

SEEING IS BELIEVING: FIGHTING EYEWITNESS MISIDENTIFICATION IN KANSAS

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I. INTRODUCTION

Writing for the Court in 1967, Justice William Brennan stated “the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”¹ Accurate data on the total number of crimes involving eyewitness identifications is unavailable, but a survey of prosecutors in 1989 indicated that, each year, at least 80,000 eyewitness identifications occur in criminal cases.² The sheer number of eyewitness cases leaves substantial room for error because law enforcement frequently relies on eyewitness testimony to prosecute suspects.³

The Innocence Project provides statistics which support Justice Brennan’s concerns about eyewitness identification.⁴ Since 1989, deoxyribonucleic acid (DNA) evidence has proven over 10,000 people were falsely accused of crimes.⁵ In cases where individuals were later exonerated by DNA, seventy percent of these cases involved eyewitness misidentifications.⁶ While DNA evidence exonerates some misidentified individuals, many cases do not contain DNA evidence for law enforcement to evaluate.⁷ Eyewitness inaccuracies in these

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1. *United States v. Wade*, 388 U.S. 218, 228 (1967).

2. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATIONS 11 (2014), <https://www.nap.edu/read/18891/chapter/3> [<https://perma.cc/B67C-56KB>].

3. *See id.* at 13.

4. *See* THE INNOCENCE PROJECT, *DNA Exonerations in the United States*, <http://www.innocenceproject.org/dna-exonerations-in-the-united-states/> [<https://perma.cc/DEM6-YZ4E>].

5. *Id.*

6. *Id.*

7. Richard A. Wise et al., *Criminal Law: A Tripartite Solution to Eyewitness Error*, 97 J. CRIM. L. & CRIMINOLOGY 807, 810 (2007).

cases are particularly concerning because DNA will not exonerate these wrongfully convicted individuals.⁸

Human memory is malleable and prone to error.⁹ Despite the imperfections of memory, jurors tend to give substantial weight to eyewitness identifications because they misunderstand “how memory generally works and how particular factors . . . affect the accuracy of eyewitness testimony.”¹⁰ Many people mistakenly believe that human memory is similar to a camera recording and that witnesses can access this recording accurately at any time.¹¹ Based on this misunderstanding, juries give more weight to eyewitness testimony than any other evidence.¹² However, eyewitness identifications are error-prone because a correct identification requires the eyewitness accurately “sense, perceive, and remember objects and events that occurred and recall them later.”¹³ Other common misconceptions are that stressful situations increase eyewitness accuracy and that an eyewitness’ certainty about his or her identification directly correlates with the accuracy of the identification.¹⁴ In reality, stress decreases identification accuracy, while eyewitness certainty does not positively correlate with accuracy.¹⁵ Prevalent eyewitness errors, combined with juror’s misunderstandings about eyewitness accuracy, invite wrongful convictions.

For decades, courts and prominent psychologists recognized the faults in eyewitness testimony.¹⁶ Despite these faults, United States jurisdictions continue to admit eyewitness testimony at trial.¹⁷ In many cases, the only evidence against a defendant is an eyewitness identification.¹⁸ In the United States, prosecutors can charge suspects when no additional evidence corroborates an eyewitness identification.¹⁹ The United States Supreme Court stated that, ordinarily, “the testimony of one eyewitness is sufficient for the purpose of identification of the perpetrator of a crime.”²⁰ This one-witness method is flawed because it assumes that eyewitness identifications are reliable.²¹ However, one-witness prosecutions persist because many crimes

8. *Id.*

9. *Id.* at 812.

10. PAUL C. GIANNELLI ET AL., SCIENTIFIC EVIDENCE § 9.02 (5th ed. 2012).

11. Wise et al., *supra* note 7, at 812.

12. Bethany Shelton, Comment, *Turning a Blind Eye to Justice: Kansas Courts Must Integrate Scientific Research Regarding Eyewitness Testimony into the Courtroom*, 56 KAN. L. REV. 949, 950 (2008).

13. NAT’L RESEARCH COUNCIL, *supra* note 2, at 45.

14. Shelton, *supra* note 12, at 964–67.

15. *Id.*

16. GIANNELLI ET AL., *supra* note 10.

17. See *United States v. Levi*, 405 F.2d 380, 382 (4th Cir. 1968).

18. *Id.*

19. *Id.*

20. *Id.* The ability to use the testimony of one eyewitness to convict is commonly known as the one-witness rule. *Id.*

21. *People v. McDonald*, 690 P.2d 709, 717 (Cal. 1984). *McDonald* addressed two issues. First, *McDonald* addressed the admissibility of expert witnesses on eyewitness identifications and adopted the limited-admissibility rule. Second, *McDonald* held that vague jury instructions created a double jeopardy issue, which barred the state from re-charging the defendant with first degree

would remain unsolved if the testimony of one eyewitness was not sufficient for a conviction.²² Therefore, other safeguards exist to protect defendants from inaccurate eyewitnesses.²³

Trial courts, especially, are “directly responsible for providing fair trials.”²⁴ In order to promote justice and allow convictions based on a single eyewitness’ testimony, United States courts implement safeguards to protect the innocent.²⁵ One safeguard is expert witness testimony.²⁶ Unfortunately, research shows that juries and judges lack the knowledge to evaluate the factors that impact eyewitness accuracy.²⁷ In trial, expert witnesses can inform juries of these factors.²⁸ Jury instructions and cross-examination are other safeguards used to inform jury members about factors affecting eyewitness accuracy; however, research shows jury instructions and cross-examination do not adequately inform the jury about how certain factors affect eyewitness accuracy.²⁹ Expert witness testimony, used in conjunction with jury instructions and cross-examination, is necessary because justice requires that jury members receive the most accurate information about eyewitness testimony.

