life in prison in 2004. *Id.* at 282.

5. STANLEY COHEN, THE WRONG MEN: AMERICA'S EPIDEMIC OF WRONGFUL DEATH ROW CONVICTIONS, at xvii (2003). Other significant factors identified in the study that led to wrongful convictions included prosecutorial and police misconduct, inaccurate scientific evidence, and forced confessions. *Id.*

6. *See generally* JENNIFER THOMPSON-CANNINO ET AL., PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2009) (discussing the friendship that Thompson-Cannino, a rape victim, and Cotton, the man whom she mistakenly identified as her attacker, forged following discovery of the misidentification and their crusade for the release of other defendants who have been wrongly incarcerated due to eyewitness identification error). Thompson-Cannino describes feeling like "everything I staked my life on . . . suddenly fell through a trap door" after learning of Cotton's innocence. *Id.* at 213. In Thompson-Cannino's case, her actual rapist was already incarcerated for another crime when she learned the news that Cotton did not rape her, alleviating her fear of an attacker on the loose but not her feelings of guilt for making a wrongful identification. *Id.* at 212–13. She eventually met Cotton, and the two now campaign together for the release of inmates in other cases where they believe wrongful identifications have occurred. *See id.* at 243, 276 (describing how Thompson-Cannino and Cotton officially met one another and an Amnesty International event that Thompson-Cannino invited Cotton to attend with her).

7. 307 Md. 164, 512 A.2d 1056 (1986).

8. JUNKIN, *supra* note 1, at 269–70. R

9. *See Bloodsworth*, 307 Md. at 177, 512 A.2d at 1062 (explaining that one of Bloodsworth's exceptions to his original trial related to the trial court's refusal to permit expert testimony regarding the eyewitness testimony put forth by the prosecution).

10. *Id.* at 184–85, 512 A.2d at 1066 (quoting Shivers v. Carnaggio, 223 Md. 585, 588–89, 165 A.2d 898, 900 (1960)) (internal quotation marks omitted).

11. Bomas v. State, 412 Md. 392, 410, 987 A.2d 98, 108 (2010) ("We agree . . . that the *Bloodsworth* opinion strikes a negative tone with respect to expert testimony on eyewitness identification."). The *Bloodsworth* opinion states that the "vast majority of courts have rejected [expert testimony on eyewitness identification] evidence" and sets out the arguments against allowing such evidence in court. *Bloodsworth*, 307 Md. at 181–85, 512 A.2d at 1064–67. The *Bloodsworth* court noted that cross-examination can reveal problems with eyewitness testimony and reasoned that expert testimony on this issue would "'invade the

In the two decades since *Bloodsworth* was decided, courts around the country have grappled with the question of how to incorporate social science data about eyewitness perceptions into the courtroom.[12] While it is well established that witnesses can be mistaken,[13] scientists have discovered that many of the common sense ideas people hold about memory and perception, such as the link between certainty and accuracy, are wrong.[14] Given this finding and concerns about wrongly incarcerating the innocent, courts have attempted to educate jurors about these factors in various ways.[15]

The most common approach is to allow experts to testify about factors affecting eyewitness perceptions at the discretion of the court.[16] Maryland has ostensibly followed this approach since the *Bloodsworth* opinion, and the Maryland Court of Appeals reaffirmed this standard in the 2010 case of *Bomas v. State*.[17] Although Maryland continues to allow this type of testimony at the discretion of the judge,

province of the jury'" and lead to a flood of experts testifying about a variety of witness credibility issues. *Id.* at 182–83, 512 A.2d at 1065 (quoting State v. Porraro, 404 A.2d 465, 471 (R.I. 1979)) (citing United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973)). As Bomas noted in his brief to the Maryland Court of Appeals, the "opinion advances all the arguments against the admissibility of expert testimony, and provides no countervailing observations which would educate trial judges as to circumstances in which expert testimony on eyewitness reliability would be helpful." Petitioner's Brief and Appendix at 19, *Bomas*, 412 Md. 392, 987 A.2d 98 (No. 125), 2009 WL 611479. For this reason, the *Maryland Evidence Handbook*, in its third edition released in 1999, cited *Bloodsworth* for the proposition that expert testimony on eyewitness identification is "generally excluded" in Maryland. *Id.* at 18 (quoting JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK § 1408 (3d ed. 1999)).

12. *See infra* Part II.

13. *See* ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, at xxi (3d ed. 1997) (describing how "[s]tories of erroneous convictions and incorrect findings of liability . . . have been a part of legal lore for a long time").

14. *See infra* Part I.B.

15. *See infra* Part II.B.

16. *See infra* Part II.B.2. For much of the twentieth century, many courts declined to let experts testify. *See, e.g.*, Tanja Rapus Benton et al., *On the Admissibility of Expert Testimony on Eyewitness Identification: A Legal and Scientific Evaluation*, 2 TENN. J.L. & POL'Y 392, 405–06 (2006) (discussing cases in which courts had declined to permit expert testimony). The cross-examination of witnesses and the common sense knowledge of jurors were often cited as tools for ferreting out a witness's mistaken perceptions. *See, e.g.*, Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983) ("[A] jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony."); State v. Goldsby, 650 P.2d 952, 954 (Or. Ct. App. 1982) (holding that, despite the potential for eyewitness error, the law does not require experts "'to debate the quality of the evidence for the jury'" (quoting State v. Calia, 514 P.2d 1354, 1356 (Or. Ct. App. 1973))).

17. 412 Md. 392, 404, 416, 987 A.2d 98, 105, 112 (2010) (explaining that *Bloodsworth* had articulated the standard for admissibility of expert testimony before concluding that "a flexible standard that can properly gauge the state of the scientific art in relation to the specific facts of the case is best").

the Maryland Court of Appeals has indicated a greater willingness than in previous years to accept this type of expert testimony at trial.[18] In addition, the court has suggested that the Maryland pattern jury instructions should be revisited in light of the latest research findings on eyewitness perception and memory.[19]

This last suggestion—using comprehensive pattern jury instructions to instruct jurors about factors affecting eyewitness testimony—is an approach that Maryland and other states should adopt.[20] The discretionary standard in place throughout much of the country means that not all juries will hear expert testimony about eyewitness identification.[21] Given this limitation on admission of expert testimony coupled with research demonstrating that jurors lack knowledge about weaknesses in eyewitness testimony,[22] a substitute needs to be found for the in-court expert.[23] Already some states have taken the lead in creating comprehensive jury instructions as a way to bridge this knowledge gap, a model that should now expand to the rest of the country.[24]

This Comment will propose that states, including Maryland, should revise their jury instructions to align with the latest social science research and to adopt policies, such as giving instructions at the beginning of trial rather than at the end, that would improve juror comprehension.[25] This approach is likely to be the most effective and easiest for the court system to administer, as pattern jury instructions convey much of the same information as expert testimony without the added time and expense associated with such testimony.[26]

To that end, Part I of this Comment will explain the science behind memory, how this science has been applied to issues faced by the legal system, such as eyewitness testimony, and what areas of consen-

18. *See infra* text accompanying notes 167–70. R

19. *See infra* text accompanying notes 172–74. R

20. *See infra* Part III.B–C. Many states have some type of eyewitness identification instruction, but these instructions frequently contain information that is contradicted by social science data. *See infra* Part II.B.3.

21. *See infra* Part II.B.2.

22. *See infra* Part I.C.

23. *See infra* Part III.

24. *See infra* Part III.E. Criticisms of jury instructions—that they are not understood by jurors and are an ineffective means of educating the jury about eyewitness factors—have often kept attorneys from exploring this avenue in more detail. These concerns can be addressed by altering the traditional method for delivering such instructions. *See infra* Part III.D.

25. *See infra* Part III.

26. *See infra* Part III.C.

sus have been reached among scientists.[27] This Part also will question how much of that information is within the common knowledge of jurors.[28] Part II will look at the various legal reactions to this research, from early prohibitions on allowing expert testimony to the modern approach, which generally permits experts to testify at the discretion of the trial court.[29] This Part will also examine the rise of jury instructions as an alternative method for teaching jurors about eyewitness identification issues in light of concerns about expert testimony in this area.[30] Part III will advocate using jury instructions as an efficient, cost-effective strategy for incorporating eyewitness research into the courtroom.[31] It will address criticisms of jury instructions and will explore various techniques that could lead to improved juror comprehension of these instructions.[32] This Part will conclude by examining pattern jury instructions used in other jurisdictions and will suggest these instructions could serve as models for states to use to better inform jurors about eyewitness identification issues.[33]

I. SCIENTIFIC RESEARCH INTO EYEWITNESS TESTIMONY AND WHAT JURORS KNOW ABOUT IT

Scientists have learned a great deal in recent years about how perception and memory actually work.[34] These observations have been applied to the testimony of eyewitnesses, with psychologists reaching a consensus on various factors that can influence the quality of eyewitness testimony.[35] This research is not necessarily within the common lay knowledge of jurors, an important observation because there has been much debate about whether jurors require expert testimony or specialized jury instructions to understand this information.[36]

27. *See infra* Part I.A–B.
28. *See infra* Part I.C.
29. *See infra* Part II.A–B.
30. *See infra* Part II.B.3.
31. *See infra* Part III.
32. *See infra* Part III.D.
33. *See infra* Part III.E.
34. *See infra* Part I.A.
35. *See infra* Part I.B.
36. *See infra* Part I.C.

A. How Memory Actually Works

Memory is far more complex a phenomenon than may be understood by the average person.[37] Researchers divide "memory" into three separate actions: the process of perceiving, remembering, and recalling an event.[38] Various factors can influence a person's memory at each of these three stages, with the potential of changing what may be viewed as a "perfect memory" into a false recollection.[39]

Memory does not work like a TiVo,[40] recording an event as we perceive it and then allowing us to return to it again and again without alteration.[41] Instead, researchers have divided the process of memory into three separate stages.[42] A person first perceives the event, described as the acquisition stage.[43] Then, time passes before the person attempts to remember the information, called the retention stage.[44] The final stage is when the person tries to recall the stored information, known as the retrieval stage.[45] There are multiple factors that can impact memory at each of these stages.[46]

The acquisition stage is the point at which a witness first perceives an event, a period that could last from a few seconds to several hours.[47] Researchers subdivide the factors that affect memory at this stage into two categories: (1) factors that occur as part of the event

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37. *Cf.* ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 2-2, at 12 (4th ed. 2007) ("[W]e do not simply record [events] in our memory as a videotape recorder would. The situation is much more complex.").

38. *Id.* at 12–13.

39. *Id.* at 13. To illustrate this possibility, Loftus and her co-authors cite an example in which a small plane crash killed all the people on board and one person on the ground. *Id.* § 2-1, at 12. One eyewitness to the crash testified that the plane was heading straight down before impact, even though photographs demonstrated that the plane hit the ground at a flat, low angle that allowed it to skid for 1,000 feet. *Id.*

40. Loftus and her co-authors have used the image of a "videotape recorder," a piece of technology that has become increasingly obsolete. *Id.* § 2-2, at 12; Chad Umble, *Vanishing VCR: Once the Viewing Standard, It's Being Replaced by High-Tech Successors*, INTELLIGENCER J. (Lancaster, Pa.), Dec. 12, 2005, at A6 ("The VCR is facing extinction."). A TiVo or DVR, which record programs for later playback, are the more common modern counterparts. *See* Umble, *supra* ("A quarter-century of evolution in home electronics has produced a whole new generation of digital successors to the VCR [including the TiVo and DVR].").

41. *See supra* note 37. R

42. LOFTUS ET AL., *supra* note 37, § 2-2, at 12. This three-stage model is the basic theo- R retical approach used by psychologists studying memory. *Id.* at 12–13.

43. *Id.*

44. *Id.* at 13.

45. *Id.*

46. *Id.* These factors, which will be discussed in more detail in the following paragraphs, include lighting conditions, the duration of an event, the amount of stress an eyewitness was under when the event occurred, and the length of time that passes between the event and the witness's attempt to recall it. *Id.*

47. *Id.* § 2-3, at 15.

itself and (2) factors that inhere in the witness.[48] Factors that are related to the event include the lighting conditions[49] and the duration of the event.[50] Factors inherent in the witness include considerations such as the amount of stress a person is facing when the event occurs.[51]

The second stage of memory is the retention stage.[52] Factors that can influence the retention of memory include both the normal process of forgetting and the receipt of postevent information that colors how a person remembers an experience.[53] It is not surprising that people tend to forget information over time, but the extent to which such forgetfulness can occur may not be fully understood.[54] Studies have shown that the process of forgetting begins almost as soon as a person first receives new information.[55] But forgetting is not the only

48. *Id.*

49. *Id.* Lighting involves more than just whether an event took place on a dark street corner. *See id.* § 2-4 to -4(c), at 16–18 (explaining that witnesses who are in well-lit areas and who suddenly move to dimly lit areas, or vice versa, may have difficulty immediately perceiving details about an event).

50. As might be expected, the longer a person perceives an event, the better his recall is likely to be regarding the details of that event. *Id.* § 2-5, at 19. The problem is that people tend to overestimate the length of time that has passed, suggesting they had more time to correctly remember an event than is actually the case. *Id.* at 19–20 (citing studies). For instance, in one study, participants watched a thirty second simulated bank robbery and were asked how long the event lasted. *Id.* at 20. No more than six percent of the male viewers correctly stated the correct time; indeed, a small percentage of female viewers even estimated that the event lasted more than fifteen minutes. *Id.*

51. *Id.* § 2-8, at 29. The role of stress in the process of memory is difficult to evaluate because researchers have found that there is an optimal level of stress that actually improves event perception. *Id.* § 2-9, at 30. At low and high levels of stress, however, memory is less likely to be accurate. *Id.* This theory, known as the Yerkes-Dodson Law, posits that at both low and high levels of stress, people's nervous systems are not fully functioning, which may prevent sensory messages from "get[ting] through." *Id.*

52. *Id.* § 2-2, at 13.

53. *See id.* § 3-2(a), at 53–54 (discussing the "common experience" of forgetting and early research suggesting that people forget most information shortly after they learn it); *id.* § 3-4, at 58–59 (explaining that postevent information "can do more than simply supplement a memory: it can apparently alter or transform the memory").

54. For example, a study involving 271 actual police cases involving eyewitness identification revealed that the accuracy of suspect identification rates dropped substantially within approximately one week of the crime. Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 475, 484 (2001). The study's authors suggested this decline in identification rates might be due in part to a greater caution on the part of witnesses "as the delay between the crime and the identification increases." *Id.* at 484.

