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REQUIRING JURY INSTRUCTIONS ON EYEWITNESS IDENTIFICATION EVIDENCE AT FEDERAL CRIMINAL TRIALS

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Eyewitness identification evidence poses real risks of wrongful conviction.[1] During the 1960s, in the wake of scholarship and Supreme Court opinions that called attention to the serious problem of misidentification in criminal trials, federal circuit courts began to join a growing number of state[2] and foreign common-law

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[1] Dangers of eyewitness misidentification have been discussed frequently. The Supreme Court quoted one scholar's view with approval: "A commentator has observed that '[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.'" United States v. Wade, 388 U.S. 218, 228-29 (1967) (quoting P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965)).

The literature is full of references to notorious cases in which the wrong person was convicted, but by its nature the full scope of the problem can never be known. For discussions of some of the cases, see E. ARNOLDS, W. CARROLL, M. LEWIS & M. SENG, EYEWITNESS TESTIMONY: STRATEGIES & TACTICS § 1.02 (1984); E. BORCHARD, CONVICTING THE INNOCENT, ERRORS OF CRIMINAL JUSTICE (1932); P. DEVLIN, REPORT TO THE SECRETARY OF STATE FOR THE HOME DEPARTMENT OF THE DEPARTMENTAL COMMITTEE ON EVIDENCE OF IDENTIFICATION IN CRIMINAL CASES 1 (1976); F. FRANKFURTER, THE CASE OF SACCO & VANZETTI 30 (1962); E. LOFTUS, EYEWITNESS TESTIMONY 1-8 (1979); P. WALL, *supra*, at 11-24; Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 935-37 (1984); Katz & Reid, *Expert Testimony on the Fallibility of Eyewitness Identification*, 1 CRIM. JUST. J. 177, 177-78 (1977); Note, *Eyewitness Identification in Utah: A Changing Perspective*, 1988 UTAH L. REV. 113, 113-14.

[2] For discussions of state court opinions that treat the issue of identification instructions, see E. ARNOLDS, W. CARROLL, M. LEWIS & M. SENG, *supra* note 1, at § 9.07; Annotation, *Necessity of, and Prejudicial Effect of Omitting, Cautionary Instruction to Jury as to*

jurisdictions that required or encouraged use of identification instructions.[3] Most federal circuits have encouraged the use of special jury instructions at criminal trials when inculpatory evidence includes eyewitness identification.[4] The instructions are designed to reduce the risk of wrongful conviction, and circuits have emphasized their importance by characterizing the instructions as required and by suggesting that their omission will result in reversal.[5]

Reliability of, or Factors to be Considered in Evaluating, Eyewitness Identification Testimony—State Cases, 23 A.L.R. 4TH 1089-1133 (1983). Scholarly discussions include Johnson, *supra* note 1, at 978-82; *Annual Survey of Oklahoma Law—Criminal Law & Procedure—Eyewitness Identification Testimony*, 6 OKLA. CITY U.L. REV. 549, 632-41 (1981); Note, *Eyewitness Identification Testimony and the Need for Cautionary Jury Instructions in Criminal Cases*, 60 WASH. U.L.Q. 1387, 1414-19 (1983) [hereinafter Note, *Eyewitness Identification Testimony*]; Note, *supra* note 1, at 127-29; Note, *Seeing Is Believing? The Need for Cautionary Jury Instructions on the Unreliability of Eyewitness Identification Testimony*, 11 SAN FERN. V.L. REV. 95, 109-22 (1983) [hereinafter Note, *Seeing Is Believing*].

[3] A series of British and Irish common law cases held that in prosecutions for particular crimes trial courts were required to instruct juries on the dangers of convicting on uncorroborated identification evidence. Some courts quashed convictions supported by uncorroborated identifications where weakness of identification evidence was clear from the record. *See* P. DEVLIN, *supra* note 1, at 82-85; Starkman, *The Use of Eyewitness Identification Evidence in Criminal Trials*, 21 CRIM. L.Q. 361, 375-76 (1979). Canadian courts encourage the use of instructions designed to guide the jury in evaluating identification evidence, Starkman, *supra*, at 376, but they have required the instructions only when the evidence suggests a great danger of misidentification. *See* Bessner, *Eyewitness Identification in Canada*, 25 CRIM. L.Q. 313, 345 (1983). Australian courts have required judicial warnings to the jury in some contexts. *See* Recent Cases, 57 AUSTL. L.J. 527 (1983).

A widely publicized 1976 report commissioned by The Home Secretary addressed the need for special identification instructions. Inquiry into the problem of eyewitness misidentification resulted from a number of publicized prosecutions of innocent persons in the 1970s. The report suggested that detailed summation, including articulation of dangers of misidentification, was the best way to reduce dangers of wrongful conviction. P. DEVLIN, *supra* note 1, at 86. The report proposed specific statutory reform:

> We do . . . wish to ensure that in ordinary cases prosecutions are not brought on eye-witness evidence alone and that, if brought, they will fail. We think they ought to fail, since in our opinion it is only in exceptional cases that identification evidence is by itself sufficiently reliable to exclude a reasonable doubt about guilt. We recommend that the trial judge should be required by statute
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> a. to direct the jury that it is not safe to convict upon eyewitness evidence unless the circumstances of the identification are exceptional or the eyewitness evidence is supported by substantial evidence of another sort; and
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> b. to indicate to the jury the circumstances, if any, which they might regard as exceptional and the evidence, if any, which they might regard as supporting the identification; and
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> c. if he is unable to indicate either such circumstances or such evidence, to direct the jury to return a verdict of not guilty.

Id. at 149-50.

[4] See *infra* text of Section II for a discussion of the experience of the circuits.

[5] *See infra* text accompanying notes 68-272. The gap between dicta and holdings has been treated ambivalently by scholars who have attempted to characterize the positions of the circuits. *Compare* 8A J. MOORE, MOORE'S FEDERAL PRACTICE § 30.09[6] at 30-98 to 30-100 (2d ed. 1988) ("The [identification] instruction's utility and comprehensive nature is evidenced by its adoption or approval in the Third, Fourth, Seventh, Eighth, Ninth, and Tenth Circuits.") *and* N. SOBEL, EYEWITNESS IDENTIFICATION § 9.7(a) at 9-37

Nevertheless, federal circuits have actually reversed in only a handful of the dozens of cases appealed on the basis of the omission of instructions. Rather the circuits have recognized numerous exceptions to the general rules requiring the instructions and have adopted standards of review that tolerate persistent omission of the instructions by trial courts.

This Article explores the gap between the hortatory dicta of federal circuit court opinions that articulate benefits of identification instructions and the practice of the circuit courts that affirm convictions routinely despite the omission of the instructions. The Article contends that reasons asserted by the circuit courts in tolerating omission of instructions are incompatible with the underlying purposes of the instructions. It proposes that the circuits adopt standards of appellate review that assure routine administration of the instructions. Finally, this Article proposes specific approaches that effectuate the policies of the instructions while promoting economy of judicial resources.

I. THE PROBLEM OF IDENTIFICATION ERROR

A. SOURCES OF IDENTIFICATION ERROR

Two different kinds of identification error may cause wrongful conviction. First, an eyewitness may commit a primary identification error. Such primary misidentification stems from inherent defects in the psychological processes of observation and recognition. Radically different models have been proposed to explain phenomena of memory and forgetting, but all theories acknowledge that observers frequently make inaccurate identifications of things and persons.[6]

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to 9-38 (D. Pridgen 2d ed. 1988) ("There is no constitutional right or other requirement that judges specifically instruct juries on the inherent fallibility of eyewitness identification."). The gap between dicta and holdings led one source to characterize identification instructions as required but not mandatory:

> The courts have responded to this risk [of misidentification] by *requiring* special instructions, in cases in which identification is a key issue, that will emphasize to the jury the need for finding that the circumstances of the identification are convincing beyond reasonable doubt . . . . The use of the [identification] instruction has not been made *mandatory*, although in several circuits the courts have used strong language suggesting that . . . it be used.

2 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 495.1 at 771 (2d ed. 1982) (emphasis added and footnotes omitted).

[6] Many sociological and psychological studies address the problem of misidentification. *See* G. DAVIES, H. ELLIS & J. SHEPHERD, PERCEIVING & REMEMBERING FACES (1981); EVALUATING WITNESS EVIDENCE (S. Lloyd-Bostock & B. Clifford eds. 1983); E. LOFTUS, *supra* note 1; L. TAYLOR, EYEWITNESS IDENTIFICATION (1982); P. WALL, *supra* note 1; A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 36-229 (1979); Barkowitz & Brigham, *Recognition of Faces: Own Race Bias, Incentive and Time Delay*, 12 J. APPLIED SOC. PSY-

Second, eyewitness identification evidence may be evaluated erroneously by a factfinder—usually a jury—which in convicting makes a secondary judgment of identity. Primary identification error may thus be perpetuated or compounded at trial.[7] While inves-

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CHOLOGY 255 (1982); Bazelon, *Eyewitness News*, PSYCHOLOGY TODAY, Mar. 1980, at 105; Brigham, *Psychological Factors in Eyewitness Identifications*, 11 J. CRIM. JUST. 47 (1983); Buckhout, *Psychology and Eyewitness Identification*, 2 LAW & PSYCHOLOGY REV. 75 (1976); Chance, Goldstein & McBride, *Differential Experience and Recognition of Memory for Faces*, 97 J. SOC. PSYCHOLOGY 243 (1975); Clifford & Scott, *Individual & Situational Factors in Eyewitness Testimony*, 63 J. APPLIED PSYCHOLOGY 352 (1978); Cross, Cross & Daly, *Sex, Race, Age and Beauty as Factors in Recognition of Faces*, 10 PERCEPTION & PSYCHOPHYSICS 393 (1971); Cutler, Penrod & Martens, *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables*, 11 LAW & HUM. BEHAV. 233 (1987); Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About the Relationship?*, 4 LAW & HUM. BEHAV. 243 (1980); Deffenbacher, Carr & Leu, *Memory for Words, Pictures and Faces: Retroactive Interference, Forgetting and Reminiscence*, 7 J. EXPERIMENTAL PSYCHOLOGY 299 (1981); Ellis, Davies & Shepherd, *Experimental Studies on Face Identification*, 3 NAT'L. J. CRIM. DEF. 219 (1977); Galper, *"Functional Race Membership" and Recognition of Faces*, 37 PERCEPTUAL & MOTOR SKILLS 455 (1973); Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 391 (1933); Houts, *The Accuracy/Fallibility of Eyewitness Reporting*, 23 TRAUMA 1 (1981); Laughery, Fessler, Lenorovitz & Yoblick, *Time Delay & Similarity Effects in Facial Recognition*, 59 J. APPLIED PSYCHOLOGY 490-96 (1974); Lavrakas, Buri & Mayzner, *A Perspective on the Recognition of Other-Race Faces*, 20 PERCEPTION & PSYCHOPHYSICS 475 (1976); Lipton, *On the Psychology of Eyewitness Testimony*, 62 J. APPLIED PSYCHOLOGY 90 (1977); Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 JURIMETRICS J. 188 (1975); Loftus & Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 BULL. PSYCHONOMIC SOC'Y 86 (1975); Luce, *Blacks, Whites and Yellows, They All Look Alike to Me*, PSYCHOLOGY TODAY, Nov. 1974, at 105; Luce, *The Role of Experience in Inter-Racial Recognition*, 1 PERSONALITY & SOC. PSYCHOLOGY BULL. 39 (1974); Malpass, *Racial Bias in Eyewitness Identification*, 1 PERSONALITY & SOC. PSYCHOLOGY BULL. 42 (1974); Malpass & Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOLOGY 482 (1981); Malpass & Kravits, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOLOGY 330 (1969); Memon, Dionne, Short, Maralani, MacKinnon & Geiselman, *Psychological Factors in the Use of Photospreads*, 16 J. POLICE SCI. & ADMIN. 62 (1988); Siegel & Loftus, *Impact of Anxiety and Life Stress upon Eyewitness Testimony*, 12 BULL. PSYCHONOMIC SOC'Y 479 (1978); Vickery & Brooks, *Time-Spaced Reporting of a "Crime" Witnessed by College Girls*, 29 J. CRIM. L. & CRIMINOLOGY 371 (1938); Wells, Ferguson & Lindsay, *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. APPLIED PSYCHOLOGY 688 (1981); Wells, Lindsay & Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOLOGY 440 (1979) [hereinafter Wells, Lindsay & Ferguson, *Accuracy*].

The proliferation of empirical studies (and inconsistent conclusions) has generated a secondary debate over whether the studies have produced valid results. *See* Cutler, Penrod & Martens, *supra*, at 233-34.

[7] An eyewitness's tentative identification may provide sufficient evidence to support a jury's finding of guilt in a case where the eyewitness was not himself or herself sufficiently confident of the identification to have convicted the suspect. The reluctance of an eyewitness to make an identification may be reduced by his or her belief that there is additional incriminating evidence. The creation of or failure to eliminate such a belief is not by itself so suggestive that the resulting identification is inadmissible at trial. Indeed, routine identification procedures like lineups and photo arrays may communicate to eyewitnesses the belief that investigating agents have independent grounds to suspect one of the subjects within the group presented for identification. The use of control

tigative procedures aggravate dangers of primary identification error, aspects of the adversary trial process aggravate dangers of secondary identification error. The common knowledge of factfinders does not include an understanding of factors that determine the accuracy of identification testimony:[8] to factfinders eyewitness testimony is credible,[9] and its persuasiveness depends more on the eyewitness's conviction and credibility than on the truth or accuracy of the identification.[10] Factfinders often sympathize with the eyewitness;[11] moreover, eyewitnesses are not subject to effective cross-examination.[12] Exclusionary rules do not adequately prevent

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groups that do not include a suspect are not legally required. Though the routine use of controls might indicate the scope of suggestivity, they would likely generate so many false identifications that convictions would be impossible in many cases.

8 *See, e.g.*, E. LOFTUS, *supra* note 1, at 171-77; Cutler, Penrod & Stuve, *Juror Decision Making in Eyewitness Identification Cases*, 12 LAW & HUM. BEHAV. 41, 53-54 (1988); Rahaim & Brodsky, *Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 LAW & PSYCHOLOGY REV. 1, 5-12 (1982).

9 The identifying witness seldom has an identifiable interest in convicting the wrong person. Moreover, research has suggested that most potential jurors ascribe greater accuracy to identifications than is warranted: "Over 80 percent of the survey respondents *over*estimated the percent of eyewitnesses who had been accurate [in independent controlled studies]." Brigham, *supra* note 6, at 54 (emphasis in original); *see* Brigham & Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 24-29 (1983). In actual cases jurors have believed identification evidence that is inherently incredible under the circumstances. *See* Starkman, *supra* note 3, at 365 (discussing identification testimony offered during the trial of Sacco and Vanzetti).

10 *See* Wells & Murray, *Eyewitness Confidence* 155-70, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES (1984); Wells, Lindsay & Ferguson, *Accuracy*, *supra* note 6. *But see* Brigham, *supra* note 6, at 48 (emphasizing inconsistency of research data in other studies).

11 Especially troubling are data that suggest that identifications by "likable" witnesses are more widely believed. *See* E. LOFTUS, *supra* note 1, at 13-14. An identifying witness is frequently a victim of the crime or a person who was present during the crime and within the zone of danger created by the criminal act. Eyewitness identification evidence is also routinely provided by law enforcement personnel. It is likely that jurors sympathize with both kinds of identifying witnesses.

12 *See generally* Johnson, *supra* note 1, at 953-54 (articulating factors that render cross-examination of limited value in disclosing weaknesses in identification testimony). Most writers have assumed or argued that cross-examination is especially unhelpful in confronting misidentification by an eyewitness. See P. WALL, *supra* note 1, at 135, who states,

> [M]aking an identification involves a mental process merely of affirming identity rather than non-identity; it is a simple yes or no proposition. Thus, it is quite different from the narration of a complex event, concerning which cross-examination might be very helpful where details are concerned. This is not to suggest that it is not useful to cross-examine an identifying witness at the trial; it is, on the contrary, most useful. But the purpose of the cross-examination is to bring out matters which would cast some doubt upon the accuracy of the identification, and not (as would usually be the case) to change in any way the tenor of the original statement.

See Starkman, *supra* note 3, at 378 ("Although the defence in cross-examination can probe the witness's bald assertion that the accused is the man, in all probability the

misidentifications, but incorrect lay attitudes about exclusionary rules may create inferences that courts will not permit doubtful identification evidence.

Courts have not differentiated between the two different kinds of misidentification.[13] A few opinions have attempted to effect changes in methods of observation and primary identification,[14] but most have accepted that certain risks of primary identification error are unavoidable and have focused on aspects of the adversary process that aggravate dangers of secondary identification error.

B. CONSTITUTIONAL LIMITS ON IDENTIFICATION EVIDENCE

Although the Constitution provides limits to the use of identification evidence, the limits are grounded in textual provisions that

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witness will have sufficiently credible answers that the force of their [*sic*] testimony will not be lessened in the eyes of the trier of fact."); Comment, *Helping the Jury Evaluate Eyewitness Testimony: The Need for Additional Safeguards*, 12 AM. J. CRIM. L. 189, 192 (1984) ("[Cross-examination] is utterly ineffective in the face of confident testimony by an eyewitness who is mistaken for reasons neither he nor the jury recognizes."); Note, *Eyewitness Identification Testimony*, *supra* note 2, at 1422 ("Cross-examination and closing arguments of counsel also inadequately protect criminal defendants from misidentification in cases in which eyewitness identification testimony is important."). *But see* United States v. Brewer, 783 F.2d 841, 843 (9th Cir. 1986) ("[C]ross-examination should be effective to expose any inconsistencies or deficiencies in eyewitness identifications.") (citing United States v. Amaral, 488 F.2d 1148, 1153 (9th Cir. 1973)); L. TAYLOR, *supra* note 6, at 228 ("The testimony of an eyewitness is almost uniquely subject to effective cross-examination.").

One work for practitioners suggests that "most eyewitness identification cases are won or lost by the cross-examination of the identifying witnesses." N. SOBEL, *supra* note 5, at § 11.1 at 11-1. Another study suggests that even when an eyewitness's identification has been discredited, factfinders are more prone to convict than when no eyewitness testified. *See* Loftus, *supra* note 6, at 189-90.

[13] Judicial reluctance to distinguish sources of misidentification may also be reflected in the ambiguous treatment of identification testimony as fact or opinion. *W*'s identification of *D* as the criminal might be characterized as *W*'s statement of fact ("*D* was the criminal" or "I saw *D* do the prohibited act") or opinion ("I believe *D* was the criminal"). The characterization is complicated by the fact that statements of identification may be qualified ("*D* looks like the criminal" or "I think *D* was the criminal but am not sure") or even retracted. Inconsistent identifications pose special problems. *W* may first identify *X* as the criminal and later identify *D*. In the courtroom *W* may identify a codefendant or third person. *W* may repeatedly fail to identify *D* and only later identify *D* as a criminal.

Courts respond to all these situations in the same way. A tentative identification, even if inconsistent, qualified, or retracted, is admissible. The ambiguous treatment of identifications as opinion or fact allows courts to subsume all types of admissible evidence under the rubric of "identification" and avoids the embarrassment of tolerating convictions based upon inconsistent facts from the same source.

[14] Such opinions have confronted identification methods employed by law enforcement personnel and persons over whom law enforcement agencies have some control. *See infra* text accompanying notes 93-99.

promote due process[15] and that assure the adversary nature of proceedings by protecting an accused's right to counsel.[16] In 1967, the Supreme Court held that a suspect had the right to counsel during a custodial lineup.[17] Explaining its extension of the right to lineups, the Court acknowledged dangers of misidentification in a passage that was to be cited widely by courts and scholars.[18] Concern with suggestive identification procedures led some federal courts to exclude uncounseled identifications made under circumstances in which the danger of suggestion was comparable to or greater than that inherent in uncounseled lineups.[19] But the Court ultimately

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15 U.S. CONST. amends. V, XIV. Although the cases interpreting an accused's right to procedural fairness do require exclusion of identifications that are the result of grossly unfair and suggestive identification procedures, the purpose of the exclusionary rule is prophylactic: it is designed to deter improper police suggestion because the undesirable detective procedures offend societal notions of fair play rather than because they have resulted in inaccurate evidence in the particular case. The threshold test for exclusion is accordingly a high one and not calculated to weed out misidentifications generally.

16 U.S. CONST. amends. V, XIV.

17 United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967). The cases held that the accused and his or her counsel must be notified of an identification lineup and that the lineup must not be held until counsel is present. The Court concluded that the rights to confront and to counsel required presence of counsel because of the lack of "legislative or other regulations" designed to eliminate abuses and suggestive procedures.

The Court promulgated a prophylactic rule of exclusion in order to enforce compliance with its rule: "Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Gilbert*, 388 U.S. at 273. The presence of counsel resulting from the prophylactic exclusion of evidence was designed to enable a defendant to challenge effectively in-court identifications by making his counsel witness to any improper or suggestive procedures that undermined accurate identification. Presence of counsel was also intended to reduce the likelihood of improper procedure.

18 The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter [in a book written prior to his membership on the Court] once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure." The Case of Sacco and Vanzetti 30 (1927). A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. . . . [T]he dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Moreover, "[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial."

Wade, 388 U.S. at 228-29 (quoting Williams & Hammelmann, *Identification Parades* (pt. 1), 1963 CRIM. L. REV. 479, 482).

19 *See, e.g.*, United States v. Zeiler, 427 F.2d 1305 (3d Cir. 1970), *overruled*, United

grounded the right to counsel in the sixth amendment and thus restricted this right to proceedings[20] at which the accused was personally present.[21]

In another case decided in 1967, the Court expressed concern with dangers of misidentification and held that due process prohibited identifications that resulted from procedures that were "unnecessarily suggestive and conducive to irreparable mistaken identification."[22] The test for constitutionally improper identifications is strict: identifications are inadmissible only where the procedures lead to "a very substantial likelihood of misidentification."[23]

States *ex rel.* Reed v. Anderson, 461 F.2d 739, 745 (3d Cir. 1972) (en banc) (discussed *infra* note 56).

20 Though the underlying concern that motivated the Court to require presence of counsel was the danger of misidentification and the need to protect the right to effective confrontation of identifying witnesses at trial, the constitutional ground of the case was ultimately limited to the sixth amendment right to counsel. Later cases held that the right attached only with "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 689 (1972). Lineups of voluntary participants or even of suspects apprehended unlawfully without warrant present all the dangers of misidentification that led the Court to limit admissibility of lineup evidence. But because no adversary proceeding has been formally initiated, no sixth amendment right to counsel attaches. The incongruous results have been criticized by many writers. *See, e.g.*, Whitten & Robertson, *Post-Custody, Pre-Indictment Problems of Fundamental Fairness and Access to Counsel: Mississippi's Opportunity*, 13 VT. L. REV. 247, 256 (1988) ("In sum, the sixth amendment as seen by a majority of the present Supreme Court protects at critical stages those suspects who have vaulted the threshold of formal judicial proceedings. It does not protect those persons when it might matter.").

21 After conflict arose among the lower courts, the Court held that a jailed suspect has no right to be present or to have his counsel present during identifications made from photographs or movies (including reproductions of a lineup at which counsel was required to be present). United States v. Ash, 413 U.S. 300 (1973).

The holding follows logically from the grounding of the right to counsel in the sixth amendment and from the historical consideration of those stages of the accusatorial process at which a person was accorded the right to legal representation. But the holding is not entirely consistent with the underlying policies that led the Court to recognize the need for presence of counsel at lineup. First, the actual dangers of misidentification resulting from suggestive procedure are arguably greater with the use of photographic and film reproductions. Second, the need for counsel to be present during out-of-court identifications in order effectively to question the evidence at trial is greater. Neither an accused nor counsel is present during the identification; therefore, neither can know what circumstances aggravated the danger of misidentification. Though the use of photographs or films may suggest the creation of some record of the identification process, there is no requirement that the record be preserved. If such a record preserves the right to confront, then it is not clear why a per se exclusionary rule was necessary for uncounseled lineups of which photographic or videotape records were made.

22 Stovall v. Denno, 388 U.S. 293, 302 (1967). Congress attempted to prevent the exclusion of identification evidence, 18 U.S.C. § 3502 (1982) (identification testimony "shall be admissible in evidence in a criminal prosecution").

23 Neil v. Biggers, 409 U.S. 188, 198 (1972). Even where an identification has resulted from constitutionally prohibited methods, subsequent identifications and testi-

Application of the standard has been problematic,[24] but courts have generally approved identifications following lineups and photographic identifications except under extremely suggestive circumstances.[25] Constitutional authority thus recognized but did not effectively reduce the dangers of identification error in routine cases.[26]

C. PSYCHOLOGICAL AND SOCIOLOGICAL SCHOLARSHIP

Scholars have recognized problems of identification error and have generally supported additional institutional safeguards designed to reduce the risk of wrongful conviction. They have discussed several options: 1) the promulgation of evidentiary rules requiring exclusion of uncorroborated identification testimony;[27] 2)

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mony are subject to exclusion only when "a very substantial likelihood of irreparable misidentification" is proved by the defendant. *Id.* at 199-201.

[24] In Manson v. Brathwaite, 432 U.S. 98, 114 (1977), the Court adopted a totality of circumstances test whose factors included "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."

[25] In Simmons v. United States, 390 U.S. 377 (1968), the Court held that photographic identifications of the defendant made from six photographs were not unconstitutionally suggestive. Most of the six photographs included groups of people, but the defendant appeared in all of them. The Court emphasized that the investigation was still in process, that a serious felony had occurred, and that the dangers of misidentification were reduced by the fact that the identifying witnesses had had ample opportunity to observe the criminal and had made the identifications soon after witnessing the crime.

In contrast, the Court held that identification was improper under circumstances where the record included evidence that cast serious doubt on the accuracy of the identification. Foster v. California, 394 U.S. 440 (1969) (witness was first unable to identify the defendant at a suggestive lineup that had included only two other men, both six inches shorter than the defendant, and at which only the defendant wore clothing similar to the criminal's; the witness was shown a second lineup several days later and the defendant was the only one included in both lineups).

[26] By requiring presence of counsel at lineups, the courts may unwittingly have encouraged the avoidance of lineup procedure and the greater use of photographic identification, which may pose a greater risk of misidentification. The effect on prosecution practice of United States v. Ash, 413 U.S. 300 (1973) (no right to counsel exists during photographic identifications), cannot be demonstrated directly, but the FBI today frequently prepares identification cases based on photographic identifications. The *Ash* opinion has been criticized precisely because of the increased dangers of misidentification that result from photographic identification. *See* N. SOBEL, EYEWITNESS IDENTIFICATION § 47 (1972); Brigham, *supra* note 6, at 52-53. The dangers of misidentification from photographs are easily demonstrated empirically. *See, e.g.*, Paley & Geiselman, *The Effects of Alternative Photospread Instructions on Suspect Identification Performance*, 7 AM. J. FORENSIC PSYCHOLOGY 3, 9 (1989) (Table 1).

[27] Rules of corroboration and exclusion would radically alter the detection and prosecution of offenses, and no federal court has considered adopting such methods of reducing the danger of misidentification. *But see* United States v. Butler, 636 F.2d 727, 730-38 (D.C. Cir. 1980) (Bazelon, J., dissenting), *cert. denied*, 451 U.S. 1019 (1981);

the liberal admission of expert opinion evidence on perception, memory, and identification;[28] and 3) the administration of jury instructions that alert jurors to problems with identification evidence

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United States v. Smith, 563 F.2d 1361, 1365-66 (9th Cir. 1977) (Hufstedler, J., concurring), *cert. denied*, 434 U.S. 1021 (1978). Proof of particular crimes may require corroboration, as with treason, and corroboration may be incorporated as a substantive element into an offense, as with the act in furtherance of conspiracy. But the strong trend is for the elimination of special corroboration requirements, and the requirement of corroborative evidence that was once required to prove some offenses, like rape, has been eroded as a process of judicial construction and statutory reform. *See* P. WALL, *supra* note 1, at 182-93. Scholars have occasionally proposed a requirement of corroboration in identification cases. *E.g., id.* at 188-93; M. HOUTS, FROM EVIDENCE TO PROOF 26 (1956); G. WILLIAMS, THE PROOF OF GUILT 113 (3d ed. 1963). Effectiveness of a requirement of corroboration in identification cases has been questioned. *E.g.*, P. DEVLIN, *supra* note 1, at 77-82; Starkman, *supra* note 3, at 373. Johnson suggested that the few scholars who have proposed exclusion of identification evidence have done so "merely as a rhetorical device for strengthening the appeal of the individual author's favored reform." Johnson, *supra* note 1, at 957-58.

28 Courts are divided on the admissibility of expert evidence concerning the accuracy and reliability of identification. *See generally* Annotation, *Admissibility, at Criminal Prosecution, of Expert Testimony on Reliability of Eyewitness Testimony*, 46 A.L.R. 4TH 1047 (1986) (collecting cases). *Compare* H. MUENSTERBERG, ON THE WITNESS STAND (2d ed. 1923) *and* Wigmore, *Professor Muensterberg and the Psychology of Testimony*, 3 U. ILL. L. REV. 399, 421, 425 (1909).

Benefits and disadvantages of expert testimony on the issue have been discussed vigorously in the literature. *See* N. SOBEL, *supra* note 5, at § 9.6 at 9-29 to 9-37; A. YARMEY, *supra* note 6, at 228; Abney, *Expert Testimony and Eyewitness Identification*, 91 CASE & COM. 26 (1986); Brigham, *supra* note 6, at 53-55; Fishman & Loftus, *Expert Psychological Testimony on Eyewitness Identification*, 4 LAW & PSYCHOLOGY REV. 87 (1978); Holt, *Expert Testimony on Eyewitness Identification: Invading the Province of the Jury*, 26 ARIZ. L. REV. 399 (1984); Hosch, Beck & McIntyre, *Influence of Expert Testimony Regarding Eyewitness Accuracy on Jury Decisions*, 4 LAW & HUM. BEHAV. 287 (1980); Johnson, *supra* note 1; Katz & Reid, *supra* note 1; Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. PITT. L. REV. 547 (1984); Loftus, *Impact of Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 65 J. APPLIED PSYCHOLOGY 9 (1980) [hereinafter Loftus, *Impact*]; Loftus & Monahan, *Trial by Data: Psychological Research as Legal Evidence*, 35 AM. PSYCHOLOGIST 270 (1980); McCloskey & Egeth, *Eyewitness Identification: What Can a Psychologist Tell a Jury?*, 38 AM. PSYCHOLOGIST 550 (1983); Sanders, *Expert Witnesses in Facial Identification Cases*, 17 TEX. TECH L. REV. 1409 (1986); Walker & Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987); Wells, Lindsay & Tousignant, *Effects of Expert Psychological Advice on Human Performance in Judging the Validity of Eyewitness Testimony*, 4 LAW & HUM. BEHAV. 275 (1980); Comment, *supra* note 12; Comment, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402 (1985); Comment, *Expert Testimony on Eyewitness Perception*, 82 DICK. L. REV. 465 (1978); Comment, *Eyewitness Identification: Should Psychologists Be Permitted to Address the Jury?*, 75 J. CRIM. L. & CRIMINOLOGY 1321 (1984) [hereinafter Comment, *Eyewitness Identification*]; Comment, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721 (1985); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (1977).