In the past few years, Kansas courts addressed two main defects in eyewitness identification cases. In 2012, Kansas eliminated the Pattern Jury Instruction which instructed jurors to use a witness’ certainty in assessing witness accuracy.³⁰ In its place, the current Kansas Pattern Jury Instructions give a cautionary instruction about eyewitness reliability.³¹ Then, in 2014, Kansas ruled that expert witnesses should be allowed to testify to eyewitness reliability at the trial judge’s discretion.³² Despite these alterations in the law, along with Kansas’ current safeguards, Kansas law remains outdated in light of

murder. In 2000, California’s Supreme Court overruled *McDonald* in part, holding that double jeopardy did not apply. *People v. Mendoza*, 4 P.3d 265, 278 (2000). *McDonald*’s decision on the admissibility of eyewitness-expert testimony still stands.

22. *See Levi*, 405 F.2d at 382.

23. *See infra* text accompanying notes 179–203.

24. Sandra Guerra Thompson, *Eyewitness Identifications and State Courts as Guardians Against Wrongful Convictions*, 7 OHIO ST. J. CRIM. L. 603, 605 (2010).

25. *See supra* text accompanying notes 179–203.

26. Thompson, *supra* note 24, at 630.

27. *Id.*

28. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 191 (1979).

29. ELIZABETH F. LOFTUS ET AL., EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL 353 (4th ed. 2007); Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2006 FED. CTS. L. REV. 3, 39, 44 (2006).

30. *State v. Mitchell*, 275 P.3d 905, 907 (Kan. 2012).

31. PIK Crim. 4th 51.110.

32. *State v. Carr*, 331 P.3d 544, 690 (Kan. 2014). This case was later overruled on other grounds. First, the Kansas Supreme Court overruled the *Carr* Court’s approach to challenging jurisdictional elements of a criminal complaint. *State v. Dunn*, 375 P.3d 332, 353–54 (Kan. 2016). Second, the United States Supreme Court rejected the *Carr* Court’s decision to vacate the defendant’s conviction when the trial judge failed to sever the defendant’s penalty phase from his codefendant’s. *Kansas v. Carr*, 136 S. Ct. 633, 643 (2016). Despite these reversals, the *Carr* rule regarding the admissibility of eyewitness-expert witnesses remains good law.

current eyewitness research.³³

In 1765, Sir William Blackstone famously reasoned “it is better that ten guilty persons escape than that one innocent suffer.”³⁴ Unfortunately, current psychological research shows that Kansas fails to protect innocent defendants from eyewitness misidentifications.³⁵ Kansas must find a way to protect the innocent from misidentifications and wrongful convictions. At the same time, the state must seek justice and convict the guilty. To achieve this balance, Kansas must adopt new guidelines for allowing experts on eyewitness testimony (eyewitness-experts) to testify in eyewitness cases.³⁶ This article discusses the admissibility of expert witness testimony regarding eyewitness identifications in Kansas courts. To fight for justice, Kansas must abandon its discretionary stance on eyewitness-expert testimony in favor of a limited-admissibility stance. Then, Kansas can implement a guideline that tells Kansas judges when they must allow eyewitness-expert testimony at trial. This guideline should specify that expert witness testimony on eyewitness identification is admissible when: (1) the eyewitness is identifying a stranger, (2) the eyewitness identification is the only substantial evidence to the prosecution’s case, and (3) one or more specific psychological factors exist that impair eyewitness accuracy.³⁷ Part II of this article discusses the history of Kansas law on eyewitness-expert admissibility to show how Kansas courts evolved in recent years and where Kansas law currently stands. Part III addresses other jurisdiction’s techniques for dealing with experts in eyewitness cases. Part IV discusses why Kansas should adopt a liberal view for allowing eyewitness-experts to testify and proposes a model guideline for Kansas. Finally, Part V addresses commonly made counter-arguments against admitting eyewitness-expert testimony and discusses why these concerns are meritless.

II. THE HISTORY OF EXPERT WITNESS ADMISSIBILITY ON EYEWITNESS TESTIMONY IN KANSAS

Throughout the decades, Kansas courts addressed the problems with eyewitness reliability. In the 1980s, the Kansas Supreme Court acknowledged the flaws of eyewitness testimony, but continued to uphold the blanket rule rendering expert testimony on eyewitness identification *per se* inadmissible for the next three decades.³⁸ In 1981, an exception to this rule existed “if the subject

33. See generally Thompson, *supra* note 24 (discussing that judges and juries are ill-equipped to understand eyewitness reliability in the absence of eyewitness testimony); see Shelton, *supra* note 12, at 960, 962 (explaining that jurors are unable to assess identification accuracy without expert testimony).

34. Blackstone’s *Formulation*, WIKIPEDIA, https://en.wikipedia.org/wiki/Blackstone%27s_formulation [<https://perma.cc/CZ4E-9VA8>].

35. See *infra* text accompanying notes 104–63.

36. See *infra* text accompanying notes 104–63.

37. See *infra* text accompanying notes 148–63. Psychological factors include: cross-racial bias, weapon focus, and witness stress level.