55. LOFTUS ET AL., *supra* note 37, § 3-2(a), at 54; *see also supra* text accompanying note 53. R R

factor that affects retention: Receiving new information after an event can change how a person later remembers that event.[56]

The third and final stage of memory is the retrieval stage in which a person tries to recall stored information.[57] When retrieving information, subtle changes in questioning can elicit different answers.[58] For example, one study found that people who watched a film of a simulated accident incorrectly identified a broken headlight on a vehicle more often when asked, "Did you see *the* broken headlight?" instead of "Did you see *a* broken headlight?"[59]

Rather than being a simple process, the concept of memory involves multiple stages and a myriad of factors that can influence how a person perceives and remembers events.[60] It is only natural that scientists have applied this research to the legal system, which relies on in-court testimony from witnesses about their memories of events.[61]

B. Social Science Research on Memory and Its Application to Eyewitness Testimony

In recent years, social scientists have conducted numerous studies to learn more about the ability of eyewitnesses to perceive and remember events.[62] As a result of this research, they have reached a consensus on certain factors that can impact the quality and accuracy of

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56. LOFTUS ET AL., *supra* note 37, § 3-4, at 58–59. For instance, a person who witnesses a car accident and later learns the driver was drinking might remember the driver's actions differently as a result. *Id.* In one study, participants viewed a video showing a car accident, and researchers then asked them a series of questions about the video. *Id.* at 59. For example, one of the questions asked how fast the car was traveling past a barn, even though no barn existed in the video. *Id.* When questioned again about the accident one week later, more than seventeen percent of participants who had been asked about a barn remembered seeing one in the video. *Id.* R

57. *Id.* § 2-2, at 13.

58. *Id.* § 3-11(a), at 70–71.

59. *Id.* at 71 (emphasis added) (internal quotation marks omitted). Another example yielding similar results involved the following questions—"How fast were the cars going when they smashed into each other?" instead of "How fast were the cars going when they hit each other?" *Id.* (internal quotation marks omitted). People asked about cars "smashing" into one another provided higher speed estimates than those asked about the cars merely "hitting" each other. *Id.*

60. *Id.* § 2-1, at 12–13.

61. *See infra* Part I.B.

62. *See* BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW 68 (1995) (noting that one of the book's authors had compiled more than 2,000 references to eyewitness research, with most of the references involving scientific studies).

eyewitness testimony.[63] This consensus should inform the decisions courts make about when and how to accept expert opinions in this field.[64]

In the past forty years alone, there have been hundreds of studies conducted in the area of eyewitness perception and memory.[65] As far back as 1989, at least one set of authors found a common consensus among eyewitness experts as to factors that can significantly impact a person's ability to perceive accurately and remember an event.[66] Three of these factors are worth considering because of the strong consensus among eyewitness experts as to their validity.[67] These factors are (1) the weak link between an eyewitness's confidence and the accuracy of his perceptions, (2) the difficulty eyewitnesses have with cross-racial identification, and (3) the impact of postevent information.[68]

The first factor, the lack of a connection between accuracy and confidence in eyewitnesses, is "one of the most consistent findings in the memory research literature."[69] Most studies find a weak or nonexistent link between an eyewitness's subjective level of confidence and

63. *See id.* at 69–70 (citing studies in which social scientists evaluated responses provided by eyewitness experts related to "phenomena pertaining to eyewitness identification").

64. *See* Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOLOGIST 405, 405, 415 (2001) [hereinafter Kassin et al., 2001] (suggesting the consensus that exists about certain eyewitness identification phenomena should guide decisions made by judges and lawyers).

65. Benton et al., *supra* note 16, at 426 (noting that there have been 469 eyewitness experiments conducted in the past four decades). R

66. *See* Saul M. Kassin et al., *The "General Acceptance" of Psychological Research on Eyewitness Testimony: A Survey of the Experts*, 44 AM. PSYCHOLOGIST 1089, 1089, 1094 (1989) [hereinafter Kassin et al., 1989] (citing wording of questions, lineup instructions, and the forgetting curve as potential factors, among others). This consensus was confirmed in 2001 using an updated survey of eyewitness experts. Kassin et al., 2001, *supra* note 64, at 405. R

67. *See* Kassin et al., 2001, *supra* note 64, at 412–13 (noting factors on which "there was a strong consensus . . . [of reliability]"). R

68. *See* Kassin et al., 1989, *supra* note 66, at 1089, 1094 (noting that eighty percent or more of the eyewitness experts initially surveyed considered these factors sufficiently reliable to present in court); *see also* Kassin et al., 2001, *supra* note 64, at 405, 412 (explaining that ninety percent or more of the eyewitness experts in the updated survey considered these factors to be "sufficiently reliable to present in court"). *But see* Ebbe B. Ebbesen & Vladimir J. Konecni, *Eyewitness Memory Research: Probative v. Prejudicial Value*, EXPERT EVIDENCE, 1996, at 2, 24 (contending that research regarding eyewitness memory "lacks the external validity necessary to be useful to jurors" and that any related findings should be excluded from court because the prejudicial value of such findings outweigh their probative value). R R

69. Kevin Krug, *The Relationship Between Confidence and Accuracy: Current Thoughts of the Literature and a New Area of Research*, 3 APPLIED PSYCHOL. IN CRIM. JUST. 7, 31 (2007).

the accuracy of his memory.[70] One meta-analysis of thirty-five eyewitness identification studies found that confident eyewitnesses were only "somewhat more accurate" than eyewitnesses who were not confident.[71] For this reason, it is not surprising that some commentators criticize current jury instructions because they advise jurors to consider an eyewitness's confidence in determining credibility.[72]

The second factor involves the ability of witnesses to identify people across racial lines. Identifying people of different races is a challenge, whether, for example, it is a white person identifying a black person, or a black person identifying a white person.[73] Numerous experiments have shown that people have an easier time identifying people of their own race and tend to make false identifications more often when identifying people of other races.[74] Because crime does not occur solely between people of the same race, this factor can be an important consideration at trial.[75]

Finally, information a witness receives following identification can impact a witness's memory.[76] There is evidence that feedback on

70. *Id.* There have been a few studies challenging this connection. *See* Behrman & Davey, *supra* note 54, at 486 (finding that "highly confident witnesses are much more prone to choose the suspect in a criminal proceeding than are moderately confident ones," although the authors caution against an inference that confidence predicts accuracy). R

71. Jennifer L. Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL'Y & L. 338, 349 (1997).

72. *E.g.*, LOFTUS ET AL., *supra* note 37, § 14-5, at 430–31 (criticizing the *Telfaire* instructions for highlighting factors, in particular the confidence of eyewitnesses, without educating jurors about how these factors impact the accuracy of testimony). Indeed, the *Maryland Criminal Pattern Jury Instructions* cite the witness's certainty as one of the factors jurors should consider in evaluating whether a person correctly identified the defendant. MD. INST. FOR CONTINUING PROF'L EDUC. OF LAWYERS, INC., MARYLAND CRIMINAL PATTERN JURY INSTRUCTIONS, MPJI-Cr 3:30: Identification of Defendant 93 (2006). R

73. LOFTUS ET AL., *supra* note 37, § 4-13, at 103. R

74. *Id.* at 103–04 ("There have now been a sizable number of cross-race studies completed. . . . The overall pattern was clear: witnesses did better at identifying suspects of their own race than those of another race."). For example, one study involved white and black customers visiting small Tallahassee convenience stores and purchasing items from both white and black store clerks. *Id.* About fifty-five percent of white clerks misidentified a black customer, but only thirty-five percent misidentified a white customer. *Id.* at 104. Real-life errors in cross-racial identification have also been documented, including a situation where five victims of a kidnapping, rape, and robbery incident each identified the same man as the perpetrator. Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 937 (1984). This man was, however, hundreds of miles away at the time of the crime, and "other than his black skin, he bore no resemblance to the original suspect." *Id.*

75. *Cf.* Johnson, *supra* note 74, at 986–87 (noting the deep societal roots of cross-racial identification problems and urging courts to act to ameliorate the effects of such misidentifications). R

76. *See supra* note 56 and accompanying text. R

eyewitness recollections, such as a detective telling witnesses that they did a good job immediately after picking suspects in a lineup, can impact certainty.[77] Likewise, an eyewitness who first identifies a suspect from a selection of mug shots may be more likely to pick out the suspect again in a live lineup because he remembers the person from the mug shot, rather than as a result of an independent recollection of the crime.[78]

Psychologists have reached a consensus on certain factors that could influence the accuracy of eyewitness testimony in court, but this consensus is not necessarily common knowledge among jurors.[79] Therefore, in deciding whether to allow an expert to testify in this field or to read a jury instruction, courts must understand what jurors know about memory.[80]

C. Jurors Lack Knowledge About How Memory Works and What Factors Influence It

The consensus among researchers about how perception and memory work, and the way in which these concepts apply to the courtroom, is not within the knowledge of the average juror.[81] Numerous studies have shown that jurors are not aware of the factors that can influence the accuracy of eyewitness testimony,[82] creating a need for the long-reluctant court system to consider how to address this knowledge gap.

Courts have a great deal of confidence in the ability of jurors to make correct decisions, with some judges concluding that jurors' lay knowledge about memory is sufficient for them to evaluate eyewitness testimony without the aid of experts.[83] Even when finding expert testimony regarding eyewitness identifications potentially valuable to ju-

77. *See* Amy L. Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 119 (2002) ("Having eyewitnesses report their certainty at the time of the identification without the contamination of external influences might inoculate them against later certainty-inflating information. If so, their expressions of certainty during a trial might remain uncontaminated.").

78. CUTLER & PENROD, *supra* note 62, at 110. R

79. *See infra* Part I.C.

80. *See infra* Part I.C.

81. *See* LOFTUS ET AL., *supra* note 37, § 6-6, at 130–31 (citing several common juror misconceptions about eyewitnesses). R

82. *Id.* For example, in one survey, only one-third of respondents recognized that it is more difficult for people of one race to identify people of a different race, while nearly half of respondents stated that cross-racial identification was no more difficult that identification within one's own race. *Id.* at 131.

83. *See* United States v. Fosher, 449 F. Supp. 76, 77 (D. Mass. 1978) ("[A]verage lay jurors, on the basis of their own life experiences and common sense, can make an in-

rors, other courts have identified specific factors, such as the effects of stress on memory and the manner in which the passage of time can affect memory, to be within jurors' common knowledge.[84] Researchers in the field of memory, however, do not share the confidence of these courts about the common understanding of jurors.[85] For instance, the average person believes that eyewitnesses remember the details of violent incidents better than mundane ones, that eyewitnesses are as likely to underestimate the duration of an event as overestimate it, and that confident eyewitnesses are more likely to be accurate.[86] In fact, research into each of these areas suggests the opposite is true.[87]

Studies of potential jurors are one way in which researchers have sought to learn more about the lay knowledge of everyday citizens.[88] One study, conducted in Florida in the early 1980s, was drawn from a random sample of citizens.[89] These potential jurors received informa-

formed evaluation of eyewitness testimony without the assistance of a psychologist . . . ."); State v. Ammons, 305 N.W.2d 812, 814 (Neb. 1981) (same).

84. Bomas v. State, 412 Md. 392, 416, 987 A.2d 98, 112 (2010).

85. CUTLER & PENROD, *supra* note 62, at 195 (noting that "there are a variety of reasons to be concerned about jury decisionmaking in eyewitness identification cases" because, *inter alia*, jurors place too much trust in eyewitnesses and have difficulty differentiating between accurate and inaccurate eyewitnesses). R

86. LOFTUS ET AL., *supra* note 37, § 6-5, at 130–31. R

87. *See, e.g.*, *id.* (noting, for instance, that "[t]he added stress that violence creates clouds our perception and memory, particularly for peripheral details"). In a study testing this proposition, two groups of people were shown a video of the same incident, one in which a man violently attacked a woman and another in which he merely asked for directions. *Id.* § 2-7, at 25. Those who watched the violent version of the video experienced greater difficulty accurately describing what had occurred compared to those who viewed the nonviolent scene. *Id.* Eyewitnesses also remember accidents or crimes lasting longer than they actually do, particularly if an event is stressful or violent. *Id.* § 6-5, at 130. For example, participants in a study were shown a forty-two second video where a man briefly rocked a baby carriage but fled when a woman confronted him. *Id.* § 2-5, at 20. A week after viewing the film, participants were asked how long the incident lasted: on average, the witnesses estimated the incident lasted approximately ninety seconds. *Id.* Indeed, some evidence even suggests that neither training nor experience increases the accuracy of eyewitness memories. *See id.* § 2-14, at 44–45 (explaining that "trained law enforcement personnel may not be better at the more mundane details"). For instance, the potential of law enforcement officers to provide identifications that are just as inaccurate as regular citizens was most recently demonstrated when a Washington, D.C., police sergeant mistakenly identified a fourteen-year-old as the driver of a vehicle involved in a deadly drive-by-shooting. Avis E. Buchanan & Shawn Armbrust, *Eyewitness Testimony in an Imperfect World*, WASH. POST, May 2, 2010, at C5.

88. *See* John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 22 (1983) (performing a study of prospective jurors to "assess whether their 'common knowledge' is sufficient to enable them to accurately access what is likely to happen in actual eyewitness situations").

89. *Id.* ("Subjects were selected so as to yield a sample equivalent to the samples of prospective jury members compiled by the courts in Leon County, Florida.").

tion about a study conducted among college students in which the students, without being told in advance, witnessed the staged theft of a calculator from a classroom.[90] The students were able to observe the alleged thief for several minutes, were later shown pictures of several individuals, including the thief, and were asked to identify the culprit.[91]

The results from the Florida study suggested that the potential jurors had difficulty predicting the frequency with which accurate eyewitness identifications occur.[92] The prospective jurors estimated that 70.6% of the students would correctly identify the thief, while only 12.5% of the students correctly did so.[93] The researchers also provided the potential jurors with descriptions of two more scenarios and asked them to gauge the accuracy of eyewitness identification; on average, more than eighty percent of the prospective jurors overestimated the likely accuracy of the eyewitnesses.[94]

Other studies have highlighted the gap between what researchers have learned about memory and how it compares to commonly held views among the public.[95] In one study, the Public Defender Service for the District of Columbia commissioned a polling firm to gather data from 1,000 prospective jurors.[96] The findings showed that jurors generally did not understand the three-stage process of memory and viewed it more like a person retrieving a recorded memory from the brain, contrary to research findings.[97] Juror responses were at odds with other research findings as well.[98] For instance, more than one-third of potential jurors in the survey indicated that the presence of a

90. *Id.* at 23.

91. *Id.*

92. *See id.* at 24 (noting that the potential jurors had "significantly overestimated the percentage of students who were able to correctly identify the confederate-thief").

93. *Id.*

94. *Id.* at 28. The second scenario in which the researchers asked the potential jurors to estimate the accuracy of identifications took place in a convenience store. *Id.* at 23. The researchers sent "customers" into convenience stores staffed by white clerks and had the "customers"—both white and black—act in purposefully conspicuous ways, such as paying only in pennies or asking for detailed directions. *Id.* The prospective jurors in the study estimated that 51.1% of the clerks would accurately identify the black "customer" in a lineup, but in reality, only 32.3% of the clerks did so. *Id.* at 24.

95. *E.g.*, Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 193–94 (2006).

96. *Id.* at 194. The prospective jurors were asked questions about what factors make some eyewitness testimony more or less reliable than other such testimony. *Id.* at 193–94.

97. *Id.* at 195–96. More than half of the potential jurors in the study either agreed with a statement that memory of a traumatic event functions like a video recorder or said they did not know whether the statement was true. *Id.* at 196.