One expert witness described her career experience in Loftus, *Ten Years in the Life of an Expert Witness*, 10 LAW & HUM. BEHAV. 241, 241-63 (1986), and discussed ethical problems faced by the expert witness in Loftus, *Experimental Psychologist as Advocate or Impartial Educator*, 10 LAW & HUM. BEHAV. 63, 63-78 (1986).

or that educate jurors about factors that render identifications less accurate.[29]

The options are not mutually exclusive. However, a corroboration rule has not been seriously pursued because enforcement of such a rule would terminate many meritorious prosecutions. Admissibility of psychological opinion evidence remains controversial, and courts have been reluctant to allow the use of expert opinion in this area.[30] Problems associated with expert opinion evidence include: 1) the lack of expert consensus on a theoretical model of identification; 2) the difficulty of applying conclusions drawn from statistical surveys to individual cases; 3) the tendency of expert opinions to undermine the judicial policy against collateral attacks on the credibility of witnesses; 4) the potential of expert testimony to deteriorate into battles of experts; and 5) the possibility that costs[31] and confusion added by routine use of experts would not be justified by the marginal benefits achieved.[32]

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[29] Legal scholars have generally approved of special identification instructions and have argued that such instructions should be made mandatory. *E.g.*, Johnson, *supra* note 1, at 982-87 (arguing for adoption of specific instructions on special dangers presented by cross-racial identifications). P. WALL, *supra* note 1, at 200, discussed several proposals for alleviating dangers of identification, concluding, "If a choice had to be made between them, if only one could be adopted, then the rule requiring a judicial warning to the jury should be favored." *See also* E. ARNOLDS, W. CARROLL, M. LEWIS & M. SENG, *supra* note 1, at 345-46; Note, *supra* note 28, at 1004 (characterizing cautionary jury instructions as "a step in the right direction" but questioning their effectiveness); Note, *Eyewitness Identification Testimony*, *supra* note 2, at 1434 ("[A]ll jurisdictions in the United States should mandate the use of such [particularized identification] instructions in appropriate cases."); Note, *Seeing Is Believing*, *supra* note 2, at 114, 119 (1983) (suggesting that a general instruction on identification should be required and that a particularized instruction should be required if requested).

[30] *See* N. SOBEL, *supra* note 5, at § 9.6(b) at 9-31 to 9-35. Surveys have indicated that a majority of defense attorneys favor routine use of identification experts, while prosecutors and law enforcement professionals oppose the routine use of such experts. *See* Brigham, *supra* note 6, at 54.

[31] There are real social costs caused by the retention of experts by the government as well as by the possible obligation of the government to subsidize retention of similar experts for an indigent defendant. *Cf.* Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987) (due process held to require the state to provide an indigent with a hypnosis expert where the state elicited identification only after hypnosis of victim), *cert. denied*, 108 S. Ct. 2857 (1988). Costs are also incurred as a result of the significant increase in trial time.

[32] This list is not exhaustive. Serious problems of external validity characterize virtually every empirical study because criminal laws and ethical considerations obviously preclude controlled studies of victims of crimes. Moreover, the statistical nature of relevant studies allows tendentious manipulation of confidence levels in order to support various conclusions.

Courts have questioned whether there is consensus within the scientific community. Judge Goodrich, in denying admission of expert opinion evidence on the psychology of identification, applied the traditional test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), concluding that eyewitness identification is a "creature of *legal terminology*, and

D. EFFICACY AND RISKS OF IDENTIFICATION INSTRUCTIONS

In contrast to their treatment of the first two options, no federal courts and no scholars have criticized the use of the third option—special identification instructions. On the contrary, the assumption that special instructions provide a low-cost, risk-free method of reducing dangers of misidentification has supported the rejection of alternative safeguards.[33] Even so, the instructions have two possible disadvantages: they may add unacceptable burdens or costs to the judicial process, and they may adversely affect law enforcement by reducing the conviction rate of offenders.

1. Risks to Trial Process

There are identifiable disadvantages to the trial process presented by alternative methods that have been proposed for reducing the danger of wrongful conviction resulting from misidentification. In contrast, special jury instructions present no obvious disadvantages to trial process. Costs are minimal because the risk of reversal on technical grounds with its attendant costs is avoided by the requirement—adopted by a number of courts[34] and proposed by this Article—that the instructions be specifically requested at trial.

2. Risks to Law Enforcement Process

Proponents of identification instructions have assumed that the instructions reduce the conviction rate for cases where identification evidence is weakest, but real problems with the assumed effect of the instructions exist. First, the instructions may not lower conviction rates uniformly. The particularized identification instruction that has been adopted by several circuits may have little or no effect on the conviction rate or may increase the rate;[35] moreover, general credibility instructions may also increase the conviction rate in cases

does not designate a particular field of *psychological* study." Goodrich, *Should Experts Be Allowed to Testify Concerning Eyewitness Testimony in Criminal Cases?*, 14 JUDGES' J. 70, 71 (1975) (emphasis in original); *see also* FED. R. EVID. 703 notes of advisory committee on proposed rules.

33 The Third Circuit referred to the availability of identification instructions in retreating from constitutional restrictions on admission of problematic eyewitness identifications. *See infra* text accompanying notes 59, 67. One writer specifically relied on identification instructions in rejecting expert opinion evidence. *See* Comment, *Eyewitness Identification*, *supra* note 28, at 1360-61.

34 *See infra* notes 330-31, 347, 374.

35 *See* Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCHOLOGY 252, 257-58, 265 (1988) [hereinafter Greene, *Judge's Instruction*]. The research is summarized in Greene, *Eyewitness Testimony and the Use of Cautionary Instructions*, 8 U. BRIDGEPORT L. REV. 15, 15-20 (1987); *see also* Hoffheimer, *Effect of Particularized Instruction on Evaluation of Eyewitness Identification Evidence*, 13 LAW & PSYCHOLOGY

litigating identity.[36] Although some empirical studies indicate that identification instructions lower conviction rates under controlled conditions,[37] while other studies suggest that identification instructions influence jury deliberation,[38] research has not demonstrated that the instructions reduce the conviction rate most often in close cases. On the contrary, research indicates that the impact of instructions on the conviction rate depends on the text of the instructions. The same instruction may have different effects depending on the evidence,[39] possibly increasing the conviction rate in one case while reducing it in another.[40] No adequate empirical study has been conducted on the types of criminal cases that are prosecuted most often in federal courts and in which identification is most often placed in issue.[41]

REV. 43 (1989). Greene's research may be subject to some of the vexing problems of external validity that I discuss. *Id.* at 51.

While the divergent result is inconsistent with previously published studies, previous studies have observed the different response caused by different crimes. Thus, Loftus, in her study of the impact of expert psychological testimony on deliberations, noted that the conviction rate was consistently higher for subjects presented with more violent offenses. Loftus, *Impact*, *supra* note 28, at 12 (one case characterized as violent and another as nonviolent, but both actually involved assaults with a handgun, and one resulted in death). Loftus noted also that the reduction of the conviction rate was greater in the case of the more violent offense, but even where expert identification testimony was considered, subjects remained more likely to convict in the more violent case. *Id.*

36 The detrimental effect of a general credibility instruction has been suggested on theoretical grounds. E. ARNOLDS, W. CARROLL, M. LEWIS & M. SENG, *supra* note 1, at 345 ("By telling the jurors to use their own knowledge and life experiences, the court may actually be aggravating error if the life experiences of the jurors are erroneous."). Empirical studies confirm that "jurors are largely unaware of the empirical evidence concerning eyewitness accuracy." Rahaim & Brodsky, *supra* note 8, at 11. A British study suggests that the general admonition about dangers of convicting on uncorroborated evidence increases the probability of conviction in cases involving identification evidence. *Juries and the Rules of Evidence*, 1973 CRIM. L. REV. 208, *cited in* Starkman, *supra* note 3, at 377 n.78a.

37 The results in Greene's two experiments are hard to reconcile. Experiment *I* evidently yielded a lower conviction rate among subjects who were given the *Telfaire* instruction, Greene, *Judge's Instruction*, *supra* note 35, at 258, but Experiment *II* yielded virtually identical results for subjects who were given the *Telfaire* instruction and for subjects who were given no instruction. *Id.* at 266 (Table 4).

38 Katzev & Wishart, *The Impact of Judicial Commentary Concerning Eyewitness Identifications on Jury Decision Making*, 76 J. CRIM. L. & CRIMINOLOGY 733, 742-43 (1985), concluded from studies of mock juries that identification instructions reduced the probability of conviction and also reduced deliberation time. This result contrasts with empirical studies of the effect of expert psychological evidence, which have concluded that expert evidence reduces the conviction rate while increasing deliberation time. *See* Loftus, *Impact*, *supra* note 28, at 12, 14; Hosch, Beck & McIntyre, *supra* note 28.

39 *See* Greene, *Judge's Instruction*, *supra* note 35, at 257, 265-66.

40 *See* Hoffheimer, *supra* note 35, at 53.

41 Most appeals that challenge the omission of identification stem from prosecutions for robbery and drug offenses. *See infra* text accompanying notes 310-25; *see also* United States Sentencing Commission, FEDERAL SENTENCING GUIDELINE MANUAL 6 (1987)

Second, identification instructions effect only a marginal reduction of the conviction *rate*. Even under controlled conditions, no instruction can be predicted to be outcome-determinative in one case. Since the instructions achieve observable benefits only in a relatively large number of cases, courts must administer the instructions routinely in order to attain benefits. But there may be a tension between the benefits gained from routine administration of the instructions and the costs of reversing in an individual case.

Third, there is no reason to believe that weaker evidentiary cases are brought disproportionately against innocent defendants. The instructions, assuming that they reduce the conviction rate most often in close cases, may benefit the guilty as much as, if not more than, the innocent. The government's need for identification evidence is not invariable; rather, dependence on eyewitness identification evidence is greater in certain types of cases, such as cases in which eyewitnesses identify bank robbers who had worn disguises. But a uniform requirement of instructions might reduce the conviction rate for those cases that depend the most on such evidence without balancing the benefit to defendants against the prosecution's need for such evidence.[42]

II. Response of the Federal Circuits

Because federal circuits have required or encouraged the use of special identification instructions under their supervisory jurisdiction,[43] the case law varies from circuit to circuit. Each circuit court

("The federal criminal system, in practice, deals mostly with drug offenses, bank robberies and white collar crimes.").

The only study of the effect of instructions on subjects' evaluation of a robbery reached results that are inconclusive, and the study suffers from problems of external validity, which I addressed in discussing the results. *See* Hoffheimer, *supra* note 35, at 47-48 (treatment of *Zeiler* case).

[42] The problem of balancing the prosecutorial and law enforcement need for evidence against the reduction of effectiveness of the evidence attained by use of the instructions has not been addressed by courts or scholars. But the Supreme Court recognized the problem in the context of application of an exclusionary rule to eyewitness identifications that result from suggestive procedure. The Court balanced dangers of suggestive procedure against the prosecutorial need for use of the procedure. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967) (allowing use of suggestive showup procedure when the eyewitness was near death).

[43] Federal courts have consistently rejected arguments from habeas corpus petitioners that omission of identification instructions at state trials violated constitutional rights. *See* Cotton v. Armontrout, 784 F.2d 320, 322 (8th Cir. 1986); Love v. Young, 781 F.2d 1307, 1318-19 (7th Cir. 1986), *cert. denied*, 476 U.S. 1185 (1986); Jones v. Smith, 772 F.2d 668, 672 (11th Cir. 1985), *cert. denied*, 474 U.S. 1073 (1986); Rodriguez v. Wainwright, 740 F.2d 884, 885 (11th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); Williams v. Lockhart, 736 F.2d 1264, 1267-68 (8th Cir. 1984); Carey v. Maryland, 617 F. Supp. 1143, 1147-49 (D. Md. 1985), *aff'd without opinion*, 795 F.2d 1007 (4th Cir. 1986);

has taken one of three general approaches: 1) encouraging the use of particularized identification instructions designed to alert jurors to specific circumstances that aggravate dangers of misidentification; 2) requiring that instructions adequately articulate the government burden of proving identity;[44] or 3) refusing to require any identification instructions.

A. CIRCUITS THAT ENCOURAGE OR REQUIRE PARTICULARIZED IDENTIFICATION INSTRUCTIONS

1. The Third Circuit

The United States Court of Appeals for the Third Circuit promulgated identification instructions prospectively at the same time that it abandoned effective constitutional limits on identification evidence. As the first federal appellate court to require identification instructions, the Third Circuit both anticipated and influenced legal developments in other circuits.

a. Experimentation with Constitutional Restrictions on Eyewitness Identifications

The Third Circuit's concern with dangers of misidentification led it initially to experiment with constitutional restrictions on the use of questionable identification evidence. Its treatment of problems of identification evidence was framed by its review, on three occasions, of a robbery prosecution. The defendant was initially convicted of three robberies in two separate trials, and evidence at both trials included troublesome eyewitness identifications.[45] In its first review of the case, the circuit con-

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Willin v. Ajello, 496 F. Supp. 804, 811 (D. Conn. 1980), *aff'd without opinion*, 652 F.2d 55 (2d Cir. 1981); Harris v. Clusen, 487 F. Supp. 616, 618-19 (E.D. Wis. 1980); United States *ex rel.* Goodyear v. Delaware Correctional Center, 419 F. Supp 93, 97-98 (D. Del. 1976); United States *ex rel.* Winfield v. Cascles, 403 F. Supp. 956, 960-61 (E.D.N.Y. 1975).

One trial court avoided the constitutional issue by ruling that failure to have requested a particularized identification instruction that resulted in waiver of the alleged error under the Massachusetts contemporaneous objection rule precluded habeas corpus relief. Brown v. Streeter, 649 F. Supp. 1554, 1559-60 (D. Mass. 1986), *aff'd without opinion*, 836 F.2d 1340 (1st Cir. 1987).

[44] The first two approaches are not exclusive, and courts have shifted from one approach to another. *See infra* text accompanying notes 281-87. Moreover, model particularized instructions frequently include instructions on the government burden concerning the issue of identity.

[45] The defendant was suspected of a series of bank robberies that had received extensive publicity. His identity had been widely reported in the press. *See* United States v. Zeiler, 278 F. Supp. 112, 113-15 (W.D. Penn. 1968), *rev'd*, 427 F.2d 1305 (3d Cir. 1970).

At a counseled lineup after arrest, 50 eyewitnesses observed the defendant and sev-

fronted constitutional challenges to the admissibility of pretrial photographic identifications and to the admissibility of in-court identifications by eyewitnesses who had participated in the photographic identifications.[46] It held that the pretrial photographic identifications[47] violated the sixth-amendment right to counsel and should not have been admitted.[48] But in considering whether in-court identifications should also have been excluded as improperly suggestive, the circuit court analyzed separately the identifications made during the first and second trials. While holding that the in-court identifications at the second trial were so suggestive that the trial court erred as a matter of law in admitting them,[49] it remanded

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eral identified him. But the defense learned only during trial that the identifying witnesses had been exposed to photographs of the defendant before the lineup. United States v. Zeiler, 427 F.2d 1305, 1306 (3d Cir. 1970) [hereinafter *Zeiler I*]. Five of the photographs were mugshots of persons other than the defendant, and three photographs depicted the defendant. The defendant was the only person in the photographs wearing glasses, and the robber had worn glasses. *Zeiler*, 427 F.2d at 1305-06; *Zeiler*, 296 F. Supp at 227.

Indicted for 11 robberies, the defendant was initially tried for 10 and convicted of two. At a second trial he was tried jointly with a co-defendant of the eleventh robbery and convicted. *Zeiler*, 427 F.2d at 1306; *Zeiler*, 296 F. Supp. at 224, 227 n.6.

46 *Zeiler*, 427 F.2d at 130-37.

47 With one exception, each identifying witness also testified on direct examination that the witness had identified the defendant during the photographic identification. *Zeiler*, 427 F.2d at 1307.

48 The court extended United States v. Wade, 338 U.S. 218 (1967) (constitutional right to counsel at custodial lineup), because the "need and reason for counsel at a photographic identification after arrest is even greater than in the case of a lineup." *Zeiler*, 427 F.2d at 1307. The court distinguished Simmons v. United States, 390 U.S. 377 (1968) (no right to counsel at photographic identifications prior to arrest), on the ground that "when as in the present case, the investigation has resulted in the arrest of an accused, the right to counsel attaches." *Zeiler*, 427 F.2d at 1307 n.3. The court held that an exclusionary rule required reversal. *Id.* at 1307 (citing Gilbert v. California, 388 U.S. 263, 273 (1967)).

49 According to the circuit court, the trial court erred in finding that the government had established that the witnesses had not been improperly influenced. The Third Circuit reviewed the record on appeal and emphasized the suggestive features of the photographic array:

> Those of the other men were police "mug shots" . . . . In contrast, the three pictures of Zeiler were ordinary snapshots; a difference which could easily have impressed the viewers who were all aware that a person thought to be the "Commuter Bandit" had only recently been apprehended. Even more suggestive was the fact that only Zeiler was pictured wearing eyeglasses, as the actual perpetrator of the robbery had done.

Zeiler, 427 F.2d at 1308. The robbery for which Zeiler was convicted at his second trial occurred some three and a half years before the suggestive confrontations. In addition, none of the witnesses was able to view the robber for more than a few minutes. None of them knew Zeiler. The court found nothing unusual in his appearance. In such circumstances, susceptibility to suggestion and the danger of misidentification are particularly grave. The district court seems to have given decisive weight to the unequivocal way in which the witnesses identified Zeiler in the courtroom. However, their certainty is irrelevant to the issue whether, consciously or subconsciously, that very in-court confidence

for an evidentiary hearing as to whether the in-court identifications introduced at the first trial conformed to due-process standards.[50]

Upon remand the trial court found no significant difference between the suggestive pretrial photographic identifications made by witnesses at the first and second trials, and the government appealed. The circuit court reversed the trial court's exclusion of the identifications, concluding that the government had proven by clear and convincing evidence that the identifications had an independent source.[51] The court emphasized that the eyewitnesses at the first trial had had greater opportunity to observe the suspect[52] and that the photographs displayed to the witnesses had been less suggestive.[53]

The court reviewed the prosecution for a third time after the defendant was again convicted of the three robberies. In affirming the convictions, it found no improper government conduct and observed that the opportunity to cross-examine adequately protected the defendant.[54] Although jury instructions were not at issue, the court opined: "The danger that the jury may give undue weight to eyewitness' testimony can be further guarded against by appropriate jury instructions."[55]

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in identification had been built up by the prior suggestive confrontation. *Id.* In remanding the conviction resulting from the second trial, the Third Circuit directed that the witnesses not be permitted to identify the defendant upon retrial. *Id.* at 1309.

50 The trial court was instructed to determine whether the government could meet its burden by "clear and convincing evidence" that the in-court identifications were not influenced by the improper photographic identifications. *Id.*

51 United States v. Zeiler, 447 F.2d 993, 994, 997 (3d Cir. 1971).

52 The witnesses at the second trial had made the photographic identifications within six weeks of observing the robber, and their photographic identifications were consistent with the general descriptions they had given of the criminal. In contrast, the witnesses at the first trial had delayed making identifications for over three years. *Zeiler*, 447 F.2d at 996.

53 The court emphasized that the photographic arrays differed significantly: "[N]one of the specific elements of suggestiveness which we found in the photographic array shown to the witnesses at the second trial are present here." *Id.* at 995.

54 United States v. Zeiler, 470 F.2d 717 (3d Cir. 1972) [hereinafter *Zeiler III*]. Inculpatory evidence included the in-court identifications that the Third Circuit had previously ruled were admissible. On appeal the defendant challenged in-court identifications on the ground that they had been improperly influenced by pretrial publicity—an issue that the court had skirted in its prior review. *Zeiler*, 427 F.2d at 1308 n.4; *Zeiler*, 447 F.2d at 996.

55 *Zeiler*, 470 F.2d at 720. In the note to this text, the court cites and quotes United States v. Barber, 442 F.2d 517, 528 (3d Cir.), *cert. denied*, 404 U.S. 958, 404 U.S. 846 (1971). Failure to give appropriate jury instructions was never raised in *Zeiler III*, and the opinion does not indicate whether any identification instructions were given. At the second trial, however, the jury had been instructed as follows:

> "If you believe that a witness' identification of the defendant Zeiler as the robber was a product of viewing photographs of him in combination with photographs of other persons, or from watching television pictures of him or from looking at news-

b. Retreat from Constitutional Grounds for Exclusion of Identification Evidence

The Third Circuit's repeated review of the robbery prosecution led it to confront problems with constitutional limits on identification evidence. During the course of the ongoing prosecution, the circuit court published an opinion (in an unrelated case) that overruled its initial holding that had recognized a right to counsel at pretrial photographic identifications.[56] Rejection of the right to counsel at photographic identifications was required by closer constitutional analysis,[57] by the conflict between the right and other constitutionally protected interests,[58] and by the detrimental effect

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paper pictures of him, shown to or viewed by that witness after the arrest of Mr. Zeiler in June, 1967, and that a witness' identification of Zeiler was not an independent recollection of the robber as she or he saw him at the time of the robbery, then you should disregard the testimony of such witness."

Zeiler, 296 F. Supp at 229 n.10.

56 United States *ex rel.* Reed v. Anderson, 461 F.2d 739, 745 (3d Cir. 1972) (en banc). Distinguishing lineups from photographic identifications, the court in a volte-face held that the sixth amendment did not attach to pretrial photographic identifications, even after arrest. It reasoned that uncounseled lineups presented greater dangers of suggestiveness than photographic identifications.

The court confronted the problem that absence of both the accused and counsel made it virtually impossible for the defendant later to reconstruct the identification procedure and to challenge effectively a suggestive identification or, indeed, preserve the circumstances of identification for judicial consideration. But the court viewed the problem as less serious when identifications were made from photographs: "[I]t is relatively simple to reconstruct identification by photographs in the presence of the judge and jury." *Id.* at 742. The court cited as example its own determination in *Zeiler I* that the photographic display to witnesses of the second trial had been improperly suggestive. *Id.* at 743.

57 In overruling *Zeiler I*, the Third Circuit construed relevant Supreme Court cases more narrowly. "In the various Supreme Court articulations of Sixth Amendment requirements of counsel, there appears one omnipresent characteristic common to the diverse fact situations—the physical presence of the accused at the 'critical stage.' " *Id.* at 741-42 (citations omitted). The circuit's treatment of the issue anticipated the authoritative ruling of United States v. Ash, 413 U.S. 300 (1973).

58 The circuit came to fear that requiring counsel at routine photographic identifications might encourage undesirable arrests and detentions during preliminary stages of investigations. Judges Adams and Van Dusen, who had participated in the panel that decided *Zeiler I*, subscribed to a concurring opinion that explained their change of interpretation of the application of the sixth amendment to photographic identifications. They suggested that 1) the possibility of error was not so great as to warrant a *per se* exclusionary rule, and 2) there was no "sufficient demonstration by empirical data" that prosecutors were routinely abusing photographic identification procedures. *Reed*, 461 F.2d at 747 (Adams, J., concurring). In a footnote, however, the concurrence also identified important policy considerations: "I am concerned that a logical extension of *Zeiler* would be to apply its holding to a case where the police had probable cause to make an arrest, but delayed in order to facilitate a photographic identification in the absence of counsel." *Id.* at 747 n.3. One consequence feared by the concurrence was that law enforcement forces would be pressured into making premature arrests so that counsel could be appointed and sanitize any photographic identification, thus both restricting

of such a right on law enforcement.[59] Moreover, the right did not ultimately assure more accurate identifications.

The opportunity for meaningful judicial review of faulty identifications provided support for the circuit court's refusal to extend the right to counsel to photographic identifications.[60] Yet in its subsequent review of the robbery prosecution, the court refrained from exploring the circumstances of the identification process: it placed the burden on the defendant to establish that the identification procedure had been so defective that subsequent identifications were inadmissible.[61] The court effectively created an appellate presumption in favor of admissibility and shielded trial court evidentiary determinations from review except for abuse of discretion.

The Third Circuit understood implicitly that its disposition of constitutional issues did not remove the dangers presented by eyewitness identifications. The circuit again relied on safeguards that might be provided by special jury instructions, citing its recent opinion that imposed "mandatory jury instructions designed to protect the accused in the trials of federal crimes where factors not conducive to proper identification are not present."[62] The retreat from constitutional safeguards increased the need for alternative methods to reduce dangers of misidentification.

c. "Mandatory" Particularized Identification Instructions

In *United States v. Barber*,[63] the Third Circuit adopted special instructions as a method of reducing the dangers of eyewitness identification evidence: "In the exercise of our supervisory power over the trial courts in this judicial circuit . . . we believe that the time has come to require new dimensions to jury instructions on identifica-

investigation of crimes and affecting adversely those suspects later determined to be innocent. *Id.*

59 The court noted that photographic identifications were often necessary to the prosecution, *id.* at 740 n.2, and noted further that the Supreme Court in United States v. Wade, 388 U.S. 218 (1967) (recognizing the right to counsel at custodial lineups), had observed the absence of countervailing interests: "Unlike the circumstance in *Wade*, we believe there are countervailing policy considerations in the use of photographic identification." *Reed*, 461 F.2d at 744.

60 *Id.* at 745.

61 The Third Circuit addressed separately the prisoner's argument that the photographic identification was so improperly suggestive that it violated his right to a fair trial under the fifth and fourteenth amendments; it remanded for determination of suggestiveness. *Id.* at 746.

62 *Id.* at 744 (citing United States v. Barber, 442 F.2d 517, 528 (3d Cir.), *cert. denied*, 404 U.S. 958, 404 U.S. 846 (1971)). Of course, because the jury instructions were required only under the court's supervisory jurisdiction, they provided no safeguard for the state petitioner.

63 442 F.2d at 526.

tion." The opinion reviewed convictions of seven defendants who had been part of a crowd that had assaulted two FBI agents and effected the escape of a prisoner in federal custody.[64] Among the issues on appeal was the adequacy of an identification instruction.[65] The court did not reverse on that ground but observed generally that identification instructions were desirable in this case:

> An affray of such short duration, involving so many participants, affords but limited opportunities for witnesses to observe and to make positive identifications. Under such circumstances it would be desirable to include, at the very least, an instruction that identification testimony should be received with caution and scrutinized carefully.[66]

The opinion emphasized the dangers of misidentification.[67] Following the approach of Pennsylvania state courts, the Third Circuit required that jurors in future cases be instructed expressly to resolve conflicts or uncertainty regarding the issue of identification.[68]

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64 *Id.* at 520.

65 The trial court had instructed the jury as follows:

> "The accuracy of an identification of a particular defendant by a witness in this case must be determined from all the circumstances relating to that identification. In this connection, if you believe from all the evidence and circumstances pertaining to a particular defendant that there is reasonable doubt as to the accuracy of the identification of that defendant as a participant in the acts charged in the indictment, then you must find him not guilty."

Id. at 525. Defendants had requested the following instruction:

> "Testimony with respect to identification must be scrutinized with great care. The possibilities of human errors and mistakes and the similarity of many persons with one another are elements which you must take into consideration. . . . I caution you very carefully to consider . . . methods of identification in great detail . . . . Especially where a witness claims to have identified a particular defendant when he had no familiarity with such defendant prior to the incident you must recognize that such a witness is expressing an opinion which he may have formed in great haste and in circumstances of considerable excitement."

Id. at 525 n.8.

66 *Id.* at 525.

67 *Id.* (citing United States v. Wade, 388 U.S. 218, 228 (1967)). The court observed that the major cause of wrongful convictions was not use of confessions but use of eyewitness identifications. *Id.* at 526 n.9 (citing Quinn, *In the Wake of* Wade: *The Dimensions of Eyewitness Identification Cases*, 42 U. COLO. L. REV. 135 (1970)).

68 *See* Commonwealth v. Kloiber, 378 Pa. 412, 424, 106 A.2d 820, 826-27, *cert. denied*, 348 U.S. 875 (1954); Commonwealth v. Wilkerson, 204 Pa. Super. 213, 203 A.2d 235, 237 (1964).

In Commonwealth v. Kloiber, 378 Pa. at 423-27, 106 A.2d at 826-28, the court affirmed robbery convictions where inculpatory testimony included positive in-court identifications by two eyewitnesses who had previously failed to identify the defendant on two occasions. The trial court had refused to give an instruction requested by defendant that " '[n]o class of testimony is more uncertain and less to be relied upon than that as to identity,' " *Id.* at 423, 106 A.2d at 826 (emphasis omitted), which language derived verbatim from a prior Pennsylvania case, Commonwealth v. House, 223 Pa. 487, 493, 72 A. 804, 806 (1909). In affirming the conviction, the court expressly criticized the prior language: "We believe such a generalization is too broad a statement of the general principle or rule of law on this subject and a trial Judge should not so charge the

The circuit court directed that the instructions focus on the formation and weight of identification testimony: "The jury will be instructed that identification may be made through the perception of any of the witness' senses, and that it is not essential that the witness himself be free from doubt as to the correctness of his opinion."[69] It established a four-part test on the reliability of identification testimony. If the four criteria were met, the jury would be permitted to treat the identification as a statement of "fact" by the witness,[70] but if the criteria were not all met, the court was required to instruct the jury to receive the evidence with caution:

> The identification testimony may be treated by the jury as a statement of fact by the witness: (1) if the witness had the opportunity to observe the accused; (2) if the witness is positive in his identification; (3) if the witness' identification testimony is not weakened by prior failure to

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jury." *Kloiber*, 378 Pa. at 424, 106 A.2d at 826. The court rather elaborated a two-part analysis:

> Where the opportunity for positive identification is good and the witness is positive in his identification and his identification is not weakened by prior failure to identify, but remains, even after cross-examination, positive and unqualified, the testimony as to identification need not be received with caution—indeed the cases say that " 'his [positive] testimony as to identity may be treated as the statement of a fact.' " . . . On the other hand, where the witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identity are weakened by qualification or by failure to identify defendant on one or more prior occasions, the accuracy of the identification is so doubtful that the Court should warn the jury that the testimony as to identity must be received with caution.

Id. at 424, 106 A.2d at 826-27 (citations omitted). The obligation to admonish was satisfied by the trial court's charge, which had alerted the jury to "accept such testimony with caution." *Id.* at 423, 106 A.2d at 826.

Some of the federal trial courts in Pennsylvania adopted the Pennsylvania state approach. In United States v. Edward, 439 F.2d 150 (3d Cir. 1971) (per curiam), the court affirmed conviction of a bank robber who challenged the failure of the trial court to admonish the jury about dangers of identification testimony. The claim was rejected because the trial court had in fact admonished the jury that "no class of testimony is more uncertain and less to be relied on than that as to identity" and had instructed the jury to "consider the circumstances stated by each witness and the opportunities they had for a safe conclusion with respect to identity." *Id.* at 151. Judge Freedman participated in the panel that decided *Edward* and also participated in the consideration of *Barber*, but died prior to the filing of the opinion. *See* United States v. Barber, 442 F.2d 517, 520 n.* (3d Cir.), *cert. denied*, 404 U.S. 953, 404 U.S. 846 (1971).

69 *Id.* at 528.