38. See generally *State v. Warren*, 635 P.2d 1236 (Kan. 1981); *State v. Wheaton*, 729 P.2d

matter involves organic or emotional disorders” of the eyewitness.³⁹ In the absence of this exception, courts excluded expert testimony on eyewitness reliability to avoid invading the jury’s fact-finding authority.⁴⁰ The Court’s concern was that eyewitness reliability was a subject matter “within the scope of the ordinary layman’s knowledge and experience.”⁴¹ The Court reasoned that the jury understands the problems associated with eyewitness testimony, so conflicting expert opinions invade the province of the jury.⁴² The Kansas Supreme Court understood the problems associated with eyewitness testimony, but believed the jury’s common knowledge, coupled with other procedural safeguards, were sufficient to prevent false convictions.⁴³ These alternative procedural safeguards include: cross-examination of the eyewitness, the defense attorney’s arguments and, most notably, a cautionary jury instruction.⁴⁴ This cautionary jury instruction acknowledges that problems exist with eyewitness testimony, and it includes factors for the jury to consider when evaluating eyewitness credibility.⁴⁵ The factors in this instruction include: lighting during the incident, eyewitness stress level, the length of time the eyewitness observed the suspect, and the length of time between the witness’ observation and the witness’ identification.⁴⁶

Only five years later, the Kansas Supreme Court considered further arguments that questioned the *Warren* Court’s decision to shield the jury from eyewitness-expert testimony.⁴⁷ The defense argued that further studies occurred after *Warren*, and the results necessitated expert testimony on eyewitness identifications.⁴⁸ Specifically, the defendant argued that the factors listed within the cautionary instruction did not protect him because a jury does not know how to apply them.⁴⁹ In fact, some jury members completely misunderstand the application of factors, rendering the factors useless or harmful to defendants.⁵⁰ Despite the defense’s argument, the *Wheaton* Court upheld *Warren*’s original holding, reasoning that expert testimony is unnecessary when a defense attorney can cross-examine a witness and argue eyewitness inaccuracies.⁵¹ These two holdings were upheld yet again in 1996, continuing the long-standing rule that

1183 (Kan. 1986).

39. *Warren*, 635 P.2d at 1242. “Organic or mental disorders” refer to physical impairments or mental disorders that could impact an eyewitness’ credibility. *Id.*

40. *Id.* at 1242–43.

41. *Id.* at 1242.

42. *Id.*

43. *Id.* at 1243.

44. *Warren*, 635 P.2d at 1243–44.

45. *Id.* at 1244–45.

46. *Id.*

47. *State v. Wheaton*, 729 P.2d 1183, 1188 (Kan. 1986).

48. *Id.*

49. *Id.*

50. *See id.* The defendant argued studies show that laypeople believe threats of violence increase the accuracy of identifications when, in actuality, threats of violence decrease eyewitness accuracy. *Id.*

51. *Id.*

eyewitness-expert testimony is *per se* inadmissible.⁵²

In 2012, the Kansas Supreme Court recognized that, “eyewitness identifications can be unreliable and result in wrongful convictions, causing some of the most tragic miscarriages of justice.”⁵³ The Court attempted to prevent injustice by considering recent science and eliminating the controversial “certainty instruction” from Kansas jury instructions.⁵⁴ However, the *per se* inadmissibility rule barring eyewitness-expert testimony remained.⁵⁵

In *State v. Carr*, the Court finally overturned this *per se* inadmissibility rule because the Court recognized Kansas law must evolve.⁵⁶ The Court finally acknowledged that justices and laypeople do not possess adequate knowledge to understand the prevalence of eyewitness inaccuracies.⁵⁷ Expert witnesses can highlight “the general fallibility of human memory” and discuss factors that influence memory.⁵⁸ Furthermore, the Court refuted its previous conclusions that expert testimony invades the province of the jury.⁵⁹ Similar to eyewitnesses, expert witnesses are subject to cross-examination, which allows the jury to make the ultimate conclusions.⁶⁰ In addition, a defendant’s use of expert witnesses to discount eyewitness credibility does not unfairly prejudice the prosecution because a state may call its own experts to offer alternative expert testimony.⁶¹ Through this process, the jury can evaluate the credibility of eyewitnesses and experts alike.⁶² The *Carr* holding drastically changed Kansas courts’ treatment of eyewitness-expert testimony because it dismissed Kansas’ *per se* inadmissibility rule, and allowed Kansas jurors to hear this testimony for the first time.⁶³

Currently, expert witnesses may testify in Kansas trials about the reliability of eyewitness identifications. The process to admit experts is flexible, allowing judges to evaluate each case to determine if an expert witness will assist the jury.⁶⁴ There is no blanket rule that outlines when expert witnesses should or should not testify about eyewitness identifications and the Kansas Supreme

52. *State v. Gaines*, 926 P.2d 641, 645–49 (Kan. 1996).

53. *State v. Mitchell*, 275 P.3d 905, 908 (Kan. 2012).

54. *Id.* at 911–13. Previous Pattern Instructions instructed the jury to consider eyewitness certainty when evaluating the credibility of a witness’ identification. See PIK Crim. 3d 52.20. The *Mitchell* Court said it was “mindful that the literature suggests certainty may not always be as reliable an indicator of accuracy.” *Mitchell*, 275 P.3d at 912.

55. *State v. Carr*, 331 P.3d 544, 690 (Kan. 2014).

56. *Id.*

57. *Id.* (overruling the Court’s general statement in *State v. Warren*, 635 P.2d 1236, 1242 (Kan. 1981)).

58. See *id.* at 688–90. In this case, the Court discusses how the expert might have testified about factors influencing eyewitness accuracy, including cross-racial bias and witness memory decay. *Id.*

59. *Id.* (addressing the concerns of the Court in *State v. Warren*, 635 P.2d 1236, 1242 (Kan. 1981)).

60. *Carr*, 331 P.3d at 690.

61. See *id.*

62. See *id.*

63. See *id.* at 689–90.

64. *Id.* at 690.