98. *Id.* at 196–97.

weapon would likely make an eyewitness's memory of the event more reliable, contrary to findings that it can distract a witness from remembering other details of the crime.[99] Additionally, a majority of the prospective jurors exhibited "a fundamental misunderstanding about the confidence-accuracy correlation,"[100] despite the demonstrated lack of such a correlation in the scientific literature.[101]

The result of these studies has long led researchers to suggest that courts adopt new methods for educating jurors about eyewitness perceptions and memory.[102] Deciding how best to educate jurors on eyewitness identification issues, whether through the testimony of an expert or specialized jury instructions, is a challenge the court system continues to address.[103]

II. THE LEGAL SYSTEM'S STRUGGLE TO INCORPORATE EYEWITNESS RESEARCH

Eyewitness testimony has long been a concern of actors within the justice system, but scientific research into the field did not begin to receive much attention from the courts until the 1960s.[104] Since that time, the legal system has taken three main approaches to the science: (1) banning expert testimony on eyewitness identification entirely, (2) allowing expert testimony on eyewitness identification at the discretion of the trial judge, and (3) crafting a specialized jury instruction to address eyewitness identification.[105] The recent decision of the Maryland Court of Appeals in the *Bomas* case serves as a perfect illustration of the debate occurring in courts around the country, as judges struggle to incorporate eyewitness identification research into the courtroom.[106]

99. *Id.*

100. *Id.* at 199.

101. Three separate reviews of studies examining the relationship between confidence and accuracy found a low correlation between eyewitness confidence and accuracy. Krug, *supra* note 69, at 9. One set of researchers reviewed thirty-one studies, another research team reviewed thirty-five studies, and a third group reviewed sixteen studies before drawing their conclusions. *Id.* R

102. *Cf.* CUTLER & PENROD, *supra* note 62, at 195 ("In sum, there are a variety of reasons to be concerned about jury decisionmaking in eyewitness identifications cases . . . ."). R

103. *See infra* Part II.

104. *See infra* Part II.A.

105. *See infra* Part II.B–C.

106. *See infra* Part II.B.2.

A. The Legal System Moves from Early Rejection of Eyewitness Science to Gradual Acceptance

Lawyers have long been aware of problems surrounding eyewitness testimony,[107] but courts have been slow to incorporate social science research from the field. This reluctance on the part of courts began to change in the late 1960s with a trio of cases decided by the Supreme Court of the United States, leading more courts around the country to consider the science behind eyewitness perception and memory.[108]

Wrongful identifications and mistaken witnesses are not a new concept in the criminal justice system. Edwin M. Borchard, a former Yale Law School professor, published a book in 1932 detailing wrongful convictions, including those that occurred due to mistaken eyewitness identifications.[109] As Borchard wrote, "Perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence. This mistake was practically alone responsible for twenty-nine of these [sixty-five] convictions."[110] Future Supreme Court Justice Felix Frankfurter[111] was another early critic of eyewitness evidence, disparaging it in his book on the Sacco and Vanzetti case.[112] After concluding that the eyewitness evidence against the two men was flawed,[113] Frankfurter rhetorically asked, "What is the worth of identi-

107. *See infra* text accompanying notes 109–10. **R**

108. *Cf.* NATHAN R. SOBEL, EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS § 1:1, at 1-1 to -2 (Dee Pridgen ed., 2d ed. 2002) ("On June 12, 1967, a significant date, the Supreme Court decided the landmark trilogy of *Wade-Gilbert-Stovall*. This was the first attempt by the Court to establish effective constitutional safeguards governing the admission of eyewitness evidence of identification in federal and state criminal trials." (footnote omitted)).

109. EDWIN M. BORCHARD, CONVICTING THE INNOCENT, at xiii (1932).

110. *Id.* Borchard also noted that "the emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy." *Id.*

111. President Franklin D. Roosevelt nominated Justice Frankfurter to the Court, and Justice Frankfurter was commissioned on January 19, 1939. *See Felix Frankfurter*, OYEZ, http://www.oyez.org/justices/felix_frankfurter (last visited Apr. 15, 2011).

112. FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN 30 (1927). Sacco and Vanzetti were Italian immigrants charged with killing two men in a robbery. Jon Umarov, Book Review, CHAMPION MAG., Mar. 2010, at 61 (reviewing SACCO AND VANZETTI (First Run Features 2007)). Worldwide protests ensued over their conviction and execution, as many thought they were killed because of their radical political views rather than because of their participation in the murder. *Id.*

113. *See* FRANKFURTER, *supra* note 112, at 31. ("All the identifying witnesses were speaking from casual observation of men they had never seen before, men of foreign race, under circumstances of unusual confusion."). **R**

fication testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy."[114]

Although lawyers were historically critical of eyewitness testimony,[115] the legal system was not quick to embrace psychological science.[116] More than 100 years ago, Hugo Münsterberg complained about judicial hostility to psychological evidence being used in the courtroom.[117] Some of the early research he cited, though not accepted by courts at the time, would eventually find support in the legal community.[118] This research included studies that questioned the accuracy of eyewitness identifications and accounts.[119]

Indeed, the first appellate court decision addressing the use of an expert to discuss the limits of eyewitness perception was written in 1931.[120] The case involved a robbery in which eyewitnesses identified the defendant, and the defendant then sought to have an expert testify about eyewitness identification of strangers.[121] The court held it was not error to exclude the testimony, as jurors could decide for themselves whether the victims of the crime were able to properly recognize the defendant.[122] This type of reasoning was common in early cases addressing the subject.[123]

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114. *Id.* at 30.

115. *See supra* text accompanying notes 109–14. R

116. *Cf.* LOFTUS & DOYLE, *supra* note 13, at xxi (paraphrasing Wigmore as claiming that when psychologists were sufficiently ready for the courts, the courts would be ready for the psychologists). R

117. HUGO MÜNSTERBERG, ON THE WITNESS STAND: ESSAYS ON PSYCHOLOGY AND CRIME 46 (1908) ("The Court would rather listen for whole days to the 'science' of the handwriting experts than allow a witness to be examined with regard to his memory and his power of perception, his attention and his associations, his volition and his suggestibility, with methods which are in accord with the exact work of experimental psychology.").

118. *Cf. id.* at 51–53 (describing, as an example, a meeting of jurists, psychologists, and physicians at which an experiment was conducted to demonstrate that even "men well trained in careful observation" erred in their eyewitness observations).

119. *E.g.*, *id.* at 51–53. Münsterberg described one experiment where a meeting was broken up by a clown being chased by a man with a gun. *Id.* at 52. Of the forty witnesses to the incident, only six provided descriptions that did not include false statements. *Id.* The witness estimates of the incident's duration varied from a few seconds to several minutes. *Id.* at 53.

120. Edward Stein, *The Admissibility of Expert Testimony About Cognitive Science Research on Eyewitness Identification*, 2 LAW, PROBABILITY & RISK 295, 297 (2003) (citing *Criglow v. State*, 36 S.W.2d 400 (Ark. 1931), as "[t]he first appellate case that discusses expert testimony on the cognitive limitations of eyewitnesses").

121. *Criglow*, 36 S.W.2d at 401.

122. *Id.*

123. *Cf.* Stein, *supra* note 120, at 297 ("Many courts have, like the *Criglow* court, viewed expert testimony on eyewitness identification with suspicion and, historically, most have excluded such expert testimony."). R

The court system did not begin to embrace scientific findings concerning eyewitnesses until the late 1960s when the United States Supreme Court began to enter this area in earnest.[124] A trio of Supreme Court cases decided in 1967 established constitutional safeguards relating to eyewitness identifications.[125] Later, in the 1972 case of *Neil v. Biggers*,[126] the Court identified factors that could be used to evaluate the reliability of eyewitness identifications in order to determine whether the police had violated the defendant's due process rights.[127] At approximately the same time, the United States Court of Appeals for the District of Columbia Circuit created a pattern instruction for eyewitness testimony that numerous courts have since employed as a model.[128] Recognition of the problems of eyewitness testimony by other appellate courts paved the way for other courts around the country to address the subject.[129]

As courts began to acknowledge the shortcomings of eyewitness testimony, one question in particular frequently arose: Whether to allow expert witnesses to testify about the science surrounding eyewitness identifications.[130] The first appellate case in which an eyewitness

124. *Cf.* SOBEL, *supra* note 108, § 1:1, at 1-2 to -3 (citing numerous court decisions discussing eyewitness identification after the Court's decisions in *Wade*, *Gilbert*, and *Stovall*). R

125. *Id.* at 1-1 to -2; *see* United States v. Wade, 388 U.S. 218, 236–37 (1967) (holding that a post-indictment lineup is a "critical stage of the prosecution" at which the defendant is entitled to have counsel); Gilbert v. California, 388 U.S. 263, 269–70, 272–73 (1967) (holding that admission of eyewitness identifications at trial that were obtained during a lineup without the presence of the defendant's counsel violated the defendant's constitutional rights); Stovall v. Denno, 388 U.S. 293, 297 (1967) (concluding that *Wade* and *Gilbert* would not be applied retroactively), *overruled by* Griffith v. Kentucky, 479 U.S. 314 (1987). These decisions were undercut in subsequent years. *See, e.g.*, SOBEL, *supra* note 108, § 1:5, at 1-12 (explaining that later cases have rendered *Wade* "virtually a dead letter"). The law surrounding lineups is very detailed and beyond the scope of this Comment. R

126. 409 U.S. 188 (1972).

127. *Id.* at 198–200 (listing as relevant factors (1) "the opportunity of the witness to view the criminal at the time of the crime"; (2) "the witness' degree of attention"; (3) "the accuracy of the witness' prior description of the criminal"; (4) "the level of certainty demonstrated by the witness at the confrontation"; and (5) "the length of time between the crime and the confrontation").

128. *See* United States v. Telfaire, 469 F.2d 552, 558–59 (D.C. Cir. 1972) (providing model instructions for eyewitness identification); *see also infra* text accompanying notes 214–15, 223–25 (discussing use of *Telfaire*'s pattern instruction as a model jury instruction). R

129. *Cf.* State v. Warren, 635 P.2d 1236, 1243 (Kan. 1981) (noting that appellate courts had traditionally disregarded the potential for injustice in eyewitness testimony, but that "more recent decisions recognize the serious nature of the problem").

130. *See, e.g.*, People v. McDonald, 690 P.2d 709, 711 (Cal. 1984) ("We address here a contention that is increasingly heard in the courts . . . [whether] it may be an abuse of discretion to exclude . . . [expert] testimony . . . on psychological factors shown by the evidence [to potentially] affect the accuracy of an eyewitness identification of the defendant."), *overruled on other grounds by* People v. Mendoza, 4 P.3d 265 (Cal. 2000).

expert was permitted to testify did not occur until 1983.[131] In that case, the appellate court found that the trial court had abused its discretion by refusing to allow an expert to testify when an eyewitness identified a person other than the defendant in the photo array and testimony from several witnesses indicated the defendant was not in the state when the crime occurred.[132] Throughout the 1980s, courts across the country continued to hear cases regarding the admission of expert testimony on eyewitness identifications.[133]

By the 1980s, judges recognized that eyewitness testimony was not always reliable, and they appeared more willing to accept scientific findings surrounding memory and perception.[134] But deciding if, and how, this information should reach jurors would become a heated debate, with courts reaching varying conclusions about the best approach to take regarding eyewitness identification evidence.[135]

B. Courts Struggle with How Best to Address Scientific Findings About Eyewitness Identifications

Before accepting psychological research into eyewitness testimony, judges must ensure that the science itself is reliable, a process governed by state or federal rules of evidence.[136] Even though judges and commentators have generally deemed the science underlying eye-

131. Wayne T. Westling, *The Case for Expert Witness Assistance to the Jury in Eyewitness Identification Cases*, 71 OR. L. REV. 93, 113 (1992) ("The earliest appellate case allowing an expert eyewitness was *State v. Chapple*, [660 P.2d 1208 (Ariz. 1983)] decided by the Arizona Supreme Court in 1983." (footnote omitted)).

132. *Chapple*, 660 P.2d at 1212, 1222–24.

133. Westling, *supra* note 131, at 114–17 (citing cases). California considered the issue not long after the *Chapple* decision, holding in *People v. McDonald* that expert testimony on eyewitness identifications, which fell within the trial judge's discretion, could be appropriate in certain cases. 690 P.2d at 711; *see also* State v. Buell, 489 N.E.2d 795, 801 (Ohio 1986) (stating that the defendant's arguments had persuaded the court that expert testimony relating to eyewitness identifications "could be helpful to a jury and should not be held as inadmissible in every instance"). R

134. *See supra* text accompanying notes 130–33. R

135. *See infra* Part II.B.

136. *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) ("[T]he Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands."); Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs"), *superseded by rule*, FED. R. EVID. 702, *as recognized in Daubert*, 509 U.S. 579; *see also* LOFTUS ET AL., *supra* note 37, § 13-6, at 363–64 ("To gain the admission of expert testimony, it is necessary to persuade the judge that the proposed testimony passes through [a filter] . . . designed to exclude what might be called 'bad science' . . . ."). R

witness testimony to be reliable,[137] courts have taken three different approaches to eyewitness identification research: (1) to preclude expert testimony and instruction to the jury regarding eyewitness research, an approach that has now been abandoned by state courts;[138] (2) to permit expert testimony at the discretion of the trial judge, the approach favored by the Maryland Court of Appeals in its recent *Bomas* decision;[139] or (3) to use jury instructions to educate jurors about eyewitness identification research.[140]

1. Barring Expert Testimony on Eyewitness Identifications

Even though the science underlying eyewitness identification research is now viewed as reliable, courts once routinely excluded expert testimony on eyewitness identification using two principal

137. Evidence demonstrates that expert testimony about eyewitness identifications satisfies both the *Daubert* and *Frye* standards for reliability. First, under *Daubert*, there is reason to believe that the science surrounding eyewitness testimony is sound enough to pass legal muster. *See* Gary L. Wells & Lisa E. Hasel, *Eyewitness Identification: Issues in Common Knowledge and Generalization*, *in* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 160–61 (Eugene Borgida & Susan T. Fiske eds., 2008) (explaining four findings demonstrating reliability in expert testimony on eyewitness identifications). Second, the science behind eyewitness identifications is generally accepted in the field, thereby satisfying the *Frye* standard, which is used by many states that do not subscribe to *Daubert*. *See* LOFTUS ET AL., *supra* note 37, § 13-9, at 368 ("Even under the restrictive test of 'general acceptance' laid out in *Frye v. United States*, there is little doubt that the *method* of experimental psychology is not in question . . . ."). Although Maryland generally follows the *Frye* test, the Court of Appeals has declined to apply that test to expert testimony on eyewitness identification, instead analyzing whether the evidence would be of appreciable help to the trier of fact in such cases. *Compare* Montgomery Mut. Ins. Co. v. Chesson, 399 Md. 314, 327, 923 A.2d 939, 946 (2007) ("Maryland adheres to the standard set forth in *Frye v. United States* for determining the admissibility of scientific evidence and expert scientific testimony." (citation omitted) (citing Reed v. State, 283 Md. 374, 389, 391 A.2d 364, 372 (1978))), *with* Bloodsworth v. State, 307 Md. 164, 184, 512 A.2d 1056, 1066 (1986) (noting that expert testimony on eyewitness identification is not similar to other experimental techniques, such as voice-prints, that Maryland courts had previously examined under *Frye*). *See generally* Nancy E. Bonifant, Note, Blackwell v. Wyeth*: It's Our Courtroom and We'll* Frye *Only if We Want To—The Maryland Court of Appeals's Unstated Adoption of* Daubert, 69 MD. L. REV. 719 (2011). R

As more studies have been conducted on eyewitness testimony, the science has continued to gain reliability and acceptance by courts. *See* State v. Copeland, 226 S.W.3d 287, 302 (Tenn. 2007) (holding that it was not harmless error to exclude expert testimony on eyewitness identification, which was found to be reliable). Additionally, DNA exonerations starting in the early 1990s have begun to prove conclusively that there have been cases where eyewitnesses were clearly mistaken, a scientific method that has only become available in the past twenty years. *See* Wells & Hasel, *supra*, at 159 (describing how more than 200 people who were convicted by juries had been proven innocent through DNA testing, with about seventy-five percent of the cases involving mistaken identification evidence).