70 The opinion was ambiguous as to whether the court should include the four criteria in its instruction to the jury or whether, when the four criteria were present, the court should instruct the jury to consider the identification as a statement of fact. *Id.* At least one trial court read the indented text of the opinion as appropriate jury instructions. *See* United States v. Corbitt, 368 F. Supp. 881, 889 (E.D. Pa. 1973), *aff'd without opinion*, 497 F.2d 922 (3d Cir.), *cert. denied*, 419 U.S. 999 (1974).

The First Circuit also read *Barber* as requiring a charge to the jury that they receive an identification as a statement of fact when the identification was not weakened by absence of any criterion for admonitory instruction. United States v. Kavanagh, 572 F.2d 9, 11 (1st Cir. 1978).

identify or by prior inconsistent identification; and (4) if, after cross-examination, his testimony remains positive and unqualified. In the absence of any one of these four conditions, however, the jury will be admonished by the court that the witness' testimony as to identity must be received with caution and scrutinized with care. The burden of proof on the prosecution extends to every element of the crime charged, including the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime for which he stands charged.[71]

d. Circumstances That Require Particularized Identification Instructions

Because *Barber* required special identification instructions prospectively only, the opinion did not address whether an instruction would have been required under the facts of that case.[72] Nor did the court determine whether the appellants had properly presented and preserved the issue at trial.[73] But the circuit subsequently held that failure to give the instruction required under *Barber* was not reversible error unless requested.[74] The circuit has also suggested that omission of the instruction might not constitute reversible error, even if an instruction were requested.[75]

In affirming a conviction for the sale of narcotics that was supported by identification testimony of an informant and of the arresting officer, the circuit concluded that the informant had had ample opportunity to observe the defendant and that his identification satisfied the criteria set forth in *Barber*.[76] The circuit conceded, how-

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71 *Barber*, 442 F.2d at 528 (footnote omitted). The opinion had previously emphasized the need for flexibility in form instructions, *id.* at 527, and the indented text was preceded by the observation that "we approve for use . . . the *approach* taken by the Pennsylvania courts . . . and require . . . only that such instructions satisfy the following [guidelines] . . . ." *Id.* at 528 (emphasis added).

72 It appears that the admonition would have been required as to the identification of at least one defendant because one witness gave inconsistent testimony about that defendant's participation in the assault. *See id.* at 522-23.

73 *See id.* at 526 n.11 ("[W]e put aside the question whether the requested instruction failed to meet the requirements of FED. R. CRIM. P. 30.").

74 United States v. Wilford, 493 F.2d 730, 736 (3d Cir.), *cert. denied*, 419 U.S. 851 (1974). The court said,

> To hold that it is plain error to fail to give a special charge in the circumstances of this or similar cases would only encourage lethargy on the part of counsel, and would permit counsel to sow the seeds of error by remaining mute until after the verdict is returned.

Id. Judge Adams dissented. *Id.*

75 "Because there was no request we need not decide whether, had a request been made, a failure to grant a request in this case would constitute harmless error." *Id.* at 735.

76 The court characterized the real issue posed by the informant's testimony as one of bias and credibility. *Id.*

ever, that the arresting officer's limited opportunity to observe the defendant and prior uncertain identification "did raise an issue of the possibility of mistaken identification."[77] The court discounted the importance of the officer's testimony, however, noting that the officer's identification placed the defendant only near the scene of the crime—a fact that was not disputed—and was thus of itself "at most tangential to the central question" of the informant's credibility.[78] In a later case, a trial court justified its refusal to give the special instruction required under *Barber* in part because the identification placed the defendant only near the scene of the crime.[79]

2. *The District of Columbia Circuit*

The United States Court of Appeals for the District of Columbia Circuit required particularized identification instructions as a result of the convergence of two separate lines of authority within the circuit. On the one hand, the circuit had recognized the need for instructions in order to present clearly to the jury the issue of identity in certain cases where identification was disputed.[80] On the other hand, as a result of constitutional limits on identification evidence, the circuit became increasingly sensitive to dangers of eyewitness identification and required particularized instructions designed to alert jurors to circumstances that aggravate dangers of

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77 *Id.*

78 *Id.*

79 United States v. Johnson, 386 F. Supp. 1034 (W.D. Pa. 1974) (denying motion for new trial after convictions for armed robbery and assault), *aff'd without opinion*, 519 F.2d 1398 (3d Cir.), *cert. denied*, 423 U.S. 933 (1975). The case illustrates some of the problems that arise from the distinction between direct and indirect identification evidence. The robbers had escaped from the scene of the crime into some woods. *Id.* at 1036. The witness testified that she observed the defendant in the woods shortly after the robbery and that he had worn a long dark coat. *Id.* The defendant was apprehended emerging from the woods but without a coat. *Id.* A long dark coat was found discarded in the woods. *Id.* Thus if the identification was believed, it was virtually impossible that the defendant was not the criminal.

The trial court justified the failure to give a particularized identification instruction on the grounds that the court had instructed generally on the circumstances of the identification: "These instructions were more than the defendant was entitled to, for the court was under no obligation to give a special instruction as to the possible unreliability of identification testimony especially when the identification was not made in the bank at the time of the robbery." *Id.* at 1036 (citing United States v. Barber, 442 F.2d 517, 525-26 (3d Cir.), *cert. denied*, 404 U.S. 958, 404 U.S. 846 (1971); United States v. Moss, 410 F.2d 386 (3d Cir.), *cert. denied*, 396 U.S. 993 (1969)). The court also observed that "review of the testimony and exhibits indicates that there was overwhelming evidence . . . of the defendant's guilt." *Id.* Evidence included his proximity to the crime, the similarity of his appearance to the criminal's, and his possession of proceeds of the crime. *Id.* at 1037.

80 *See infra* notes 84-100.

misidentification.[81] Influenced by Third Circuit authority, the District of Columbia Circuit in turn influenced other courts:[82] particularized identification instructions have become widely known as *Telfaire* instructions after the style of the leading District of Columbia Circuit case, *United States v. Telfaire*.[83]

a. Pre-*Telfaire* Cases Requiring Instruction on the Issue of Identity

In 1942, the District of Columbia Circuit reversed a conviction in a death penalty case where the jury was not instructed on identification.[84] The court held that "the failure to say in plain words that if the circumstances of the identification were not convincing, they should acquit, was error."[85] But subsequent cases construed the holding narrowly and distinguished it on grounds that the trial instructions had failed properly to instruct on the burden of proof,[86] that an identification instruction had been requested,[87] and that the death penalty had been imposed.[88]

In 1965, the court reversed a conviction for the sale of narcotics where the trial court had failed to give a requested instruction on identification but had instructed generally on the government's burden of proof.[89] Judge Skelly Wright, in a short opinion that neither discussed the evidence nor described the circumstances of identification,[90] rejected the government's argument that proper burden-

81 *See infra* notes 101-02.

82 *See, e.g., infra* note 163.

83 469 F.2d 552 (D.C. Cir. 1972).

84 McKenzie v. United States, 126 F.2d 533 (D.C. Cir. 1942).

85 *Id.* at 536.

86 Jones v. United States, 307 F.2d 190 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 919 (1963); Obery v. United States, 217 F.2d 860 (D.C. Cir. 1954), *cert. denied*, 349 U.S. 923 (1955).

87 *See* Salley v. United States, 353 F.2d at 898 (D.C. Cir. 1965); *Jones*, 307 F.2d 190; *Obery*, 217 F.2d 860.

88 *See Salley*, 353 F.2d at 898; *Jones*, 307 F.2d 190; *Obery*, 217 F.2d 860.

89 The requested instruction directed the jury's attention to the issue of identification but did not alert the jury to circumstances that made identification unreliable. *Salley*, 353 F.2d at 899 n.2 (court quoted requested instruction). The trial court had instructed properly on the general burden of proof of each element and further instructed, " 'If . . . you find that the defendant did not make the sale . . . you will find the defendant not guilty on each count. And if you have a reasonable doubt as to whether the defendant did or did not make the sale, you will also find the defendant not guilty.' " *Id.* at 898 n.1.

90 From the rationale offered for the requirement of an identification instruction, it is clear that the disputed identification was made by an undercover police officer.

Other aspects of the record concerned the court; it noted, "There are, in addition, a number of other grounds which independently require reversal, but we do not discuss them at length." *Id.* at 899. It remanded for trial before a different judge. *Id.* (citing Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962)). *Naples* had itself cited Calvaresi

of-proof instructions presented the jury adequately with the issue of mistaken identification: "It may be that some jurors drew this conclusion, but the matter is too important to be left to inference and speculation."[91] The court relied for authority not on cases requiring identification instructions, but on cases holding that the failure to instruct on the "defendant's theory of the case" was reversible error.[92]

The opinion evinced special concern with dangers of misidentification that resulted from undercover police investigations of drug offenses:

> The widespread police practice of utilizing undercover agents and informers to infiltrate the narcotics underworld . . . creates added danger that the innocent may be convicted. The undercover agent often files for as many as 100 warrants after his tour of duty, which generally lasts for a number of months. During that time he meets many people, making buys from some and not from others. The possibility of error due to mistake and the fallibility of human memory is obvious.[93]

The opinion emphasized that a defendant who had been misidentified by a police officer was often forced to defend by appealing to juror uncertainty about the identification. Implicit in the court's reasoning was the recognition of the difficulty of effectively challenging the credibility of a police officer.[94]

Within a year, however, the court limited the requirement of identification instructions to cases involving "identification in multiple unrelated narcotics purchase cases"[95] and held broadly that a requested identification instruction need not be given in a robbery case.[96] Contrary to Judge Skelly Wright's prior reasoning, the circuit held that a general instruction on the government's burden of

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v. United States, 348 U.S. 961 (1955), and Blunt v. United States, 244 F.2d 355 (D.C Cir. 1957). *Naples*, 307 F.2d at 631 n.43. The cases all contained oblique references to some evidence of bias by the trial court. *See Blunt*, 244 F.2d at 365.

91 *Salley*, 353 F.2d at 899.

92 *Id.* at 898 (citing Levine v. United States, 261 F.2d 747, 748 (D.C. Cir. 1958); Tatum v. United States, 190 F.2d 612, 617 (D.C. Cir. 1951)). The court emphasized that, though an identification instruction was mandatory if requested, a trial court need not adopt the language of the instruction tendered by defense counsel; the court was, however, "obligated to instruct the jury that if there was a reasonable doubt as to the identification of the defendant as the person who made the sale, then the jury should acquit." *Id.* at 899.

93 *Id.* at 898-99.

94 Often the only chance a defendant has to defend himself without accusing the officer of total fabrication is to raise in the jury's mind a reasonable doubt as to whether the defendant was, in fact, the seller. A requested instruction specifically bringing this defense of mistaken identity to the jury's attention in a narcotics case must be given.

Id. at 899.

95 Jones v. United States, 361 F.2d 537, 542 (D.C. Cir. 1966).

96 *Salley*, 353 F.2d at 898-99.

proving each element was adequate.[97] Nevertheless, the court suggested that identification instructions should be given in similar cases.[98] This suggestive dictum—rather than the holding—was cited a little over a year later by Judge Skelly Wright in an opinion reversing murder and robbery convictions that had been supported by conflicting identification testimony:

> The instructions to the jury in this case were deficient. In spite of the fact that the only real issue presented by the evidence was the identification of the defendant, no charge on identification was given. . . . [T]he jury's attention was not focused on the fact that it not only had to find beyond a reasonable doubt that the crimes had been committed as charged before the defendant could be convicted, but also that beyond a reasonable doubt it was the defendant on trial who had committed them.[99]

Judge Skelly Wright also expressed concern with the dangers of misidentification: "An identification instruction alone will not, of course, obviate the danger. But at least it is a step in the right direction. That step should have been taken in this case."[100]

The circuit's growing concern with problems of misidentification was connected closely with the elaboration of constitutional safeguards by the Supreme Court. Judge Skelly Wright specifically urged that identification instructions be amplified by reference to the Supreme Court's observations on circumstances affecting identification.[101] And Chief Judge Bazelon, in a separate opinion in two cases that questioned the right to counsel during identifications made from photographs of lineups, wrote broadly of the failure of constitutional authority to address adequately inherent problems in the process of identification.[102]

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97 *Jones*, 361 F.2d at 541. The record indicated that identification had been a critical issue at trial, and circumstances of the crime reported in the opinion indicated the possibility of misidentification: the robber had concealed part of his face during the robbery, the witness initially identified the defendant from an array of seven to ten photographs, and later identified the defendant in isolation at a room in a courthouse. *Id.* at 538-39.

98 *Id.* at 542.

99 Gregory v. United States, 369 F.2d 185, 190 (D.C. Cir. 1966).

100 *Id.* (citing *Jones*, 361 F.2d 537; *Salley*, 353 F.2d 897). The court articulated five other important grounds for the reversal. *See Gregory*, 369 F.2d at 187-92.

The opinion did not indicate whether an identification instruction had been requested, but in a later case Judge Skelly Wright addressed that problem. Affirming a robbery conviction, the court held specifically that general instructions on burden of proof on all elements were adequate where no identification instruction had been requested at trial. The court noted, however, that "this type of general instruction would not meet the need for a specific identification instruction if requested." Macklin v. United States, 409 F.2d 174, 177 n.3 (D.C. Cir. 1969) (Skelly Wright, J.). The court again took the opportunity to exhort trial courts to instruct on identification. *Id.* at 178.

101 *Id.*

102 The Chief Judge admitted the limited efficacy of the procedural safeguards that he

b. *Telfaire* and the Prospective Requirement of Particularized Identification Instructions

In *Telfaire*, the District of Columbia Circuit affirmed a robbery conviction that was supported by the uncorroborated testimony of the eyewitness victim.[103] No instruction had been given at trial on the issue of identification.[104] The court acknowledged the need for both the one-witness rule[105] and the absence of those circumstances that might indicate a danger of misidentification.[106] It attributed importance to detailed alibi and burden-of-proof instructions: "[W]e are satisfied that the attention of the jury was significantly focused on the issue of identity."[107]

But the circuit strongly encouraged use of particularized identification instructions. Reviewing previous circuit authority that recognized benefits of cautionary instructions on the dangers of misidentification, it adopted and expanded upon language from Third Circuit authority.[108] The opinion included as an appendix the

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unsuccessfully advocated: "Of course, not all of the problems connected with identifications can be fully cured by requiring the presence of counsel. One critical problem concerns their reliability, yet courts regularly protest a lack of interest in the reliability of identifications, as opposed to the suggestivity that may have prompted them . . . ." United States v. Brown, 461 F.2d 134, 145 n.1 (D.C. Cir. 1972) (Bazelon, C.J., concurring and dissenting) (citing United States v. Ash, 461 F.2d 92 (D.C. Cir.), *rev'd*, 413 U.S. 300 (1972)). The Chief Judge observed that eyewitness identifications were statistically as unreliable as lie-detector tests, which were routinely excluded because of their unreliability. *Id.* He cited empirical and psychological studies that demonstrated inherent problems in the process of identification and suggested that the judiciary had not addressed the question of jurors' ability to evaluate identification testimony. *Id.* at 146 n.1. He further criticized the judicial reluctance to address the problem of accuracy of interracial identifications. *Id.*

103 *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

104 Although a cautionary instruction was not tendered, the court did not rely on that fact in its holding; it characterized the trial court's error as its "fail[ure] to initiate a special instruction on identification even in the absence of request by defense counsel." *Id.* at 554.

105 *Id.*

106 The court emphasized that the facts presented "none of the special difficulties often presented by identification testimony that would require additional information be given to the jury." *Id.* at 556. The court pointed to the fact that the victim had an adequate opportunity to observe the robber and had made a spontaneous identification soon after the crime. *Id.* In finding no prejudice from the absence of the instruction, the court relied on prior District of Columbia Circuit authority in which benefits of identification instructions had been recognized but in which failure to instruct had been deemed nonprejudicial. *Id.* (citing United States v. Shelvy, 458 F.2d 823 (D.C. Cir. 1972); Macklin v. United States, 409 F.2d 174 (D.C. Cir. 1969)).

107 *Telfaire*, 469 F.2d at 556. Although the court also alluded to "follow-on instructions dealing with . . . the problem of mistaken identity," *id.*, the instructions quoted by the court did not deal with that issue apart from the issue of alibi and burden of proof. *Id.* at 556 n.13.

108 *Id.* at 557 (citing Barber v. United States, 442 F.2d 517, 528 (3d Cir.), *cert. denied*,

text of a model particularized identification instruction,[109] and the circuit exhorted trial courts to use the model instruction in future cases, suggesting that omission of the instruction would result in reversal.[110]

c. Circumstances in Which Identification Instructions Must Be Given

Since *Telfaire*, the District of Columbia Circuit has affirmed convictions despite the omission of identification instructions when no instruction was requested or when defense counsel did not preserve at trial objections to jury instructions. The first case to challenge a trial court's omission of the model *Telfaire* instruction[111] stemmed from a trial that predated the circuit's promulgation of the *Telfaire* instruction at which the trial court had given the pre-*Telfaire* model instruction on mistaken identity. In affirming, the circuit court did not attach significance to the time of the trial; instead it emphasized that the defense had preserved no objection at trial to the omission of the instruction and had, on the contrary, expressed satisfaction with the instruction.[112] The circuit further reviewed the record on appeal, concluding that evidence of guilt was overwhelming.[113]

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404 U.S. 958, 404 U.S. 846 (1971); citing United States v. Edward, 439 F.2d 150 (3d Cir. 1971)). The *Telfaire* opinion was published per curiam with separate concurrences by Chief Judge Bazelon and Judge Leventhal.

109 *Id.* at 558-59; *see also* District of Columbia Criminal Jury Instructions 5.06, *reprinted in* 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 15.19 at 477-78 (3d ed. 1977).

The model instruction did not address special problems of cross-racial identifications, the need for which was controversial and was addressed by the concurring opinions. *Telfaire*, 469 F.2d at 559-61 (Bazelon, C.J., concurring) (urging the adoption of language apprising jurors of problems inherent in cross-racial identifications and proposing a model instruction); *Id.* at 561-63 (Leventhal, J., concurring) (defending the refusal to promulgate such additional instruction).

110 The court cautioned, "It is not being set forth in terms of compulsion, but a failure to use this model, with appropriate adaptations, would constitute a risk in future cases that should not be ignored unless there is strong reason in the particular case." *Telfaire*, 469 F.2d at 557.

111 United States v. Thomas, 485 F.2d 1012, 1013-14 (D.C. Cir. 1973).

112 *Id.* at 1013.

113 "We think the court's instruction on the identification testimony was adequate. In any event counsel did not object to it; and the evidence of the appellant's guilt was overwhelming." *Id.* at 1014. The crimes included an armed robbery at a store and an assault on two police officers while fleeing. *Id.* at 1013. An officer observed the defendant acting furtively before the robbery and saw him again while fleeing. *Id.* The officers pursued the defendant and apprehended him shortly after the crimes. *Id.* at 1014. They found him hiding in a nearby building, and they found a discarded jacket and weapon like those used in the robbery in or near the same building. *Id.*

It was not clear from the opinion which witnesses had identified the defendant. Two store employees had misidentified the criminal during a custodial lineup. *Id.* (he

In the second case to appeal the issue of trial court failure to give a *Telfaire* instruction, the defense had also expressed satisfaction with the instruction.[114] Danger of mistaken identification was minimal because the defendant was known to the witness, and a particularized identification instruction was superfluous.[115] In affirming, the circuit court again noted the failure to object but grounded its holding directly on its conclusion that an identification instruction was inappropriate under the facts; a *Telfaire* instruction would have confused rather than clarified the issues.[116]

The circuit has subsequently left cases involving problematic identification evidence to the jury when *Telfaire* instructions are given,[117] but it has recognized that the instructions do not remove all dangers of misidentification. The Court confronted problems posed by eyewitness identifications in an unusual case during which

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had cut his hair in the meanwhile, and they both identified a person in the lineup with long hair). It is not clear whether they properly identified the defendant at trial and whether the police officers also identified the defendant at trial. In any event, the identifications were corroborated by flight, concealment, and the recovery of the incriminating items in the vicinity of the defendant. The defendant's explanation for his location in the building was that he was looking for a friend, whose last name he did not know, and whom he had not seen for over a year. *Id.* He also explained that he cut his hair under the advice of a prison doctor. *Id.* He evidently proffered no testimony to corroborate either explanation. *Id.* All identifying witnesses had the opportunity to observe the defendant at close range, in daylight, without any mask. *Id.* at 1013-14.

In another post-*Telfaire* case, the District of Columbia Circuit rejected the argument that the identifying witness was incompetent because of discrepancies in testimony. United States v. Jackson, 509 F.2d 499, 507 (D.C. Cir. 1974). In holding that the issues were properly submitted to the jury, the court noted that the jury was fully aware of inconsistencies and was "deliberating under unchallenged instructions by the judge." *Id.*

114 United States v. Garner, 499 F.2d 536, 537 (D.C. Cir. 1974).

115 Inculpatory evidence was provided by an undercover police officer who had dealt with the defendant on six different occasions, had known the defendant, and had had ample opportunity repeatedly to view and observe the defendant. *Id.* at 538. The officer had initiated contact with the criminal and had approached the criminal and inquired about the sale of narcotics. *Id.* at 537-38.

The defense had really been one of alibi, with the defendant's wife testifying that he had been with her at relevant times. *Id.* at 538. The court characterized the dispute as a simple issue of credibility between the police officer and the defendant: "We think the issue here was one of veracity between Johnson and Garner. Johnson saw and dealt with Garner [repeatedly] . . . so that Garner was well known to him. The instruction suggested in the *Telfaire* case does not focus on identifications of this sort . . . ." *Id.*

116 *Id.*

117 United States v. Butler, 636 F.2d 727 (D.C. Cir. 1980) (affirming various drug-offense convictions that were supported by the uncorroborated testimony of one eyewitness), *cert. denied*, 451 U.S. 1019 (1981).

A dissent emphasized inconsistencies between the pre-arrest description of the criminal and the features of the defendant. *Id.* at 730-38 (Bazelon, J., dissenting). The dissenting opinion reflected Judge Bazelon's growing dissatisfaction with the legal safeguards against dangers of misidentification which he had discussed previously.

the sole eyewitness recanted his identification pending appeal, and the trial judge consequently requested that the case be remanded.[118] No error was alleged in the instructions, but the court cited *Telfaire* on the dangers of misidentification.[119] The court observed, however, that the eyewitness identification had had "all the indicia of reliability to which this court has repeatedly looked."[120]

The court reversed another conviction on grounds of "plain error" where objections to burden-of-proof and alibi instructions had not been preserved at trial.[121] In weighing the risk of error against the evidence of guilt, as part of the plain error calculus, the court emphasized that the alibi testimony presented the jury with an issue of credibility.[122] Citing *Telfaire*, the court observed that dangers of misidentification increased the countervailing need for proper alibi and burden-of-proof instructions.[123]

3. The First Circuit

The United States Court of Appeals for the First Circuit has expressed concern with the danger of misidentification and has approved particularized identification instructions. But it has held that at least under some circumstances the failure to give a requested identification instruction is not reversible error. In affirming an armed robbery conviction, supported in part by inconsistent identification evidence[124] and in part by a web of circumstantial evi-

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118 United States v. Greer, 538 F.2d 437 (D.C. Cir. 1976).

119 *Id.* at 442 n.16.

120 *Id.* at 443. The court discussed the indicia of reliability:

> The victim had a sustained opportunity to observe the robbers; he made the first identification while his memory of the incident was fresh but after the severe emotional distress presumably subsided; there was no hint of suggestivity in the photographs he viewed or in the words of any policeman or prosecutor; and the victim showed a capacity to discriminate in his identifications by identifying only one of the two robbers.

Id. at 443 n.17. The analysis of the indicia was somewhat inconsistent with the court's discussion of the record, which indicated that the eyewitness had sworn in a post-trial affidavit that he had never been positive about the identification and that police had told him repeatedly that the person he had identified had a history of robberies. *Id.* at 441. Moreover, the witness had originally identified the defendant from mugshots at the police station. *Id.* at 439. The court noted the "inherent pressure an eyewitness may feel to select at least one photograph in an array." *Id.* at 443.

121 United States v. Alston, 551 F.2d 315 (D.C. Cir. 1976).

122 *Id.* at 320.

123 *Id.* at 320 n.26 (court did not rely on the absence of a particularized identification instruction, and opinion does not indicate whether a *Telfaire* instruction was requested or given).

124 United States v. Kavanagh, 572 F.2d 9 (1st Cir. 1978). The robbers had worn masks, and none were identified by witnesses at the crime scene. *Id.* at 10. Witnesses along the flight route identified participants in the robbery and established a chain-of-evidence leading the robbers to a taxi. *Id.* Only the testimony of the taxi driver identi-

dence,[125] the court noted that "dangers inherent in eyewitness identifications of strangers have been well chronicled."[126] It expressed its general approval of the instruction that the defendant had unsuccessfully requested at trial[127] but held that the failure to give the instruction was not reversible.

> We join eight other circuits in approving use of the *Barber* charge, or variations of it, in the discretion of the district court, in cases where the evidence suggests a possible misidentification. Under the circumstances here, however, we conclude that the failure to give the requested charge does not warrant reversal.[128]

The First Circuit justified its refusal to promulgate a specific instruction or to require that the trial courts elaborate a suitable instruction by referring to considerations of judicial administration and by relying on the good sense of trial judges.[129] Because the court refrained from requiring identification instructions, the opinion did not confront directly the issue of whether the failure to give an identification instruction would be reversible error absent special circumstances. Rather, the opinion identified factors that supported its conclusion that the failure to instruct was not reversible: 1) the defense counsel's focus on the problem of misidentification during cross-examination and through introduction of other inconsistent identifications; 2) the administration of general burden-of-proof and credibility instructions; and 3) the presence of independent evidence that linked the defendant to the crime.[130]

The standard of review in the First Circuit is ambiguous. The

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fied the defendant as one of the riders in her cab. *Id.* Although the opinion noted that cross-examination had elicited her failure to identify consistently the person with whom the defendant took the taxi, and further elicited prior inconsistent identification of other robbers by non-testifying observers, the taxi driver apparently was not herself inconsistent in identifying the defendant. *Id.* She made no identification from a photographic array that she was first shown, but the array did not include a photograph of the defendant. *Id.* She identified the defendant at a lineup and subsequently identified him at trial. *Id.* at 11.

125 Police recovered the defendant's fingerprints from a newspaper that had been in a car that was seen idling outside the crime scene. *Id.* at 10. The newspaper was published the day of the crime, thus placing the defendant in the car on that day. Police also observed parts of rubber gloves in the car and retrieved corresponding parts of rubber gloves along the flight route of the robbers. *Id.* at 10.

126 *Id.* at 11 (citations omitted).

127 The defendant had requested an instruction drawn from the language approved by the Third Circuit that identification testimony " 'must be received with caution and scrutinized with care.' " *Id.* at 11.

128 *Id.* at 10.

129 *Id.* at 13.

130 *Id.* at 12-13. The court summarized, "The thoroughness of the charge given and the strength of the other evidence of guilt rendered the failure to give defendant's suggested identification charge not prejudicial." *Id.* at 13.

circuit delegated the decision about identification instructions to the "broad discretion" of trial courts, indicating that reversal of such a decision would require an abuse of discretion but characterized the requested instruction as a "useful precaution" and observed that "[t]here would appear to be no reason for not giving such a charge, particularly if counsel so requested."[131] Omission for no reason of a requested instruction that is designed to benefit the defendant and that has been approved by the circuit would seem to constitute abuse of discretion.[132]

4. The Second Circuit

The United States Court of Appeals for the Second Circuit has repeatedly expressed approval of identification instructions. Earlier circuit opinions emphasized the educational function of identification instructions, but its most recent opinion treats the function of identification instructions primarily as a forensic method of articulating the defendant's theory of the case. Because the circuit has not expressly acknowledged the shift or criticized its earlier opinions, the apparent shift may reflect merely an aberration in the rationale offered by one panel rather than a modification of prior circuit authority.

a. Recognition of the Need for Particularized Identification Instructions

Like the Third and District of Columbia Circuits, the Second Circuit required identification instructions in the context of its recognition of the ineffectiveness of constitutional restrictions on identification evidence. In its first case to require a particularized

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131 *Id.* at 12 (citations omitted).

132 In an opinion after *Kavanagh*, the First Circuit considered the trial court's failure to give an identification instruction. United States v. Hickey, 596 F.2d 1082, 1091 (1st Cir.) (The trial court "refused to instruct the jury that . . . [an] in-court identification of [defendant] should be received with caution."), *cert. denied*, 444 U.S. 853 (1979). The opinion noted, however, that the trial occurred before *Kavanagh*. *Hickey*, 596 F.2d at 1091.

As in *Kavanagh*, the government's case in *Hickey* included an in-court identification by a witness who had observed the defendant after the robbery; furthermore, the government had independent evidence. The robbers had worn ski masks, and hairs on a ski mask, sweater, and hair brush recovered from the getaway car were "identical" to defendant's hair. *Id.* at 1084. Nor was there evidence of prior inconsistent identification of the defendant. From the opinion it seems that the key defense strategy was to impeach the credibility of the identifying witness rather than to challenge the accuracy of his identification. The court neither reviewed the evidence nor expressed an opinion as to the propriety of an identification instruction; however, it directed the trial court to "consider whether such an instruction is appropriate" in light of prior circuit authority. *Id.* at 1091 (citing *Kavanagh*, 572 F.2d at 12-13).

identification instruction, the Second Circuit confronted constitutional objections to pretrial photographic identification as well as objections to the trial court's omission of a requested identification instruction.[133]

The circuit opined—though the issue was not presented—that a photographic identification violated no right to counsel although it occurred after indictment and while defendant was in custody.[134] It ruled that pretrial photographic identifications were impermissibly suggestive, yet it did not conclude that the evidence must be excluded. Rather, in turning to the "more doubtful question" of whether admission of the photographic identifications was prejudicial, it concluded that "we cannot say that under the circumstances . . . [the] photographic identification[s] . . . did not play a part in the result."[135] The circuit refrained from holding that the prejudicial identifications by themselves required reversal, grounding its reversal rather in the cumulative effect of errors, including the failure of the trial court to give a requested identification instruction.[136]

The Second Circuit did not promulgate a model instruction, but it expressed approval of particularized identification instructions designed to alert jurors to circumstances that aggravate dangers of misidentification:

> While a defendant is not entitled to a reading of all that was said about the dangers of misidentification in [*Wade* and *Simmons*], we would think it reasonable that a properly drafted instruction, drawing particularly on Mr. Justice Harlan's language in *Simmons*, should be given if re-

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133 The defendant was convicted of armed robbery. United States v. Fernandez, 456 F.2d 638, 639 (2d Cir. 1972) (Friendly, C.J.). Evidence at trial included a side profile of the robber taken by a surveillance camera and photographic and in-court identifications of the defendant by two eyewitnesses to the robbery. *Id.* The photographic identifications were made from a photographic array that included only one photograph of a man with features similar to the defendant—a fair-skinned black man with long hair. *Id.* at 641.

The trial court instructed generally on the burden of proof as to identification but refused to instruct further as requested by counsel; the language of the requested instruction was not preserved in the record. *Id.* at 643. Counsel had objected to the failure to charge that misidentification could result from honest error and that an erroneous photographic identification may affect a later in-court identification. *Id.*

134 *Id.* at 641 n.1. The court suggested that the government might "not only better protect the rights of the defendant" but also strengthen its case by conducting a properly counseled lineup. *Id.*

135 *Id.* at 642.