Court does not offer much guidance for trial court judges to follow when deciding admissibility.⁶⁵ As long as the expert's testimony "meets any other applicable test for admission of expert evidence," the Kansas trial judge is free to make decisions in each case.⁶⁶

III. RULES FOR ADMITTING EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATIONS IN OTHER JURISDICTIONS

Similar to Kansas, other jurisdictions initially banned expert testimony on eyewitness reliability. Historically, most jurisdictions upheld trial judges' exclusions of eyewitness-expert testimony.⁶⁷ The rationale for these exclusions, in both state and federal jurisdictions, include: the jury can accurately judge eyewitness reliability, experts invade the "province of the jury," and experts confuse the jury with complex, often contradictory, testimony.⁶⁸ Kansas courts used the same rationale to exclude eyewitness-expert testimony. However, unlike Kansas, several states changed the admissibility of eyewitness-expert testimony throughout the 1980s because courts recognized the complex nature of eyewitness identifications.⁶⁹ Even the United States Supreme Court addressed the possibility of misidentification and discussed expert testimony as a potential safeguard to prevent these issues.⁷⁰

Among United States jurisdictions, three theories currently exist regarding the admissibility of eyewitness-expert testimony⁷¹: the prohibitory view, the discretionary view, and the limited-admissibility view.⁷² Jurisdictions like Louisiana use the prohibitory view, which renders expert testimony on eyewitness identifications *per se* inadmissible.⁷³ Kansas followed this view until 2014, when *Carr* was decided.⁷⁴ Kansas currently follows the discretionary view, which allows admission of expert testimony at the trial court's discretion.⁷⁵ Jurisdictions like Montana, Utah, and California follow the limited-admissibility rule.⁷⁶ Limited-admissibility jurisdictions hold that denying expert testimony is an abuse of the trial court's discretion "when no corroborating evidence exists."⁷⁷ The rest of this section will address the rule of law in limited-admissibility jurisdictions because Kansas should abandon its current

65. *Id.*

66. *Carr*, 331 P.3d at 690.

67. GIANNELLI ET AL., *supra* note 10.

68. *Id.*

69. *Id.* Kansas did not allow eyewitness-expert witness testimony until 2014. *State v. Carr*, 331 P.3d 544, 690 (Kan. 2014).

70. *See United States v. Wade*, 388 U.S. 218, 228 (1967); *Perry v. New Hampshire*, 565 U.S. 228, 247 (2012).

71. GIANNELLI ET AL., *supra* note 10, at § 9.02.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*; *State v. Carr*, 331 P.3d 544, 690 (Kan. 2014).

76. GIANNELLI ET AL., *supra* note 10.

77. *Id.*

discretionary view and adopt a limited-admissibility view. This limited-admissibility view should incorporate aspects of California, Utah, and Montana law.

A. California's Liberal Admission of Expert Testimony

In 1984, California adopted the limited-admissibility rule.⁷⁸ Montana followed California's lead two decades later.⁷⁹ The California Supreme Court addressed expert testimony about eyewitness identification for the first time in *People v. McDonald*.⁸⁰ The defendant in *McDonald* wanted an expert witness to testify to the reliability of eyewitness identifications and the psychological factors that affect eyewitness accuracy.⁸¹ In this case, the expert would have testified that the suddenness of the crime, the stress of the situation, and the cross-racial identification are psychological factors that affect eyewitness accuracy.⁸² The trial court held that the expert witness testimony was inadmissible, citing California precedent.⁸³ However, the California Supreme Court reversed, finding that California precedent failed to adequately address the admission of expert testimony on eyewitness identifications.⁸⁴

The California Supreme Court addressed various courts' concerns about eyewitness-expert testimony when it developed a new test for admitting expert testimony on eyewitness identifications⁸⁵:

When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.⁸⁶

As applied in *McDonald*, the expert witness should have testified because the eyewitness identification was the key element of the prosecution's case and specific psychological factors existed which could affect accuracy.⁸⁷ In the absence of other evidence connecting the defendant to the crime, the expert's testimony was crucial to defend against the prosecution's allegations.⁸⁸ This holding transformed California into a limited-admissibility jurisdiction.

78. *People v. McDonald*, 690 P.2d 709, 719–20 (Cal. 1984).

79. *State v. DuBray*, 77 P.3d 247, 255–56 (Mont. 2003).

80. *McDonald*, 690 P.2d at 719.

81. *Id.* at 716.

82. *Id.* at 715.

83. *Id.* at 716–17.

84. *Id.* at 718–23.

85. *Id.* at 727.

86. *McDonald*, 690 P.2d at 727.

87. *See id.* at 726.

88. *See id.*

B. Expert Testimony in Relation to Rules of Evidence

Other jurisdictions switched to the limited-admissibility theory, using state rules of evidence to illustrate situations when barring expert testimony is an abuse of discretion. The Montana Supreme Court adopted the same test as California in 2003, holding that “it shall be an abuse of discretion for a district court to disallow expert testimony on eyewitness testimony when no substantial corroborating evidence exists.”⁸⁹ This court focused on Montana’s Rule of Evidence, which requires that expert testimony must assist the trier of fact.⁹⁰ The court held that, when a case meets the elements of the *McDonald* test, eyewitness-expert testimony will assist the trier of fact, as the Montana Rules of Evidence require.⁹¹ Based on Montana’s new test, the court in *State v. DuBray* held that the trial court did not abuse its discretion when it refused to allow expert testimony.⁹² The *McDonald* test was not met because additional evidence implicated the defendant, including multiple eyewitnesses and inconsistencies in testimony about the defendant’s alibis.⁹³ The court in *DuBray* placed limits on an expert’s ability to testify, which demonstrates that the limited-admissibility *McDonald* test bars excessive expert testimony.⁹⁴

Utah adopted a limited-admissibility stance in 2009 when it created a broad rule about eyewitness-expert testimony.⁹⁵ The Utah court held that expert testimony about eyewitness identification is admissible when the expert testifies about factors affecting eyewitness accuracy, as long as the testimony satisfies Utah’s Rules of Evidence.⁹⁶ This new interpretation results in a “liberal and routine admission of eyewitness expert testimony.”⁹⁷ In situations where an eyewitness is identifying a stranger and factors are present which could affect the eyewitnesses’ accuracy, an expert will assist the trier of fact.⁹⁸ Like California and Montana, Utah’s rule contains limitations because it requires a stranger identification, plus the presence of factors affecting accuracy, before presuming an expert will assist the judge or jury.⁹⁹ These limitations prevent excessive use of eyewitness-expert testimony.¹⁰⁰

All three of the above jurisdictions adopted the limited-admissibility theory.¹⁰¹ However, each jurisdiction offered slightly different guidelines for

89. *State v. DuBray*, 77 P.3d 247, 255 (Mont. 2003).