138. *See infra* Part II.B.1.

139. *See infra* Part II.B.2.

140. *See infra* Part II.B.3.

justifications: (1) the availability of cross-examination permitted counsel to address witness perception and memory, and (2) the science behind memory was deemed to be within a juror's lay knowledge.[141] Courts flatly prohibiting expert testimony on eyewitness identification issues are virtually nonexistent today,[142] and valid criticisms of the arguments used to support this former prohibition on experts demonstrate why this approach fell into disrepute.

Courts often view cross-examination as an adequate means to attack an eyewitness's ability to perceive or remember events.[143] Its supporters have long extolled the virtues of cross-examination as "the greatest legal engine ever invented for the discovery of truth."[144] Additionally, courts have assumed that any deficiency in a witness's perception or memory can be brought out through sharp questioning by an astute attorney.[145]

There are, however, limits to what cross-examination can do in a situation where a witness may be mistaken but has no apparent bias or motive to lie, and may not be aware that what he is saying is incorrect.[146] For instance, the issue of cross-racial identification can be succinctly explained but is difficult to explore on cross-examination.[147]

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141. *See* Handberg, *supra* note 2, at 1038 (cross-examination justification); Westling, *supra* note 131, at 104–05 (common knowledge justification). R R

142. *See* Benton et al., *supra* note 16, at 404 (citing Tennessee as the only state with a prohibitory approach); *see also Copeland*, 226 S.W.3d at 302 (abandoning Tennessee's prohibitory approach to allow for expert testimony on eyewitness identification where the testimony was "reliable and would have been of substantial assistance to the jury"). R

143. Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 728 (2007).

144. 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW INCLUDING THE STATUTES AND JUDICIAL DECISIONS OF ALL JURISDICTIONS OF THE UNITED STATES AND CANADA § 1367, at 27 (2d ed. 1923).

145. *See* Epstein, *supra* note 143, at 728–29 ("Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification . . . ." (quoting Watkins v. Sowders, 449 U.S. 341, 348 (1981))). R

146. *See* BRIAN L. CUTLER, EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT'S WITNESS 97 (2002) ("Cross-examining a neutral, credible, and confident eyewitness is a challenge for even the most experienced and successful attorneys. The likelihood that a committed eyewitness will recant his position (or fall apart on the stand) is so minimal that it is hardly worth considering.").

147. *See* Epstein, *supra* note 143, at 775–76 (describing race as "one of the most sensitive issues in American society and discourse" and explaining the difficulties that arise when trying to explore race bias in eyewitness identifications). Epstein uses "Sir, isn't it true that you are better at identifying people of your own race than African-Americans?" as an example of a question that addresses cross-racial identification but is likely to offend both the witness and the jury. *Id.* at 775. This result obtains because the question suggests that the witness may be racist, an accusation that the witness and jurors might consider insulting if asked without a proper foundation. *See id.* Equally limiting is the likelihood that the witness will merely answer "no" to the question, even if studies suggest that he would have a harder time identifying people of a different race than his own. *Id.*; *see supra* notes 73–75 R

Because witnesses only face cross-examination about subjects of which they have direct knowledge,[148] and attorneys are not permitted to testify directly to the jury,[149] educating jurors about cross-racial identification, or other research into eyewitness testimony, solely through cross-examination is difficult.[150]

The other principal justification courts have invoked when excluding expert testimony regarding eyewitness identification is that the information rests in the lay knowledge of jurors.[151] Research into what jurors understand about how perception and memory work show that this justification lacks support.[152]

2. *Allowing Expert Testimony on a Discretionary Basis: The* Bomas *Case*

The second, and most common, approach to expert testimony is to allow it at the discretion of the trial judge.[153] The Maryland Court of Appeals took this approach in the *Bomas* case, a 2010 decision that illustrates the considerations judges weigh in deciding how best to incorporate social science research into eyewitnesses identifications at trial.[154] The court considered the alternatives to the use of expert testimony, which included a fresh look at the state's jury instructions surrounding eyewitness testimony, before concluding that decisions about the use of expert testimony on eyewitness identification should

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and accompanying text. Finally, Epstein posits that directly asking a witness about studies demonstrating problems in cross-racial identification is likely to elicit the following answer: "I don't know what you're talking about." Epstein, *supra* note 143, at 775–76 (internal quotation marks omitted). As these examples illustrate, "there can be no effective cross-examination on the phenomenon of cross-racial bias." *Id.* at 776.

148. *See* GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL EVIDENCE 241 (4th ed. 2001) (quoting Federal Rule of Evidence 602, which generally limits witness testimony to matters about which the witness has personal knowledge).

149. *See* United States v. Alu, 246 F.2d 29, 33 (2d Cir. 1957) ("It has been widely recognized that lawyers representing litigants should not be called as witnesses in trials involving those litigants . . . .").

150. *E.g.*, Epstein, *supra* note 143, at 776. R

151. Westling, *supra* note 131, at 104–05. An additional justification sometimes invoked is that expert testimony is unfairly prejudicial because it could tilt the scales too greatly in favor of the party offering it. Handberg, *supra* note 2, at 1039. R R

152. *See supra* Part I.C.

153. Benton et al., *supra* note 16, at 404–05 (noting that ninety-eight percent of states "take a discretionary approach" when determining whether to admit an eyewitness expert). R

154. Bomas v. State, 412 Md. 392, 407–16, 987 A.2d 98, 106–12 (2010) (reaching the following conclusion after carefully weighing the arguments related to use of expert testimony in eyewitness identification cases: "the application of [the test for admitting expert testimony on eyewitness identification] is 'a matter largely within the discretion of the trial court[ ]'" (quoting Bloodsworth v. State, 307 Md. 164, 185, 512 A.2d 1056, 1067 (1986)) (internal quotation marks omitted)).

remain in the trial judge's discretion.[155] The main drawback of this approach is that it can be discretionary in theory but prohibitory in practice.[156]

The facts of the *Bomas* case are straightforward. In 2004, an off-duty detective named Kenneth Bailey stopped his truck in traffic around 2 A.M. near a Baltimore bar.[157] While he was stopped, he heard six to eight gunshots come from a crowd standing on the sidewalk, and he watched as a black male shot and killed another black male.[158]

The gunman, later identified as Tavon Bomar,[159] ran away from the crowd, passing within about a car length of where Bailey's truck was stopped.[160] Bailey drew his gun and attempted to follow Bomar but was delayed and unable to apprehend him.[161] A week after the incident, Bailey filed a report, describing the shooter as "a black male."[162] After receiving information from an informant approximately six months later, police created a photo array from which Bailey identified Bomar as the gunman.[163]

At trial, Bomar sought to introduce testimony from a licensed psychologist and expert in neuropsychology, who offered testimony on several factors that could impact the accuracy of the eyewitness identification in the case.[164] The motions judge declined to admit the testimony, ruling that "it would be unhelpful to a jury and that a jury was capable of appropriately evaluating and weighing the eyewitness identifications."[165]

The Maryland Court of Appeals affirmed Bomar's second-degree murder conviction, holding that the trial court did not err in declin-

155. *See infra* text accompanying notes 168–74. R

156. *See* Benton et al., *supra* note 16, at 404–05 (noting that one-third of the states that purport to "take a discretionary approach" had used such "harsh language" when finding expert testimony inadmissible as "to suggest a nearly per se rule of exclusion"). R

157. *Bomas*, 412 Md. at 395, 987 A.2d at 100.

158. *Id.* at 395–96, 987 A.2d at 100.

159. Although identified as "Bomas" in court documents, the defendant's last name is actually Bomar; Bomas was one of the defendant's known aliases. *Id.* at 395 n.1, 987 A.2d at 99 n.1.

160. *Id.* at 396, 987 A.2d at 100.

161. *Id.*

162. *Id.* (internal quotation marks omitted).

163. *Id.*

164. *Id.* at 397, 987 A.2d at 100–01. The factors that Bomar's expert sought to discuss included the following: the weak link between confidence and accuracy, the impact of stress and the passage of time on memory, and the tendency for jurors to believe eyewitness testimony even when substantial weaknesses are exposed through the process of cross-examination. *Id.*

165. *Id.* at 401, 987 A.2d at 103.

ing to allow testimony from Bomar's expert.[166] In so ruling, the court stated that trial courts have the discretion to admit expert testimony on eyewitness identification if it is of "appreciable help to the trier of fact."[167]

In its decision, the court recognized that scientific advances in the area of memory had progressed significantly since the court last visited the issue twenty-four years earlier in *Bloodsworth v. State*[168] and acknowledged that experts in the field may have insights that are beyond the ken of a layperson.[169] Recognizing that jurisdictions now generally trend toward admitting expert testimony, and that this information could be helpful to jurors, the *Bomas* court stated that trial courts should be mindful of the scientific advances in the area of eyewitness testimony research.[170] Despite this conclusion, however, the court reasoned that not all factors of eyewitness identification are beyond the experience of a jury and refrained from requiring courts to admit expert testimony on the subject, thus upholding a discretionary standard.[171]

The court thus declined Bomar's invitation to make this type of evidence presumptively admissible in all circumstances, although the court did suggest that jury instructions might be a useful substitute.[172] One of the court's concerns about automatically admitting expert testimony on eyewitness identification was that it would lead to a "battle of the experts" that would take over the trial and confuse jurors.[173] The court explained that expert testimony is not the only avenue to use in educating jurors about eyewitness testimony, and suggested that the Maryland Criminal Pattern Jury Instruction Committee should

166. *Id.* at 395, 423, 987 A.2d at 99, 116.

167. *Id.* at 416–17, 987 A.2d at 112 (quoting Bloodsworth v. State, 307 Md. 164, 184, 512 A.2d 1056, 1066 (1986)) (internal quotation marks omitted).

168. In *Bloodsworth*, the Court of Appeals upheld the trial court's decision to exclude an expert's testimony, holding that the standard for the admissibility of expert testimony on eyewitness identification is "whether [the expert's] testimony will be of real appreciable help to the trier of fact in deciding the issue presented." 307 Md. at 184, 512 A.2d at 1066 (internal quotation marks omitted). The *Bomas* decision acknowledged the *Bloodsworth* court's "negative tone" toward expert testimony on eyewitness identification. *Bomas*, 412 Md. at 410, 987 A.2d at 108.

169. *Bomas*, 412 Md. at 416, 987 A.2d at 112.

170. *Id.* ("Thus, it is time to make clear that trial courts should recognize these scientific advances in exercising their discretion whether to admit such expert testimony in a particular case.").

171. *Id.* (citing stress and passage of time as factors affecting memory that are within the common knowledge of jurors).

172. *Id.* at 417–18, 987 A.2d at 112–13.

173. *Id.* at 419, 987 A.2d at 113–14.

consider modifying its current instructions in light of new scientific studies related to the reliability of eyewitness perceptions.[174]

The *Bomas* court's reasoning reflects much of the debate that has occurred around the country concerning eyewitness identification evidence.[175] Despite the wealth of social science evidence regarding eyewitness identification, courts have expressed countervailing concerns about that information being within a jury's lay knowledge or too general to be helpful and about creating a battle of the experts.[176]

Maryland's discretionary approach is followed by the majority of states, which means that in practice experts will only testify infrequently about eyewitness identification issues.[177] Judges retain a great deal of control in this area, and appellate courts typically do not consider exclusion of this evidence to infringe on a defendant's rights.[178] Even among courts that follow a discretionary standard, judges remain reluctant to admit expert testimony on eyewitness identification.[179] Indeed, a recent analysis of eyewitness identification cases found that courts uphold the exclusion of such testimony far more

174. *Id.* at 418, 987 A.2d at 113. Applying this rationale to the facts of Bomar's case, the Court of Appeals then agreed with the trial court that the proposed expert testimony was general, vague, and inconclusive. *Id.* at 420–22, 987 A.2d at 114–15. The *Bomas* court additionally found that the testimony would not have been helpful to the jury and was information within the jurors' scope of knowledge. *Id.* at 421–22, 987 A.2d at 115. Because the trial court did not appear unduly biased against this type of expert evidence, the *Bomas* court concluded that the trial court acted within its discretion in excluding the expert testimony. *Id.* at 416, 987 A.2d at 116.

175. *Cf.* Benton et al., *supra* note 16, at 404–09 (evaluating cases in which courts have claimed to adopt the discretionary approach and explaining that there are frequently differing rationales and outcomes within this approach). R

176. *Id.* at 405–07. Benton and her co-authors noted that courts may view eyewitness testimony research as lacking in "'scientific or technical'" underpinnings, thereby placing it within the regular knowledge of jurors. *Id.* at 405–06 (quoting State v. McKinney, 74 S.W.3d 291, 302 (Tenn. 2002)). Additionally, courts may find the information experts provide on eyewitness testimony to be too general because experts cannot opine whether a specific witness is mistaken about what he witnessed. *Id.* at 407. Finally, some courts do not believe that the potential for error in an eyewitness's testimony is best dealt with by having experts duel over the meaning of the evidence. *Id.*

177. *See supra* text accompanying notes 153, 156. R

178. *See* Benton et al., *supra* note 16, at 405 (noting that appellate courts typically review trial court decisions related to the admission of expert testimony on eyewitness identification under an abuse of discretion standard that leads to few reversals). There is evidence, however, that this view has started to change in some jurisdictions. For instance, in a 2007 case, the Supreme Court of Tennessee reversed a murder conviction after the court held that it was not harmless error to refuse to allow a psychologist to testify about the reliability of eyewitness identifications. State v. Copeland, 226 S.W.3d 287, 289, 304 (Tenn. 2007). R

179. *See* Benton et al., *supra* note 16, at 404–05 (noting that seventy percent of states purporting to use the discretionary approach had refused to admit expert testimony when requested). R

than they overrule the exclusion of it, indicating that experts on eyewitness testimony remain uncommon in courtrooms.[180]

Because cross-examination on eyewitness identification is often limited and courts routinely exclude expert testimony on that issue, the question of how best to convey this information to jurors remains open.[181] Jury instructions, the third approach taken by courts and one suggested by the *Bomas* court, present an ideal middle ground between excluding this type of evidence entirely and only allowing it through expert testimony.[182]

3. The Rise of Pattern Jury Instructions on Eyewitness Identification Issues

Jury instructions provide a method for judges to instruct jurors about the law and how to apply it.[183] Pattern jury instructions, which arose in the twentieth century, provide judges with basic models to follow when drafting instructions and have been applied to the realm of eyewitness testimony.[184] This application, starting in *United States v. Telfaire*,[185] has not been without criticism,[186] and states continue to debate how jury instructions should be used to inform jurors about eyewitness testimony research.[187]

The U.S. legal system places a great deal of faith in the wisdom of juries.[188] Ordinary men and women are taken from their everyday lives and asked to decide matters of life and death involving strangers,[189] and some of them might have only a rudimentary understand-

180. *See id.*

181. *See infra* Part III.C.