136 Because of the opportunity for initial observation and the certainty of the first identifications, the court held that subsequent in-court identifications need not be excluded under Simmons v. United States, 390 U.S. 377, 384 (1968). *Fernandez*, 456 F.2d at 642-43. A third error was the trial court's requirement that defense counsel make objections to the charge in the presence of the jury. *Id.* at 642, 644. The third error is unlikely to recur. *See* FED. R. CRIM. P. 30.

quested. Whether failure to do so would constitute reversible error would depend upon the circumstances.[137]

b. Circumstances in Which Failure to Instruct on Identification Is Not Reversible

The Second Circuit considered circumstances that require reversal for failure to give requested identification instructions in a second case alleging a combination of errors which included objections to in-court identifications.[138] In contrast to its previous concern with the cumulative effect of errors, the circuit separately analyzed the objections, concluding that no reversal was warranted because each error alone did not require reversal.[139] First, it held that in-court identifications were not so tainted by suggestive pretrial identification as to require exclusion.[140] Second, it held that there was no error in the trial court's refusal to give a requested identification instruction.[141]

The circuit acknowledged that identification evidence is "notably fallible, and the result of it can be, and sometimes has been . . . the conviction of the wrong man."[142] In holding that the failure to

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137 *Fernandez*, 456 F.2d at 643-44 (citing *Simmons*, 390 U.S. at 383-84; United States v. Wade, 388 U.S. 218, 228-36 (1967)).

138 United States v. Evans, 484 F.2d 1178, 1179-80 (2d Cir. 1973). The defendant was convicted of armed robbery. He had been identified in court by three eyewitnesses to the robbery, and inculpatory evidence included a surveillance film taken of the robbery. *Id.* One of the witnesses had initially been unable to identify the defendant during trial but identified him after her memory had been refreshed by reviewing the surveillance film. *Id.* at 1181.

The identifying witnesses had inconclusively identified the defendant from a photographic array, and the prior inconclusive identifications were placed in evidence. *Id.* at 1180. Each eyewitness had selected the defendant from the array but each also selected another man as the criminal. *Id.* The alternative selections were brought to the attention of the jury, but the opinion does not indicate whether the evidence of the pretrial identifications was elicited during direct or cross examination. *Id.* at 1180-81. The defendant apparently either did not seek to exclude evidence of the photographic identifications or did not preserve objections to their admissibility. Thus, in contrast to *Fernandez*, the court was not presented with the possible cumulative effect of erroneous admission of identification and failure to give the requested identification instructions.

139 *Id.* at 1187-88.

140 The circuit court reviewed the photographic identification and found it to be free of suggestiveness. *Evans*, 484 F.2d at 1185 ("The selection by each of [the witnesses] of [defendant's] photograph, while not wholly positive, was careful and free of any marks of police pressure or suggestion. Indeed, their tentativeness is in itself evidence that the spreads were fair, for if identification is risky, some doubt is customarily to be expected.").

The court separately addressed the argument that the identifications were tainted by the witnesses' review of the surveillance film. The court concluded that the totality of circumstances did not require exclusion of the in-court identification. *Id.* at 1186-87.

141 *Id.* at 1188.

142 *Id.* at 1187.

give the requested instruction was not reversible, it emphasized two circumstances: the "full opportunity afforded to develop all the facts relevant to identification" and the "careful and accurate instructions to the jury."[143]

The court has also held that refusal to give requested identification instructions does not require reversal in cases in which identification is not a critical issue. In one such case the court concluded that equivocal identification testimony was the result of prevarication by an adverse witness, not the result of the inability of an eyewitness to identify accurately.[144] Indeed, the court suggested that it would have been improper under the facts for the trial court to have instructed on misidentification.[145] In another case, the circuit similarly held that no identification instruction was required where neither the witness's extensive opportunity to view the criminal nor the circumstances of the subsequent identification presented any of the dangers of misidentification that special instructions are designed to reduce.[146] It emphasized that "this is not a case involv-

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143 *Id.* at 1188. The instructions relied on by the court were general instructions on credibility. *See id.* at 1188 n.11.

144 United States v. Marchand, 564 F.2d 983 (2d Cir. 1977) (Friendly, J.), *cert. denied*, 434 U.S. 1015 (1978). The court affirmed convictions of possession and distribution of drugs. *Id.* at 1001. Inculpatory evidence had included problematic identification testimony from two accomplices who had known the criminal. *Id.* at 985. The government also introduced evidence of the accomplices' pretrial identifications, which included inculpatory grand jury testimony by one accomplice and a sketch and photographic identifications by another accomplice. *Id.* at 986-87. The Second Circuit held that the trial court did not err in admitting the evidence. *Id.* at 989, 998-99. It further held that the trial court properly refused to give a requested instruction on dangers of eyewitness identification. *Id.* at 997.

145 "[C]ircumstances were such that a cautionary instruction might have led the jury away from the truth rather than toward it." *Id.*

Language in the opinion questioned whether a particularized instruction was mandatory. "The reversal in [*Fernandez*] rested on other grounds. Defendant has cited no decision holding that the giving of such a charge is mandatory, and a number have refused to do so." *Id.* (citing cases from the Second and Third Circuits).

The court grounded its holding on its view that the evidence did not present an issue of identification and that inconsistencies in identifications reflected bias or prevarication on the part of the accomplice witnesses. One of the witnesses had known the defendant for years, and the other had sufficiently observed the criminal to compose a detailed sketch that fit the defendant perfectly. *Id.* at 989.

> [T]he appeal has been presented as if this were a case where there is a substantial doubt that defendant is the person who committed the crime charged. . . . But, as the trial judge and the jury seem to have been well aware, that is not this case at all. The case is rather one of accomplice witnesses, one of whom had known the marijuana supplier for years. The jury could well have inferred that any difficulty these witnesses expressed about identification was due to unwillingness rather than inability to identify.

Id. at 985.

146 United States v. Montelbano, 605 F.2d 56 (2d Cir. 1979) (affirming conviction of truck hijacking where inculpatory evidence included pretrial and in-court identifications

ing 'dubious identifications' "[147] and noted the presence of "overwhelming" inculpatory evidence apart from the identifications.[148]

The circuit has consistently affirmed convictions where defendants did not request identification instructions[149] under a plain error standard of review.[150] But it has continued to refer to identification instructions with approval while holding that their omission does not constitute plain error.[151] Affirming convictions in these cases, the Second Circuit has also reviewed the records on appeal to find factors that tend to reduce the risk of misidentification.[152]

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by driver whose rig was hijacked). The witness had ample opportunity to become familiar with the criminal's appearance and testified that the defendant looked "similar" to the criminal but conceded that he was not certain. *Id.* at 58.

> While [the witness] technically was a victim of the crime . . . his identification of [defendant] was based on close observation of him over a five hour period on the day of the hijacking. [The witness] sat next to [the defendant] in both the truck and the Rambler for long intervals. [The defendant] was not disguised in any way, nor was [the witness's] view obstructed. [The witness's] observation was such that he was able to identify [the defendant] twice after the hijacking—once nine days later at FBI headquarters and again at trial. Despite the wide scope of cross-examination accorded to defense counsel, [the witness's] identification of [the defendant] was never significantly undermined.

Id. at 59.

147 *Id.* (quoting *Marchand*, 564 F.2d at 985).

148 Incriminating evidence included the following facts: the defendant had access to the car that was used in the crime and had driven it on the day of the crime; the defendant gave false alibi evidence; and the defendant had engaged in prior thefts of large quantities of seafood. *Montelbano*, 605 F.2d at 59.

149 United States v. Lewis, 565 F.2d 1248, 1253 (2d Cir. 1977) (defense counsel had refused to submit an identification instruction although the trial court had invited counsel to do so, and the trial court instructed generally on the government's burden of proving the defendant's participation in the crimes), *cert. denied*, 435 U.S. 973 (1978); United States v. Gentile, 530 F.2d 461 (2d Cir. 1976) (though the trial court had indicated during the course of the trial that it would give a cautionary instruction, defense counsel had apparently neither tendered an instruction nor objected to the omission of an identification instruction), *cert. denied*, 426 U.S. 936 (1976).

150 *Lewis*, 565 F.2d at 1253 ("it is better practice to give such a charge" but its omission under the circumstances was not plain error); *Gentile*, 530 F.2d at 461.

151 In *Gentile*, the court cited Second Circuit authority and stated that the cases emphasized "the desirability of giving a properly drafted cautionary instruction on the fallibility of eyewitness identification when requested." 530 F.2d at 469.

152 In *Gentile*, the court characterized the identification in issue as being "so equivocal as to make its fallibility self-evident." *Id.* The opinion noted that the trial court had instructed on credibility and characterized the credibility instruction as "clear and thorough"; it interpreted the instructions as "implicitly caution[ing] the jury about eyewitness identifications based on brief and distant encounters." *Id.* (citing United States v. Evans, 484 F.2d 1178 (2d Cir. 1973) (relying in part on credibility instruction as grounds for not reversing failure to instruct on identification)). Lastly, the court found any error to have been harmless because of extensive evidence of guilt: five other witnesses linked the defendant to the same criminal transaction that was the subject of the problematic

c. Recognition of Identification Instructions as Presenting the Defense Theory of the Case

In a recent discussion of identification instructions,[153] the Second Circuit continued to express concern with the problems of misidentification but refused to require that trial courts give requested identification instructions. In affirming a conviction, a court noted that, though the trial court had not given the requested identification instruction, the trial court had instructed on the government's burden of proving identity.[154] It characterized the identification evidence as "particularly reliable in this case"[155] and concluded that "the jury had the defense theory of misidentification fairly before it."[156] The case may signal greater deference to trial court decision-

identification, and seven other witnesses connected the defendant to other securities fraud crimes that were the subject of the prosecution. *Id.*

In *Lewis*, the court affirmed convictions of armed robbery and conspiracy where the "overwhelming" case against the defendant included recovery of guns in his possession that had been stolen from the crime scene, admission by the defendant of his guilt, identification by a witness who transported the defendant to the crime scene, and identification by an eyewitness to the robbery. 565 F.2d at 1250. The eyewitness to the robbery was unable to identify the defendant at trial; she mistakenly identified a Deputy United States Marshal. *Id.* at 1250 & n.4. Her pretrial photographic identification of the defendant was admitted as evidence. *Id.* at 1250. She again selected at trial the photograph that she had previously identified, but the appellate opinion characterized this not as an in-court identification but as evidence of the prior identification. *Id.* The investigating agent also testified about the witness's pretrial photographic identification. *Id.* In holding that the evidence was not improperly admitted and that the omission of an identification instruction was not plain error, the court noted that the trial court had instructed properly on the burden of proving the defendant's participation in the crimes. *Id.* at 1253.

153 United States v. Luis, 835 F.2d 37, 40-42 (2d Cir. 1987).

154 It is not clear from the opinion whether the defendant requested a detailed cautionary instruction setting forth specific considerations that aggravate dangers of misidentification. The court reported only that the defendant requested the court to instruct that " 'identification of the defendant as the perpetrator' has to be proved beyond a reasonable doubt." *Id.* at 39. The court instructed, however, that "[t]he burden is on the government to establish the identity of that defendant." *Id.* at 40.

155 *Id.* at 41. In assessing the reliability of identification, the court looked to the criteria set forth in Neil v. Biggers, 409 U.S. 188, 199-200 (1972): 1) the opportunity of the witness to view the suspect at the time of the crime; 2) the witness's degree of attention; 3) the witness's accuracy of prior description; 4) the witness's degree of certainty as to the identification; and 5) the length of time between the crime and the courtroom identification. *Id.*

The court emphasized that trained police officers made identifications; that they were especially alert to making an identification at the time they observed the defendant; that they had ample opportunity to observe the defendant; that they gave a sufficiently detailed description of the defendant to lead to his arrest at the scene of the crime shortly after the crime occurred; that they verified that the right person had been arrested shortly afterwards; and that the defendant corresponded to the written description of the criminal recorded by one of the undercover agents. *Luis*, 835 F.2d at 41-42.

156 *Id.* at 41.

making and may also reveal an underlying shift in the circuit's approach to the function of identification instructions.

5. *The Fourth Circuit*

In *United States v. Holley*,[157] the United States Court of Appeals for the Fourth Circuit reversed an armed robbery conviction where inculpatory evidence consisted exclusively of an identification of the defendant by a witness to the crime. The eyewitness had initially failed to identify the defendant in a photograph but later identified the defendant in custody and at trial.[158] The robber's features were concealed during the crime, and two other eyewitnesses had failed to identify the defendant as the criminal.[159]

In contrast, in *United States v. Johnson*,[160] argued the same day as *Holley*, the Fourth Circuit affirmed a robbery conviction where identification evidence was "more convincing" than that in *Holley*[161] and there was inculpatory circumstantial evidence.[162] Both decisions referred to the Fourth Circuit's prospective adoption of a particularized identification instruction modeled on the *Telfaire* instruction.[163] According trial courts some flexibility in the language of the instruction, the court forcefully expressed its concern that an appropriate instruction be given: "Prospectively, we shall view with grave concern the failure to give the substantial equivalent of such an instruction, but it is not our purpose to require that it be given verbatim."[164]

The court sought to harmonize the two holdings, emphasizing that it promulgated the model instruction "in the context of a case that contains no evidence of identification except eyewitness testi-

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157 502 F.2d 273 (4th Cir. 1974) (argued Feb. 5, 1974).

158 The witness identified the defendant at jail, selecting him from 10 persons, and again identified him at trial. *Id.* at 274.

159 *Id.*

160 495 F.2d 377 (4th Cir.) (argued Feb. 5, 1974 before the same panel as *Holley*), *cert. denied*, 419 U.S. 853 (1974). The opinion expressly referred to the holding of *Holley*, which was published about two months later. *See id.* at 377.

161 The identifying witness observed the defendant from a shop outside the crime scene, became suspicious that the defendant was preparing to rob, carefully observed the defendant as he fled from the scene, and followed him. The witness identified a photograph of the defendant, subsequently identified the defendant at a lineup, and identified the defendant at trial. *Id.* at 378.

162 Four fingerprints of the defendant were found in the getaway car, and the defendant's flight to avoid prosecution and use of fictitious names evidenced consciousness of guilt. *Id.*

163 The court noted that the District of Columbia Circuit had relied in part on Fourth Circuit authority, and the Fourth Circuit published the model instruction as an appendix to *Holley*. *Holley*, 502 F.2d at 274-75, 277-78.

164 *Id.* at 275.

mony."[165] But the court did not limit prospective requirement of identification instructions to cases that lacked corroborating evidence; rather, it required that appropriate language be added to instructions in cases where additional evidence was present:

> Where there are corroborating circumstances the district judge will, of course, modify the model instruction so as to refer to them. He will then charge the jury that it must be convinced beyond a reasonable doubt of the accuracy of the identification either by the identification testimony or the other circumstances, if sufficient, or both.[166]

In refusing to reverse in *Johnson*, the court specifically held that omission of the requested identification instruction was not reversible error because the instruction was required prospectively only.[167] But the court also reviewed the evidence in *Johnson* to explain the difference in outcome from *Holley*. Observing that the trial court had instructed generally on the issue of identity in *Johnson*, the court explained that the general instruction did not cure the omission of an identification instruction.[168] The court stated that it would "be inclined to reverse as in *Holley* were it not for circumstances greatly reducing the possibility of misidentification."[169] In reversing *Holley* despite the prospectivity of the requirement of identification instructions, the court explored weaknesses in the identification evidence, which it characterized as "so lacking in positiveness as to strongly suggest the 'likelihood of irreparable misidentification.' "[170]

The circuit subsequently confirmed the prospective effect of its requirement of identification instructions in reviewing an appeal from a robbery conviction that predated its holding in *Holley*. It rejected retroactive application of the model instructions where the trial court had properly instructed under the standard prevailing at the time of trial.[171] The opinion also indicated the presence of in-

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165 *Id.*

166 *Id.*

167 *Johnson*, 495 F.2d at 377 ("We, therefore, hold that at the time Johnson sought a *Telfaire* instruction the refusal to give it was not reversible error.").

168 *Id.*

169 *Id.*

170 *Holley*, 502 F.2d at 276 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)).

171 United States v. Peterson, 524 F.2d 167, 176 n.15 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088, 424 U.S. 925 (1976). The opinion did not state whether the defendant had requested a particularized identification instruction, and it did not attempt to distinguish the factual bases of the identification. The court stated,

> Nor do we find error in the manner the District Judge instructed the jury to receive identification evidence when measured by the then-prevailing standard. . . .
>
> In *United States v. Holley* we *prospectively* adopted a more detailed model instruction on the evaluation of identification evidence patterned after the rule announced

culpatory evidence that corroborated the identification.[172]

The Fourth Circuit has held that failure to give the instructions required under *Holley* is not reversible error in a case in which the instruction was not requested and there was corroborating inculpatory evidence.[173] Emphasizing that it was reviewing an omission of the instruction under a plain error standard because the instruction had not been requested, the court nevertheless proceeded to distinguish the facts from those that had supported reversal of the conviction in *Holley*. It noted that the identification had been reliable, that there was corroborating evidence, and that "[f]ailure to give the Model Special Instructions on Identification appended to *Holley*, if error, was harmless beyond a reasonable doubt."[174] Returning to the problem in the context of an advisory opinion, the court implied that trial court failure to give requested identification instructions would be reviewed under an abuse of discretion standard where the identification was not a central issue or where the danger of misidentification was slight.[175]

6. *The Sixth Circuit*

The United States Court of Appeals for the Sixth Circuit has repeatedly acknowledged the need for cautionary instructions on

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in [*Telfaire*]. In the instant appeal, the District Judge could not have reasonably anticipated our decision in *Holley* and we, therefore, judge the adequacy of his instructions by the rule of this Circuit in effect at the time of the trial.

Id. at 176 n.15 (emphasis added) (citations omitted).

172 Inculpatory evidence included testimony placing the defendant in the presence of the other robbers prior to the robbery wearing a security guard uniform like that worn by the robber. *Id.* at 176.

173 United States v. Revels, 575 F.2d 74, 75-76 (4th Cir. 1978). Identifications were made by a rape and kidnapping victim who had the opportunity to observe the attacker for several hours. *Id.* at 75. She prepared a composite photographic depiction of her attacker and later identified the defendant from a photo array. *Id.* She again identified the defendant at trial. *Id.* She made no identifications of two other persons who attacked her. *Id.* The defendant weighed some 400 pounds, and evidence placed him near the scene of the crime and showed that he had access to a car similar to that used by the rapist. *Id.*

174 *Id.* at 75-76.

175 Reversing narcotics convictions of eight defendants because the trial court improperly limited peremptory challenges, the court addressed a series of additional issues that were likely to occur again at trial. Without elaborating on the context, the court opined,

> We do not think that the issue of King's [defendant's] identification was so central to the case against him or that the evidence of identification was so weak that the district court abused its discretion in declining to give the instructions based upon United States v. Holley, 502 F.2d 273 (4th Cir. 1974), which King requested.

United States v. Ricks, 776 F.2d 455, 466 (4th Cir. 1985), *aff'd on rehearing*, 802 F.2d 731 (4th Cir.) (en banc), *cert. denied*, 479 U.S. 1009 (1986). The opinion is of limited authority because of its advisory posture and omission of the factual context of the issues.

eyewitness identification, but it has yet to reverse a conviction because of the omission of such instructions. In reviewing a theft conviction[176] where inculpatory evidence included inconsistent eyewitness identifications,[177] the court held that lineup identifications had violated no constitutional standards.[178] It further concluded that the trial court did not err by refusing to strike identification evidence where the jury was fairly presented with all the circumstances of the prior misidentifications: "The weight to be given this evidence was for the jury to determine."[179] The opinion reviewed the circumstances of the identifications and concluded that special dangers of misidentification were absent; because the crime was "committed not by force, but by ruse,"[180] the court dismissed concerns about the inability of most of the observers to identify the defendant.[181]

Nonetheless, the court acknowledged that "the question is not without difficulty":[182]

> Absent other facts, such a set of circumstances might well warrant striking from the record the proffered subsequent identification of the defendant. This, however, was no ordinary bank robbery where a sudden threat of death focuses all of the senses of those threatened upon the one who by words or action says, "The money or your life!"[183]

The opinion also articulated procedural grounds for affirming despite the omission of the identification instruction; it observed that an instruction on identification had been given and that the failure to include additional cautionary language was not reversible error

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176 United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974). Two thieves disguised as Brinks guards removed a large sum of money from a bank with the help of bank employees, who believed they were genuine Brinks guards. *Id.* at 369. Strong circumstantial evidence incriminated the defendant: the defendant told his girlfriend that he was going to acquire a large sum of money; he shaved his facial hair prior to the theft; his girlfriend observed a uniform in his apartment; he told his girlfriend on the day of the theft that he might never see her again because he might be dead; he was apprehended out of state with a large amount of cash in his possession, much of it in 50 and 100 dollar bills similar to those that had been stolen. *Id.* at 369-70.

177 Two eyewitnesses identified the defendant as one of the two thieves. *Id.* at 369. But both witnesses had earlier misidentified another person as the criminal. *Id.* Six of the eight persons who had observed the thieves were unable to identify the defendant, and none identified the defendant at the first lineup that they observed, while five identified persons other than the defendant as the thief. *Id.* at 371-72.

178 *Id.* at 372.

179 *Id.* (citation omitted).

180 *Id.* at 371.

181 In addressing the misidentifications, the court noted that the defendant's photograph was not clean-shaven and that the other persons in the lineups were similar in appearance to the defendant. *Id.* at 371-72.

182 *Id.* at 372.

183 *Id.* at 371.

because no additional instruction had been requested.[184]

In a second case, however, the court confronted a conviction of violent crimes—armed robbery and assault—and defense counsel had specifically requested a particularized identification instruction.[185] The court acknowledged that the requested instruction "has been favorably received in this Circuit" but held that the trial court's "refusal to give such an instruction was without prejudice to the rights of the defendant."[186] The opinion did not elaborate on the facts that warranted a finding that omission of the instruction was nonprejudicial. The circuit was satisfied that identification was not a crucial issue[187] and that there was overwhelming circumstantial evidence of guilt.[188] It cited authority from other circuits that approved the particularized cautionary instruction but observed that "[a]ll of these cases have emphasized that the model instruction need be given only when the issue of identity is crucial, *i.e.*, either where no corroboration of the testimony exists, or where the witness' memory has faded by the time of trial, or where there was a limited opportunity for observation."[189] Though finding no reversible error, the circuit expressed again its approval of particularized identification instructions.[190]

In a third case appealing the omission of identification instructions, the Sixth Circuit again affirmed the conviction upon reviewing the record, characterizing the inculpatory evidence of the defendant's unlawful theft of mail as overwhelming.[191] Rather than treat-

184 The court agreed that a cautionary jury instruction should have been given about the danger of misidentification but reviewed the record and found that an identification instruction had indeed been given. *Id.* at 373.

185 United States v. Scott, 578 F.2d 1186, 1190-91 (6th Cir.), *cert. denied*, 439 U.S. 870 (1978). The trial court had generally instructed the jury on the government's burden of proving identification using the model instruction in 1 E. DEVITT & C. BLACKMAR, *supra* note 109, at § 15.18. The court opined that the instruction "preserved [the defendant's] . . . right to a fair trial." *Scott*, 578 F.2d at 1191.

186 *Id.*

187 Inculpatory evidence included the fact that police had shot and wounded the fleeing robber, and when the defendant was apprehended the next day, he was found with a bullet wound. *Id.* at 1187-88. Moreover, the defendant was in possession of both a paper bag containing the money stolen during the robbery and a gun used to shoot a police officer during the flight. *Id.* at 1188.

188 The Sixth Circuit emphasized that identification was corroborated by strong incriminating evidence. *Id.* at 1191.

189 *Id.*

190 "We agree . . . that in appropriate cases the *Telfaire* instruction may be used at the discretion of the trial court to deal 'realistically with the shortcomings and trouble spots of the identification process.'" *Scott*, 578 F.2d at 1191 (citation omitted) (quoting United States v. Telfaire, 469 F.2d 552, 559 (D.C. Cir. 1974) (Bazelon, C.J., concurring)).

191 Indeed, prior to addressing the issue of jury instructions, the court held that the

ing the importance of the issue or the potential for prejudice, the court held that the trial court's refusal to give a cautionary identification instruction[192] was not error because its prior cases held that an instruction was required only when there was no corroborating evidence.[193] In none of the reported opinions did the Sixth Circuit confront a case in which identification was crucial and corroborating inculpatory evidence was disputed.[194]

7. *The Seventh Circuit*

In *United States v. Hodges*,[195] the United States Court of Appeals for the Seventh Circuit reversed a conviction of possession of a check stolen from the mail. The only issue on appeal was the trial

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government's violation of the defendant's right not to testify was harmless because of such evidence: "Three eyewitnesses placed him at the scene of the crime; two of them, who knew [the defendant] . . . personally, observed him opening the stolen mail [after the theft]. This is not a case which turns on doubtful testimony or circumstantial evidence." United States v. Boyd, 620 F.2d 129, 131 (6th Cir.), *cert. denied*, 449 U.S. 855 (1980).

192 The opinion did not quote the language of the requested instruction, but it alluded to the request in characterizing the issue on appeal as being whether "the trial court erred in refusing to instruct the jury to examine the reliability of identification witnesses." *Id.* at 130.

193 "In this Circuit, however, identification instructions are within the discretion of the trial court; they need be given only where there is a danger of misidentification due to lack of corroborative evidence." *Id.* at 131-32 (citing *Scott*, 578 F.2d 1186).

Corroborating evidence included the following: 1) testimony by an acquaintance of the defendant who observed him break into the mail car; 2) testimony by two acquaintances of the defendant who observed him after the theft in possession of stolen mail; and 3) testimony of a neighbor who observed the defendant wearing clothes on the day of the crime like those worn by the thief. *Id.* at 131-32.

194 United States v. Smith, 831 F.2d 657, 664 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1044 (1988) (affirming a robbery conviction and holding that the trial court refusal to give a *Telfaire* instruction was not error). The court quoted language in *Boyd* that identification instructions "are within the discretion of the trial court" and concluded that "there was no abuse of that discretion here." *Id.* But the requested instruction would arguably have been improper even under *Telfaire*, for the identifying witnesses were not eyewitnesses but rather persons acquainted with the defendant before the crime who identified the defendant through surveillance photographs. *Id.* The identifications presented none of the factors that aggravate the danger of misidentification. Furthermore, the trial court had given an identification instruction tailored narrowly to the factors of identification presented by the facts at trial: "The district court properly rejected portions of the proposed instruction that would have been irrelevant and confusing, and the court correctly instructed the jury to consider those factors, such as the clarity of the photos, that would affect the value of the testimony identifying the men in the pictures." *Id.* at 664.

In United States v. Melton, No. 85-3529, slip op. (6th Cir. Mar. 23, 1987) (LEXIS, Genfed library, Courts file) (not recommended for full text publication), *cert. denied*, 484 U.S. 1068 (1988), the court again noted its prior approval of the cautionary instruction but held that the trial court's failure to give the instruction was harmless error where corroborating inculpatory evidence was present.

195 515 F.2d 650 (7th Cir. 1975).

court's refusal to give an identification instruction. "The government's case rested almost entirely upon the three eyewitness identifications"[196] of the defendant by persons to whom the stolen check had been presented. The eyewitnesses identified the defendant in a showup and again at trial fifteen months after the crime.[197] Immediately prior to trial, two of the eyewitnesses had been unable to identify the defendant from a photograph that depicted the defendant at the time of his arrest.[198]

The government argued the following: that a cautionary instruction was not required because the identifications were corroborated; that no instruction was required because the witnesses had adequate opportunities to observe the criminal and gave consistent and positive identifications;[199] that "many Circuits have left the matter of giving an identification instruction to the trial judge's discretion";[200] and that the jury was presented with the full implications of the issue of identification by extensive cross-examination and defense argument so "the jury was clearly aware of its duty to find beyond a reasonable doubt that appellant was properly identified as the person who attempted to cash the check."[201] The court rejected all of the government's arguments. It further held that neither instructions on burden of proof and credibility nor presentation of the issue of identification by counsel in cross-examination and argument were sufficient.[202]

Though recognizing the existence of that authority holding that identification instructions are discretionary, the court preferred authority that such instructions should be given routinely. It expanded language from prior circuit authority, stating that such instructions were "the better practice,"[203] into a requirement that such instructions be given.[204] The court expressly approved language patterned after the *Telfaire* instruction, suggesting (as had the

196 *Id.* at 651.

197 *Id.*

198 *Id.*

199 The court alluded to the argument in its opinion:

> Since the witnesses here, argues appellee, had the opportunity to observe the accused, were positive in their identifications, were not weakened by prior misidentification, and remained unqualified after cross-examination, an instruction on the dangers of identification testimony was not warranted by the facts.

Id. at 652.

200 *Id.*

201 *Id.*

202 *Id.* at 653.

203 *Id.* at 652 (citing United States v. Napue, 401 F.2d 107, 112 (7th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969)).

204 *Id.* at 653.

District of Columbia Circuit) that the model instruction need not be given verbatim, but cautioning (as had the Fourth Circuit) that failure to give its "substantial equivalent" would constitute reversible error.[205]

The Seventh Circuit subsequently held that an instruction that omitted the concluding paragraph of the model instruction met the *Hodges* requirement that a "substantial equivalent" of the model instruction be given.[206] Omission of the concluding language was within trial court discretion, especially where "the concept of reasonable doubt [covered by the omitted text] was adequately covered in other instructions and repeatedly emphasized in the closing arguments by defense counsel."[207]

The circuit has also held that the *Hodges* requirement that the "substantial equivalent" of the *Telfaire* instruction be given was met where a trial court refused to give a requested *Telfaire* instruction but instead gave a pattern instruction that directed the jury to consider circumstances of the identification and that articulated the government's burden of proof.[208] The opinion noted that the trial

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205 *Id.*

206 In United States v. Kimbrough, 528 F.2d 1242, 1243-44 (7th Cir. 1976) (affirming conviction of assault with intent to steal mail), the criminal had worn a mask, but the victim recognized him immediately as the same person who had accosted her without a mask a short time earlier in broad daylight. She described him accurately to postal agents at the scene of the attack and identified him shortly after the attack from a composite drawing and two photographs. *Id.* at 1244. She identified him again at a lineup. *Id.* Inculpatory evidence also included the defendant's admission, when arrested, that he had been identified by a "woman," though he had not previously been told the sex of the victim. *Id.* at 1244, 1246-47. The government also introduced evidence of prior similar crimes. *Id.* at 1248-49.

207 *Id.* at 1248.