90. *Id.* (discussing MONT. R. EVID. 702).

91. *See id.*

92. *Id.* at 254–55.

93. *Id.* at 255.

94. *Id.*

95. *See State v. Clopten*, 223 P.3d 1103 (Utah 2009).

96. *Id.* at 1112.

97. *Id.* (discussing UTAH R. EVID. 702).

98. *Id.* at 1113 (noting that UTAH R. EVID. 702 is satisfied when these factors are present).

99. *Id.*; *State v. DuBray*, 77 P.3d 247, 255 (Mont. 2003); *People v. McDonald*, 690 P.2d 709, 727 (Cal. 1984).

100. *See Clopten*, 223 P.3d at 1113.

101. *See McDonald*, 690 P.2d at 727; *DuBray*, 77 P.3d at 255; *Clopten*, 223 P.3d at 1112.

judges to follow.¹⁰² These guidelines leave immense discretion for judges to determine eyewitness-expert admissibility, but prevent unlimited judicial discretion.¹⁰³ Unfortunately, Kansas' discretionary theory does not provide admissibility guidelines for Kansas judges. Kansas needs a limited-admissibility guideline to assist judges in making decisions about admitting eyewitness-expert testimony.

IV. KANSAS SHOULD ADOPT THE LIMITED-ADMISSIBILITY THEORY BECAUSE CURRENT KANSAS LAW DOES NOT ADEQUATELY SAFEGUARD AGAINST WRONGFUL CONVICTIONS

Kansas should abandon its discretionary view on the admissibility of eyewitness-expert testimony and instead adopt the limited-admissibility theory. In doing so, Kansas courts should adopt an easy-to-follow guideline, which combines particular aspects of California's, Montana's, and Utah's guidelines.¹⁰⁴ This guideline should specify that expert witness testimony on eyewitness identification is admissible when: (1) the eyewitness is identifying a stranger, (2) the eyewitness identification is the only substantial evidence to the prosecution's case, and (3) one or more specific psychological factors exist that impair eyewitness accuracy. When these elements exist, judges should presume the expert will assist the jury in evaluating the evidence and that excluding expert witness testimony is an abuse of discretion.¹⁰⁵ Additionally, the expert needs to meet other evidentiary requirements, such as reliability and a scientific basis for the testimony.¹⁰⁶ This guideline effectively allows more eyewitness-experts in necessary cases but limits excessive expert testimony in other cases.

A. Importance of Adopting a Guideline for Judges

In *Manson v. Brathwaite* the United States Supreme Court describes the test federal courts use to evaluate eyewitness reliability.¹⁰⁷ The *Manson* Court

102. See *McDonald*, 690 P.2d at 727 ("It shall be an abuse of discretion for a district court to disallow expert testimony on eyewitness testimony when no substantial corroborating evidence exists."); *DuBray*, 77 P.3d at 255 ("It shall be an abuse of discretion for a district court to disallow expert testimony on eyewitness testimony when no substantial corroborating evidence exists."); *Clopten*, 223 P.3d at 1112 ("[T]estimony of a qualified expert regarding factors that have been shown to contribute to inaccurate eyewitness identifications should be admitted whenever it meets the requirements of rule 702 of the Utah Rules of Evidence.").

103. See *McDonald*, 690 P.2d at 727 ("We reiterate that the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion."); *DuBray*, 77 P.3d at 254 ("The determination of the qualification and competency of expert witnesses rests largely within the trial judge, and without a showing of an abuse of discretion, such determination will not be disturbed."); *Clopten*, 223 P.3d at 1112 ("[T]rial judges perform a gatekeeper function to screen out unreliable expert testimony and are advised to view proposed experts with 'rational skepticism.'").

104. See *McDonald*, 690 P.2d at 727; *DuBray*, 77 P.3d at 255; *Clopten*, 223 P.3d at 1112.

105. See Thompson, *supra* note 24, at 630.

106. See *DuBray*, 77 P.3d at 255.

107. *Manson v. Brathwaite*, 432 U.S. 98, 113–14 (1977); NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 2, at 18.

posits that, “reliability is the linchpin in determining . . . [eyewitness] admissibility.”¹⁰⁸ The *Manson* test directs judges to use eyewitness reliability factors discussed in prior court rulings to determine the admissibility of eyewitness-expert testimony.¹⁰⁹ Essentially, this means judges rely on precedent, rather than science, to decide how to evaluate an eyewitness’ accuracy.¹¹⁰ Therefore, when prior courts misunderstand how psychological factors affect eyewitness accuracy, current courts continually rely on prior judicial misconceptions to rule on expert admissibility.¹¹¹ To fix this problem, judges need guidelines rooted in science to evaluate if an eyewitness is reliable enough to exclude eyewitness-expert testimony.