182. *See infra* Part III.C.

183. *See* Neil P. Cohen, *The Timing of Jury Instructions*, 67 TENN. L. REV. 681, 683 (2000) ("Jurors cannot perform their duties without being instructed on the law they are to apply."). Although early jurors were not instructed on the law, states have required jury instructions to be delivered in court cases since the late nineteenth century. Harvey S. Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 NEB. L. REV. 520, 527–28 (1986).

184. *See infra* text accompanying notes 194–202. R

185. 469 F.2d 552 (D.C. Cir. 1972).

186. *See* LOFTUS ET AL., *supra* note 37, § 14-5, at 433 (citing a study that found that mock jurors receiving the *Telfaire* instruction voted to convict at a higher rate than mock jurors who received no instruction at all). R

187. *Compare infra* Part II.C (discussing how Utah decided to make a jury instruction on eyewitness testimony mandatory in cases in which identity is at issue), *with* Jones v. State, 749 N.E.2d 575, 585 (Ind. Ct. App. 2001) (holding that a trial court was not required to provide *any* jury instruction regarding eyewitness testimony).

188. LOFTUS ET AL., *supra* note 37, § 14-1, at 424. R

189. *Cf. id.* ("Our system venerates the role of the jurors, lay fact finders, who are untrained in the law.").

ing of the law and legal system.[190] In such a system, jury instructions serve to educate these citizens about what the law is and how to apply it properly.[191]

Pattern jury instructions, a standard set of definitions and explanations to be used in recurring types of cases,[192] are popular because they give judges and lawyers a firm basis for drafting instructions.[193] In 1938, California became the first state to create pattern jury instructions, concentrating on negligence because more than ninety percent of the civil jury cases tried in the state were based on that claim.[194] Other states followed suit, including Illinois, which appointed a committee to craft jury instructions in 1955.[195] Some states strongly encourage the use of pattern jury instructions,[196] even posting them online for easy access by lawyers and judges.[197]

As attorneys have attempted to present information on eyewitness perceptions and memory to juries, judges have turned to specialized instructions as one method of informing jurors about this research.[198] Indeed, as early as 1954, the Supreme Court of Pennsylvania ruled that judges should "warn the jury" if evidence suggests that an eyewitness may not have made a positive identification.[199] This early instruction, however, was an outlier, as most of the legal discussion surrounding research into eyewitness identification did not begin until the late 1960s.[200]

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190. *See* Cohen, *supra* note 183, at 682 (noting that "some jurors may know virtually nothing accurate about the process they will go through"). R

191. LOFTUS ET AL., *supra* note 37, § 14-1, at 424. R

192. *Id.* at 424–25.

193. *See id.* at 424 (noting that judges tend to "lean heavily on approved 'pattern' instructions" in part to avoid being reversed on appeal).

194. 6 AM. JUR. *Trials* § 2 (1967); Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 593 (2002) (describing as "influential" the publication of California pattern jury instructions by the Judges of the Superior Court of Los Angeles in 1938).

195. 6 AM. JUR. *Trials* § 2. The Illinois pattern instructions were to be used unless a situation arose in which the instructions were not applicable. *Id.*

196. Maryland's appellate courts are among those that strongly favor the use of pattern instructions. *See* Green v. State, 127 Md. App. 758, 771, 736 A.2d 450, 457 (1999) (noting that the state's pattern jury instructions "have been put together by a group of distinguished judges and lawyers who almost amount to a 'Who's Who' of the Maryland Bench and Bar" and "have been passed upon by our appellate courts").

197. For example, the Seventh Circuit maintains an online library of civil and criminal jury instructions from more than twenty states. *State Jury Instructions*, LIB. OF THE U.S. CTS. OF THE SEVENTH CIRCUIT, http://www.lb7.uscourts.gov/reflinks.htm (follow "Jury Instructions" hyperlink under "State Legal Resources") (last visited Apr. 15, 2011).

198. Benton et al., *supra* note 16, at 421–22. R

199. Commonwealth v. Kloiber, 106 A.2d 820, 826–27 (Pa. 1954).

200. *See supra* Part II.A.

The "most widely used"[201] instruction on eyewitness identification testimony came out of the 1972 case *United States v. Telfaire*.[202] In *Telfaire*, the defendant was accused of robbing a man of ten dollars in a poorly lit hotel hallway.[203] The defendant was arrested in the hotel lobby a short time later and took the stand during the trial to deny committing the robbery.[204]

Although it affirmed the robbery conviction, the *Telfaire* court discussed the importance of a jury instruction informing the jury of its responsibility to decide beyond a reasonable doubt that the defendant was correctly identified as the culprit.[205] Because the trial judge gave a lengthy instruction that focused on the issue of identity, the *Telfaire* court found that the defendant was not prejudiced by the failure of the court to deliver a more specialized instruction.[206]

The appendix to *Telfaire* contained a sample jury instruction that has generated debate among legal scholars.[207] The appendix sets out the court's attempt to "further the administration of justice" by laying out a model jury instruction in identification cases.[208] The court did not make the instruction mandatory but stated that not using it "would constitute a risk in future cases that should not be ignored unless there is strong reason."[209]

The *Telfaire* instruction focuses on the question of whether the prosecution has proven the identity of the defendant as the one who committed the crime.[210] As the instruction states, the value of identification testimony "depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later."[211] It focuses jury attention on the opportunity of a witness to perceive a person or event and asks jurors to consider how much time a witness had to perceive the event, the conditions under

201. Benton et al., *supra* note 16, at 422. R

202. 469 F.2d 552, 558–59 (D.C. Cir. 1972).

203. *Id.* at 554 n.4.

204. *Id.*

205. *Id.* at 554–55. Indeed, the court emphasized the importance of trial courts including "as a matter of routine, an identification instruction." *Id.* at 555 n.11 (quoting Macklin v. United States, 409 F.2d 174, 178 (D.C. Cir. 1969)) ("In cases where identification is a major issue the judge should not rely on defense counsel to request so important a charge.").

206. *Id.* at 556–57.

207. *See* LOFTUS ET AL., *supra* note 37, § 14-6, at 433 (noting criticism among lawyers about the effectiveness of the *Telfaire* instruction). R

208. *Telfaire*, 469 F.2d at 557.

209. *Id.* at 557.

210. *Id.* at 558.

211. *Id.* at 558.

which it occurred, and the amount of time between perceiving the event and the actual identification.[212] The *Telfaire* court encouraged judges to revise and adapt the instruction as necessary to the facts of each particular case.[213]

The *Telfaire* instruction met mixed reviews. Some courts have used it as a model in evaluating the adequacy of the instruction given by the trial court[214] and require an identification instruction in particular situations.[215] But, many commentators have criticized the *Telfaire* instruction as providing "nothing more than a few generalities,"[216] while others criticize the instruction as being too beneficial to the defendant by making jurors overly skeptical of eyewitness testimony.[217] Despite these criticisms, in one study of mock jurors, the jurors actually voted to convict at higher rates when given the *Telfaire* instruction than when not given the instruction.[218]

In the years since *Telfaire*, more courts have begun to use some type of instruction on eyewitness identification.[219] These instructions vary from short and succinct to more detailed, and the circumstances in which courts employ them differ from case-to-case.[220] The decision on the type of jury instruction to deliver, much like the question of

212. *Id.* at 558–59 (identifying additional factors, such as occasions in which the witness failed to identify the defendant and the witness's capacity, in determining the accuracy of an eyewitness identification).

213. *Id.* at 557.

214. *See, e.g.*, United States v. Hodges, 515 F.2d 650, 653 (7th Cir. 1975) ("We believe that . . . the *Telfaire* case propounds an appropriate model instruction to be applied in cases where, as here, the crucial issue involved is the defendant's identification . . . ."); Commonwealth v. Rodriguez, 391 N.E.2d 889, 893 (Mass. 1979) (recognizing *Telfaire*'s suggestion that defendants may be entitled to a jury instruction on eyewitness identification as an "enlightened rule" and appending the *Telfaire* instruction to its opinion).

215. *See, e.g.*, State v. Warren, 635 P.2d 1236, 1243 (Kan. 1981) (holding that in criminal cases where eyewitness identification of the defendant is an important part of the prosecution's case, a jury instruction on eyewitness identification should be delivered). *But see* State v. Taft, 746 A.2d 813, 819 (Conn. App. Ct. 2000) (holding that there is no constitutional right to a jury instruction on the fallibility of witnesses), *aff'd on other grounds*, 781 A.2d 302 (Conn. 2001); Jones v. State, 749 N.E.2d 575, 585 (Ind. Ct. App. 2001) (holding that the trial court was not required to give any jury instruction regarding eyewitness testimony).

216. Handberg, *supra* note 2, at 1062 & n. 293. These commentators have instead suggested that the *Telfaire* instruction be delivered in addition to expert testimony and be read prior to the expert testimony rather than the end of trial. *Id.* at 1062–63. R

217. *See* Benton et al., *supra* note 16, at 423 (noting one study in which a researcher modified the *Telfaire* instruction to be "more understandable to mock jurors" and subsequently noticed "an increase in skepticism towards eyewitness testimony"). R

218. LOFTUS ET AL., *supra* note 37, § 14-6, at 433. R

219. *Id.* at 430 ("A growing number of courts now follow this course [by providing a jury instruction related to eyewitness identification], although few courts automatically reverse a trial judge who fails to comply.").

220. For a more detailed discussion of these types of jury instructions, see *infra* Part II.C.

whether to allow an expert to testify, is generally left to the discretion of the trial judge.[221]

Many of the jurisdictions using an eyewitness identification instruction model it after the *Telfaire* instruction.[222] For instance, the Maryland Criminal Pattern Jury Instructions resemble *Telfaire* in that they provide jurors with a list of questions to consider in deciding the credibility of witnesses.[223] These questions include the accuracy of the witness's memory and the witness's opportunity to see and hear the things about which he testified.[224] Critics of these types of instructions argue their effectiveness will be limited because evaluating the accuracy of an eyewitness's memory depends not only on citing factors that may impact memory, but also on explaining how those factors may do so.[225] Additionally, although judges may instruct jurors to consider a witness's certainty or lack of certainty, researchers have criticized this factor due to its weak correlation with accuracy.[226]

Jury instructions have been revolutionized in the past hundred years, as pattern instructions have become standard and as many courts have begun to use a *Telfaire*-like instruction in cases involving eyewitness testimony. But a handful of jurisdictions have gone beyond these succinct instructions, seeking to comprehensively inform juries about factors that can affect the reliability of eyewitness testimony without using experts.[227]

C. Some Courts Have Adopted Comprehensive Eyewitness Jury Instructions

Comprehensive pattern jury instructions, designed to incorporate social science research into the courtroom, exist at the state and fed-

221. *See* United States v. Hodges, 515 F.2d 650, 652 (7th Cir. 1975) (recognizing that giving a jury instruction about eyewitness identification fell within the trial court's discretion while emphasizing that courts "*should*" provide such an instruction where eyewitness identification is a "key issue" (emphasis added)).

222. LOFTUS ET AL., *supra* note 37, § 14-5, at 430–31. Although Loftus and her co-authors recognize the *Telfaire* instruction for drawing jurors' attention to factors that can affect an eyewitness identification, they also criticize the instructions for not informing jurors how to evaluate these factors. *Id.* R

223. MD. INST. FOR CONTINUING PROF'L EDUC. OF LAWYERS, *supra* note 72, MPJI-Cr 3:10: Credibility of Witnesses, at 48. R

224. *Id.* (also citing factors such as the witness's interest in the case and the consistency of the witness's testimony); *see also id.*, MPJI-Cr 3:30: Identification of Defendant, at 93 (citing witness certainty as a factor for jurors to consider in determining the accuracy of eyewitness testimony).

225. CUTLER & PENROD, *supra* note 62, at 256–57. R

226. *Id.* A variety of sources have discussed the lack of a connection between accuracy and witness confidence. *See supra* note 101. R

227. *See infra* Part II.C.

eral levels. The type of instruction these jurisdictions use and the rationale behind it is instructive as a model for other jurisdictions to follow.[228] Utah, for example, provides a detailed instruction that serves to incorporate the social science research into perception and memory that would otherwise be provided through expert testimony.[229] Utah began its road to reform the same year that the Maryland Court of Appeals decided *Bloodsworth*.[230] But where the Court of Appeals struck a negative tone toward eyewitness identification evidence,[231] the Supreme Court of Utah in *State v. Long*[232] reached the opposite conclusion, requiring cautionary instructions in every case in which eyewitness identification is at issue.[233]

The *Long* case involved an attempted armed robbery outside a home in which the victims and the assailants exchanged gunfire, and one of the victims was shot while trying to defend the home.[234] The shooting victim was unable to identify Long, the defendant, in a photo array, but he later identified him at preliminary hearings and at trial.[235] Long sought a cautionary instruction on eyewitness testimony, modeled on the *Telfaire* instruction, but the trial judge denied the request.[236]

The *Long* court held that the trial judge erred in refusing to give the jury a cautionary instruction on eyewitness testimony and concluded that all future cases in which eyewitness identification is a key issue must include such an instruction.[237] The court articulated sev-

228. For a more detailed discussion about why courts should use these pattern instructions as models, see *supra* Part III.E.

229. In 1986, Utah began requiring a jury instruction on eyewitness testimony in cases in which identity is an issue. State v. Long, 721 P.2d 483, 492 (Utah 1986) ("We are convinced that, at a minimum, additional judicial guidance to the jury in evaluating [eyewitness] testimony is warranted. We therefore . . . direct that . . . trial courts shall give such an instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense."). The Supreme Court of Utah made this decision based on the "overwhelming weight of the empirical research" into eyewitness memory. *Id.*

230. *See id.*; *supra* note 168. R

231. *See supra* note 168. R

232. 721 P.2d 483.

233. *Id.* at 492.

234. *Id.* at 484.

235. *Id.* At the time that police presented the shooting victim with the photo array, the victim was still medicated and in the hospital recovering from the gunshot wound. *Id.*

236. *Id.* The jury subsequently convicted Long "of aggravated assault and possession of a dangerous weapon by a restricted person." *Id.*

237. *Id.* at 484, 492. Maryland, by contrast, does not require a mandatory jury instruction regarding eyewitness identification, but the Court of Appeals has held that in situations where uncorroborated eyewitness testimony is a central element of the prosecution's case, a judge should give "careful consideration" to a request for an identification instruction. Gunning v. State, 347 Md. 332, 354, 701 A.2d 374, 385 (1997).

eral justifications for its conclusion. First, it noted that allowing judges to employ a jury instruction at their discretion frequently meant such instructions were not used.[238] Second, the wealth of social science research into the unreliability of eyewitness testimony convinced the court that an instruction is needed in cases where identification is a major issue.[239] Finally, the court cited the lack of knowledge among jurors about the "unperceived flaws" in eyewitness identifications to justify its requirement of a cautionary instruction.[240]

The current Utah model instruction is divided into an introduction and four questions.[241] The introduction emphasizes the importance of "identification of the defendant" and reminds the jury that the prosecution must prove identity beyond a reasonable doubt.[242] The questions ask about the following factors: (1) Whether the eyewitness had "an adequate opportunity to observe the person who committed the crime";[243] (2) Whether the eyewitness had the capacity to properly observe the perpetrator;[244] (3) Whether the eyewitness was aware at the time that a crime was occurring and was "sufficiently attentive" to observe and recall details;[245] and (4) Whether the eyewitness identification was solely a result of the witness's memory.[246]

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238. *Long*, 721 P.2d. at 487 (explaining that "trial courts rarely, if ever" provided a jury instruction about eyewitness identification when they had the discretion to determine the propriety of an instruction).