208 United States v. Anderson, 739 F.2d 1254, 1257-58 & n.5 (7th Cir. 1984). The defendant was convicted of bank robbery. *Id.* at 1257. The court characterized the eyewitness identification as "a vital part of the government's case," and noted that the trial took place almost three years after the crime. *Id.* at 1258. "The eyewitnesses who testified had all had difficulties shortly after the robbery in describing the robbers and recognizing photographs." *Id.* The trial court had given the Seventh Circuit pattern instruction § 3.06:

> "The reliability of eyewitness identification has been raised as an issue in this case and deserves your attention. Identification testimony is an expression of belief or impression by the witness. Its value depends upon the opportunity the witness had to observe the offender at the time of the offense and later to make a reliable identification, and upon the influences and circumstances under which the witness made the identification.
>
> You must consider the credibility of each identification witness in the same way as any other witness. Consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation of the matter covered in his testimony.
>
> The government has the burden of proving beyond a reasonable doubt that the defendant was the person who committed the crime."

court's instruction had focused the jury's attention on the reliability of identifications:

> In our view, the requirements of [*Hodges*] are met when the trial judge calls the jury's attention to the importance of the opportunity the witness had to observe the offender at the time of the offense, the ability of the witness to make subsequent identifications and the circumstances of those later identifications. The pattern instruction given here suffices.[209]

Finally, the Seventh Circuit has held that the failure to give identification instructions is not reversible error when no identification instruction was requested[210] or when defense counsel requested an instruction that was "neither accurate nor appropriate."[211]

8. The Eighth Circuit

In a departure from older circuit authority,[212] the first opinion of the United States Court of Appeals for the Eighth Circuit after

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Id. at 1257 n.4; *see* E. DEVITT & C. BLACKMAR, *supra* note 109, at § 15.19 at 341 (Supp. 1988).

209 *Anderson*, 739 F.2d at 1258 (citation omitted). The court approved broad discretion in the framing of instructions that met the general requirements. *Id.* at 1258-59 n.6.

210 United States v. Fleming, 594 F.2d 598, 606 (7th Cir.), *cert. denied*, 442 U.S. 931 (1979). Three defendants appealed convictions of murder, assault, and robbery. *Id.* at 599-600. A bank teller identified two of the defendants at trial; she had been unable to identify one of them at a line up conducted shortly after the crime. *Id.* at 600-01. The court reversed one of the defendant's convictions on confrontation clause grounds and affirmed the other convictions. *Id.* at 604; *accord* United States v. Kimberlin, 805 F.2d 210, 233 (7th Cir. 1986) ("Defendant now argues that the court should have given a greater portion of the instruction on identification recommended in United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir.1972). This claim was waived by failure to object."), *cert. denied*, 107 S. Ct. 3270 (1987).

211 In United States v. Cowsen, 530 F.2d 734, 738 (7th Cir.) (affirming conviction of distributing narcotics), *cert. denied*, 426 U.S. 906 (1976), inculpatory evidence included the testimony of two undercover police officers, who purchased drugs, and admissions by defendant upon arrest that evidenced consciousness of guilt. The trial occurred about six months after the crime. *Id.* at 735. Because the defendant presented no evidence raising an issue of the inaccuracy of the identifications, the court held that the requested instruction was inaccurate; it began, " '[t]he evidence . . . raises the question' " of identity. *Id.* at 738. The court held broadly that no reversible error was committed by the trial court's refusal "to give an inaccurate instruction." *Id.* But the court further addressed the question of whether a *Hodges* instruction was required. Noting that the trial occurred only two weeks after the *Hodges* opinion was published, the court acknowledged that *Hodges* required an instruction similar to that approved in *Telfaire* if requested, but it emphasized that "[t]he defendant in the case at bar did not meet that requirement, because the instruction he tendered was not similar to the *Telfaire* model and was neither accurate nor appropriate." *Id.*

212 In Cullen v. United States, 408 F.2d 1178, 1179 (8th Cir. 1969), five eyewitnesses identified the defendant as the robber, and the defendant was also linked to the crime by circumstantial evidence, including bullet holes in the defendant's car in the location where police had damaged the fleeing robber's car. The Eighth Circuit affirmed, hold-

Telfaire to consider the issue of identification instructions suggested that the District of Columbia Circuit model instruction "has much to commend it in those cases in which eyewitness identification is essential to support a conviction."[213] The court did not reverse, however, because an identification instruction had not been requested and the omission was consequently not plain error.[214]

In subsequently reviewing a case where a trial court refused to give a requested identification instruction,[215] a court noted the Seventh Circuit's prior approval of the *Telfaire* instruction but nevertheless affirmed the conviction because of factual circumstances that reduced the dangers of mistake and because the trial court had given some instruction on identification.[216] Citing Supreme Court

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ing that the requested instruction was redundant, argumentative, and "fail[ed] to correctly state the law." *Id.* at 1181.

213 United States v. Roundtree, 527 F.2d 16, 19 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976).

214 *Id.* The opinion did not recite details of inculpatory evidence. The defendant was convicted of armed robbery of an undercover officer. *Id.* at 17. Evidently the victim's identification of the defendant was at issue. The trial court had instructed generally, "Consider the opportunity that that witness had to observe the matters about which he testifies, and whether or not he impressed you as having an accurate recollection of the things that he testified about." *Id.* at 19. Defense counsel had extensively cross-examined the witness on the identification and had emphasized problems with the identification in argument. *Id.*

In a subsequent case, the Eighth Circuit affirmed a defendant's convictions of robbery and assault where the trial court "adequately instructed the jury concerning evaluation of testimony, including eyewitness testimony" and where the defendant did not request a *Telfaire* instruction; the court stated, "We rejected a similar contention in [*Roundtree*], and we reject the contention here. No plain error exists." United States v. Chrysler, 533 F.2d 1055, 1057 (8th Cir.), *cert. denied*, 429 U.S. 844 (1976).

215 United States v. Dodge, 538 F.2d 770, 783-84 (8th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977). The requested instruction drew on language in United States v. Barber, 442 F.2d 517, 528 (3d Cir.), *cert. denied*, 404 U.S. 958, 404 U.S. 846 (1971).

The defendant was convicted of simple assault. Only one of two victims was able to identify the defendant. The witness first identified the defendant from police photographs hours after the assault, from another group of photographs later, and at trial. *Dodge*, 538 F.2d at 783.

The trial court refused to give the requested instruction but instructed:

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

Id. The trial court also instructed generally on credibility and directed the jury to consider each witness's "ability to observe the matters as to which he has testified." *Id.* at 784.

216 The court contrasted the identification on appeal from those in *Holley*, where the eyewitness had been unable to identify the defendant from photographs, and *Hodges*, where the trial court had given no identification instruction at all:

Here, we have a clear and positive identification of appellant by [the eyewitness]

cases,[217] the court expressed concern with dangers of identification testimony, and the opinion strongly suggested that a particularized identification instruction was required prospectively:

> We remain . . . deeply concerned with the inherent fallibility of eyewitness identification and the great injustice that can arise from misidentification. Although we do not specifically adopt the *Telfaire* model instruction today, we will view with grave concern the failure to give specific and detailed instructions on identification in future cases where identification of the defendant is based solely or substantially on eyewitness testimony.[218]

The Eighth Circuit later held that an instruction that employed the language of the *Telfaire* instruction but omitted its first and last paragraphs was "adequate" where the identification of the defendant was not based solely or substantially on eyewitness testimony.[219] In another case, the court held that no particularized identification instruction was required where testimony identified a defendant as being in the vicinity of a car later used in the crime.[220]

> within several hours after the [assault] as well as a subsequent photograph identification and an in-court identification of [the defendant] while he was seated in a spectator section of the court from among a number of similar looking persons. The trial judge here did give a special identification instruction along with a credibility instruction.

Id.

217 *Id.* (citing Biggers v. Tennessee, 390 U.S. 404 (1968); Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967)).

218 *Id.* (citations omitted).

219 Durns v. United States, 562 F.2d 542, 549-50 (8th Cir.) (affirming kidnapping conviction where there was "substantial" inculpatory circumstantial evidence), *cert. denied*, 434 U.S. 959 (1977). The defendant leased the apartment at which the victim was held; a cup at the apartment had lipstick marks that were identified as the victim's; ransom money was recovered from the defendant; ransom money was recovered from the defendant's girlfriend who testified that the defendant had given it to her; a ring stolen from the victim was recovered from the defendant's girlfriend who testified that the defendant had given it to her; and the defendant had possession of a car on the day of the kidnapping identical to that used by the kidnapper. *Id.* at 544-46. The defendant was identified by a bank teller as the person who had attempted to negotiate a check that had been extorted from the victim. *Id.* at 546. A tape recording of the criminal was admitted into evidence which, the court held, supported a finding that it recorded the defendant's voice. *Id.* at 546-47. And the defendant was identified by the victim of another similar crime as the criminal in that crime. *Id.* at 545.

The opinion emphasized, "The trial court charged the jury quite exhaustively on the issue of identification, utilizing most of defendant's proposed instruction, which was based on [*Telfaire*]." *Id.* at 549 (citation omitted). The court concluded:

> As noted previously, there was substantial circumstantial evidence in this case, other than eyewitness testimony, identifying [the defendant] . . . as the criminal actor. The case is not one in which the identification of the defendant was based solely or substantially on eyewitness testimony. The court's instruction on identification was clearly adequate.

Id. at 550.

220 Osborne v. United States, 542 F.2d 1015, 1018 (8th Cir. 1976) (affirming a robbery conviction where inculpatory evidence included testimony by two witnesses that

In *United States v. Greene*,[221] the Eighth Circuit reversed a defendant's conviction of two counts of perjury where the trial court refused to give particularized identification instructions. The defendant was prosecuted for testifying falsely about his location and that of his mother.[222] One eyewitness provided critical testimony about the location of the defendant and his mother,[223] and inculpatory evidence about the location of the defendant consisted exclusively of the eyewitness's identification.[224] The record on appeal also included evidence that was inconsistent with the eyewitness's testimony.[225]

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they had observed an automobile similar to the defendant's being driven by the defendant near the area where the car used in the robbery had been parked). The court emphasized that no identification of the defendant by an eyewitness to the crime was at issue and that the identification instruction was unnecessary: "There was no error in refusing a superfluous instruction." *Id.* The court did not elaborate on the factors that rendered an identification by a witness to the crime more problematic.

221 591 F.2d 471 (8th Cir. 1979).

222 *Id.* at 473.

223 The defendant had been released on bail pending an appeal of his conviction of criminal mail fraud. *Id.* at 472. A condition of his bail was that he was not to leave Kansas City without court permission. *Id.* at 472-73. He obtained permission to travel to Chicago, but the court reporter testified that she recognized the defendant on a flight scheduled to go to Los Angeles. *Id.* at 473. At a subsequent hearing on the defendant's violation of conditions of his bail, he testified that neither he nor his mother had been on the flight and further denied that he had been in Los Angeles. *Id.* He was subsequently tried before a jury on the materially false testimony 1) that he was not on a scheduled flight to Los Angeles (Count I), 2) that he was not in Los Angeles but in Chicago (Count II), and 3) that his mother was not on a scheduled flight to Los Angeles (Count III). *Id.*

The trial court denied the defendant's request for particularized jury instructions on the issue of identification; he was convicted of three counts of perjury. *Id.* at 472.

The second of the requested instructions generally followed the *Telfaire* instructions. *See id.* at 474-75 n.4. The defendant apparently only appealed the error of the trial court refusal to give the identification instructions in challenging convictions on Count I and Count III. *Id.* at 475. The defendant's presence in Los Angeles was, however, established by extensive circumstantial and expert opinion evidence. *Id.* at 473.

While the court did not draw attention to the fact, it may have been important to its view of the case that evidence supporting one count (the presence of the defendant's car in California) was apparently inconsistent with the counts charging his presence on the flight. Likewise, evidence of the defendant's presence in Kansas City and Chicago during the time in question was not exculpatory with regard to presence in California but was apparently inconsistent with evidence of the defendant's presence on the flight. The flight occurred on September 26 and the defendant introduced evidence that he was still in Kansas City on September 27. *Id.* at 473.

224 "[T]he only evidence that [the defendant] . . . was on Flight 245 was the eyewitness testimony of [the court reporter] . . . ." *Id.* at 475-76. The court carefully distinguished the inferences that could be drawn from the circumstantial evidence of the defendant's presence in Los Angeles after the flight, emphasizing that such evidence did not necessarily corroborate the defendant's presence on the flight. "[T]here is no evidence independent of the eyewitness identification, that [the defendant] . . . travelled to Los Angeles on Flight 245 . . . ." *Id.* at 476.

225 The defendant claimed that his brother-in-law, who traveled on the flight, resembled the defendant. The court noted that the jury "apparently found enough physical

Though the identification of the defendant's mother was supported by some circumstantial evidence[226] and was apparently controverted by no inconsistent evidence, the court held that the refusal to give the identification instruction was reversible error.[227] The court expressed concern with the dangers of misidentification:

> It has traditionally been recognized that identification testimony presents special problems of reliability because the in-court testimony of an eyewitness can be devastatingly persuasive. Therefore, it is essential that a jury be aware of the conditions under which the observation was made, the physical ability of the witness to observe the defendant, and any possible problems which could distort the witness' observation powers and judgment.[228]

Distinguishing its failure to reverse in prior appeals, the circuit indicated the presence of three aggravating factors: 1) no instruction had been given that alerted the jury that identification was a "crucial issue"; 2) the eyewitness identification was the sole basis, or a substantial basis, of the conviction; and 3) the record established the possibility of misidentification.[229]

The Eighth Circuit affirmed convictions in two cases in which inculpatory identifications were supported by significant corroborating evidence. Affirming an arson conviction in which inculpatory evidence included eyewitness identifications,[230] one court acknowl-

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similarity between the two to declare defendant not guilty on Count IV [charging the defendant with perjury in testifying that his brother-in-law resembled him physically]." *Id.* at 476. But the defendant did not dispute that he was present on the airplane prior to its departure, helping his wife and children board. *Id.* at 475-76. The court characterized the controverted evidence as raising a real possibility of misidentification: "[I]t raises enough of a question about [the] . . . eyewitness identification to warrant the additional protection against misidentification that the *Telfaire* instruction provides." *Id.* at 476.

226 Airline personnel testified that a ticket in the name of the defendant's mother was used on the flight and that the mother had paid for the ticket. *Id.* at 477. But the court carefully scrutinized the inferences supported by the evidence:

> While this testimony suggests that [the defendant's mother] . . . was on the flight, it is not conclusive because it is impossible to confirm that the person whose name was on a ticket actually used that ticket. Nor is it determinative that [the defendant's mother] . . . purchased a ticket because family members often purchase tickets for use by other family members. Therefore, as to Count III, the independent evidence produced by the government is not conclusive and the testimony of [the eyewitness] . . . that she saw [the defendant's mother] . . . serves as the essential link in an otherwise inconclusive case.

Id. at 477.

227 *Id.*

228 *Id.* at 475 (citations omitted).

229 *Id.* at 477.

230 United States v. Cain, 616 F.2d 1056 (8th Cir. 1980). The opinion does not disclose the circumstances of the identifications. One witness evidently observed the act of arson or some strongly inculpatory conduct, and her identification was "corroborated to some extent by the testimony of the sister of the witness." *Id.* at 1057.

edged that a requested *Telfaire* instruction must be given when the government's case rests solely on questionable eyewitness identification,[231] and it suggested that "the trial judge should have given" the requested instruction.[232] The court affirmed the conviction because identification was "strongly corroborated" by the defendant's admission.[233] Similarly, in affirming an armed robbery conviction[234] where inculpatory evidence included eyewitness identification,[235] accomplice testimony, and circumstantial evidence,[236] the court acknowledged that refusal to give the instruction was reversible error when "the government's case rests solely on questionable eyewitness identification," and opined that "the district judge might well have given such an instruction."[237] But the court held that refusal to give the instruction was not "prejudicial error" because of other corroborating inculpatory evidence, especially the accomplice testimony.[238]

B. CIRCUITS THAT ENCOURAGE OR REQUIRE INSTRUCTIONS ON THE ISSUE OF IDENTITY

1. The Fifth Circuit

The United States Court of Appeals for the Fifth Circuit has

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231 *Id.* at 1058 (citing *Greene*, 591 F.2d at 474-77).

232 *Id.*

233 *Id.* at 1058-59. The defendant's cell mate testified that the defendant told him that he started the fire and that the identifying witness would be able to identify him: " '[H]e said, the only one that could identify him was [the identifying witness], when he started the fire.' " *Id.* at 1057. The admission not only provided independent inculpatory evidence but corroborated the capacity of the identifying witness.

234 United States v. Mays, 822 F.2d 793, 798 (8th Cir. 1987). The court did not expressly state that an instruction was requested but refers to the trial court's "refus[al]" to give an instruction; nor does the opinion describe the instruction, which was presumably the approved *Telfaire* instruction, because the court noted that "[i]t is reversible error for a trial court to refuse this specific jury instruction." *Id.*

235 The robber had worn a mesh hat over his face, but the bank manager observed the robber enter the bank before the robber masked his face. *Id.* at 795. The eyewitness later identified the defendant from photographs and again at trial. *Id.* The photographs included only two persons with facial hair, but the court rejected a constitutional challenge to the admission of the identification. *Id.* at 798.

236 Under grant of immunity, an accomplice testified about her participation in the robbery with the defendant. *Id.* at 795. Parts of her testimony were corroborated by circumstantial evidence, including the recovery of proceeds of the robbery from a hotel room identified by an accomplice. *Id.* The accomplice also testified about another robbery that she and the defendant had committed and about their illegal entry into a hunting lodge after the robbery. *Id.* The Eighth Circuit held that the evidence of the other robbery was admissible but that evidence of the illegal entry was improperly admitted; it held that the admission of the evidence was harmless error because of "the other substantial evidence of [the defendant's] guilt." *Id.* at 798.

237 *Id.*

238 *Id.*

approved the use of identification instructions[239] and has adopted a pattern particularized instruction that alerts jurors to circumstances that influence the accuracy of eyewitness identification.[240] Yet the circuit's opinions have not considered the special admonitory purpose of particularized instructions and have focused narrowly on whether instructions adequately presented the defense theory of mistaken identification.

In one case,[241] the court affirmed a robbery conviction where an eyewitness identified the defendant as one of the robbers (who had been disguised), while no other eyewitnesses identified the defendant. The defendant had requested the instruction[242] previously approved by the Fifth Circuit,[243] but upon its review of the instructions, evidence, and arguments, the court concluded that it was "inconceivable" that the jury did not appreciate the importance of deciding the issue of identity.[244] In another case,[245] the court affirmed a conviction of aiding and abetting the illegal transportation of aliens. Inculpatory evidence included two in-court identifications by illegal aliens who testified that the defendant had guided them into the country.[246] They "admitted that they made the crossing at night and only saw their guide for a short time."[247] Their prior de-

239 United States v. Rodriguez, 498 F.2d 302, 307 (5th Cir. 1974) (stating that identification instructions "may be appropriate if requested" but finding no error where no identification instruction was requested and where the context of evidence clearly presented the jury with issue of identification).

240 Fifth Circuit Pattern Special Instruction No. 6, *reprinted in* E. DEVITT & C. BLACKMAR, *supra* note 109, at § 15.19 at 340-41 (Supp. 1988), includes a direction to consider circumstances of observation:

> In evaluating the identification testimony of a witness . . . you should also consider, in particular, whether the witness had an adequate opportunity to observe the person in question at the time or times about which the witness testified. You may consider, in that regard, such matters as the length of time the witness had to observe the person in question, the prevailing conditions at that time in terms of visibility or distance and the like, and whether the witness had known or observed the person at earlier times.
>
> You may also consider the circumstances surrounding the identification itself including, for example, the manner in which the Defendant was presented to the witness for identification, and the length of time that elapsed between the incident in question and the next opportunity the witness had to observe the Defendant.

241 United States v. Rhodes, 569 F.2d 384, 389-90 (5th Cir.), *cert. denied*, 439 U.S. 844 (1978).

242 The instruction stated that the burden of proof was on the prosecution and "this burden includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime charged." *Id.* at 389.

243 *See* United States v. Blanks, 485 F.2d 545, 549 (5th Cir. 1973), *cert. denied*, 416 U.S. 987 (1974).

244 *Rhodes*, 569 F.2d at 390.

245 United States v. Ramirez-Rizo, 809 F.2d 1069 (5th Cir. 1987).

246 *Id.* at 1070.

247 *Id.*

scriptions of the guide were arguably inconsistent with the defendant's appearance.[248] The Fifth Circuit recognized that identification was a critical issue in the case; it stated that the jury could have convicted based on the identification even if it disbelieved accomplice testimony, and that the government's closing argument had urged the jury to convict based exclusively on that evidence.[249] The court, however, uncovered no abuse of discretion in the trial court's failure to give a requested instruction under circumstances where no error was alleged in the language of the instruction actually given.[250] While conceding that "giving the requested instruction may have been the better practice,"[251] the court held that the "key consideration" in determining whether the trial court abused its discretion was whether the omission prevented the jury from considering a theory of defense.[252]

2. *The Tenth Circuit*

Influenced by Supreme Court opinions that emphasized the dangers of misidentification, the United States Court of Appeals for the Tenth Circuit required trial courts to "call attention to the fact that the jury must find beyond a reasonable doubt that it was the defendant . . . who had committed the acts as alleged."[253] But the

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248 Inculpatory testimony also included testimony by an accomplice. *Id.* The defendant challenged the identifications and sought to impeach the accomplice testimony. *Id.* The trial court instructed on dangers of accomplice testimony but refused to give a requested instruction on identification that directed the jurors' attention to the witness's opportunity to observe. *Id.* at 1072.

249 *Id.* at 1071.

250 *Id.*

251 *Id.* at 1072.

252 From the context of the case, including argument of counsel, the court had little difficulty in concluding that the jury had been presented with the defense theory of mistaken identification. *Id.*

253 McGee v. United States, 402 F.2d 434, 436 (10th Cir. 1968) (affirming a conviction of two counts of knowingly transporting forged securities in interstate commerce), *cert. denied*, 394 U.S. 908 (1969). Inculpatory evidence included identifications by two persons to whom the money orders were presented for payment. *Id.* The opinion does not fully describe the identification procedures. The witnesses either identified the defendant at trial or the government introduced evidence of their photographic identification of the defendant prior to trial because the defendant moved unsuccessfully to exclude the identification evidence on the ground that the photographic identifications had occurred while the defendant was in custody but without the presence of counsel. *Id.* The court rejected the sixth-amendment argument. *Id.*

In recognizing a requirement that the jury be instructed on the general issue of identity and the government's burden of proving identity, the court relied on pre-*Telfaire* and pre-*Barber* authority from the District of Columbia, Third, and Eighth Circuits. *Id.* (citing Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966); Jones v. United States, 358 F.2d 383 (8th Cir. 1966); Salley v. United States, 353 F.2d 897 (D.C. Cir. 1965); United States v. McCarthy, 301 F.2d 796 (3d Cir. 1962)).

court held that a general instruction on the burden of proving identity was adequate and that no particularized instruction was required to articulate these factors that aggravated the risk of misidentification.[254]

The Tenth Circuit has further held that a *Telfaire* instruction was "under the circumstances, more than adequate" and that a trial court need not give additional cautionary instructions about special problems of cross-racial identification.[255] It has also held that no *Telfaire* instruction need be given in a case where inculpatory evidence included a second eyewitness identification and corroborating evidence.[256] In its most thorough discussion of the problem,[257] the court recognized the judicial concern with problems of misidentification and suggested that a particularized identification instruction might be required in some cases; however, it indicated that the failure of a trial court to give requested identification instructions would be reviewed in the context of the facts of each case. Refusal

254 The defendant's requested instruction is not set forth in the opinion, but the court characterized it as "purport[ing] to caution the jury by calling attention to the fallibility of the human memory with regard to eye-witness identification." *Id.* The court reviewed authority from other circuits and concluded that the authority did not support such a cautionary instruction; it held that the authority required nothing more than the general burden-of-proof and credibility instruction that the trial court had in fact given. *Id.* at 436 & n.4.

255 United States v. Ingram, 600 F.2d 260, 263 (10th Cir. 1979) (affirming an armed robbery conviction where the defendant was identified at trial by one eyewitness, but another witness was unable to identify the defendant). Two other witnesses identified the defendant as the robber in out-of-court photographic identifications, which were admitted into evidence, but they were unable to identify the defendant at trial. *Id.* at 261. Surveillance photographs were also admitted. *Id.*

The only issue at trial was identification. The court gave a *Telfaire* instruction, but the defendant requested additional instructions on cross-racial identification. The court held that "refusal to give an inter-racial instruction was not error." *Id.* at 263.

256 United States v. Cueto, 628 F.2d 1273, 1276 (10th Cir. 1980) (affirming robbery conviction where the defendant was identified by the bank teller before and during trial and also identified by an accomplice who participated in the robbery).

The trial court refused to give the *Telfaire* instruction requested by the defendant. *Id.* Citing Ninth Circuit authority that it is not error to refuse to give a particularized identification instruction when the identification is corroborated by other inculpatory evidence and that identification instructions are matters of trial court discretion, the Tenth Circuit held that the refusal to give the requested instruction was not error given the inculpatory evidence of two eyewitnesses and other corroborating evidence. *Id.*

257 United States v. Thoma, 713 F.2d 604 (10th Cir. 1983), *cert. denied*, 464 U.S. 1047 (1984). The court characterized the issue on appeal as being whether the refusal of the trial court to give a requested identification instruction constituted a denial of "due process." *Id.* at 607. It is not clear whether the defendant or the court suggested the constitutional standard of review for trial court error; the court initially characterized the defendant's argument on appeal as being that the refusal of the trial court to give the requested instructions "deprived him of due process of law." *Id.* at 605. Nor is it clear whether the court's treatment of the alleged error was significantly affected by the standard of review it articulated.

to give a requested identification instruction was not reversible error when inculpatory evidence included more than one eyewitness,[258] when the defendant's wife also provided incriminating testimony,[259] and when other instructions as well as closing argument presented the jury with the issue of identification.[260] In subsequent cases, the circuit has consistently refused to reverse the omission of requested identification instructions when the record on appeal contains some corroborating evidence[261] or when the identification is not a critical issue.[262]

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258 The defendant was convicted of several counts of robbery and armed robbery in connection with two separate bank robberies. *Id.* Two tellers at the first robbery identified the defendant from photographs and identified the defendant at trial as the criminal. *Id.* Two eyewitnesses to the second bank robbery identified the defendant from a photographic lineup and identified the defendant at trial as the criminal. *Id.* The opinion does not describe the identification procedure but notes that defense counsel argued that the photographic identifications were suggestive because none of the other persons depicted in the photo arrays resembled the defendant. *Id.* at 606.

259 The defendant's common-law wife testified that he had brought home manila envelopes containing large sums of money at a time when he was unemployed. *Id.* at 605-06. Witnesses testified that the robber had carried manila envelopes at both robberies. *Id.* at 605.

260 "[T]he jury's attention was sufficiently focused on the issue of identification and the possibility of misidentification that the failure to give a cautionary instruction in this case was not reversible error." *Id.* at 608.

261 United States v. Conner, 752 F.2d 504, 507-08 (10th Cir. 1985) (affirming robbery conviction where inculpatory evidence included pretrial photographic and in-court identifications of the defendant by at least four eyewitnesses). Circumstantial evidence included the defendant's possession of $10,000, the cash proceeds of the robbery, at the time of his arrest.

The trial court refused to give a requested *Telfaire* instruction but instead administered the Fifth Circuit pattern instruction. *Compare* Fifth Circuit Pattern Special Instruction No. 6, *reprinted in* E. DEVITT & C. BLACKMAR, *supra* note 109, at § 15.19 at 344 (Supp. 1988) *and Conner*, 752 F.2d at 507-08 (court quoted instruction).

Following the holding of *Thoma* the court held "that the district court did adequately instruct the jury and did not err in refusing to give [the defendant's] . . . proffered instruction. As in *Thoma*, this is not a case in which the Government's case depended on a single eyewitness whose testimony was not corroborated by other evidence." *Conner*, 732 F.2d at 508.

262 United States v. Espinosa, 771 F.2d 1382, 1412-13 (10th Cir.) (affirming convictions of possession of marijuana with intent to distribute and conspiracy to distribute), *cert. denied*, 474 U.S. 1023 (1985). The defendant was jointly prosecuted, tried, and convicted with nine other defendants. The prosecutions stemmed from police investigation of an unscheduled late-night flight. *Id.* at 1390. As police approached the plane after it landed, the suspects fled and were apprehended at various times. *Id.* Near the plane was an abandoned truck containing 20,000 pounds of marijuana. *Id.*

The case against the defendant consisted of exposed film that had been discovered in a car that was abandoned four and one-half miles from the abandoned truck. *Id.* The film depicted the defendant and co-defendants building a shed on land located 35 miles from the site of the plane. *Id.* at 1390, 1395. The court wrote, "[The defendant] was identified in a photograph with other co-defendants building a shed that the jury could reasonably infer was to be used in the illegal operation." *Id.* at 1395. The defendant was apprehended the day after the plane landed at a ranch eight or nine miles from the

C. CIRCUITS THAT DO NOT REQUIRE IDENTIFICATION INSTRUCTIONS

Two circuits have neither encouraged nor required the use of special identification instructions. The United States Court of Appeals for the Ninth Circuit has left identification instructions to the discretion of trial courts.[263] Its leading case refused to follow authority from the District of Columbia and Fourth Circuits and held that it was no abuse of discretion for the trial court to refuse to give identification instructions.[264] The Ninth Circuit has continued to

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plane. *Id.* at 1391. Arresting officers gave conflicting testimony about whether the defendant smelled of aviation fuel at the time of his arrest. *Id.* at 1395 n.13. The defendant explained that he was at the ranch because his car had broken down, but no disabled car was found. *Id.* at 1395 n.12. A sweepstakes ticket issued to the defendant's wife was recovered from a motel room containing building equipment and filters for diesel engines. *Id.* at 1395 n.11. Viewing such evidence in the light most favorable to the government, the court concluded that the evidence supported the conviction. *Id.* at 1395.

The defendant was also identified as the person who rented a vehicle that had been recovered near the plane. *Id.* at 1390, 1412. But the identification was questioned, and the vehicle had been rented in the name of one of the co-defendants who had the keys to the vehicle in his possession at the time of his arrest. *Id.* at 1390, 1412. The co-defendant's signature also appeared on the rental documents, and the court "recognize[d] that a serious question is raised as to whether [the identifying witness] . . . adequately observed the renter of the vehicle." *Id.* at 1412.

The opinion does not suggest that the defendant requested a particularized identification instruction. Rather the defendant argued on appeal that the trial court should have corrected the misidentification to the jury. *Id.* The court nevertheless approached the issue as analogous to that of cautionary eyewitness instructions. Citing prior Tenth Circuit authority that such identification instructions are not required when inculpatory evidence does not consist solely of one eyewitness identification, the court held that there was no requirement that the court correct the witness's testimony: "[I]dentification was not a critical issue here. The government's case against [the defendant] . . . did not depend on [the identification] . . . testimony, but rather on other independent evidence linking him to the conspiracy and the landing and unloading of the plane . . . ." *Id.*

263 United States v. Masterson, 529 F.2d 30 (9th Cir.) (affirming robbery conviction), *cert. denied*, 426 U.S. 908 (1976). The defendant had been prosecuted for three separate bank robberies. *Id.* at 31. The trial court granted a judgment of acquittal on one of the robberies, and the jury found the defendant not guilty of another of the robberies. *Id.* Inculpatory evidence supporting the conviction consisted of an eyewitness identification, a description by another eyewitness that "resembled, though it did not exactly match" the defendant, a surveillance photograph of the robber, and the defendant's fingerprints at one location and palmprint at another location at the robbery site. *Id.* The opinion did not describe the identification testimony nor explain whether the defendant offered any explanation for the presence of his fingerprints at the scene of the crime.