Kansas’ discretionary view of eyewitness-expert testimony creates problems similar to those in the *Manson* test. Absent a specific guideline, judges must rely on precedent and their own intuition to determine an eyewitness’ reliability.¹¹² The Kansas Supreme Court suggests in *Carr* that Kansas justices lack the knowledge to properly evaluate eyewitness reliability.¹¹³ Two psychological studies tested that assertion.¹¹⁴ The first study assessed judges’ beliefs about basic psychological factors that affect eyewitness accuracy.¹¹⁵ Despite their level of experience, judges were generally unfamiliar with common problems surrounding eyewitness identifications.¹¹⁶ In addition, judges were more likely than eyewitness-experts to assume jury members accurately understand factors affecting eyewitness testimony.¹¹⁷ In another study about eyewitness identification, researchers compared the knowledge of judges with the knowledge of undergraduate students.¹¹⁸ The study found that judges were not more knowledgeable than undergraduates about factors affecting eyewitness accuracy.¹¹⁹

The above studies indicate that Kansas trial judges’ misunderstandings about eyewitness accuracy, combined with unlimited judicial discretion, led to the exclusion of expert testimony.¹²⁰ These exclusions prevent juries from

108. *Brathwaite*, 432 U.S. at 114.

109. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *supra* note 2, at 18.

110. *See id.*

111. *Id.*

112. *See generally id.* at 18–19 (describing state supreme court efforts to incorporate scientific research to ensure reliable eyewitness identification in light of *Brathwaite*).

113. *State v. Carr*, 331 P.3d 544, 690 (Kan. 2014) (“Although many of us are aware of the general fallibility of human memory, we are not well versed in its scientifically documented tendencies to decay or become polluted by outside information and influences over time.”); *see also Thompson*, *supra* note 24, at 620 (“The scientific literature shows clearly that jurors (not to mention judges and lawyers) are not generally equipped to distinguish between reliable and unreliable identification evidence.”).

114. Richard A. Wise & Martin A. Safer, *A Survey of Judges’ Knowledge and Beliefs About Eyewitness Testimony*, 40 CT. REV. 6 (2003); Wise et al., *supra* note 7, at 825–26.

115. Wise & Safer, *supra* note 114.

116. *Id.* at 13.

117. *Id.* at 12.

118. Wise et al., *supra* note 7, at 826.

119. *Id.*

120. *See* Maureen Stoneman, Note, *United States v. Smith: An Example to Other Courts for*

evaluating all the relevant evidence in a case.¹²¹ Therefore, judges need a clear standard that dictates when judges must allow expert witnesses to testify about eyewitness testimony.¹²² An admissibility standard ensures that juries can evaluate all of the available evidence and make informed decisions.¹²³ Kansas' current discretionary approach ignores clear evidence that trial judges do not understand how psychological factors affect eyewitness accuracy. If Kansas switches to the limited-admissibility approach, then it can implement helpful guidelines for judges and combat judges' misconceptions about eyewitness identification.

B. Basis for the Elements in the Proposed Kansas Guideline

All three of the elements proposed for the Kansas guideline—the stranger element, the substantial evidence element, and the psychological factors element—combine other jurisdiction's rules.¹²⁴ The following discussion will provide psychological evidence to support how all three elements work together to prevent wrongful convictions based on inaccurate identifications.

1. Stranger Element

Expert witness testimony about eyewitness identification is not usually admissible if an eyewitness identifies someone he or she already knows.¹²⁵ This is reasonable because eyewitnesses recognize familiar faces significantly better than unfamiliar faces.¹²⁶ In contrast, expert witness testimony should be admissible in stranger identifications.¹²⁷ People's abilities to identify unfamiliar suspects is much less accurate because environmental distractions, witness perception, witness memory, and a suspect's disguise all interfere with facial recognition of strangers.¹²⁸ These various interferences create ample room for error.¹²⁹ However, most people do not recognize error-prone identifications because people “often identify familiar faces with ease” which creates a false belief that people are “generally very good at face recognition.”¹³⁰

An individual's ability to recognize unfamiliar faces varies greatly from person to person.¹³¹ Some people are programmed to never forget a face, while others struggle with identification.¹³² This high variability creates the need to evaluate eyewitness reliability on a case-by-case basis. The Kansas guidelines

How They Should Approach Eyewitness Experts, 60 CATH. U.L. REV. 533, 536 (2011).

121. See Wise et al., *supra* note 7, at 825–26.

122. See *id.* at 870–71.

123. See *id.*

124. See *State v. Clopten*, 223 P.3d 1103 (Utah 2009); *State v. DuBray*, 77 P.3d 247, 255–56 (Mont. 2003); *People v. McDonald*, 690 P.2d 709, 727 (Cal. 1984).

125. *Clopten*, 223 P.3d at 1113.

126. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 2, at 68.

127. See *Clopten*, 223 P.3d at 1113.

128. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 2, at 69.

129. See *id.*

130. *Id.* at 68–69.

131. *Id.* at 69.

132. *Id.*

should include a stranger element because certain cases require an expert witness to explain to the judge and jury that eyewitnesses identify unfamiliar faces with less accuracy. This element protects defendants from eyewitness misidentifications, while limiting unnecessary expert testimony when eyewitnesses identify familiar suspects.¹³³

2. No Other Substantial Evidence Exists

Misidentifications increase the potential for wrongful convictions when there is no other substantial evidence against a defendant.¹³⁴ In order to combat the strong weight jurors give to eyewitness identifications, courts must implement safeguards when the primary evidence against the defendant is a potentially erroneous identification.¹³⁵ Otherwise, jury members can base a defendant's conviction on one witness' misidentification, which leads to irreversible consequences. To prevent wrongful convictions, the Kansas guideline needs to instruct judges to admit experts when there is no other substantial evidence to prove the defendant's guilt. Every year, there are approximately 80,000 criminal trials where the sole evidence against the defendant is an eyewitness identification.¹³⁶ Despite eyewitness inaccuracies, juries give substantial weight to eyewitness identifications.¹³⁷ One court wrote that, "of all the evidence that may be presented to a jury, a witness' in-court statement that 'he is the one' is probably the most dramatic and persuasive."¹³⁸ Jurors must learn why eyewitness identifications are not always reliable so they do not rely solely on eyewitness identification to reach a guilty verdict.