239. *Id.* at 488.

240. *Id.* at 492. Although the court required a cautionary instruction, it left some discretion to judges and lawyers to draft an appropriate instruction, provided that the instruction includes certain factors known to impact the reliability of eyewitness testimony. *Id.* at 492–93.

241. MODEL UTAH JURY INSTRUCTIONS 2D (CRIMINAL), CR404 Eyewitness Identification (*Long* Instruction), http://www.utcourts.gov/resources/muji/index.asp?page=crim (follow "400 – Stock Instructions for Particular Circumstances" hyperlink under "Sections"; then follow "CR 404—Eyewitness Identification [*Long* instruction]." hyperlink under "Index of Instructions") (last visited Apr. 17, 2011) [hereinafter *Long* Instruction].

242. *Id.* The introduction further advises jurors that they need not find the eyewitness insincere in order to find the eyewitness identification to be "mistaken." *Id.*

243. *Id.* Some criteria cited by the *Long* court for juror consideration in relation to this factor are the "length of time the witness[ ] observed the [person]," the lighting conditions, the distance at which the identification took place, the presence of distracting noises or other activity during the eyewitness observation, and "the extent to which the person's features were visible." *Long*, 721 P.2d at 494 n.8.

244. *Long* Instruction, *supra* note 241. Jurors may consider the effect of stress, drugs or alcohol, and fatigue, as well as the eyewitness's "uncorrected visual defects" and "personal motivations, biases, or prejudices." *Id.* If relevant, an instruction regarding cross-racial identification may be given. *Id.* R

245. *Id.*

246. *Id.* In relation to this factor, jurors may consider the length of time that passed between the event and the identification, postevent feedback that may have independently influenced the witness's recollection, and instances in which the witness gave inconsistent descriptions of the defendant. *Id.* Finally, the instruction notes that "picking the defen-

Current Utah law actually goes one step beyond the cautionary instruction, also requiring expert testimony to be "routinely admitted" in cases in which the eyewitness has identified a stranger and at least one of the factors listed above is present.[247] The Utah court's position in this regard, however, is unusual, and its reasoning has not been widely adopted.[248]

Strong examples of comprehensive jury instructions also exist at the federal level. The Third Circuit, for instance, uses an instruction for eyewitness identification that incorporates many of the concepts used in the Utah instruction.[249] Like the Utah instruction, the instruction begins with an admonition that one of the most important issues in a case involving eyewitness identification is whether the defendant is the one who committed the charged crime.[250] It also mentions factors that can impact an eyewitness's opportunity to observe, including the length of time of an observation, the amount of stress the witness experienced at the time, and the potential difference in race of the eyewitness and the person committing the crime.[251]

These model instructions from the state and federal systems demonstrate that successful instructions can be drafted to educate jurors about factors that can affect eyewitness testimony.[252] They can provide other jurisdictions, such as Maryland, with a roadmap for how to rework their jury instructions to incorporate social science research in lieu of using expert testimony.[253]

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dant from a group of similar individuals is generally more reliable than an identification made from the defendant being presented alone to the witness." *Id.*

247. State v. Clopten, 223 P.3d 1103, 1118 (Utah 2009).

248. *See, e.g.*, Bomas v. State, 412 Md. 392, 417, 987 A.2d 98, 112 (2010) (declining to find expert testimony on eyewitness identifications presumptively admissible, noting that "most jurisdictions have not embraced a presumption of admissibility"). *But see* State v. Copeland, 226 S.W.3d 287, 307 (Tenn. 2007) (finding that it is not harmless error to exclude expert testimony on eyewitnesses in certain situations).

249. THIRD CIRCUIT JURY INSTRUCTIONS § 4.15, at 26–32 (2010), *available at* http://www.ca3.uscourts.gov/criminaljury/Nov2010/Final%20update%20Chapter%204.pdf.

250. *Id.*

251. *Id.* The instruction further advises jurors to consider whether the identification was made under circumstances that might have influenced the identification. *Id.* For instance, jurors are asked to consider whether police presented the witness with a variety of individuals who looked similar to the suspect or whether the suspect appeared alone. *Id.*

252. *See infra* Part III.E.

253. *See infra* Part III.

III. JURY INSTRUCTIONS ARE THE BEST MEANS FOR EDUCATING JURORS ABOUT EYEWITNESS TESTIMONY

Given the concern that the legal system has expressed regarding inaccurate eyewitness testimony,[254] the consensus that has emerged in the scientific community about the factors that affect perception and memory,[255] and the lack of knowledge that jurors have about this information,[256] the legal system has a duty to act.[257] Expert testimony, however, has too many drawbacks to be an effective and realistic solution to this problem.[258] Instead, courts should employ jury instructions, which provide a low-cost, effective means of communicating this information to jurors without the concerns of administrability, cost, and efficiency that come with using experts.[259] Although jury instructions are often criticized, certain reforms, such as writing them in plain language and using visual aids to present them, can address these criticisms and ensure the instructions are understandable.[260] States, such as Maryland, should look to Utah and other jurisdictions with histories of using comprehensive instructions to address the weaknesses inherent in many eyewitness identifications.[261]

A. Wrongful Convictions Remain a Concern for Courts and Require Action

Concerns about wrongful convictions remain a pressing concern for the legal system. Although there is a scientific consensus on factors that can affect eyewitness perception and memory,[262] jurors are unaware of much of this information.[263] Given this state of affairs, the legal system needs to act to address these problems in a way that will prevent future wrongful convictions from occurring.[264]

Far from being a relic of the past, fears about wrongful convictions based on inaccurate eyewitness testimony remain a pressing concern warranting action by the legal system.[265] A 2009 report on fifty-

254. *See infra* Part III.A.
255. *See supra* Part I.B.
256. *See supra* Part I.C.
257. *See infra* Part III.A.
258. *See infra* Part III.B.
259. *See infra* Part III.C.
260. *See infra* Part III.D.
261. *See infra* Part III.E.
262. *See supra* Part I.B.
263. *See supra* Part I.C.
264. *Cf.* COHEN, *supra* note 5, at xvii (noting that mistaken or perjured eyewitness testimony is the leading cause of wrongful convictions in capital cases in the United States). R
265. *See id.*

three wrongful convictions in New York found that thirty-six of the cases involved the misidentification of the accused by the victim or other witnesses.[266] Similarly, a recent study by the Center on Wrongful Convictions analyzed eighty-six wrongful conviction cases dating as far back as the mid-1970s, discovering that slightly more than half involved mistaken eyewitness testimony.[267] Out of those cases, thirty-three were cases in which "eyewitness testimony was the sole basis of conviction."[268]

In addition to recent studies identifying wrongful convictions based on eyewitness identifications, research addressing the factors impacting eyewitness testimony also abounds.[269] For instance, a 2001 study of sixty-four eyewitness experts found sixteen factors that more than eighty percent of the experts agreed could influence an eyewitness's testimony.[270] These factors include question wording, postevent information, and cross-racial bias,[271] but studies have shown that jurors remain unaware of how these factors affect eyewitness identifications.[272] A 2004 survey of potential jurors in the Washington,

266. TASK FORCE ON WRONGFUL CONVICTIONS, N.Y. STATE BAR ASS'N, PRELIMINARY REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS 6–7 (Jan. 30, 2009), *available at* http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/TFWrongfulConvictionsreport.pdf.

267. COHEN, *supra* note 5, at xvii.

268. *Id.* Rather than merely being a concern of death penalty opponents, the fear of wrongful conviction has been sufficiently strong to spur states and government agencies into taking affirmative steps to avoid it. For instance, the Supreme Court of New Jersey recently issued a report calling for mandatory pretrial hearings to evaluate the testimony of eyewitnesses in all criminal cases due to concern about wrongful identifications. Emilie Lounsberry, *New Jersey Report Calls for Assessing Eyewitnesses' Validity*, PHILA. INQUIRER, June 22, 2010, at A1. The U.S. Department of Justice has even released its own guidelines to law enforcement regarding eyewitness evidence, utilizing social science data to implement procedures designed to avoid wrongful arrests. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT 1 (Oct. 1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/178240.pdf ("During the past 20 years, research psychologists have produced a substantial body of findings regarding eyewitness evidence. These findings offer the legal system a valuable body of empirical knowledge in the area of eyewitness evidence."). In particular, police lineup and identification procedures have been refined in an effort to eliminate errors that might occur by detectives inadvertently giving confirming clues to witnesses or using procedures that are more likely to lead to a mistaken identification. Wells & Hasel, *supra* note 137, at 160 (noting that New Jersey, North Carolina, and Wisconsin are among the states that have made reforms to lineup procedures). R

269. *E.g.*, Kassin et al., 2001, *supra* note 64. R

270. *Id.* at 412 & tbl.4.

271. *Id.*

272. *See supra* Part I.C. For instance, experts estimated that many of these factors, particularly the weak link between confidence and accuracy, would not be part of a juror's common sense knowledge. Kassin et al., 2001, *supra* note 64, at 412 & tbl.4 (noting that only five percent of the eyewitness experts concluded that the link between accuracy and confidence was within the lay knowledge of jurors). R

D.C., area confirmed many of the experts' suspicions,[273] finding that jurors did not have a solid grasp of how memory works[274] and wrongly believed that factors such as confidence were a good gauge of accuracy.[275]

With this consensus among experts about factors that can influence eyewitness testimony[276] and a lack of knowledge among jurors about these factors,[277] the legal system needs to take action.[278] Any approach needs to ensure that relevant information about eyewitness testimony reaches jurors.[279] Courts continue to debate the best method for accomplishing this goal,[280] but the drawbacks to expert testimony suggest that pattern jury instructions are the best approach.[281]

B. Concerns About Expert Testimony Suggest Jury Instructions Are the Best Approach to Addressing Weaknesses Inherent in Eyewitness Identifications

Expert testimony can teach jurors about the research into eyewitness perception and memory, but the cost associated with such testimony means it will not be available in all cases.[282] Additionally, expert testimony can consume a significant portion of trial time, making judges reluctant to permit experts to testify in all cases.[283] These con-

273. Schmechel et al., *supra* note 95, at 194. R

274. *Id.* at 195–96.

275. *Id.* at 198–99 (finding that thirty-one percent of potential jurors indicated that an eyewitness who seemed "absolutely certain" was "much more reliable" than eyewitnesses who exhibited less confidence (internal quotation marks omitted)).

276. *See supra* text accompanying note 270. R

277. *See supra* Part I.C.

278. The Supreme Court of Utah is among the few judicial bodies that have agreed action is necessary to prevent wrongful convictions. *See* State v. Long, 721 P.2d. 483, 492 (Utah 1986) ("[W]e do consider ourselves compelled by the overwhelming weight of the empirical research to take steps to alleviate the difficulties inherent in any use of eyewitness identification testimony. . . . We are convinced that, at a minimum, additional judicial guidance to the jury in evaluating such testimony is warranted.").

279. *Cf.* LOFTUS ET AL., *supra* note 37, § 14-1, at 425–26 (noting that lawyers have two concerns with jury instructions: (1) making sure the instructions accurately describe the psychological factors of the eyewitness identification process and (2) making sure they are delivered in "comprehensible language"). R

280. *See supra* Part II.B.

281. *See infra* Part III.B.

282. *Cf.* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 11–12 (Dec. 2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/defender/brokenpromise/execsummary.authcheckdam.pdf (evaluating the lack of resources in many public defender offices due to budget deficits).

283. *See* United States v. Burrous, 934 F. Supp. 525, 527–28 (E.D.N.Y. 1996) (declining to allow an expert to testify on eyewitness perception factors because "this was to be a short

cerns suggest jury instructions are the best available method for presenting eyewitness identification factors to the jury.[284]

The use of expert testimony, while providing jurors with a great deal of information, has drawbacks. The cost of experts alone is a significant consideration.[285] Wealthy defendants have no problem paying for experts to testify, but cash-strapped public defender offices cannot hire experts in every case.[286] Even when the court has discretionary authority to appoint an expert, judges are reluctant to do so in cases in which one party is indigent and cannot share the costs.[287] Therefore, educating only some jurors about eyewitness identification issues serves as only a partial step toward avoiding wrongful convictions.

Additionally, courts may be concerned about confusing a jury "by creating a battle of the experts."[288] While some cases surely turn on the issue of eyewitness identification, a court may nonetheless resist extending a short trial to accommodate expert testimony addressing eyewitness identification.[289] A related fear is the risk of overwhelming jurors with technical information, leading them to ignore the expert testimony completely and undercutting the reason for introducing it in the first place.[290] Because of these concerns about the use of expert testimony, jury instructions remain the best solution for informing jurors about eyewitness perception and memory.[291]

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trial with relatively uncomplicated evidence [and] a lengthy battle of experts would be distracting and confusing to the jury").

284. *See infra* Part III.C.

285. *See* LOFTUS ET AL., *supra* note 37, § 14-1, at 425 (explaining that jury instructions are cheaper to provide than expert testimony). A recent study addressing the inadequate budgets of many legal aid organizations is illustrative. According to this study, conducted between 1997 and 2001, one district attorney's office in Louisiana spent $200,000 annually on experts. Hannah Jacobs Wiseman, *Pro Bono Publico: The Growing Need for Expert Aid*, 60 S.C. L. REV. 493, 527 (2008). This district attorney's office had a yearly budget of $3.7 million, compared to the public defender's office, which had a budget of $1.2 million and spent most of its $250,000 professional services budget on hiring outside attorneys in situations where it would be a conflict to represent two or more co-defendants. Wiseman, *supra*, at 527–28. R

286. Wiseman, *supra* note 285, at 527. R

287. *Id.* at 518. Indeed, a study conducted by the Federal Judicial Center revealed that slightly more than half of eighty-six judges surveyed had appointed an expert only once, with many of the judges citing the cost of obtaining an expert as one reason for their infrequent appointment. *Id.*

288. Handberg, *supra* note 2, at 1040 (internal quotation marks omitted). R

289. *See, e.g.*, *supra* note 283. R

290. *See* Bomas v. State, 412 Md. 392, 419, 987 A.2d 98, 114 (2010) (noting the ability of dueling experts to "leav[e] the jury more confused than aided by the expert opinions").

291. *See infra* Part III.C.