264 The requested instruction was not quoted in the opinion, but the court noted that the defendant had expressed at trial his satisfaction with any instruction to the effect that " 'eye-witness testimony is a peculiarly dangerous type of testimony.' " *Id.* at 32.

In refusing to follow the authority from other circuits, the Ninth Circuit relied on its own prior cases, which it cited as authority for the holding that identification instructions are discretionary and that the refusal to give detailed instructions is not error. *Id.* (citing United States v. Sambrano, 505 F.2d 284, 286 (9th Cir. 1974); United States v.

employ an abuse of discretion standard and has consistently held that omission of identification instructions is not an abuse of discretion.[265]

Trejo, 501 F.2d 138, 140 (9th Cir. 1974); United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973)).

But in *Trejo*, 501 F.2d at 140, and *Amaral*, 488 F.2d at 1151, defendants had requested no identification instructions at trial, and the court was reviewing the alleged error under a plain error standard. Moreover, the opinion in *Amaral* apparently reflected the problematic view that other circuits had not approved such identification instructions. The court cited only United States v. Evans, 484 F.2d 1178 (2d Cir. 1973), as authority that identification instructions were discretionary, and quoted the following language from United States v. Barber, 442 F.2d 517, 526 (3d Cir.), *cert. denied*, 404 U.S. 958, 404 U.S. 846 (1971): "it is necessary neither to instruct the jury that they should receive certain identification testimony with caution, nor to suggest to them the inherent unreliability of certain eye-witness identification." *Amaral*, 488 F.2d at 1148; *see supra* text accompanying notes 68-75. The opinion in *Amaral* did not describe the inculpatory evidence against the defendant, but it appears from other issues raised on appeal that the identification process included both a pretrial photographic identification of the defendant, which the defendant claimed was suggestive, and a showup identification of the defendant. *Amaral*, 488 F.2d at 1151-52.

Trejo affirmed a robbery conviction where inculpatory evidence included seven eyewitnesses and a surveillance photograph. 501 F.2d at 139. The defendant did not request an identification instruction, and the court held the trial court's failure to instruct the jury to consider eyewitness testimony with caution was not plain error. *Id.* at 140. The court opined further, however, that "even if requested, the trial court would have acted properly in refusing to give such an instruction." *Id.*

Sambrano affirmed two defendants' armed robbery convictions, holding that the trial court did not err in refusing to give requested identification instructions. 505 F.2d 284. The opinion did not cite the language of the instructions but characterized the defendants' arguments as being that "when the only real issue at trial is the identity of the defendants as the perpetrators, more detailed instruction on identity should be given to insure that the jury's attention is focused clearly on that issue." *Id.* at 287. It is thus not clear whether the defendants had requested a particularized identification instruction or had merely requested that the jury be instructed generally on the issue of burden of proof as to identity. The Ninth Circuit concluded that general instructions on identification, credibility, and burden of proof "were fully adequate and made sure that the jury's attention was focused on the issue of the defendants' identity." *Id.* at 287.

None of the prior Ninth Circuit authority relied on in *Masterson* thus appeared to deal with the special problems of identification or with the educational function of particularized identification instructions, for the court was either not presented with, or did not chose to address, the specific purpose of the instructions.

265 In United States v. Butcher, 557 F.2d 666 (9th Cir. 1977), the court affirmed a robbery conviction where inculpatory evidence included two eyewitnesses who identified the defendant as the robber and surveillance photographs taken of the robbery. Three government witnesses also gave opinion testimony of the defendant's identity as the robber depicted in the photographs. *Id.* at 667. The defendant called an eyewitness to the robbery who had been unable to identify the defendant, but she testified nonetheless that he looked similar to the robber. *Id.* The defendant requested a *Telfaire* instruction. *Id.* at 667-68 n.4 (court quoted requested instruction). The trial court refused to give the requested instruction and instructed generally on credibility, witnesses, and burden of proof. *Id.* at 668-69 n.5. The court held, "It is clearly the law of this circuit that the giving of a jury instruction on identification is largely within the discretion of the trial judge." *Id.* at 670 (citations omitted).

In United States v. Collins, 559 F.2d 561 (9th Cir.), *cert. denied*, 434 U.S. 907 (1977),

The United States Court of Appeals for the Eleventh Circuit has

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the court affirmed a robbery conviction where inculpatory evidence included two eyewitnesses to the robbery, and clothes similar to those worn by the robber were also found in the defendant's possession at the time of his arrest. The defendant requested a *Telfaire* instruction, and the trial court gave part but not all of the requested instruction. The opinion does not indicate how much of the instruction was given but indicates that the court did admonish the jury that identification testimony " 'should be considered with great caution and weighed with great care.' " *Id.* at 566. The defendant appealed the failure to give the requested instruction in its entirety. The court reiterated its policy of reviewing trial court failure to give identification instructions under an abuse-of-discretion standard: "this court has repeatedly declined to require the use of the *Telfaire* instruction." *Id.* at 556. It further opined that the trial court "went beyond that which was approved in *Masterson*" by giving any cautionary instruction to the jury. *Id.*

In United States v. Allen, 449 F.2d 346 (9th Cir. 1971), the court affirmed the defendant's conviction of possession of stolen mail. The defendant was arrested shortly after he was observed behaving suspiciously at a bus station. *Id.* at 347. Stolen mail was found in his possession when he was arrested. *Id.* The court held that there was no error in the trial court's refusal to give an identification instruction, for the defendant's identity was "never in question" and the only issue was his scienter. *Id.*

In United States v. Lone Bear, 579 F.2d 522 (9th Cir. 1978), the court affirmed two defendants' convictions of rape. The court discussed neither the evidence nor the requested instructions, stating only, "Appellants' proposed instruction No. 14 was an instruction on witness identification. In this circuit failure to give an identification instruction is not error. Appellants' only response to *Masterson* and *Amaral* is that we 'modify' them. This panel cannot undertake the suggested modification." *Id.* at 524 (citations omitted).

In United States v. Cassasa, 588 F.2d 282, 284 (9th Cir. 1978), *cert. denied*, 441 U.S. 909 (1979), the court affirmed an armed robbery conviction where two eyewitnesses identified the defendant both in a lineup and at trial and where the sole issue at trial was the accuracy of the identifications. The defendant requested a *Telfaire* instruction, but the trial court gave instead a "different and briefer instruction" which the opinion did not describe further. *Id.* at 285. The court held that the *Telfaire* instruction was not required: "[I]n some other circuits the *Telfaire* instruction must be given if requested in cases involving eye-witness identification. This circuit, however, has refused to require the giving of the *Telfaire* instruction." *Id.*

In United States v. Field, 625 F.2d 862 (9th Cir. 1980), the court reversed a conviction of armed robbery where three eyewitnesses to the robbery positively identified the defendant at trial. Each eyewitness had been unable to identify the defendant from a photo spread containing a photograph of the defendant, and one of them had identified a person other than the defendant as the robber from the photo spread. *Id.* at 865. After their initial inability to identify the defendant, an FBI agent disclosed in the presence of each witness the photograph of the defendant as the robber. *Id.* Each witness, before making in-court identification, also viewed the defendant at the courthouse and knew that he was the suspect. *Id.* Two of the witnesses observed the defendant in handcuffs. *Id.* The Ninth Circuit reversed the conviction on the ground that the suggestive pretrial identification procedure created a substantial likelihood of misidentification as to at least two of the witnesses. *Id.* at 869-70. The court also addressed the issue of whether the trial court had erred in refusing to give a *Telfaire* instruction where the trial court gave an unspecified "shorter form of eye-witness identification instruction": "There is no need to depart from our established rule that the giving of jury instructions is discretionary, and that trial courts need not give the *Telfaire* instruction when the matter is covered by simpler instructions." *Id.* at 872 (citations omitted).

In United States v. Miller, 688 F.2d 652 (9th Cir. 1982), the court affirmed a conviction of receiving stolen property where inculpatory evidence included testimony from

also failed to encourage or require identification instructions. Its treatment of identification instructions is affected by the standard of review that the circuit applies generally to trial court refusal to give instructions. Appeals from instruction error are reviewed under a plain error test which requires the defendant to show that the refusal to give the requested instruction "seriously impaired the defendant's ability to present an effective defense."[266] In reviewing a trial court's refusal to give a requested identification instruction, the circuit has held that no cautionary instruction is required when the trial court gives standard instructions on burden of proof and credibility of witnesses.[267]

III. CONSTRUCTING THE LAW OF THE FEDERAL CIRCUITS

Most federal circuits have repeatedly expressed the view that identification instructions are desirable. Appellate court statements

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the owner of the stolen property that he observed the property, which had been concealed and altered, on the defendant's land. The defense apparently raised the issues of the defendant's control over the property or knowledge of the property's stolen status. The defendant unsuccessfully requested an identification instruction similar to that discussed in United States v. Hodges, 515 F.2d 650, 652-53 (7th Cir. 1975). *Miller*, 688 F.2d at 662. Since identification did not appear to be at issue, the relevance of the instruction was problematic. But in affirming the conviction, the court relied on the fact that the defendant did not object to the omission of the instruction after requesting it. *Id.* at 662-63. The court did not elaborate further, suggesting either that it believed the error was waived or that any discussion of plain error was superfluous. *Id.*

In United States v. Smith, 563 F.2d 1361 (9th Cir. 1977), *cert. denied*, 434 U.S. 1021 (1978), the court affirmed an armed robbery conviction where the sole inculpatory testimony was the identification by an eyewitness who had observed the partially masked face of the robber. The court held that there was sufficient evidence to support the conviction and that the trial court properly refused to give an instruction on the defendant's "theory of the case" which the court characterized as argumentative. *Id.* at 1363-64. The instruction stated, " '[The defendant] . . . contends that the eyewitnesses to the crime had insufficient opportunity to observe the robber, and that her identification of him as the robber is not correct.' " *Id.* at 1363-64.

266 *See* United States v. Walker, 720 F.2d 1527, 1541 (11th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) (citing United States v. Grissom, 645 F.2d 461, 464 (5th Cir. Unit A May 1981)).

267 In United States v. Martinez, 763 F.2d 1297, 1304-05 (11th Cir. 1985), the court affirmed convictions of conspiracy, possession with intent to distribute cocaine, and importation of cocaine where inculpatory evidence included testimony that the defendant off-loaded the drugs. *Id.* at 1304. The defendant requested the pattern Fifth Circuit identification instruction. *Compare id.* at 1304 n.6 (court quoted requested instruction) *and* Fifth Circuit Pattern Special Instruction No. 6, *reprinted in* E. DEVITT & C. BLACKMAR, *supra* note 109, at § 15.19 at 340 (Supp. 1988). The court held that although the defendant had requested the instruction, it was required to evaluate any error in the trial court's refusal to give the instruction under a plain error standard because the defendant had failed also to object to the court's proposed jury instructions. *Martinez*, 763 F.2d at 1304. It held that there was no plain error and stated there was no error generally because the court had given general instructions on burden of proof and credibility. *Id.* at 1304-05 n.7.

of policy, threats of future reversal, and promulgation of model instructions have no doubt influenced trial court practices.[268] But in the great majority of individual appeals, the circuits have refused to reverse on the grounds of the omission of identification instructions.

Instead, the circuits have generated a complex body of case law concerning standards of appellate review and exceptional circumstances under which trial courts need not give identification instructions. The exceptions frequently conflict with the underlying policies that led circuits to recognize the need for identification instructions, and the standards of review that several circuits have adopted are incompatible with important policies of appellate procedure.

A. PROBLEMS OF THEORETICAL COHERENCE

1. Conflicting Effects Ascribed to the Operation of Instructions

Although the majority of circuits have approved of identifica-

268 No accurate method exists to determine the extent to which such instructions are now given. The District of Columbia Circuit has not confronted an appeal from a case that was tried after *Telfaire* in which the model instruction was requested at trial but omitted by the trial court. Trial courts in the Second Circuit have not universally instructed on identification. *See* United States v. Robinson, 544 F.2d 110, 112 & n.2 (2d Cir. 1976) (reversing on other grounds but noting that trial court failed to give requested identification instruction in a case where the "central issue" was the identification), *cert. denied*, 434 U.S. 1050 (1978). Reported cases from the Third Circuit after *Barber* indicate that at least some trial courts have given the instructions. *See* United States v. Zarintash, 736 F.2d 66, 75 (3d Cir. 1984) (rejecting an argument that the trial court had prejudicially commented on evidence in giving a " '*Barber*' charge"); United States v. Samuels, 374 F. Supp. 684, 687 (E.D. Pa. 1974) (denying a motion for acquittal that challenged the court's failure to suppress identification testimony, noting that the identification presented a fact question, and determining that the jury had been properly instructed under the Pennsylvania approach approved in *Barber*); United States v. Corbitt, 368 F. Supp. 881, 889-90 (E.D. Pa. 1973) (rejecting as harmless error the inclusion of language from *Barber* in a jury instruction), *aff'd without opinion*, 497 F.2d 921 (3d Cir.), *cert. denied*, 419 U.S. 999 (1974); United States v. Matthews, 346 F. Supp. 861, 862 (E.D. Pa.) (observing, in denying a motion for acquittal, that "this Court instructed the jury in accordance with the Third Circuit's direction in [*Barber*], that a witness' testimony as to identity must be received with caution and scrutinized with care.") (citations omitted), *aff'd without opinion*, 474 F.2d 1337 (3d Cir. 1972).

In contrast, the Sixth Circuit evidently has failed effectively to communicate to trial courts its view that such instructions be given. The circuit has twice heard appeals from the same trial court which refused to administer appropriate identification instructions and which instead administered instructions that the circuit conceded were erroneous. *See* United States v. Melton, No. 85-3529, slip op. (6th Cir. Mar. 23, 1987) (LEXIS, Genfed library, Courts file) (not recommended for full text publication) (affirming as "harmless error" the administration of improper identification instructions by the same court from which the appeal was made in United States v. Boyd, 620 F.2d 129 (6th Cir. 1980), *cert. denied*, 449 U.S. 855 (1980) (omission of instructions held not reversible under the facts)), *cert. denied*, 484 U.S. 1068 (1988).

tion instructions, they have proposed two different kinds of instructions. Both kinds are designed to reduce the danger of wrongful conviction, but important differences in operation exist between the two kinds of instructions.

Particularized identification instructions direct factfinders to consider problematic features of primary identification, such as the circumstances of the initial observation, the mental or emotional condition of the witness at the time of observation, and previous contact between the eyewitness and the person identified.[269] Moreover, particularized instructions direct factfinders to consider factors that erode the accuracy of identification, such as the suggestiveness of confrontations or inconsistent identifications by the witness. Because their purpose is to control the evaluation of specific features of evidence, particularized instructions are most important in those cases that present the features that the instructions articulate. Neither the effective presentation of evidence that controverts an eyewitness identification nor argument by counsel should reduce the need for particularized instructions.[270]

In contrast, instructions on the burden of proving identity seek to reduce the risk of wrongful conviction by imposing the risk of nonpersuasion on the government.[271] Such instructions may in theory be less important in those cases where identification is most sharply litigated—cases in which parties put identity in issue and argue it to the jury. Disclosure of weaknesses or inconsistencies in identification testimony through cross-examination or in closing argument may render such instructions superfluous,[272] although em-

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269 *See* Fifth Circuit Pattern Special Instruction No. 6, *reprinted in* E. DEVITT & C. BLACKMAR, *supra* note 109, at § 15.19 at 340 (Supp. 1988).

270 The Third Circuit established the weakening of identification testimony by cross-examination as one of the specific circumstances that required administration of a cautionary instruction. United States v. Barber, 442 F.2d 517, 528 (3d Cir.), *cert. denied*, 404 U.S. 958, 404 U.S. 846 (1971). The Seventh Circuit expressly rejected arguments that the omission of instructions was not reversible when the eyewitness had been cross-examined extensively and the issue had been addressed during argument. United States v. Hodges, 515 F.2d 650, 653 (7th Cir. 1975).

271 Though the general burden-of-proof instructions place the risk of nonpersuasion on the government, identification-issue instructions further focus juror attention on the need to apply the burden to the specific issue of identity.

272 Older District of Columbia Circuit cases had held that general burden-of-proof instructions in robbery cases obviated the need for additional identification instruction. Jones v. United States, 361 F.2d 537, 541 (D.C. Cir. 1966). The First Circuit held that a trial court did not abuse its discretion by refusing an identification instruction where the eyewitness was cross-examined regarding the accuracy of the identification, the court gave general burden-of-proof and credibility instructions, and other inculpatory evidence existed. United States v. Kavanagh, 572 F.2d 9, 12-13 (1st Cir. 1978). The Fifth Circuit held that no abuse of discretion occurred in the omission of an identification instruction where the context of the case, including the defense argument, presented the

pirical studies do not support the inference that omission of the identification instructions has no effect on factfinders.[273]

Theoretical incoherence has resulted when circuits that recognized the need for particularized identification instructions later tolerated omission of the instructions by reference to circumstances that militate only against the need for instructions on the burden of proving identity. The Fifth[274] and Second Circuits[275] have recognized the need for particularized instructions but have affirmed convictions when the instructions were omitted on the ground that the

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issue of identity to the jury. *See* United States v. Ramirez-Rizo, 809 F.2d 1069, 1072 (5th Cir. 1987); United States v. Rhodes, 569 F.2d 384, 389-90 (5th Cir. 1978). The Tenth Circuit held that the omission of an identification instruction was not reversible error where other instructions and argument presented the jury with the issue of identity. United States v. Thoma, 713 F.2d 604, 608 (10th Cir. 1983), *cert. denied*, 464 U.S. 1047 (1984).

273 One study suggests that an emphasis on identification problems by counsel in argument does not increase juror appreciation of such problems. Cutler, Penrod & Stuve, *supra* note 8, at 54. Another study suggests that jurors are more likely to convict when presented with an eyewitness identification, even if the identification has been discredited. *See* Loftus, *supra* note 6, at 189-90. And another study suggests that instructions on the burden of proving identity may reduce the conviction rate more than particularized identification instructions. *See* Hoffheimer, *supra* note 35, at 53.

274 The Fifth Circuit had adopted a pattern particularized identification instruction, *see* Fifth Circuit Pattern Special Instruction No. 6, *reprinted in* E. DEVITT & C. BLACKMAR, *supra* note 109, at § 15.19 at 340 (Supp. 1988) (for the text of the instruction, see *supra* note 240), but it held in a 1978 case that the omission of an identification instruction did not require reversal where closing argument focused the jury's attention on the issue of identification. *Rhodes*, 569 F.2d at 389-90. The opinion relied pointedly on Ninth Circuit authority suggesting that the use of identification instructions is discretionary.

The Fifth Circuit followed this authority in a 1987 case in which a defendant was convicted of aiding and abetting the transportation of illegal aliens. *Ramirez-Rizo*, 809 F.2d 1069. Two eyewitnesses who claimed to have seen the defendant at night for a short period and who provided testimony that arguably contradicted that of an accomplice provided critical inculpatory evidence. *Id.* at 1071. An accomplice who had pleaded guilty also provided inculpatory evidence, but the accomplice's testimony was impeached, and the record does not establish that the jury did not convict exclusively because of the identification evidence. "Indeed, the government in its closing argument invited the jury to convict [the defendant] . . . solely on the basis of the aliens' identification of him as their guide." *Id.*

The defendant specifically requested the Fifth Circuit Special Jury Instruction. *Compare Ramirez-Rizo*, 809 F.2d at 1070 n.1 (court quoted requested instruction) *and* Fifth Circuit Pattern Special Instruction No. 6, *reprinted in* E. DEVITT & C. BLACKMAR, *supra* note 109, at § 15.19 at 343 (Supp. 1988). But the court did not identify the requested instruction as one of the Fifth Circuit Pattern Special Instructions.

In affirming, the court did not even acknowledge that the requested instruction had been promulgated for use within the circuit; it held flatly that refusal to give the instruction "did not prevent the jury from considering [the defendant's] . . . theory of defense." *Ramirez-Rizo*, 809 F.2d at 1072.

275 The Second Circuit shifted from the need for particularized identification instruction, *see* United States v. Fernandez, 456 F.2d 638, 644 (2d Cir. 1972), to a view of the function of the instructions as articulating the issue of misidentification, United States v. Luis, 835 F.2d 37, 41 (2d Cir. 1987).

factfinder was presented with the issue of identity. Neither circuit has recognized that the rationale is inconsistent with the policies promoted by the particularized instructions.

2. *Conflicting Policies Behind Identification Instructions*

Federal circuits have sought to promote different policies through the use of special identification instructions. For example, the District of Columbia Circuit addressed dangers of primary identification error that resulted from prolonged undercover narcotics investigations.[276] The court discovered that problems of effectively challenging testimony by police officers aggravated the dangers of secondary identification error.[277] The court consequently perceived an enhanced need for special identification instructions when the identifying witness was an undercover police officer.[278]

Courts in other circuits have not differentiated between recognition of a suspect by police and by persons who had previously known the suspect. Viewing the primary goal of the instructions as the reduction of secondary identification error, courts in most circuits have considered the need for instructions greatest when the risk of primary identification error was aggravated by factors such as stress of observation and a witness's lack of familiarity with a suspect.[279] In contrast to the District of Columbia Circuit's approach, most courts have treated eyewitness identification by a police officer who was familiar with the defendant as a circumstance that reduced the dangers of misidentification and thereby reduced the need for an identification instruction.[280]

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276 *See supra* text accompanying notes 89-93.

277 *See* Salley v. United States, 353 F.2d 897 (D.C. Cir. 1965).

278 *See supra* text accompanying notes 94.

279 Cases in which courts have affirmed convictions notwithstanding the omission of identification instructions where an identifying witness had acquired familiarity with the defendant's features prior to the crime include the following: Cotton v. Armontrout, 784 F.2d 320 (8th Cir. 1986); United States v. Martinez, 763 F.2d 1297 (11th Cir. 1985); United States v. Boyd, 620 F.2d 129 (6th Cir.), *cert. denied*, 449 U.S. 855 (1980); United States v. Ingram, 600 F.2d 260 (10th Cir. 1979); United States v. Butcher, 557 F.2d 666 (9th Cir. 1978); United States v. Marchand, 564 F.2d 983 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); United States v. Garner, 499 F.2d 536 (D.C. Cir. 1974); United States v. Rodriguez, 498 F.2d 302 (5th Cir. 1974); United States v. Barber, 442 F.2d 517 (3d Cir.), *cert. denied*. 404 U.S. 958, 404 U.S. 846 (1971); United States v. Wilford, 493 F.2d 730 (3d Cir.), *cert. denied*, 419 U.S. 851 (1971).

280 *E.g.*, United States v. Luis, 835 F.2d 37 (2d Cir. 1987); *Butcher*, 557 F.2d 666; United States v. Thomas, 485 F.2d 1012 (D.C. Cir. 1973); *Barber*, 442 F.2d 517.

3. *Manipulation of Authority*

Courts, like scholars,[281] have experienced difficulty in precisely characterizing the positions of the federal courts on the need for identification instructions. Ambiguity has provided room for manipulation and choice of authority.

The First Circuit characterized the Third, Fourth, Seventh, and District of Columbia Circuits as requiring identification instructions, while characterizing the Second, Sixth, Eighth, and Ninth Circuits as approving of the "concept" of such instructions.[282] One Second Circuit court cited authority from the District of Columbia, Third, Fifth, Eighth, and Tenth Circuits for the proposition that identification instructions are a matter of trial court discretion.[283] Another Second Circuit court characterized authority from the District of Columbia, Fourth, and Seventh Circuits as requiring identification instructions, while characterizing authority from the Ninth and Tenth Circuits as holding that identification instructions are discretionary.[284] The Eighth Circuit has characterized the District of Columbia, Third, Fourth, and Seventh Circuits as adopting model identification instructions.[285] The Fifth Circuit has characterized only fourth and seventh circuit authority as holding that omission of identification instruction constitutes reversible error.[286] The Tenth Circuit has characterized only third and seventh circuit authority as requiring identification instructions.[287]

The Second Circuit quoted with approval language from *Barber* that acknowledged old precedent that identification instructions are

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281 *See supra* note 5.

282 United States v. Kavanagh, 572 F.2d 9, 12 (1st Cir. 1978).

283 United States v. Evans, 484 F.2d 1178, 1188 (2d Cir. 1973).

284 *Luis*, 835 F.2d at 41.

285 United States v. Dodge, 538 F.2d 770, 784 (8th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977).

286 United States v. Ramirez-Rizo, 809 F.2d 1069, 1072 (5th Cir. 1987).

287 In reviewing authority from other circuits, the Tenth Circuit read the Third and Seventh Circuits as requiring a cautionary instruction when identification was in issue and identification testimony was qualified or uncertain. United States v. Thoma, 713 F.2d 604, 607 (10th Cir. 1983), *cert. denied*, 464 U.S. 1047 (1984) (citing United States v. Hodges, 515 F.2d 650, 652-53 (7th Cir. 1975); United States v. Barber, 442 F.2d 517, 528 (3d Cir.), *cert. denied*, 404 U.S. 958, 404 U.S. 846 (1971)). It read the Second and Ninth Circuits as not requiring the instructions. *Id.* (citing *Evans*, 484 F.2d at 1188; United States v. Masterson, 529 F.2d 30, 32 (9th Cir.), *cert. denied*, 426 U.S. 908 (1976)). And it read the District of Columbia, First, Fourth, and Eighth Circuits as having "strongly urged the giving of such an instruction" but "stop[ping] short of saying that failure to give the instruction is reversible error . . . ." *Id.* (citing United States v. Kavanagh, 572 F.2d 9, 12 (1st Cir. 1978); *Dodge*, 538 F.2d at 784; United States v. Holley, 502 F.2d 273, 275 (4th Cir. 1974); United States v. Telfaire, 469 F.2d 552, 556-57 (D.C. Cir. 1972)).

not required.[288] But the Second Circuit did not explain clearly the context of the quoted language, which related to precedent on which the trial court had relied and which was overruled prospectively by the Third Circuit in *Barber*.[289] The Second Circuit also relied on pre-*Telfaire* authority from the District of Columbia Circuit that failure to give identification instructions was not reversible error.[290] It read authority from other circuits as leaving the matter of identification instructions to the discretion of trial courts.[291] The Ninth Circuit also cited *Barber* for authority that the instructions are not required, and it characterized second circuit authority as holding that such instructions are discretionary.[292]

Characterization of ambiguous authority has typically resulted in interpretations that support holdings in particular cases that no identification instructions are required or that omission of instructions is not reversible error under the circumstances.[293] When authority has been construed to generate a consensus or majority in favor of affirming, opinions have purported to follow the lead of other circuits.[294] But when authority has been construed to require reversing a conviction, courts have relied on the existence of a split of authority to justify adoption of a position that supports affirming

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288 *Evans*, 484 F.2d at 1187 ("We note, however, that there is also 'formidable precedential authority which holds that it is necessary neither to instruct the jury that they should receive certain identification testimony with caution, nor to suggest to them the inherent unreliability of certain eye-witness identification.' ") (quoting United States v. Barber, 442 F.2d 517, 526 (3d Cir.), *cert. denied*, 404 U.S. 958, 404 U.S. 846 (1971)).

289 *See Barber*, 442 F.2d at 526.

290 *Evans*, 484 F.2d at 1187 (citing Macklin v. United States, 409 F.2d 174, 177 (D.C. Cir. 1969)).

291 *Id.* at 1188 (citing United States v. Shelvy, 458 F.2d 823 (D.C. Cir. 1972); *Barber*, 442 F.2d 517; Barber v. United States, 412 F.2d 775 (5th Cir. 1969); United States v. Moss, 410 F.2d 386 (3d Cir.), *cert. denied*, 396 U.S. 993 (1969); Cullen v. United States, 408 F.2d 1178 (8th Cir. 1969); McGee v. United States, 402 F.2d 434 (10th Cir. 1968), *cert. denied*, 394 U.S. 908 (1969)).

292 United States v. Amaral, 488 F.2d 1148, 1151 (9th Cir. 1973).

293 In refusing to require identification instructions, the Ninth Circuit read authority from the Fourth and District of Columbia Circuits as supporting the defendant's request for instructions. United States v. Masterson, 529 F.2d 30, 32 (9th Cir.) (citing United States v. Holley, 502 F.2d 273 (4th Cir. 1974); United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972), *cert. denied*, 426 U.S. 908 (1976)), *cert. denied*, 426 U.S. 908 (1976). The Ninth Circuit also distinguished these two cases, observing that "[i]n both *Holley* and *Telfaire* a single eyewitness was the only incriminating evidence against the defendant." *Id.* The opinion emphasized, in contrast, that incriminating evidence of the photograph and the fingerprints corroborated the identification. *Id.* And the circuit expressly refused to follow the Fourth and District of Columbia Circuits; rather, it held that "the giving of a jury instruction on identification is largely within the discretion of the trial judge." *Id.*

294 *E.g.*, *Evans*, 484 F.2d at 1188.

under the facts of the case on appeal.[295] Circuits that find themselves in that minority that refuses to require or encourage identification instructions have relied formalistically on intracircuit authority to avoid confronting the substantive problems posed by the instructions and to avoid intercircuit conflict.[296]

B. APPELLATE RESISTANCE TO REVERSING OMISSION OF IDENTIFICATION INSTRUCTIONS

1. Formal Grounds of Resistance

Formal aspects of appellate decisionmaking limited the effect of opinions that required or encouraged the administration of identification instructions. Leading cases in several circuits were limited to prospective effect.[297] Other circuits recognized benefits of the instructions in the context of cases where the omission of instructions did not require reversal.[298] As a matter of judicial administration, the advisory character of such opinions failed effectively to communicate the new standards to trial courts.[299]

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295 *E.g.*, United States v. Kavanagh, 572 F.2d 9, 12 (1st Cir. 1978).

296 The Ninth Circuit has relied increasingly on circuit precedent in disposing of appeals from trial court omissions of identification instructions. *E.g.*, United States v. Lone Bear, 579 F.2d 522, 524 (9th Cir. 1978) (refusing on formal grounds to modify circuit precedent). In the course of generating the circuit precedent on which it now relies, however, the Ninth Circuit looked to authority from other circuits, including authority from the Third and Eighth Circuits that has been effectively overruled within those circuits. *Cf.* United States v. Trejo, 501 F.2d 138, 140 (9th Cir. 1974) (citing Cullen v. United States, 408 F.2d 1178 (8th Cir. 1969), which was effectively overruled by United States v. Greene, 591 F.2d 471 (8th Cir. 1979), and United States v. Roundtree, 527 F.2d 16 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976)); *Amaral*, 488 F.2d 1148 (citing with approval pre-*Barber* authority from the Third Circuit that had been effectively overruled).

297 The requirement of identification instructions was expressly limited to prospective application in leading cases from the Third Circuit, United States v. Barber, 442 F.2d 517, 525 (3d Cir.), *cert. denied*, 404 U.S. 958, 404 U.S. 846 (1971), District of Columbia Circuit, *Telfaire*, 469 F.2d at 558-59, and Fourth Circuit, *Holley*, 502 F.2d at 275.

298 The First and Sixth Circuits expressed general approval of the concept of identification instructions in cases where they did not find reversible error. The First Circuit refused to reverse due to the focus on the issue of identity by other instructions and due to the presence of corroborating inculpatory evidence. *Kavanagh*, 572 F.2d at 13-14. The Sixth Circuit refused to reverse where dangers of misidentification were absent, where corroborating evidence existed, and where no proper instruction was requested. United States v. O'Neal, 496 F.2d 368, 369-70 (6th Cir. 1974).