Psychologist Elizabeth Loftus conducted a study with mock jurors to illustrate how eyewitness identifications influence jury members.¹³⁹ In Loftus's study, the likelihood of the defendant's acquittal was directly related to the presence or absence of an eyewitness.¹⁴⁰ Three groups of jurors heard the same mock case, but each group was given different information about an eyewitness' identification.¹⁴¹ In the first group, jurors were told there was no eyewitness, and only eighteen percent of the jurors voted to convict.¹⁴² In the second group, jurors were informed that an eyewitness identified the defendant, and no argument was made about the eyewitness' accuracy.¹⁴³ This group voted to convict at seventy-two percent.¹⁴⁴ In the third group, jurors were told an

133. See *State v. Clopten*, 223 P.3d 1103, 1113 (Utah 2009).

134. See *Stoneman*, *supra* note 120, at 556 ("Even courts highly critical of eyewitness-expert testimony have stated that they would consider admitting the testimony if there was no other corroborating evidence.").

135. See GIANNELLI ET AL., *supra* note 10.

136. Wise et al., *supra* note 7, at 810–11.

137. GIANNELLI ET AL., *supra* note 10.

138. *United States v. Russell*, 532 F.2d 1063, 1067 (6th Cir. 1976).

139. Elizabeth F. Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 JOURNAL OF JURIMETRICS 188, 189. (1975).

140. *Id.* at 189–90.

141. *Id.* at 189.

142. *Id.*

143. *Id.*

144. *Id.*

eyewitness identified the defendant, but the eyewitness was not wearing his glasses during the event, making it extremely unlikely he saw the defendant's face.¹⁴⁵ This group still voted to convict the defendant at sixty-eight percent.¹⁴⁶ This study demonstrates the strong weight jurors give to eyewitness identifications. Despite an extreme deficiency in the eyewitness' accuracy, the jurors in group three voted to convict the defendant at more than triple the rate than the jurors with no eyewitness.¹⁴⁷

3. Presence of Psychological Factors Affecting Accuracy

If a psychological factor exists in a case, and this factor is known to affect eyewitness accuracy, courts should allow eyewitness-experts to describe these factors' effects on identifications. Jurors do not understand factors that affect eyewitness accuracy, so they use their own erroneous beliefs to evaluate eyewitness accuracy.¹⁴⁸ For example, jurors tend to positively correlate eyewitness certainty with identification accuracy, but science suggests that certainty and accuracy do not correlate.¹⁴⁹ In contrast, juries tend to ignore psychological factors which actually impair identification accuracy.¹⁵⁰ For example, jurors ignore that eyewitness identifications are less accurate when there is violence involved, accuracy decreases when witnesses are subject to extreme stress, accuracy decreases when a weapon is present, and adult witnesses are generally more accurate than children.¹⁵¹ These factors are called estimator variables.¹⁵² To evaluate eyewitness accuracy, it is vital to assess how estimator variables affect identifications.¹⁵³ Therefore, jurors must understand these variables' effects before determining an eyewitness' reliability. Expert witness testimony can clarify jurors' misconceptions about the relationships between estimator variables and eyewitness accuracy. While many misconceptions exist about eyewitness accuracy, the most striking misunderstanding is the relationship between witness stress level and accuracy. In a 2008 study, researchers found that high anxiety catastrophically impacts eyewitness accuracy.¹⁵⁴ Low-anxiety witnesses correctly identified individuals at a rate of seventy-five percent, while high-anxiety witnesses correctly identified individuals at a rate of eighteen percent.¹⁵⁵ This study illustrates the drastic effects of stress on eyewitnesses.¹⁵⁶ Another study found that witnesses' memories of high-stress events are "highly vulnerable to modification" after the

145. Loftus, *supra* note 139, at 189.

146. *Id.* at 189–90.

147. *Id.*

148. *See id.*

149. *Id.*

150. *See id.*

151. Loftus, *supra* note 139, at 189–90.

152. *Id.* Estimator variables include anything the eyewitness observes during the crime. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 2, at 49. The witness experienced the estimator variables at the time of the event, so these are unalterable variables. *Id.*

153. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 2, at 49.

154. *Id.* at 95.

155. *Id.*

156. *Id.*

event occurs.¹⁵⁷ In spite of scientific research, the average layperson believes high-stress situations increase eyewitness accuracy.¹⁵⁸ At a criminal trial, an expert witness can overcome laypeople's misunderstandings by describing how stress negatively impacts a witness' ability to accurately recall and identify suspects.¹⁵⁹

In addition to witness stress level, experts can discuss specific factors that affect eyewitness accuracy. A couple of these factors are weapon focus and own-race bias. For example, the presence of a weapon at the scene, "captures the visual attention of the witness and impedes the ability of the witness to attend to. . .the face of the perpetrator."¹⁶⁰ In cases of cross-racial identification, own-race bias has striking effects on eyewitness accuracy.¹⁶¹ Data from the Innocence Project reveals that, in cases involving erroneous eyewitness identifications, forty-two percent of these cases involved cross-racial identifications.¹⁶² These are only a couple examples of the psychological factors present in eyewitness cases that expert witnesses can clarify for the jury.

Expert witness testimony provides jury members with detailed information about the factors influencing eyewitness accuracy. This information makes it more likely that jury members will spend more time evaluating the accuracy of the identification and contemplating all the evidence.¹⁶³ To prevent wrongful convictions based on eyewitness inaccuracies, experts must educate jurors to distinguish between an accurate eyewitness and an inaccurate one. For these reasons, any proposed Kansas guideline must include an element requiring the admissibility of expert testimony when psychological factors affecting accuracy coexist with the other two elements. The extent of psychological factors included under this element should be determined based on current scientific research. This section is by no means an exclusive list of the options available for this element of the Kansas guideline.