C. *Jury Instructions Are an Efficient Means of Educating Jurors About Eyewitness Testimony*

Jury instructions are the best method for educating jurors about eyewitness identification issues for a variety of reasons. Judges are already familiar with instructions and comfortable using them.[292] Instructions can easily be incorporated into a trial and are compatible with already existing instructions.[293] They cost little to implement and are efficient.[294] Instructions also avoid the adversarial nature of dueling experts and allow for a continuing debate within the legal community.[295] Trial judges retain discretion to modify them as needed for the facts of any particular case.[296] Finally, they offer a uniform and neutral means of educating jurors.[297]

First, jury instructions are an attractive alternative to expert testimony because they are already familiar to the court system.[298] Jurors are not trained in the law, and so jury instructions are meant to provide them with the essential background needed to reach a correct decision in light of the facts.[299] For instance, no one expects jurors to know what the legal meaning of negligence is, or what the elements of conspiracy are, before receiving jury instructions from the judge.[300] For similar reasons, it makes sense to inform jurors about certain factors that can affect the accuracy of eyewitness testimony, especially as many jurors are likely to be unfamiliar with these concepts or hold beliefs that are contrary to the scientific consensus.[301]

Second, the rules surrounding the delivery of jury instructions are easily compatible with the introduction of additional instructions on eyewitness testimony, and the Maryland rules governing jury instructions provide a good illustration of this compatibility. These rules require instructions at the conclusion of all the evidence and

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292. *See infra* text accompanying notes 298–301. R
293. *See infra* text accompanying notes 302–05. R
294. *See infra* text accompanying notes 306–09. R
295. *See infra* text accompanying notes 310–20. R
296. *See infra* text accompanying notes 321–24. R
297. *See infra* text accompanying notes 325–27. R
298. Handberg, *supra* note 2, at 1061 (noting that "judges are already in the habit of giving jury instructions, so they will find it easy to incorporate a new instruction"). R
299. *See* Cruz v. State, 407 Md. 202, 209, 963 A.2d 1184, 1188 (2009) ("The main purpose of a jury instruction is to aid the jury in clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury arrive at a correct verdict." (quoting Chambers v. State, 337 Md. 44, 48, 650 A.2d 727, 729 (1994)) (internal quotation marks omitted)).
300. *See* Cohen, *supra* note 183, at 683 ("Jurors cannot perform their duties without being instructed on the law they are to apply."). R
301. *See supra* Part I.C.

prior to closing arguments.[302] In the court's discretion, a judge may also give instructions before the presentation of evidence or during the course of the trial.[303] In addition, the court is allowed to give the instructions orally and in writing, and parties are permitted to request additional instructions.[304] Courts generally have a great deal of discretion in deciding when to give supplemental instructions, such as those involving eyewitness testimony.[305]

Third, with well-established rules governing how and when specialized instructions may be introduced, using jury instructions to educate jurors on eyewitness testimony is both inexpensive and efficient.[306] Unlike expert testimony, which is often expensive,[307] the greatest effort in crafting pattern instructions occurs during the drafting stage.[308] Use of jury instructions is also efficient because pattern instructions are already a part of the trial process, making them familiar to the judiciary and easy to administer.[309]

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302. MD. R. 4-325(a).

303. *Id.*

304. MD. R. 4-325(b), (c). Rule 4-325(c) has been interpreted to require the judge to provide the jury with a party's requested instruction when the requested instruction accurately states the law, "is applicable under the facts of the case," and was not covered elsewhere in the jury instruction. Tucker v. State, 407 Md. 368, 379–80, 965 A.2d 900, 907 (2009) (citing Dickey v. State, 404 Md. 187, 197–98, 946 A.2d 444, 450 (2008); Thompson v. State, 393 Md. 291, 302–03, 901 A.2d 208, 214 (2006); Patterson v. State, 356 Md. 677, 683–84, 741 A.2d 1119, 1122 (1999)).

305. Mitchell v. State, 338 Md. 536, 540, 659 A.2d 1282, 1284 (1995) (citing Howard v. State, 66 Md. App. 273, 284, 503 A.2d 739, 744–45 (1986)) (noting that appellate courts will not reverse the trial judge's determination regarding the propriety of a supplemental jury instruction unless there is a clear abuse of discretion).

306. Handberg, *supra* note 2, at 1061 (noting that "jury instructions are a low cost solution"). R

307. *See supra* text accompanying note 285 (noting cost as one reason that judges rarely appoint experts to testify).

308. *Cf.* Handberg, *supra* note 2, at 1061 ("[J]ury instructions . . . take[ ] only a few minutes at the end of a trial for the judge to read . . . ."); Johnson, *supra* note 74, at 985 ("Jury instructions . . . are both cheap and available to all defendants."). Indeed, courts can increase efficiency by using model instructions and modifying them to fit the facts of the case without any added expense. The Supreme Court of Utah adopted this approach in *State v. Long*, where the court set forth specific factors that must be included in an instruction on eyewitness identification but allowed trial courts to modify the instruction as needed to fit the circumstances of a given case. 721 P.2d 483, 493–95 (Utah 1986). R R

309. Handberg, *supra* note 2, at 1061. There are two factors that make jury instructions easy to administer. First, judges present the instructions to the jury at a time when it is a captive audience. Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 495–96 (2006). Second, courts are generally required to do no more than tailor the instructions to the particular case. *See supra* note 304. R R

Fourth, jury instructions avoid the adversarial nature of dueling experts.[310] Pattern instructions are designed to give jurors a neutral view of the factors involved with eyewitness testimony.[311] If one side uses an expert at trial, it puts added pressure on the other side to find its own expert to challenge the first expert's views.[312] This adversarial method could end up confusing jurors more than enlightening them.[313] The judge, as a neutral authority figure, is the best source for this type of information and is more likely to be believed by the jury.[314] This is not to say that experts should not debate the science, but that this discussion could be more productive when centered on the goal of drafting neutral pattern instructions.

Fifth, the drafting of instructions itself can serve as a continuing debate among the legal community.[315] Beyond instructing jurors on the law, instructions can serve as a medium for lawyers to discuss what the law is and should be.[316] Developing a jury instruction regarding eyewitness identification is a way for the legal community to argue the

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310. *See* United States v. Burrous, 934 F. Supp. 525, 527–28 (E.D.N.Y. 1996) (utilizing a jury instruction on eyewitness perception rather than allowing an expert to testify in part to avoid a "distracting" battle of the experts); Bomas v. State, 412 Md. 392, 419, 987 A.2d 98, 114 (2010) ("Dueling experts could interject differing interpretations of statistics and scientific studies on identification, leaving the jury more confused than aided by the expert opinions.").

311. *See* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 102 (1988) ("The court may not summarize the evidence, express or otherwise indicate to the jury any personal opinion on the weight or credibility of any evidence, or give any instruction regarding the desirability of reaching a verdict." (quoting UNIF. R. CRIM. P. 523(d))).

312. *See* Joseph Sanders, *Expert Witnesses in Eyewitness Facial Identification Cases*, 17 TEX. TECH L. REV. 1409, 1469 (1986) (noting that the increased acceptance of expert testimony may lead prosecutors to call their own experts "whenever the defense introduces expert testimony," which may then "cause defense counsel to reserve the use of experts to important cases where they perceive they have a distinct advantage in the psychological literature").

313. *Cf. supra* note 310 and accompanying text. R

314. As one commentator has noted,

> An advantage to having the judge read the instructions to the jury as the jurors sit in the jury box is that they are physically present, with their attention riveted on the judge. . . . The jurors might not understand all the instructions, but they are, at least, exposed to them. Furthermore, they have heard the law from the judge, a figure of authority in the courtroom. Having the judge do the reading reinforces the lesson that the law is to be respected and that the jurors are to try to follow it as best they can.

Cf. Marder, *supra* note 309, at 495–96. R

315. *See* Perlman, *supra* note 183, at 535 (noting that jury instructions are the end result of an "essentially intraprofessional discussion" among judges and counsel). R

316. *See id.*

social science and how to apply it in legal practice.[317] If new research emerges that challenges older methods, judges can incorporate it into revised instructions.[318] Ideally, jury instructions are a jumping off point that judges can adapt to each case and the unique issues it raises.[319] Unlike experts, whom attorneys must seek to admit in each individual case, pattern instructions based on reliable science could be used repeatedly and modified as the circumstances require.[320]

Sixth, jury instructions allow judges to continue to exercise their discretion precisely because they can adopt instructions to the particular circumstances of a case.[321] Courts that are hesitant to allow jury instructions in every case involving eyewitness testimony may limit them to cases in which the eyewitness's testimony is the central element of the prosecution's case[322] or the facts otherwise suggest that the eyewitness testimony is unreliable.[323] Indeed, even though the delivery of a jury instruction on eyewitness identification could be mandatory in certain cases, such as those in which the only evidence

317. This ability to debate the reliability of eyewitness identification science during the drafting process of pattern instructions is an advantage of such instructions. In a recent case dealing with the issue of cross-racial identification, one judge on the Maryland Court of Appeals urged a *Frye-Reed* or *in limine* hearing when either party seeks to offer an expert witness or jury instruction related to cross-racial identification in order to evaluate the reliability of the science underlying the subject. Tucker v. State, 407 Md. 368, 384–85, 965 A.2d 900, 909–10 (2009) (Harrell, J., dissenting) ("[I]t has gone largely unexamined and unresolved in Maryland whether the underlying social science, adequate to the purposes of a court of law . . . supports a relevant instruction or the propriety of such an argument." (citation omitted)).

318. *Cf.* Kassin et al., 2001, *supra* note 64, at 414 (explaining that later research into eyewitness identification science "will inevitably force experts to revise at least some of their current assessments"). R

319. Perlman, *supra* note 183, at 533 (describing pattern instructions as being able to "bridge the gap between abstraction and case-specific instructions by providing opportunities for the judge to adapt the instruction to the facts of a particular case"). R

320. *Id.*; *see also* LOFTUS ET AL., *supra* note 37, § 13-6, at 364. R

321. Cohen, *supra* note 183, at 684–85 (emphasizing that judges have "broad discretion" in delivering jury instructions). R

322. *See, e.g.*, State v. Long, 721 P.2d 483, 492 (Utah 1986) (requiring Utah state courts to administer a jury instruction regarding eyewitness identification only in cases in which eyewitness identification is a key issue).

323. *See, e.g.*, State v. Warren, 635 P.2d 1236, 1244 (Kan. 1981) (requiring a cautionary jury instruction about factors that may impact eyewitness identification "in any criminal action in which eyewitness identification is a critical part of the prosecution's case and there is a serious question about the reliability of the identification"); State v. Cromedy, 727 A.2d 457, 467 (N.J. 1999) (holding that a judge should provide a cross-racial instruction where eyewitness identification is a key issue and is not corroborated by other evidence); State v. Green, 430 A.2d 914, 919–20 (N.J. 1981) (requiring an instruction relating to eyewitness identification in a case in which a rape victim's identification of her attacker was a critical piece of evidence and the victim had been attacked in a dimly lit area at night).

against a defendant is an eyewitness identification, trial judges would nonetheless retain discretion as to the wording and timing of the instruction.[324]

Finally, instructions offer a uniform and neutral means of educating jurors.[325] But unlike with jury instructions, such uniformity cannot develop with expert testimony because only a limited number of trials will feature experts.[326] Additionally, because judges and counsel craft instructions in advance, and not from scratch in the heat of trial, it is possible to tailor the instructions in a way that is fair to both sides.[327]

There are indications this approach has succeeded in practice. One such case, *United States v. Burrous*,[328] involved the identification of the defendant by the manager of a fast food restaurant whom the defendant had allegedly robbed.[329] The district court refused to admit expert testimony on eyewitness identification science, but it allowed a detailed jury instruction that encompassed in plain language many of the issues about which an expert might have testified.[330] The judge in *Burrous* later stated that he believed the jurors "thoughtfully considered" the instruction, as they had asked to review the eyewitness testimony and the police photo arrays before returning a guilty verdict.[331]

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324. For instance, a judge could eliminate any reference to cross-racial identification in a case where the witness and the defendant are of the same race. *See* Cohen, *supra* note 183, at 685 (recognizing the discretion that trial judges may retain regarding the timing and manner of jury instruction delivery). R

325. *Cf.* Johnson, *supra* note 74, at 985 (emphasizing their availability to all defendants as one benefit of jury instructions). R

326. *See supra* notes 285–87 and accompanying text (discussing how cost concerns may limit the use of expert testimony in trials). R

327. For instance, the judge in *United States v. Burrous* noted his efforts to craft a "balanced" instruction related to eyewitness identification. *See* 934 F. Supp. 525, 531 (E.D.N.Y. 1996) (noting that even the defendant's eyewitness expert found the instructions "'quite fair overall'").

328. 934 F. Supp. 525.

329. *Id.* at 526.

330. *Id.* at 530. The introductory instruction read as follows:

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

Id. (emphasis omitted). It also cited several factors, such as "weapon focus," for jurors to consider in determining whether the eyewitness testimony was accurate. *Id.* (internal quotation marks omitted). Weapon focus is the concept that recognizes that memory may be influenced by the presence of a weapon because the eyewitness will likely focus on the weapon rather than the assailant. *Id.*

331. *Id.* at 531.

Indeed, legal commentators and members of the judiciary have repeatedly recognized the usefulness of jury instructions on eyewitness identification. Legal scholars, while often advocating for expert testimony as a means of educating jurors, have acknowledged the effectiveness of jury instructions in conveying scientific information.[332] As one legal commentator has noted, "In lieu of expert testimony, a detailed jury instruction from the court specifying those psychological factors and police practices pertinent to the specific case may be designed . . . . [T]he efficacy of a comprehensive instruction has been demonstrated . . . and can significantly inform juror evaluation of eyewitness testimony."[333] The Maryland Court of Appeals, long skeptical of eyewitness identification evidence,[334] even recently signaled that revising jury instructions may be the appropriate method to employ when integrating eyewitness identification research into the courtroom.[335]

Using jury instructions is an ideal way to educate jurors about eyewitness research because the instructions are already familiar to the legal system, cost little to implement, avoid adversarial battles of experts, allow for intraprofessional debate, vest discretion in judges, and offer a uniform means of teaching juries about factors affecting eyewitness testimony.[336] Jury instructions, however, are not without critics, and this criticism has led many commentators to doubt the effectiveness of jury instructions in the eyewitness testimony context.[337] But incorporating certain changes in the delivery of these instructions would address these criticisms, making jury instructions even more effective in educating jurors.[338]

D. Criticism of Jury Instructions Can Be Addressed by Reforming Their Language and Presentation to Jurors

Jury instructions are often criticized as incomprehensible and ineffective in conveying important information, such as the science underlying eyewitness identifications, thus leading jurors to disregard

332. *E.g.*, Epstein, *supra* note 143, at 783. R

333. *Id.* (footnote omitted).

334. *See supra* note 10 and accompanying text.

335. *See* Bomas v. State, 412 Md. 392, 418, 987 A.2d 98, 113 (2010) ("Indeed, it might be an appropriate time for the Maryland Criminal Pattern Jury Instruction Committee to evaluate whether its current rule on witnesses . . . should be modified in light of the studies about eyewitness testimony, and the scientific advances in this area.").