299 The formal method of judicial lawmaking which entails promulgating specific rules of general application, yet refusing to apply the rules to specific cases, militates against effective communication of the rules to trial courts. The experience of the circuits illustrates Schauer's thesis that a pervasive tension exists between the adjudication and lawmaking functions of courts. *See* Schauer, *Refining the Lawmaking Function of the Supreme Court*, 17 U. MICH. J.L. REF. 1, 6-8 (1983).

Prospective rulings or opinions that elaborate and qualify a rule but that do not reverse simply may not be communicated to trial judges. Appeals that postdated the

Grounds asserted in support of affirming convictions in leading cases provided subsequent authority for refusing to reverse. Even when leading cases were limited to prospective application on narrow grounds—for example, reliance of trial courts on previously approved instructions—the refusal to reverse provided authority in subsequent cases that affirmed the omission of instructions.[300]

2. *Resistance to Requiring Instructions in Hard Cases*

The advisory and prospective character of leading opinions and the reluctance to reverse in later cases reflected legitimate but unarticulated concerns about the consequences of the instructions.[301] The experience of the circuits reveals a pattern of selective resistance to enforcing a requirement of identification instructions. The resistance is more pronounced in hard cases—prosecutions of violent crimes and drug offenses.

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respective promulgation of model identification instructions in the District of Columbia, Fifth, and Seventh Circuits demonstrate that the promulgation of instructions does not ensure their routine administration by trial courts. The Sixth Circuit has urged the use of identification instructions in at least four opinions, but it has never reversed. *See supra* text accompanying notes 185-206. In United States v. Melton, No. 85-3529, slip op. (6th Cir. Mar. 23, 1987) (LEXIS, Genfed library, Courts file) (not recommended for full text publication), *cert. denied*, 484 U.S. 1068 (1988), the court reviewed an appeal from the trial court, opining that the trial court had given the wrong instruction and that the appellant "correctly" contended that his requested "instruction would have been helpful to the jury in evaluating [identification testimony], whereas the instruction actually given was not." *Id.* at 4. Nevertheless, the court considered the errors harmless. Because it did not reverse, the circuit never communicated the applicable law to the same trial court that had previously refused to give identification instructions. United States v. Boyd, 620 F.2d 129 (6th Cir.), *cert. denied*, 449 U.S. 855 (1980).

300 In refusing to reverse, the Second Circuit noted the fact that the Third Circuit had limited its holding in *Barber* to prospective cases. *See* United States v. Evans, 484 F.2d 1178, 1187 (2d Cir. 1973) ("In *Barber* . . . the court approved the use of a specific cautionary charge only prospectively, and then not in all instances."). In refusing to reverse in United States v. Johnson, 495 F.2d 377 (4th Cir.), *cert. denied*, 419 U.S. 860 (1974), the court held that omission of the requested identification instruction was not reversible because it required the instruction only prospectively in *Holley* which was decided on the same day as *Johnson*.

The courts also relied on the prospectivity of holdings in finding no constitutional error in the omission of identification instructions. *See* United States *ex rel.* Goodyear v. Delaware Correctional Center, 419 F. Supp. 93, 97-98 (D. Del. 1976) (noting that *Barber* only required identification instructions prospectively and that the Third Circuit had not reversed in that case); Jones v. Smith, 772 F.2d 668, 672 (11th Cir. 1985), *cert. denied*, 474 U.S. 1073 (1986) (noting that *Telfaire* only required identification instructions prospectively and that the District of Columbia Circuit had not reversed in that case).

301 The prospective and advisory character of leading opinions militated against judicial confrontation of two important problems. First, while attributing benefits to the routine use of identification instructions, the circuits did not consider corresponding disadvantages. Second, the benefits that were expected to result in a large number of cases motivated the routine use of identification instructions. The circuits did not consider whether the benefits had any demonstrable effect in individual cases.

The circuits have affirmed robbery and armed robbery convictions, notwithstanding omission of identification instructions, in over thirty cases.[302] Only one such conviction was reversed.[303] They have affirmed convictions of assault,[304] arson,[305] kidnapping,[306] rape,[307] and homicide,[308] notwithstanding omissions of identification instructions. Few convictions of serious violent felo-

302 *See* United States v. Smith, 831 F.2d 657 (6th Cir. 1987), *cert. denied*, 484 U.S. 1072 (1988); United States v. Mays, 822 F.2d 793 (8th Cir. 1987); *Melton*, No. 85-3529, slip op. (6th Cir. Mar. 23, 1987); United States v. Anderson, 739 F.2d 1254 (7th Cir. 1984); United States v. Thoma, 713 F.2d 604 (10th Cir. 1983), *cert. denied*, 464 U.S. 1047 (1984); United States v. Cueto, 628 F.2d 1273 (10th Cir. 1980); United States v. Field, 625 F.2d 862 (9th Cir. 1980); United States v. Ingram, 600 F.2d 260 (10th Cir. 1979); United States v. Hickey, 596 F.2d 1082 (1st Cir.), *cert. denied*, 444 U.S. 853 (1979); United States v. Fleming, 594 F.2d 598 (7th Cir.), *cert. denied*, 442 U.S. 931 (1979); United States v. Cassasa, 588 F.2d 282 (9th Cir. 1978), *cert. denied*, 441 U.S. 909 (1979); United States v. Scott, 578 F.2d 1186 (6th Cir.), *cert. denied*, 439 U.S. 870 (1978); *Kavanagh*, 572 F.2d 9; United States v. Rhodes, 569 F.2d 384 (5th Cir.), *cert. denied*, 439 U.S. 844 (1978); United States v. Lewis, 565 F.2d 1248 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978); United States v. Smith, 563 F.2d 1361 (9th Cir. 1977), *cert. denied*, 434 U.S. 1021 (1978); United States v. Butcher, 557 F.2d 666 (9th Cir. 1977); Osborne v. United States, 542 F.2d 1015 (8th Cir. 1976); United States v. Chrysler, 533 F.2d 1055 (8th Cir.), *cert. denied*, 429 U.S. 844 (1976); United States v. Masterson, 529 F.2d 30 (9th Cir.), *cert. denied*, 426 U.S. 908 (1976); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088, 424 U.S. 925 (1976); United States v. Jackson, 509 F.2d 499 (D.C. Cir. 1974); United States v. Sambrano, 505 F.2d 284 (9th Cir. 1974); United States v. Trejo, 501 F.2d 138 (9th Cir. 1974); *Johnson*, 495 F.2d 378; United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973); United States v. Thomas, 485 F.2d 1012 (D.C. Cir. 1973); United States v. Banks, 485 F.2d 545 (5th Cir. 1973), *cert. denied*, 416 U.S. 987 (1974); *Evans*, 484 F.2d 1178; United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972); United States v. Edward, 439 F.2d 150 (3d Cir. 1971); United States v. Moss, 410 F.2d 386 (3d Cir.), *cert. denied*, 396 U.S. 993 (1969).

303 *Holley*, 502 F.2d at 276. In reversing, the court emphasized the extraordinary weakness of inculpatory identification evidence.

In two cases, federal appellate courts reversed convictions for robbery offenses on other grounds where the trial courts had also omitted identification instructions. In United States v. Fernandez, 456 F.2d 638 (2d Cir. 1972) (Friendly, C.J.), the court specifically grounded reversal on cumulative errors and refrained from deciding whether the omission of identification instructions alone required reversal. *See also* United States v. Marchand, 564 F.2d 983, 997 (2d Cir. 1977) (Friendly, C.J.) ("The reversal in [*Fernandez*] rested on other grounds."), *cert. denied*, 434 U.S. 1013 (1978). In United States v. Robinson, 544 F.2d 110, 112 n.2 (2d Cir. 1976), *cert. denied*, 434 U.S. 1050 (1978), the court specifically refused to address the alleged error in the omission of the identification instruction.

304 United States v. Kimbrough, 528 F.2d 1242 (7th Cir. 1976) (assault with intent to steal mail); United States v. Dodge, 538 F.2d 770 (8th Cir. 1976) (simple assault), *cert. denied*, 429 U.S. 1099 (1977); United States v. Roundtree, 527 F.2d 16 (8th Cir. 1975) (robbery and assault with a deadly weapon), *cert. denied*, 424 U.S. 923 (1976); United States v. Barber, 442 F.2d 517 (3d Cir.) (assault on F.B.I. agents), *cert. denied*, 404 U.S. 958, 404 U.S. 846 (1971).

305 United States v. Cain, 616 F.2d 1056 (8th Cir. 1980).

306 United States v. Revels, 575 F.2d 74 (4th Cir. 1978); Durns v. United States, 562 F.2d 542 (8th Cir.), *cert. denied*, 434 U.S. 959 (1977).

307 United States v. Lone Bear, 579 F.2d 522 (9th Cir. 1978).

nies have been reversed because of the omission of identification instructions.[309] The circuits have likewise repeatedly affirmed convictions for a variety of drug-related offenses despite trial court omissions of identification instructions,[310] and have reversed only one such conviction because of the omission of identification instructions.[311]

In contrast, the circuits have more willingly enforced the requirement of identification instructions in other kinds of cases. Only four opinions have actually reversed convictions because of trial court failure to give identification instructions.[312] Two of the cases concerned appeals of nonviolent offenses: larceny of a check from the mail[313] and perjury.[314] The reversals in these two cases appear more unusual when put in the context of the number of cases on appeal that have alleged as error the omission of identification instructions. Approximately eight cases that did not involve convictions of violent crimes or drug offenses have presented the issue of identification instructions to appellate courts,[315] and about twenty-five percent of those appeals resulted in reversals. In con-

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308 United States v. Fleming, 594 F.2d 598 (7th Cir.) (armed robbery, assault, and homicide), *cert. denied*, 442 U.S. 931 (1979).

309 In McKenzie v. United States, 126 F.2d 533, 536 (D.C. Cir. 1942), the court reversed robbery and murder convictions where no identification instruction was given.

310 United States v. Luis, 835 F.2d 37 (2d Cir. 1987); United States v. Ricks, 776 F.2d 455 (4th Cir. 1985), *aff'd on reh'g*, 802 F.2d 731 (4th Cir.) (en banc), *cert. denied*, 479 U.S. 1009 (1986); United States v. Espinosa, 771 F.2d 1382 (10th Cir.), *cert. denied*, 474 U.S. 1023 (1985); United States v. Martinez, 763 F.2d 1297 (11th Cir. 1985); United States v. Marchand, 564 F.2d 983 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); United States v. Cowsen, 530 F.2d 734 (7th Cir.), *cert. denied*, 426 U.S. 906 (1976); United States v. Garner, 499 F.2d 536 (D.C. Cir. 1974); United States v. Rodriguez, 498 F.2d 302 (5th Cir. 1974); United States v. Wilford, 493 F.2d 730 (3d Cir.), *cert. denied*, 419 U.S. 851 (1974); United States v. Napue, 401 F.2d 107 (7th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

311 Salley v. United States, 353 F.2d 897 (D.C. Cir. 1965).

312 United States v. Greene, 591 F.2d 471 (8th Cir. 1979) (perjury); United States v. Hodges, 515 F.2d 650 (7th Cir. 1975) (theft of check from mail); United States v. Holley, 502 F.2d 273 (4th Cir. 1974) (armed robbery); *Salley*, 353 F.2d 897 (narcotics). In United States v. Fernandez, 456 F.2d 638 (2d Cir. 1978) (armed robbery), the court included omission of identification instruction as one of a series of errors that together required reversal. *But see Marchand*, 564 F.2d at 997.

313 *Hodges*, 515 F.2d 650.

314 *Greene*, 591 F.2d 471.

315 United States v. Ramirez-Rizo, 809 F.2d 1069 (5th Cir. 1987) (aiding and abetting transportation of illegal aliens); United States v. Miller, 688 F.2d 652 (9th Cir. 1982) (receiving stolen property); United States v. Boyd, 620 F.2d 129 (6th Cir.) (theft from mail), *cert. denied*, 449 U.S. 855 (1980); *Greene*, 591 F.2d 471 (perjury); United States v. Gentile, 530 F.2d 461 (2d Cir.) (conspiracy to sell fraudulently issued securities), *cert. denied*, 426 U.S. 936 (1976); *Hodges*, 515 F.2d 650 (theft from mail); United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974) (larceny by ruse from a bank); McGee v. United States, 402 F.2d 434 (10th Cir. 1968) (forgery), *cert. denied*, 394 U.S. 908 (1969).

trast, of more than fifty appeals from convictions of violent crimes and drug offenses, less than four percent resulted in reversals.[316]

3. *Rationalizing Resistance in Hard Cases*

Hard cases are the norm rather than the exception.[317] The evasion of a requirement of identification instructions in hard cases thus threatens to eliminate routine administration of identification instructions. Moreover, because no circuit has recognized an exception related to the severity of the offense,[318] reasons that have been offered to support affirming convictions in hard cases apply generally and threaten to result in the evasion of the effective requirement of identification instructions in all cases.

By refusing to distinguish among different types of cases and instead limiting the effect of the rule by manipulating the application of a general rule in fact-specific cases, circuits may appear to have engaged in result-oriented jurisprudence. In order to discover

316 Review of the opinions that affirmed six of the eight appeals that did not involve violent or drug-related offenses further suggests that the courts tended to rely upon narrow grounds for finding that omission of the instruction was not reversible error. In *Gentile*, 530 F.2d at 469, the trial court had indicated that it would give an identification instruction but omitted the instruction; counsel did not object to the omission, and the Second Circuit refused to hold that the omission was plain error. The Second Circuit further opined that the omission was harmless because the weakness of the identification was apparent and because 12 other witnesses provided inculpatory evidence. *Id.*

In *O'Neal*, 496 F.2d at 372, the Sixth Circuit affirmed where the trial court did provide some instruction on misidentification and where the instruction requested by the defendant was argumentative.

In *Boyd*, 620 F.2d at 131-32, the Sixth Circuit affirmed where inculpatory evidence was so overwhelming that it concluded from the record on appeal that the defendant was guilty beyond a reasonable doubt. Indeed, the court refused to reverse a clear violation of the defendant's fifth-amendment right against self-incrimination because "the jury could still not have entertained a reasonable doubt that Boyd was guilty as charged." *Id.* at 131.

But see Ramirez-Rizo, 809 F.2d at 1071 (holding that omission was not reversible unless it prevented the jury from considering the defense theory of the case); *McGee*, 402 F.2d at 436 (holding that trial court's simple instruction on the need to find that defendant committed the crimes at issue satisfied any requirement of an identification instruction).

317 In practice, judges are subject in their decisionmaking to the same pressures that jurors are, and it has long been accepted that the severity of the crime charged affects juror decisionmaking. *See, e.g.*, Kaplan, *Decision Theory and the Fact-Finding Process*, 4 STAN. L. REV. 1065, 1073-74 (1968); Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1032-41 (1977). Empirical studies of factfinders' evaluation of identification evidence also have demonstrated the influence of the severity of the crime. *See, e.g.*, Loftus, *Impact*, *supra* note 28, at 12; Hoffheimer, *supra* note 35, at 53.

318 The Sixth Circuit has suggested that the absence of violence during the commission of a crime or the observer's lack of stress may militate against the danger of identification error. *Cf. O'Neal*, 496 F.2d at 371 (fact that the crime occurred without witnesses' knowledge was a circumstance that accounted for failure of eyewitnesses subsequently to identify the defendant).

underlying rational policy grounds for the disparate treatment of hard cases, it is necessary to distinguish between different types of hard cases.

a. Violent Crimes

Prosecutions of violent crimes where substantial inculpatory evidence is provided by eyewitnesses who were victims of, or within the zone of danger created by, criminal activity pose dangers of primary identification error.[319] Omission of special instructions cannot be justified in such cases on the ground that risks of misidentification are minimal.[320] On the contrary, the assumed effectiveness of instructions in reducing the conviction rate explains judicial tolerance of their omission. Such hard cases force the circuit courts to confront practical disadvantages of identification instructions, which they have avoided in advisory and prospective opinions. By reducing the conviction rate in close cases, the instructions would result in acquittals in prosecutions of violent crimes where the disutility[321] of acquittal is high and where the prosecution is forced to rely exclusively or substantially on eyewitness identification.

Yet despite the increased risk of primary identification error where the eyewitness was a victim of a violent crime, empirical studies indicate both that factfinders ascribe greater accuracy to such eyewitness identifications than the data suggest is warranted and that the conviction rate remains higher for violent crimes than for nonviolent crimes.[322] Empirical studies also suggest that safeguards

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319 An empirical study concluded that while identification accuracy was "better under low disguise and low weapon visibility conditions," Cutler, Penrod & Martens, *supra* note 7, at 244, the violence of the crime observed did not significantly reduce identification accuracy. *Id.* at 250. But other studies have concluded that the stress of observation reduces identification accuracy. *See, e.g.*, E. LOFTUS, *supra* note 1, at 33-36; Brigham, *supra* note 6, at 49; Buckhout, *supra* note 6; Clifford & Scott, *supra* note 6; Siegel & Loftus, *supra* note 6.

320 Courts have characterized identifications made by crime victims as especially reliable. *See, e.g.*, United States v. Greer, 538 F.2d 437, 443 n.17 (D.C. Cir. 1976) (victim's opportunity to observe robbers characterized as indication of reliability). Conversely, one court relied on the fact that a crime was committed secretly by deception rather than under circumstances of violence to explain why most witnesses failed to identify the defendant. *O'Neal*, 496 F.2d at 372.

321 Scholars have provided models that account for the proclivity of factfinders to convict persons suspected of violent crimes. The variable standard of proof that factfinders create for themselves results from the consideration of the disutility of allowing a dangerous suspect to go free as compared to the disutility of convicting an innocent person. This difference is greater than the comparable difference for less violent offenses. *See* Kaplan, *supra* note 317, at 1073-74; Lempert, *supra* note 317, at 1032-41 (1977). The models are also helpful for understanding appellate decsionmaking.

322 The data usually is relied upon to support the need for safeguards such as expert opinion evidence or identification instructions. *E.g.*, Rahaim & Brodsky, *supra* note 8, at

designed to reduce secondary identification error do not reduce the conviction rate as much for violent crimes as for nonviolent crimes.[323] Accordingly, unspoken judicial concern with the practical disadvantages of identification instructions appears misplaced. The need to avoid imposing greater legal burdens on criminal defendants depending on the nature of the crime charged suggests that courts should require identification instructions in prosecutions for violent crimes.

b. Drug Crimes

The need for identification instructions in drug offense cases may be reduced by the absence of factors that courts have associated with an increased risk of primary identification error. In prosecutions of drug offenses, eyewitness identification testimony is often provided by informants or undercover law enforcement agents. Such witnesses frequently knew the defendant before or become acquainted with the defendant during the course of the investigation.[324] They observed the criminal under circumstances where they knew an identification would later be necessary.[325] They were not victims of or within a zone of danger created by criminal activity, nor were they otherwise under intense stress at the time of the encounter with the criminal.[326] Consequently, omission of instructions may not require reversal because of the absence of circumstances that aggravate the danger of primary identification error and that increase the need for identification instructions.

C. STANDARDS OF REVIEW

The federal circuits have applied different standards of review to trial court omissions of identification instructions. At one extreme lie the Ninth and Eleventh Circuits, whose standards of review are indistinguishable in effect from a rejection of the

12 ("[R]esults offer a compelling argument for allowing expert psychological testimony in cases involving eyewitness evidence.").

323 Studies of the effect of both identification instructions and expert opinion evidence revealed a higher conviction rate for violent crimes even after instructions or evidence. *See* Hoffheimer, *supra* note 35, at 53.

324 All model particularized instructions articulate the witness's familiarity with a suspect as a factor that relates to the weight of eyewitness identification evidence.

325 Although particularized instructions do not refer specifically to the witness's training or understanding of the need to make a subsequent identification, one empirical study found that pre-identification instructions "significantly affected identification accuracy." Cutler, Penrod & Martens, *supra* note 6, at 244.

326 Stress reduces identification accuracy. *See supra* note 319. And particularized identification instructions typically articulate the witness's state of mind at the time of observation as a circumstance that the factfinder should consider.

requirement of identification instructions.[327] At the other extreme lie a few cases that have reversed convictions because of the omission of identification instructions without regard to whether the instructions had been requested at trial, though they have explained their holdings in different ways.[328]

Courts between the extremes have affirmed convictions when no identification instruction was requested at trial, although they have explained their holdings in different ways.[329] Omission of un-

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327 The Ninth Circuit's observation that trial courts' affirmative administration of identification instructions is discretionary, *e.g.*, United States v. Masterson, 529 F.2d 30, 32 (9th Cir.), *cert. denied*, 426 U.S. 908 (1976), is judicial supererogation. The government cannot preserve error regarding a trial court's decision to give the instruction because an acquittal is not appealable. U.S. CONST. amend. V. The circuit's consistent position that omission of the instruction is discretionary does not support a characterization that it has adopted or approved of the instructions. *Cf.* 8A J. MOORE, *supra* note 5, at § 30.09[6] at 30-98 to 30-100 ("The [*Telfaire*] instruction's utility and comprehensive nature is evidenced by its adoption or approval in the . . . Ninth . . . Circuit[]." (footnotes omitted)).

328 In United States v. Holley, 502 F.2d 273 (4th Cir. 1974), the court reversed because the trial court omitted the identification instruction; the court required use of *Telfaire* instructions prospectively and justified reversing the conviction on appeal because the identification was so problematic that it verged on a constitutional violation. The court stated, "[T]he identification testimony here was so lacking in positiveness as to strongly suggest the 'likelihood of irreparable misidentification,' and that the jury should have been specifically instructed to consider the possibility of misidentification under the specific circumstances revealed by the evidence." *Holley*, 502 F.2d at 276 (quoting Simmons v. United States, 390 U.S. 377 (1968)). The court did not mention the request for identification instruction at trial.

The court in United States v. Telfaire, 469 F.2d 552, 554 (D.C. Cir. 1972), held that omission of the identification instructions was error under circumstances where no instruction was requested but limited the holding to future cases on the grounds that the absence of a special identification instruction did not prejudice the appellant's case.

In McKenzie v. United States, 126 F.2d 533 (D.C. Cir. 1942), the court expressly applied an extraordinary standard of review because the trial court had imposed the death penalty: "This being a death case, we have exercised the right to examine the entire record, without regard to assigned errors, to determine whether the accused has had a fair and impartial trial." *Id.* at 534 (citations omitted). The court reversed, concluding from its review of the record that identification evidence had been critical and that the instructions had not adequately focused the jury's attention on the issue. *Id.* at 536. The court did not suggest that the defendant had either requested a specific identification instruction or objected to the ambiguous instructions that were administered.

329 Expansive language in a few opinions might be read as suggesting that trial courts are required to give the instructions regardless of whether they are requested. For example, when affirming a conviction where *Telfaire* instructions were both requested and given at trial, the District of Columbia Circuit observed that "the trial judge should instruct the jury on how to properly evaluate identification testimony." United States v. Butler, 636 F.2d 727, 729 (D.C. Cir. 1980) (citations omitted), *cert. denied*, 451 U.S. 1019 (1981). Such broad language has confused some writers as to the real standard of review to be applied when trial courts omit identification instruction. *E.g.*, Note, *supra* note 1, at 123 n.64. The proper standard must be determined in those cases that have appealed the omission of identification instructions when the defendant did not request the instructions at trial.

requested instructions is generally reviewed under a plain error standard,[330] and courts addressing the issue have concluded that omission of unrequested identification instructions is not plain error.[331]

Important policies of judicial administration support routine affirmance of convictions under a plain error standard when no identification instruction is requested. When instructions have been requested, however, circuits have adopted radically different standards in upholding convictions—stretching the appropriate standards for harmless error, qualifying substantive requirements as to when identification instructions are required, and reviewing the record on appeal for corroborating inculpatory evidence. Such expansive policies of appellate review both erode efficiency of judicial procedure and conflict with purposes of identification instructions.

1. Plain Error

Requiring that jury instructions be requested[332] discourages default and provides defense counsel with incentive adequately to inform the trial court of the applicable law.[333] Where instructions have not been requested, the omission may nonetheless be reversed

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330 FED. R. CRIM. P. 52(b).

331 *E.g.*, United States v. Fleming, 594 F.2d 598, 606 (7th Cir.), *cert. denied*, 442 U.S. 931 (1979); United States v. Revels, 575 F.2d 74, 76 (4th Cir. 1978); United States v. Lewis, 565 F.2d 1248, 1253 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978); United States v. Chrysler, 533 F.2d 1055, 1057 (8th Cir.), *cert. denied*, 429 U.S. 844 (1976); United States v. Gentile, 530 F.2d 461, 469 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976); United States. v. Roundtree, 527 F.2d 16, 19 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976); United States v. Wilford, 493 F.2d 730 (3d Cir.), *cert. denied*, 419 U.S. 851 (1974). *Cf.* United States v. Alston, 551 F.2d 315 (D.C. Cir. 1976) (reversing as plain error omissions in and modifications of alibi and burden-of-proof instructions and noting that omission of instructions central to the determination of guilt or innocence may aggravate the danger of wrongful conviction).

332 See FED. R. CRIM. P. 30 which states,

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

333 *But see Wilford*, 493 F.2d at 736 (Adams, J., dissenting) (conviction should have been reversed because of omission of proper identification instruction even though defendant did not request instruction at trial). *See generally* Note, *supra* note 1, at 124 ("Given its importance, trial courts should include the eyewitness identification instruction as a matter of course, rather than relying on defense counsel 'to request so important a charge.' ") (quoting Macklin v. United States, 409 F.2d 174, 178 (D.C. Cir. 1969)); Note, *Seeing Is Believing*, *supra* note 25, at 120 ("An appellate court should order a new trial when a trial judge fails to give a particularized cautionary identification instruction in a case in which the identification of the defendant as the perpetrator depends exclusively on a single eyewitness identification.").

if the omission constitutes plain error.[334]

Determination of whether an error that has not been preserved properly is plain error that warrants reversal is conclusory: the outcome of the determination is affected by consideration of whether the procedural exception undermines important policies of appellate and trial procedure. The plain error standard of review will promote judicial economy if it is a strict standard of review. Through a restrictive application of the standard, the requirement that objections normally be raised in time for them to be corrected[335] will not be eroded. A strict standard of review promotes judicial economy at the trial level by avoiding retrial and at the appellate level by simplifying the process of review itself, focusing the appellate court's inquiry on the legal significance of the error or the quality of the rights adversely affected rather than on the potential impact of the error at trial.[336] Plain error provides an opportunity to categorize broad issues that do not merit detailed judicial review of the trial record and thus promotes uniformity of decisionmaking.

Nonetheless, the plain error standard has not been applied uniformly to omissions of unrequested identification instructions. Circuits have varied considerably in the extent to which they have probed records on appeal in order to demonstrate the absence of plain error. Only the Seventh and Eighth Circuits have consistently maintained that omission of an unrequested identification instruc-

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334 See FED. R. CRIM. P. 52(b) which states, "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This provision was intended to restate existing case law. *See* FED. R. CRIM. P. 52 advisory committee's notes. The rule does not define plain error, and it is ambiguous whether plain errors are those defects that affect substantial rights or whether the rule applies to two kinds of errors.

In applying the plain error standard of review to unobjected omission of identification instructions, courts implicitly reject a possible reading of FED. R. CRIM. P. 30 as providing an absolute bar to appellate reconsideration of any appeal from erroneous instructions when the error was not presented to the trial court.

335 Indeed, a notion of substantive justice lurks behind the older explanations of waiver and invited error: a defendant should not be allowed to raise errors to a second tribunal when he did not present them in time for the first tribunal to correct the errors, and the defendant should not be allowed to benefit from an error that he helped cause.

Behind the values of substantive justice are complex considerations that are not analyzed. To allow the defendant to challenge the error after the event is unfair because the courts cannot be sure that the error contributed to the conviction. Thus, a defendant who would be convicted in any event has no incentive to present a timely objection. The defendant's increased chance of acquittal upon retrial may be a function of delay, discovery of the government's case, and other changes in procedural opportunities that result from the existence of a prior trial rather than from the issuance of instructions.

336 The rule refers to "defects affecting substantial rights," FED. R. CRIM. P. 52(b), but if the court can determine that the rights are not substantial, the court should avoid further inquiry into the potential operation of the defects.

tion does not constitute plain error without further inquiry into the record.[337] While the Second Circuit has consistently affirmed convictions under a plain error standard where no identification instructions were requested, it has nevertheless probed records to identify factors, such as corroborating evidence, that establish the error to have been harmless[338] or the guilt to have been overwhelming.[339] The Third Circuit, too, while affirming a conviction where identification instructions were not requested, reviewed circumstances of the identifications before concluding that one was reliable and the other only tangentially incriminating.[340] The Fourth Circuit, applying plain error when no instruction was requested, nevertheless considered the record to conclude that corroborating evidence and indications that the identification was reliable rendered the omission of identification instructions harmless error.[341] The Fifth Circuit's review under a plain error standard has included scrutiny of closing argument in order to confirm that the context of the case presented the jury with the issue of identification.[342] The District of Columbia affirmed a conviction where the defendant did not request identification instructions but also reviewed the record to satisfy itself that corroborating evidence established guilt conclusively.[343] In another case, the District of Columbia Circuit explored the record to conclude that the instruction would have been inappropriate under the facts.[344]

To effectuate policies underlying the plain error standard, courts reviewing alleged error in the omission of identification instructions that were not requested at trial should apply a limited standard of appellate review. Erosion of judicial economy results from the failure of appellate courts consistently to apply plain error doctrine to appeals from the omission of unrequested instructions. The reluctance of courts to apply plain error categorically to such

337 United States v. Kimberlin, 805 F.2d 210, 233 (7th Cir. 1986), *cert. denied*, 483 U.S. 1023 (1987); United States v. Fleming, 594 F.2d 598, 606 (7th Cir.), *cert. denied*, 442 U.S. 931 (1979); United States v. Chrysler, 533 F.2d 1055, 1057 (8th Cir.), *cert. denied*, 429 U.S. 844 (1976); United States v. Roundtree, 527 F.2d 16, 19 (8th Cir. 1975), *cert. denied*, 424 U.S. 923 (1976).

338 United States v. Gentile, 530 F.2d 461, 469 (2d Cir.) (finding the error harmless due to the extensive evidence of guilt independent of problematic identification evidence), *cert. denied*, 426 U.S. 936 (1976).

339 United States v. Lewis, 565 F.2d 1248 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978).

340 United States v. Wilford, 493 F.2d 730, 735 (3d Cir.), *cert. denied*, 419 U.S. 851 (1974).

341 United States v. Revels, 575 F.2d 74, 76 (4th Cir. 1978).

342 United States v. Rodriguez, 498 F.2d 302, 307 (5th Cir. 1974).

343 United States v. Thomas, 485 F.2d 1012, 1014 (D.C. Cir. 1973).

344 United States v. Garner, 499 F.2d 536, 537-38 (D.C. Cir. 1974).

appeals may reflect either a perception that the importance of the issue requires scrutiny of the record[345] or a desire to harmonize cases that affirm convictions regardless of whether instructions were requested at trial.[346] Such concerns are misdirected. By avoiding the limited review indicated by the plain error standard, appellate courts waste judicial resources that the standard is intended to preserve. Elaborating exceptions to general requirements of identification instructions in the context of plain error review only aggravates the problem of inconsistent cases.