336. *See supra* text accompanying notes 298–327 (summarizing the benefits of jury instructions). R

337. *See infra* text accompanying note 339. R

338. *See infra* Part III.D.

them.[339] In response, scholars have advocated for particular changes, such as the use of visual aids, plain language, and alterations to the timing of instruction delivery, to improve juror comprehension of instructions.[340] Adoption of these reforms would ensure that jury instructions regarding eyewitness identification would be neither ignored nor misunderstood, thereby increasing their effectiveness.[341]

It is easy to criticize using jury instructions as a solution to addressing eyewitness identification problems.[342] The basic model of presenting them to the jury assumes a culture that is well read and has the habit of sitting through long oration.[343] As a result, critics of jury instructions argue that jurors often ignore or misunderstand them, rendering the instructions ineffective in educating juries about necessary elements of the law.[344] Lessons from the field of education, however, could address these complaints.[345]

Educators have long known that not everyone learns in the same manner and that varying the method of material presentation may increase comprehension.[346] Because the process of providing jury instructions resembles that of a professor lecturing to his students, insights from the latter could theoretically apply in the courtroom.[347] In particular, three suggested reforms could have a significant impact on juror comprehension: (1) writing instructions in plain language, (2) incorporating visual aids, and (3) delivering instructions throughout the trial rather than solely at the trial's conclusion.[348]

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339. *Cf.* Handberg, *supra* note 2, at 1061 ("Unfortunately, jury instructions often work better in theory than they do in practice."). R

340. Marder, *supra* note 309, at 510–11. R

341. *Cf.* Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting the Presumption That Jurors Understand Instructions*, 69 MO. L. REV. 163, 199 (2004) (citing a study in which researchers found significant improvements in jury comprehension, by as much as ninety-three percent, when jurors received instructions that had been rewritten in clearer language).

342. *Cf. id.* at 164 (stating that the presumption that instructions are understood by jurors "is not supported by an adequate foundation").

343. *Cf.* Marder, *supra* note 309, at 453 ("Typically, judges read the instructions aloud to jurors, no matter how many pages they span or how many hours it might take."). R

344. Handberg, *supra* note 2, at 1061. R

345. *See, e.g.*, Marder, *supra* note 309, at 453 ("Lessons from the classroom . . . suggest that a lengthy lecture is not the best, or certainly not the only, way to impart difficult information."). R

346. *Cf. id.* at 504 (explaining that the use of various presentation methods would "be familiar to any teacher or professor").

347. *See id.* ("Judges need to be willing to borrow from other settings and to use tools that have proven effective . . . in the classroom to convey difficult material like jury instructions.").

348. *See infra* notes 349–62 (discussing these reforms in detail). R

The first of these reforms, writing instructions in plain language, is one simple and effective solution.[349] One research study found that simply rewriting a pattern jury instruction may double the number of jurors who understand it.[350] In that study, two legal scholars without any specialized training in English composition or linguistics revised several pattern instructions with the primary goal of increasing comprehensibility.[351] When provided with the standard pattern instruction on accomplice testimony, less than ten percent of study participants demonstrated a correct understanding of it.[352] After hearing the rewritten instruction, however, participant comprehension of the instruction more than doubled.[353] Another study found a similar increase in comprehension after instructions were rewritten, with participants experiencing a gain of as much as ninety-three percent when provided with revised instructions.[354]

The second reform that may increase the comprehensibility of jury instructions is the use of visual aids.[355] Studies have shown that many people are visual learners, and hearing instructions alone may not allow them to comprehend the information fully.[356] Graphics, illustrations, charts, and photos of key ideas, such as how memory

349. *See* Steele & Thornburg, *supra* note 311, at 90–91 (explaining the results of one study in which participants exhibited a ninety-one percent gain in comprehension when provided with rewritten instructions). R

350. *Id.*

351. *Id.* at 93. As part of the study, the researchers read participants the instruction only once in order to mimic a judge reading instructions at the end of trial. *Id.* The participants also heard only the instruction, without any factual context, to ensure that their understanding of the instruction derived solely from the instruction, not from the facts of the case. *Id.*

352. *Id.* at 92.

353. *Id.* The study's authors acknowledged that, despite these gains, only about twenty percent of participants understood even the revised instruction. *Id.* But they emphasized that these successful results obtained from the work of two scholars without expertise in composition or linguistics, demonstrating the gains that attorneys might similarly realize by trying to make instructions more comprehensible. *Id.* at 93.

354. Ritter, *supra* note 341, at 198–99. In this case, the study's authors began by examining California's pattern civil jury instructions and identifying phrases that might impact juror comprehension. *Id.* at 198. The authors then revised the instructions by removing items deemed to confuse jurors, such as nominalizations, technical legal jargon, and double or triple negatives. *Id.* at 198–99. R

355. Marder, *supra* note 309, at 504. Indeed, simply providing jurors with written copies of the jury instructions may increase juror comprehension of those instructions. *See id.* at 499 (arguing further that judges should permit jurors to take notes when the judge presents the instructions to the jury). R

356. *See* M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 SEATTLE U. L. REV. 139, 151–52 (2001) (discussing the growing number of students who are visual learners and who might benefit from material presented in a "visually enhanced manner").

works, could supplement the instructions in particular circumstances.[357] For instance, judges could employ technology such as PowerPoint to instruct jurors visually while the instructions are read aloud, a practice effectively used by at least one judge.[358]

The final reform is to change the timing of jury instruction delivery. Studies have shown an increase in comprehension when judges provide the instructions not only at the end of a trial, when a jury has heard all the evidence, but also at the beginning of a trial.[359] At least one commentator has suggested adding instructions during the trial as they become relevant.[360] In a case that relies heavily on eyewitness identification, the judge could deliver an instruction on those issues before the first eyewitness takes the stand. Providing such an instruction and repeating that instruction at the close of the trial may aid juror comprehension.[361] By repeatedly referencing detailed jury instructions during the trial, trial judges could ensure that jurors were informed about the factors that may influence the accuracy of eyewitness identification and could thus appropriately evaluate its reliability.[362]

E. Excellent Models Already Exist for Jurisdictions to Follow in Developing Their Own Detailed Eyewitness Identification Instructions

Courts need not start from scratch in crafting jury instructions that inform jurors about eyewitness identification issues.[363] Strong examples from jurisdictions such as Utah have already been successfully used in trial courts.[364] States, including Maryland, should look to

357. *See* Marder, *supra* note 309, at 504 (citing use of diagrams, mini-summaries, and other aids for juror comprehension); *cf.* Jacobson, *supra* note 356, at 152 (suggesting that professors consider using "charts, diagrams, insets, shading or color, or . . . [other] visually stimulating materials that illustrate the analytical concepts" to aid visual learners). R R

358. Marder, *supra* note 309, at 504 (noting that the judge who utilizes this technique presented it at a conference and explained that he uses the presentation to emphasize key points and terms for the jury). R

359. *Id.* at 498 (citing Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163, 177 (1977)).

360. *Id.* at 499. For instance, before a law enforcement officer testifies about an eyewitness identification, the judge might instruct jurors that the officer's testimony should receive no more or less weight than other eyewitness testimony based solely on the officer's position. *Id.*

361. Cohen, *supra* note 183, at 689. R

362. *See infra* Part III.E.

363. *See supra* Part II.C.

364. *See, e.g.*, *supra* text accompanying notes 328–31. Several other jurisdictions have promulgated detailed instructions relating to eyewitness identification. *See, e.g.*, *supra* text accompanying notes 249–51 (discussing the eyewitness identification instruction promul- R R

these examples and the way in which they incorporate social science research as models in crafting their own instructions.

Lawyers looking for guidance on how to draft a comprehensive jury instruction on eyewitness identification issues do not need to go far. Utah is one example of a jurisdiction that has long used a detailed instruction in cases in which eyewitness identification is a key issue.[365] The *Long* instruction provides a wealth of factors that jurors should consider in assessing eyewitness testimony, and this instruction is worth examining at length because it incorporates many of the best practices identified by social science research.

Utah's eyewitness identification instruction includes a statement that a person need not be lying or insincere to be mistaken.[366] This language is helpful because it can place an eyewitness's potential misidentification of a defendant in context. That is, the factors identified by researchers do not arise because the witness is clearly biased toward a particular party or stands to benefit personally from a misidentification.[367] Rather, the misperceptions and inaccurate memories of eyewitnesses are generally unconscious.[368] Informing jurors about these factors permits them to evaluate eyewitness testimony cautiously but without automatically assuming that the eyewitness has lied.

The bulk of the *Long* instruction sets out the many factors that may affect the accuracy of eyewitness identification, and it separates these factors based on those affecting perception and those affecting memory.[369] This separation is important because the process of memory is divided into stages,[370] and having jurors assess eyewitness testimony using knowledge of how memory actually works ensures that jurors have a sound basis for evaluating the reliability of eyewitness testimony.[371] To be most effective, the instruction should reference

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gated by the Third Circuit). For illustrative purposes, this Section will focus on the instruction given by Utah courts.

365. *See* State v. Long, 721 P.2d 483, 492 (Utah 1986) (requiring the use of a cautionary instruction "whenever eyewitness identification is a central issue in a case").

366. *Long* Instruction, *supra* note 241. R

367. *Cf., e.g.*, THOMPSON-CANNINO ET AL., *supra* note 6, at 212–13 (discussing a case in which a rape victim wrongfully identified her attacker and suffered from substantial guilt upon learning of the misidentification). R

368. *See, e.g., supra* notes 146–50 and accompanying text (discussing the difficulty that attorneys face when trying to cross-examine an eyewitness regarding cross-racial bias). R

369. *Long* Instruction, *supra* note 241 (focusing three of its four questions on eyewitness perception and one question on the witness's memory). R

370. LOFTUS ET AL., supra note 37, § 2-2, at 12–13. R

371. *Cf. id.*, § 13-1 to -2, at 353–54 (discussing the importance of educating jurors about how memory works in order to diffuse "jurors' absolute confidence in the eyewitness's accuracy" even in situations in which the eyewitnesses have been "substantially impeached by their own prior statements or contradicted by other witnesses").

those factors that eyewitness experts agree may influence eyewitness perception and memory.[372]

The factors affecting perception cited within the *Long* instruction—such as the length of time the witness had to observe a person, the lighting conditions, and cross-racial identification[373]—correlate to research findings in the field of eyewitness identification.[374] It is important to discuss these factors in the jury instruction because it grounds the instruction in science rather than on general assumptions lawyers might make about eyewitness testimony.[375] Grounded in research,[376] these factors require jurors to think critically about the conditions in which eyewitness identification takes place and factors relating to eyewitness perception that could influence the accuracy of the observations.

The *Long* instruction also asks jurors to think about factors affecting memory.[377] It cites factors including the length of time that passed between the event and identification, postevent feedback that could influence a witness's memory, and instances in which a witness gave inconsistent descriptions.[378] The instruction also notes that confidence does not necessarily equate to accuracy.[379] Like the perception factors, this part of the instruction is grounded in research and requires jurors to evaluate each aspect of an eyewitness's testimony carefully.[380]

At first blush, having jurors focus on so many aspects of an eyewitness identification might seem to bolster the defense. After all, increasing skepticism among jurors seems to only make it more likely

372. *See supra* Part I.B (citing the weak link between confidence and accuracy, cross-racial bias, and postevent information as three factors about which researchers have reached such a consensus).

373. *Long* Instruction, *supra* note 241 (listing these factors when asking jurors to consider whether an eyewitness had "an adequate opportunity to observe the person who committed the crime" and had "the capacity to observe the person committing the crime"). R

374. *See, e.g.*, LOFTUS ET AL., *supra* note 37, § 2-4 to -5, at 16–20, § 4-13, at 103–04 (discussing research that shows how the length of time a witness has to view an incident, the lighting conditions, and a difference in race between a witness and subject can change a person's perception of events); *see also supra* Part I.B. R

375. *Cf.* LOFTUS ET AL., *supra* note 37, § 14-14, at 442 (noting that many standard instructions contain "boilerplate language" based on "dubious" psychological assumptions). R

376. *E.g.*, *id.* § 2-4 to -5, at 18–21, § 4-13, at 103–05 (discussing research on the impact of light adaptation, event duration, and cross-racial bias on eyewitness identification).

377. *Long* Instruction, *supra* note 241 (asking jurors, in its final question, to consider whether the eyewitness's "identification of the defendant [was] completely the product of the witness's own memory"). R

378. *Id.*

379. *Id.*

380. *E.g.*, CUTLER & PENROD, *supra* note 62, at 93–96 (discussing research on factors such as consistency of description and eyewitness confidence). R

they will acquit.[381] But, these factors can also benefit the prosecution as they signal the circumstances under which eyewitness identifications tend to be more reliable.[382] For instance, an eyewitness to a robbery who had a long period of time to identify the defendant and immediately identified the defendant following the robbery is more likely to be accurate than an eyewitness in a situation in which neither of these factors was present.[383]

The *Long* instruction illustrates several concepts that should appear in any model jury instruction regarding eyewitness identification. That instruction should emphasize the importance of identification in the case, inform jurors of general concepts influencing perception and memory (such as the weak link between certainty and accuracy), and describe other concepts (such as cross-racial identification) as required by the facts of the case. Rather than starting from scratch, Maryland[384] and other states can use this instruction as a template in their ongoing intraprofessional debates about the reliability of eyewitness identification evidence.

IV. CONCLUSION

Wrongful convictions based on mistaken eyewitness identifications remain a concern for the legal system.[385] Because jurors may hold mistaken beliefs about how eyewitnesses perceive and remember events,[386] it is imperative that juries receive information about the reli-

381. *Cf.* Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603, 606–07 (2010) (arguing that state courts may avoid admitting eyewitness identification evidence out of fear that "violent criminals may be wrongly acquitted").

382. *Cf.* Ebbesen & Konecni, *supra* note 68, at 23 (noting that prosecutors have used experts to testify on eyewitness identification issues, even though defense attorneys use these experts far more frequently). R

383. LOFTUS ET AL., *supra* note 37, § 2-5, at 19, § 3-6, at 65 (discussing a positive correlation between identification accuracy and the length of time a witness views an event, as well as an indirect correlation between such accuracy and the length of time that passes before identification). This factual scenario is similar to that of *United States v. Burrous*, a case in which the eyewitness to a fast food robbery did not identify the defendant the night of the robbery, but immediately gave law enforcement a detailed description of the defendant and picked him out of a photo array within days of the robbery. 934 F. Supp. 525, 526 (E.D.N.Y. 1996). R

384. One legal scholar has already suggested that Maryland adopt a jury instruction on cross-racial identification. 1 DAVID E. AARONSON, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY § 2.57(B) & cmt. A (3d ed. 2009).

385. *See supra* Part III.A.

386. *See supra* Part I.C.

ability of eyewitness identifications and factors that may affect those identifications.[387]

Maryland and other states should pursue jury instruction reform to ensure that jurors are well educated about eyewitness identification.[388] Incorporating social science research through a jury instruction still permits the trial judge to act with discretion and also allows lawyers to debate the instruction's specific wording if there is a concern that it does not sufficiently represent the state of current research of the facts of a particular case.[389] In this process, experts, instead of testifying in court, can contribute their knowledge to the drafting of better instructions.[390] Additionally, courts could employ visual aids and other methods drawn from education to ensure that jurors comprehend the instructions they ultimately receive.[391] Using existing instructions from other jurisdictions as a model would permit states, such as Maryland, to move toward full recognition of the risks of mistaken eyewitness testimony and away from convictions based on erroneous eyewitness identifications.[392]

387. *See supra* Part III.A.
388. *See supra* Part III.B–C.
389. *See supra* Part III.C.
390. *See supra* Part III.C.
391. *See supra* Part III.D.
392. *See supra* Part III.E.