Balancing the increased risk of wrongful conviction in an individual case resulting from omission of the instruction against the real social costs incurred by reversal weighs heavily towards a rejection of plain error. And because the stricter standard is applied only when no instruction was requested at trial, affirming in such cases does not deter the routine administration of identification instructions. No case has yet reversed the omission of identification instructions as plain error, and there has now developed sufficient authority for courts routinely to reject such appeals upon summary review.[347]

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345 Having further scrutinized a record under the plain error standard, courts have not found that plain error is established by the omission of identification instructions. Sufficient appellate case law demonstrates either that the "right" to identification instructions is not so significant that it requires reversal or that plain error precludes reversal of the alleged error regardless of its affect on the factfinder.

346 A number of opinions reveal both the desire to develop a uniform standard that applies regardless of whether instructions were requested and the reluctance to justify affirmance on a defendant's failure to request instructions. *E.g.*, United States v. Wilford, 493 F.2d 730, 735-36 (3d Cir.) (refusing to find plain error where an identification instruction was not requested but opining gratuitously that harmless error might support affirming in certain cases where the instruction was requested), *cert. denied*, 419 U.S. 851 (1974). The Fourth Circuit created special problems for itself because it first required identification instructions in an opinion that limited the requirement to prospective application and then it reversed the conviction on appeal. *Compare* United States v. Holley, 502 F.2d 273 (4th Cir. 1974) *and* United States v. Johnson, 495 F.2d 378 (4th Cir.), *cert. denied*, 419 U.S. 860 (1974). Because it nevertheless found that circumstances supported reversal in *Holley*, the court distinguished the facts in other cases from *Holley*, even when applying a plain error standard of review. *See Holley*, 495 F.2d at 378; United States v. Revels, 575 F.2d 74, 76 (4th Cir. 1978). The District of Columbia Circuit also required identification instructions prospectively in an appeal where the defendant had not requested the instructions at trial. United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1973). In later appeals from unrequested instructions, the District of Columbia Circuit probed the record to confirm that omission of the instruction was proper. *Garner*, 499 F.2d at 537-38 (distinguishing the case from *Telfaire*).

347 Where extraordinary circumstances indicate the real possibility of mistaken identification, courts may reverse on limited grounds. Such a case will, however, probably present challenges to the sufficiency of the evidence and, perhaps, constitutional challenges to the identification procedure.

2. *Harmless Error*

Procedural economy does not require restrictive appellate review when a defendant requested identification instructions at trial. In such a case, the defendant fulfilled his or her obligations to the trial court and contributed in no way to the error on appeal. Nevertheless, the doctrine of harmless error[348] supports affirmance of convictions notwithstanding error at trial when the error was purely technical or did not adversely affect the factfinder's deliberation.[349]

Characterization of error as harmless is conclusory and requires a consideration of substantive and procedural interests that are affected by the standard of review. Harmless error review decreases judicial efficiency at the appellate level by requiring appellate scrutiny of the record in order to determine whether the error affected the factfinding process, thereby increasing the risk of wrongful conviction.[350] But harmless error promotes judicial economy by avoid-

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348 FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

349 Harmless error serves principles of substantive justice distinct from those promoted by plain error. Its goal is to uphold a judgment despite error when the error did not adversely affect a party's rights. The most compelling case for application of the rule occurs when the party objects to an improper procedure or instruction that actually benefits him. The assumption behind identification instructions is that such instructions benefit a defendant. If this assumption is correct, a conviction should be affirmed on grounds of harmless error where a defendant objected to an identification instruction that was given at trial. *See* United States v. Zarintash, 736 F.2d 66, 75 (3d Cir. 1984) (identification instruction was not prejudicial judicial comment on the evidence).

Harmless error promotes judicial economy by preventing a second trial. A defendant appealing from a nonprejudicial error obviously seeks a new trial with the hope of obtaining a different outcome. But the different outcome need not relate to the merits of the case. If a defendant has a constant 10% chance of acquittal (because of the burden of proof placed on the government, or some other reason), a defendant who has the opportunity for a retrial, if convicted, has a 19% chance of acquittal. In reality, the difference may be greater because a defendant may benefit from the delay of a second trial and from the experience he acquired during the first trial, so that the probability of acquittal does not remain constant but instead tends to increase. Harmless error promotes underlying substantive values by assuring that a different outcome will not be obtained solely because of enhanced procedural opportunities related to delay or discovery. Similarly situated defendants are treated the same, and each suffers the same risk of conviction.

350 The scope of the appellate inquiry depends upon the court's treatment of the function of identification instructions. Circuits that require instructions only to articulate the issue of identity may conduct a more limited inquiry into the structure of the proceedings, the nature of inculpatory evidence, and the arguments and instructions in order to determine whether the jury focused on the issue. Such courts have affirmed convictions notwithstanding omission of requested identification instructions when identification was not a critical issue at trial. *See* United States v. Espinosa, 771 F.2d 1382, 1412 (10th Cir.), *cert. denied*, 474 U.S. 1023 (1985). When identification is in issue, such courts have affirmed where the case as a whole clearly presented the issue of identification. Courts have even tolerated the omission of requested identification instructions because the identification evidence was especially weak or vigorously contested.

ing repetitious trial litigation where the avoidance of the error at retrial would not benefit the defendant.

A conclusion that error was harmless requires a finding "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error."[351] The finding may not be supported by speculation about how the error actually affected jury deliberation nor by estimation of the probability of reconviction.[352] Because appellate courts must avoid speculating about the potential impact of the error upon the jury—if the jury may have relied on problematic identification evidence, and if a trial court refusal to give a proper identification instruction may have adversely affected the jury's evaluation of the identification—harmless error would not support affirmance.[353]

Omission of identification instructions may constitute harmless error in three types of cases. First, trial court refusal to give identification instructions will not prejudice the defendant where misiden-

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Thus, in United States v. Ramirez-Rizo, 809 F.2d 1069, 1072 (5th Cir. 1987), the court affirmed in part precisely because the government relied heavily upon identification evidence in its argument. *See also* United State v. Rhodes, 569 F.2d 384, 390 (5th Cir.) (affirming based upon a general review of nature of government's case, instructions, and closing arguments), *cert. denied*, 439 U.S. 844 (1978).

In contrast, circuits that require identification instructions as a method of alerting the jury to dangers of identification evidence and of focusing the jury's attention on circumstances that militate against accurate identification should probe the record to determine whether circumstances conducive to misidentification are present. Absence of circumstances that erode reliability of identification might render the instructions unnecessary and their omission harmless. In *Telfaire*, 469 F.2d at 556, the court justified its failure to reverse—and the prospective effect of its requirement of particularized identification instruction—on the ground that circumstances of the identification, including the fact that it was made spontaneously and soon after the crime, presented no special danger of misidentification.

351 Kotteakos v. United States, 328 U.S. 750, 765 (1946). In construing the harmless error doctrine, the Court reversed convictions notwithstanding a "harmless error" statute that FED. R. CRIM. P. 52(a) subsequently replaced. *See* FED. R. CRIM. P. 52(a) advisory committee's notes; 3A C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 852 at 295-97 (2d ed. 1982).

Kotteakos suggests a two-part analysis to support a finding of harmless error. First, the right affected by the error must be substantial. Second, the right must be affected adversely by the error. 328 U.S. at 765.

352 "[I]t is not the appellate court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out." *Id.* at 763 (citations omitted).

353 [T]he question is, not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the things done wrong on the minds of other men, not on one's own, in the total setting.

Id. at 764 (citations omitted).

tification was not in issue[354] or where identification was not important to the government's case.[355] In cases where identification was not in issue, omission of the instruction would not be error and further analysis of prejudice would not be required.[356] Harmless error would also support affirming where a witness's inconsistent identifications resulted not from an inability to recognize a suspect but rather from perjury,[357] or where the defense challenge to identification was based not on the witness's opportunity to observe and identify but rather on the witness's bias.[358]

Second, harmless error may support affirming a conviction where the instructions would not have attained the benefits that they

354 *See* United States v. Cowsen, 530 F.2d 734, 738 (7th Cir.) (defendant did not raise any conflict or uncertainty in the evidence on the issue of identity), *cert. denied*, 426 U.S. 906 (1976).

355 Where inculpatory evidence does not include eyewitness identification, but where the defendant introduces an exculpatory identification, an identification instruction might not be required.

Nonetheless, harmless error should not be established merely because the identification supported an inference of guilt rather than providing direct evidence. An identification that places a suspect near the crime scene is not so unimportant that the omission of identification instructions is harmless error, unless the location of the defendant is not in issue. *Compare* United States v. Wilford, 493 F.2d 730, 735 (3d Cir.) (police officer's identification only placed the suspect near the scene of the drug transaction, but that fact was not disputed and taken alone did not support any inference of participation in the drug sale), *cert. denied*, 419 U.S. 851 (1978) *and* Osborne v. United States, 542 F.2d 1015, 1018 (8th Cir. 1976) (eyewitness testified that the defendant was in a car similar to that driven in the robbery, but court held that such evidence was not an eyewitness identification that required any instruction) *and* United States v. Johnson, 386 F. Supp. 1034, 1037 (W.D. Pa. 1974) (no instruction required when identification provided circumstantial evidence that was strongly inculpatory), *aff'd without opinion*, 519 F.2d 1398 (3d Cir.), *cert. denied*, 423 U.S. 933 (1975).

356 *See Osborne*, 542 F.2d at 1018 (when witnesses testified to observing a car similar to the defendant's near the scene of the robbery but did not identify the defendant, identification was not in issue and the instruction was superfluous).

357 United States v. Marchand, 564 F.2d 983 (2d Cir. 1977) (holding that no identification instruction was required where apparent inconsistencies in accomplices' testimony resulted from willful changes in testimony rather than any inability to identify the suspect whom the witnesses had known for a long time), *cert. denied*, 434 U.S. 1015 (1978). The court concluded from the record that misidentification was not a danger, and identification instructions were thus not required. *Id.* at 995-97.

358 A challenge to an identification by an accomplice rests on the bias of the witness rather than circumstances that may cause misidentification; hence, a particularized identification instruction designed to alert jurors to circumstances that aggravate the risk of misidentification would be superfluous. *See* United States v. Ramirez-Rizo, 809 F.2d 1069 (5th Cir. 1987) (most credible eyewitness was accomplice who entered guilty plea to aiding and abetting transportation of illegal aliens); United States v. Cueto, 628 F.2d 1273, 1276 (10th Cir. 1980) (identification of robber by bank teller was supported by accomplice testimony that the defendant participated in the robbery); *Marchand*, 564 F.2d 983 (inconsistent identifications by two accomplices to possession and distribution of contraband); United States v. Rodriguez, 498 F.2d 302 (5th Cir. 1978) (chief eyewitness was accomplice who had entered guilty plea).

are designed to achieve. For example, omission of particularized identification instructions may not prejudice the defendant where the circumstances of identification did not pose special dangers of misidentification that the instructions were designed to reduce.[359] Because the purpose of particularized identification instructions is to alert jurors to dangers inherent in the process of identification, omission of the instructions may be harmless where the suspect was previously known to the witness,[360] where the witness was not a vic-

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359 In United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1972), the court justified its prospective ruling by emphasizing that the spontaneity and timing of the identification reduced the danger of misidentification. The Third Circuit attempted to limit the requirement of identification instructions to cases that presented special dangers of misidentification and sought to articulate circumstances that posed such dangers. *See* United States v. Barber, 442 F.2d 517, 528 (3d Cir.), *cert. denied*, 404 U.S. 958, 404 U.S. 846 (1971).

Several courts have affirmed where no circumstances to which particularized instructions were designed to alert were present in the record. *E.g.*, United States v. Montelbano, 605 F.2d 56 (2d Cir. 1979) (witness had extensive opportunity to observe and the subsequent identifications presented none of the suggestive circumstances that aggravate dangers of misidentification). But *Montelbano* also illustrates the opportunity for manipulation, because the court relied upon the witness's reluctance to express certainty as a factor that reduced the danger of secondary identification error. In contrast, the Third Circuit's *Barber* instruction specifically set forth lack of positiveness of a witness as a condition that required cautionary identification instructions. *See Barber*, 442 F.2d at 528.

360 *See* United States v. Garner, 499 F.2d 536, 538 (D.C. Cir. 1974) (the witness was a police officer who had seen defendant on six occasions prior to observing him complete narcotics sale, and "the issue here was one of veracity between [the witness] and [the defendant] . . . . The instruction suggested in the *Telfaire* case does not focus on identifications of this sort . . . ."). In a number of cases where identifications were made by persons who previously knew the defendant, appellate courts have affirmed on other grounds. *See Cueto*, 628 F.2d 1273 (omission of instruction held not reversible because of corroborating evidence, but identification was made by accomplice); United States v. Boyd, 620 F.2d 129 (6th Cir.) (while holding that no identification instruction was required because of corroborating evidence, the court also noted that two of three identifying witnesses knew the defendant personally, so that no special danger of misidentification existed), *cert. denied*, 449 U.S. 855 (1980); United States v. Ingram, 600 F.2d 260 (10th Cir. 1979) (holding that an identification instruction on dangers of cross-racial identification was argumentative in a case where acquaintances of the defendant identified him in surveillance photographs); United States v. Butcher, 557 F.2d 666 (9th Cir. 1977) (holding that identification instructions were discretionary, the court noted that identification evidence was provided by police officers and parole officer who had known the defendant before the crime was recorded on surveillance photographs); *Rodriguez*, 498 F.2d 302 (holding that the defense theory of the case was presented to the jury, the court implicitly assumed that accomplice testimony did not present special dangers of misidentification); United States v. Wilford, 493 F.2d 730 (3d Cir.) (no instruction was requested and no plain error supported reversal, but the court also noted that one identification was provided by an informant who had known the defendant previously and had ample opportunity to observe the transaction), *cert. denied*, 419 U.S. 851 (1974).

A more difficult fact situation arose in United States v. Kimbrough, 528 F.2d 1242 (7th Cir. 1976), where the victim of assault and attempted robbery had an opportunity to

tim of the crime or otherwise under stress at the time of observation,[361] or where the witness was alerted prior to the crime of the need to make an accurate observation and identification.[362] Development of harmless error case law would allow appellate courts to elaborate circumstances that aggravate identification error. Judicial articulation of such circumstances would promote expeditious appellate review and would provide a mechanism for continuing judi-

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observe the defendant only a short time before the attack. Nonetheless, the court affirmed because the trial court gave the "substantial equivalent" of the *Telfaire* instruction to the jury. *Id.*

One court reversed the refusal to give requested identification instructions notwithstanding the fact that the eyewitness had become familiar with the defendant prior to observing the alleged crime. *See* United States v. Greene, 591 F.2d 471 (8th Cir. 1979) (court reporter who recognized the defendant from court appearance identified the defendant on airplane).

361 This category could include participants in the crime who knew the criminal's identity prior to the crime so that no special danger of misidentification was presented. *See supra* note 369 (discussing cases where the identifying witness knew the defendant prior to the crime or identification). It could include persons who expected to benefit from the crime. *See Ramirez-Rizo*, 809 F.2d 1069 (while one eyewitness was an accomplice to the crime of transporting illegal aliens, two other witnesses were the aliens who sought transportation). The category could also include persons who observed but were not victims of a crime. *E.g.*, United States v. Luis, 835 F.2d 37 (2d Cir. 1987) (testimony by undercover law enforcement officers who purchased drugs from defendant); United States v. Cowsen, 530 F.2d 734 (7th Cir.) (identifications by two undercover law enforcement officers who purchased contraband), *cert. denied*, 426 U.S. 906 (1976). *But see Greene*, 591 F.2d 471 (reversing conviction where trial court refused to give identification instruction for situation in which court employee observed the defendant on an airplane in violation of terms of bond). It could include persons who did not know that they were victims at the time they were targets of a criminal offense. *E.g.*, United States v. Gentile, 530 F.2d 461 (2d Cir.) (identification was made by purchaser of fraudulently issued securities who did not know the securities were fraudulent at the time of the sale), *cert. denied*, 426 U.S. 936 (1976); United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974) (witnesses were victims of theft by deception who did not know the crime was occurring at the time); McGee v. United States, 402 F.2d 434, 436 (10th Cir. 1968) (identification by two persons to whom forged securities were presented for payment), *cert. denied*, 394 U.S. 908 (1969). Finally, it could include persons who observed the defendant and whose identification testimony is inculpatory only in the context of other evidence but who did not understand that the person originally observed was engaged in wrongdoing at the time of the observation. *See* United States v. Kavanagh, 572 F.2d 9, 11 (1st Cir. 1978) (identification by taxi driver who transported robber without knowing that he was fleeing a crime); United States v. Lewis, 565 F.2d 1248 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978).

362 Identification evidence by undercover law enforcement officers would present less of a risk of identification error because of the reduced stress of observation and because the witnesses knew in advance that subsequent identification would be made. *But see* Salley v. United States, 353 F.2d 897 (D.C. Cir. 1965) (reversing conviction supported by undercover officer's identification, noting the special dangers of misidentification that resulted from large number of investigations in which such witnesses participated at one time, and further noting the problems faced by the defense's challenge of police testimony).

cial integration of advances in the psychology of misidentification and the sociology of jury instructions.

Third, omission of identification instructions may constitute harmless error because of other inculpatory evidence. But predicating a finding of harmless error on the presence of other inculpatory evidence should not rest on impermissible speculation about the grounds of juror decisionmaking. Although courts have affirmed convictions where they have characterized other inculpatory evidence as substantial or overwhelming,[363] the grounds of harmless error are not present where the appellate court weighs the quality of inculpatory evidence that supports an identification.

It is rarely possible to determine what evidence a jury credited from the record on appeal. Though it may be possible to conclude that omission of instructions did not prevent the jury from considering the issue of identity,[364] it will be impossible to determine that the omission did not influence the qualitative evaluation of identification evidence.[365] The record will rarely eliminate the possibility that the jury—or one juror—relied exclusively on identification evidence or that the evaluation of other evidence was affected by consideration of supporting identification evidence. In unusual cases where evidence of guilt is overwhelming, the appellate court should

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363 *E.g., Montelbano*, 605 F.2d 56 (inculpatory evidence characterized as "overwhelming"); United States v. Revels, 575 F.2d 74, 76 (4th Cir. 1978) (corroborating evidence rendered omission of model instruction harmless beyond reasonable doubt); United States v. Thomas, 485 F.2d 1012 (D.C. Cir. 1973) (affirming omission of *Telfaire* instruction where evidence, including corroborating witnesses, was "overwhelming").

364 *See, e.g.*, United States v. Thoma, 713 F.2d 604 (10th Cir. 1983) (holding in a case where four eyewitnesses identified the defendant from a photo array, and the identifications were corroborated by other evidence, that the omission of an identification instruction was not reversible error because the parties' arguments presented the issue of identification), *cert. denied*, 464 U.S. 1047 (1984); United States v. Rhodes, 569 F.2d 384 (5th Cir.) (holding, in a case where only one of five eyewitnesses identified the defendant, but prosecution presented corroborating circumstantial evidence, that the parties' arguments presented the issue of identification), *cert. denied*, 439 U.S. 844 (1978); United States v. Roundtree, 527 F.2d 16 (8th Cir. 1975) (holding in a case where a government agent identified the defendant as the person who robbed him that argument alerted the jury to the problem of mistaken identification), *cert. denied*, 424 U.S. 923 (1976); United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973) (observing that issue of identification was presented in argument); United States v. Napue, 401 F.2d 107 (7th Cir. 1968) (holding in a case where three eyewitnesses identified the defendant as the person they observed under poor lighting that omission of identification instruction was harmless error because testimony and instructions led to the conclusion that the jury "could not possibly [have] been misled."), *cert. denied*, 393 U.S. 1024 (1969).

365 One study concluded that an emphasis in closing argument on particular conditions that weakened an identification did not "sensitize" jurors to those conditions. Cutler, Penrod & Stuve, *supra* note 8, at 54. Another study suggested that the burden of proving identity instructions affected the conviction rate. Hoffheimer, *supra* note 35, at 53.

affirm only if it is satisfied beyond a reasonable doubt of the defendant's guilt from evidence other than eyewitness identifications.[366]

3. *Rule of Corroboration*

A number of courts have held that identification instructions are not required where an eyewitness identification is corroborated.[367] Though articulated as a substantive rule as to when instructions are required, a rule of corroboration does not identify factors that reduce dangers of primary identification error.[368] Nor

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366 Some circuits have adopted the reasonable doubt standard for purposes of determining whether an omission was harmless error, but in so doing they have considered the accuracy of the identification. *See, e.g., Revels*, 575 F.2d at 76 (characterizing omission of instruction as harmless beyond reasonable doubt). It has been suggested, however, that courts affirm only where inculpatory evidence, other than the identification, supports conviction under that standard. Several cases actually satisfy this extraordinary standard of review. *See, e.g.*, United States v. Scott, 578 F.2d 1186 (6th Cir.) (defendant arrested after being wounded by police in possession of gun used to shoot at police and in possession of proceeds of robbery), *cert. denied*, 439 U.S. 870 (1978); Durns v. United States, 562 F.2d 542 (8th Cir.) (defendant leased apartment where kidnap victim was held, gave ransom money to his girlfriend, and was found in possession of property of the victim), *cert. denied*, 434 U.S. 959 (1977); United States v. Cowsen, 530 F.2d 734 (7th Cir.) (bullet holes in defendant's car were located where police had hit fleeing suspect's car), *cert. denied*, 426 U.S. 906 (1976); United States v. Kimbrough, 528 F.2d 1242 (7th Cir. 1976) (inculpatory admission upon arrest); United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974) (statements of intention to girlfriend, possession of disguise used in robbery, and arrest in another state in possession of proceeds of the robbery).

367 The Sixth Circuit held, "In this Circuit . . . identification instructions . . . need be given only where there is a danger of misidentification due to lack of corroborative evidence." United States v. Boyd, 620 F.2d 129, 131 (6th Cir.) (affirming conviction despite omission of requested instruction), *cert. denied*, 449 U.S. 855 (1980). The Eighth Circuit repeatedly stated that identification instructions are required when the prosecution relies exclusively on eyewitness identification, and the circuit has affirmed in cases which included corroborating inculpatory evidence. United States v. Mays, 822 F.2d 793, 798 (8th Cir. 1987); United States v. Cain, 616 F.2d 1056, 1058-59 (8th Cir. 1980). The Fourth Circuit adopted a rule of corroboration in affirming a conviction where no instruction was requested. *See Revels*, 575 F.2d at 76 (omission of unrequested instruction was not plain error where there was corroborating evidence).

Other opinions have referred to the presence of corroborating evidence in finding that omission of identification instructions was not reversible error. *See* United States v. Conner, 752 F.2d 504, 507-08 (10th Cir. 1985) (finding that trial court instructed adequately and observing that "this is not a case in which the Government's case depended on a single eyewitness whose testimony was not corroborated by other evidence"); *Thoma*, 713 F.2d 604 (no reversible error where there was inculpatory evidence); *Montelbano*, 605 F.2d 56 (2d Cir. 1979) (affirming despite omission of instructions where the corroborating evidence was "overwhelming"); *Scott*, 578 F.2d 1186 (no reversible error where identification was not crucial issue and overwhelming corroborating circumstantial evidence existed); United States v. Kavanagh, 572 F.2d 9, 12-13 (1st Cir. 1978) (presence of corroborating inculpatory evidence was one factor that supported the court's refusal to reverse omission of instruction).

368 In only one case did inculpatory evidence relate directly to the accuracy of identification evidence. *Cain*, 616 F.2d 1056 (defendant's admission established the capacity of the eyewitness to incriminate him). In most cases, independent circumstantial inculpa-

does a rule of appellate corroboration guide trial courts in determining when the instructions are beneficial or appropriate.[369] Instead, corroboration provides a method of qualitative evaluation of the trial record by appellate courts to determine whether a conviction was meritorious. Presence of corroborating evidence may demonstrate that the risk of wrongful conviction was minimal. And appellate courts have engaged in extensive review of evidence in justifying findings that corroborative evidence supports a conviction.

But application of a rule of corroboration raises four problems. First, independent evidentiary review by the appellate court undermines the integrity of jury factfinding. Second, appellate evaluation depends on a problematic characterization of evidence as corroborating an identification.[370] Third, corroboration requires inefficient appellate review of evidence supporting individual convictions.

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tory evidence or additional eyewitness identifications provide corroborating evidence. The presence of such additional incriminating evidence is logically unrelated to the accuracy of primary identification. Just as positive identifications are made of innocent defendants, positive identifications are made of guilty defendants under circumstances that render the identifications completely unreliable. Presence of additional incriminating evidence—such as proximity to the crime, motive, or consciousness of guilt—may be admitted against either the innocent or guilty defendant. Such evidence does not relate to the quality of the eyewitness identification but undoubtedly increases the probability of conviction. The probability of conviction is enhanced in part, however, because additional incriminating evidence bolsters a doubtful identification. Corroborating evidence thus aggravates the risk of wrongful conviction in cases where factfinders would acquit in the absence of additional incriminating evidence.

369 Consequently, opinions affirming convictions because of the presence of corroborating evidence nevertheless have urged trial courts to give the instructions and have even suggested that the instructions would have aided the jury in evaluating the case on appeal. *E.g.*, United States v. Melton, No. 85-3529, slip op. (6th Cir. Mar. 23, 1987) (LEXIS, Genfed library, Courts file) (not recommended for full text publication), *cert. denied*, 484 U.S. 1068 (1988).

370 The proper characterization of the inculpatory evidence in the leading District of Columbia Circuit case illustrates the problems. The Ninth Circuit distinguished the eyewitness testimony in *Telfaire* as uncorroborated. *See* United States v. Masterson, 529 F.2d 30, 32 (9th Cir.), *cert. denied*, 426 U.S. 908 (1976). But the defendant had actually been apprehended shortly after the crime near the scene of the crime. *See* United States v. Telfaire, 469 F.2d 552, 554 n.4 (D.C. Cir. 1972). The defendant argued, however, that his presence near the scene evidenced lack of flight and was thus exculpatory. *Id.* at 554.

Other problems with elaborating a law of corroboration are posed where two eyewitnesses identify a defendant, *e.g.*, United States v. Cueto, 628 F.2d 1273 (10th Cir. 1980) (identification instruction not required where two eyewitnesses identify defendant), where an alibi is impeached, or where some other defense has failed. Still other problems are posed where corroborating evidence supports inferences of guilt. The Eighth Circuit confronted this problem and concluded that incriminating circumstantial evidence that supports inferences does not reduce the need for identification instructions because the factfinder's evaluation of identification evidence affects the inferences that are drawn from the other evidence. *See* United States v. Greene, 591 F.2d 471 (8th Cir. 1979).

Fourth, corroboration limits the administration of identification instructions routinely[371] and thus reduces significantly the systemic benefits that the instructions are designed to achieve.

As a practical matter, the government rarely prosecutes a case based solely on one eyewitness's testimony. But good prosecutors do bolster weak circumstantial cases with weak eyewitness identifications.[372] The presence of corroborating evidence in such cases may indicate the accuracy of an identification. But presence of such evidence may equally have enhanced an eyewitness's confidence in the accuracy of an identification. Corroborating evidence may thus itself constitute a suggestive circumstance that renders an identification more problematic—a circumstance that increases the need for proper instructions.[373]

IV. PROPOSALS

The striking federal appellate resistance to enforcing a requirement of identification instructions reveals legitimate concerns with the substantive effect of the instructions. Yet most circuit courts have continued to express concern with the dangers of wrongful conviction that are presented by eyewitness identification testimony, and the circuits have encouraged administration of identification instructions as one method of reducing the risk of wrongful conviction. The effectiveness of the instructions requires their routine administration in cases that present the greatest risk of identification error. The standards of review adopted in most circuits, however, undermine the routine administration of identification instructions at trials and engender a complex and procedurally inefficient appellate review of inculpatory evidence.

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371 Because corroboration is expressed as a substantive rule that concerns when the instructions must be administered, trial courts may correctly conclude that the instructions are not required where identifications are corroborated. Because individual convictions are affirmed, trial courts are not informed of the appellate standards as to identification instructions.

372 Prosecutors undoubtedly appreciate the impact of even weak identification evidence. *See supra* note 11; E. LOFTUS, *supra* note 1. Surveys of prosecutors and law enforcement officers indicate that they attribute higher accuracy to identifications than other lawyers. *See* Brigham, *supra* note 6, at 48; Brigham & Wolfskeil, *Opinions of Attorneys and Law Enforcement Personnel on the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 337 (1983).

373 The presence of incriminating evidence, like other suggestive circumstances, may increase the risk of wrongful conviction at the same time that it increases the probability that any individual identification is accurate. Studies of the effect of blatantly biased photospread instructions on the accuracy of identifications illustrate the problem. Such instructions increased the number of accurate identifications but "at the expense of a dramatically higher false identification rate." Paley & Geiselman, *supra* note 26, at 11.

Circuits should adopt rules that assure that the instructions are administered routinely in appropriate cases and that promote legitimate policies of judicial administration. The following rules effectuate the purposes of the instructions and promote judicial economy. They also comport with the holdings—but not the dicta—of most of the opinions of the federal circuits.

1. Omission of identification instructions that were not requested at trial should be reviewed under a plain error standard. As a matter of law, such an omission should not constitute plain error.[374]

2. Omission of requested identification instructions on the government's burden of proving identity should constitute reversible error.

3. Omission of requested particularized instructions should constitute reversible error in cases where circumstances are present that increase the danger of primary identification error. Appellate elaboration of circumstances that require particularized instructions would provide circuit courts with the opportunity to articulate those factors that aggravate the danger of misidentification. For example, courts may determine on this ground that identifications made by witnesses who previously knew the defendant (such as informants or accomplices) or who were alerted at the time of initial observation of the need to identify (such as undercover law enforcement agents) present none of the special dangers of misidentification that particularized instructions are designed to avoid. Circuits would thus elaborate a typology of cases that would comport with the policies of the instructions at the same time that it would promote efficient appellate review.

4. Omission of requested instructions should constitute harmless error in cases where the appellate court can reach one of the following conclusions: 1) identification was not in issue; 2) factors that aggravate dangers of misidentification were not present; or 3) the defendant is guilty beyond a reasonable doubt based on evidence other than eyewitness identification.

Lastly, rules of decision within circuits should be developed with humble recognition both of the complexity of the underlying

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374 The proposed standard does not prevent courts from finding plain error where other errors are also present, even if the other errors (considered in isolation) do not constitute plain error. *Cf.* United States v. Alston, 551 F.2d 315, 320 (D.C. Cir. 1976) (risk of misidentification supported finding of plain error in instructions on burden of proof and alibi, though no objection was preserved at trial); United States v. Fernandez, 456 F.2d 638, 642 (2d Cir. 1972) (reversing because of cumulative effect of errors, including omission of requested identification instructions).

problem and the extent of collective ignorance of a solution. The integration of growing scholarship on the psychology of identification and the effect of jury instructions militates against hasty prescription of model instructions and against formal grounds of decisionmaking. The diversity among circuits and the internal tensions within circuits suggest the need for continuing judicial consideration of the substantive policies of the special identification instructions.