V. ARGUMENTS AGAINST THE LIMITED-ADMISSIBILITY VIEW ARE INSUFFICIENT TO OUTWEIGH THE BENEFITS

Arguments persist that the limited-admissibility view, and its encouragement of eyewitness-experts, invades the province of the jury.¹⁶⁴ Others argue that eyewitness-expert testimony is unnecessary because traditional courtroom safeguards exist to protect the innocent from wrongful

157. *Id.*

158. See Shelton, *supra* note 12, at 966–67.

159. See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 2, at 95.

160. See *id.* at 93.

161. *Id.* at 96. ("[O]wn-race bias describes the phenomenon in which faces of people of races different from that of the eyewitness are harder to discriminate (and thus harder to identify accurately) than are faces of people of the same race as the eyewitness.").

162. Edwin Grimsley, *What Wrongful Convictions Teach Us About Racial Inequality*, THE INNOCENCE PROJECT (Sept. 26, 2012), <https://www.innocenceproject.org/what-wrongful-convictions-teach-us-about-racial-inequality/> [<https://perma.cc/DZ9N-398C>].

163. Stoneman, *supra* note 120, at 545–46.

164. Shelton, *supra* note 12, at 975.

convictions.¹⁶⁵ Both of these arguments are rebuttable and do not provide adequate evidence that the limited-admissibility view is contrary to justice.¹⁶⁶ The Court in *People v. McDonald* discussed and dismissed the concern that introducing expert testimony usurps the function of the jury.¹⁶⁷ The argument against eyewitness-experts is that factors affecting eyewitness identifications are within the jury's common knowledge and should not be addressed by an expert.¹⁶⁸ In addressing this concern, the Court held that, "[t]he jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert testimony would ever be heard."¹⁶⁹ A jury may generally understand that length of exposure to a suspect, lighting, and distance between the eyewitness and suspect influences the accuracy of identifications, but studies show the average person does not understand how other psychological factors affect identification accuracy.¹⁷⁰ The Seventh Circuit supplemented the *McDonald* Court's assertion and explained "[i]t will not do to reply that jurors know from their daily lives that memory is fallible."¹⁷¹ Jurors' prior beliefs do not render expert witnesses irrelevant. Instead, these beliefs "make such evidence vital, for if jurors' beliefs are mistaken then they may reach incorrect conclusions."¹⁷² Information from eyewitness-experts does not invade the province of the jury when the jury does not possess adequate knowledge to evaluate the information on its own.¹⁷³

Expert witnesses do not invade the province of the jury because testimony is limited and the expert is subject to cross-examination by opposing counsel.¹⁷⁴ Typically, expert witnesses will identify the presence of factors affecting accuracy and explain how these factors work.¹⁷⁵ Experts can explain current scientific research and narrowly tailor their testimony to relevant factors in the defendant's case.¹⁷⁶ As long as experts refrain from stating opinions about the eyewitness' accuracy in the specific case, then the jury retains the duty to evaluate the eyewitness' accuracy in relation to psychological factors.¹⁷⁷ Additionally, experts are subject to cross-examination.¹⁷⁸

Another argument is that traditional safeguards are sufficient to protect

165. See Jacqueline McMurtrie, *The Role of Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1276–77 (2005).

166. See Shelton, *supra* note 12, at 975–77; NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 2, at 40.

167. *People v. McDonald*, 690 P.2d 709, 722 (Cal. 1984).

168. *Id.* at 720.

169. *Id.*

170. *Id.*

171. *United States v. Bartless*, 567 F.3d 901, 906 (7th Cir. 2009).

172. *Id.*

173. See Shelton, *supra* note 12, at 975–76.

174. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 2, at 111.

175. Wise et al., *supra* note 7, at 836–37.

176. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 2, at 111.

177. Wise et al., *supra* note 7, at 836–37; see *People v. McDonald*, 690 P.2d 709, 722 (Cal. 1984).

178. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 2, at 111.

against eyewitness misidentifications.¹⁷⁹ However, eyewitness errors continue to occur while these safeguards are in place.¹⁸⁰ Research suggests that “expert testimony on memory and eyewitness identification is the only legal safeguard that is effective in sensitizing jurors to eyewitness errors.”¹⁸¹ Thus, traditional safeguards such as cross examination and jury instructions are insufficient to protect against misidentifications.

Cross-examination and jury instructions are two traditional safeguards thought to protect defendants from eyewitness errors.¹⁸² One view is that cross-examination is sufficient to notify the jury of unreliable eyewitnesses.¹⁸³ However, this view assumes that attorneys are aware of factors in each case that affect eyewitness accuracy.¹⁸⁴ In addition, the argument assumes attorneys will have the time and opportunity to introduce the presence of these factors on cross-examination.¹⁸⁵ Even if an attorney is aware of factors affecting accuracy, and has the opportunity to explore these on cross-examination, the jury is unlikely to understand how these factors affect eyewitness identification.¹⁸⁶ Cross-examination is an important tool in the trial process because it helps expose witnesses’ lies.¹⁸⁷ Unfortunately, it is not effective when eyewitnesses believe they are testifying truthfully to a defendant’s identity.¹⁸⁸ Therefore, cross-examination is not a sufficient safeguard to protect defendants from incorrect identifications.¹⁸⁹

Jury instructions, like cross-examinations, fail to protect defendants from misidentifications.¹⁹⁰ Some jurisdictions list factors which affect eyewitness identification in the jury instructions.¹⁹¹ However, studies show jury instructions do not assist jurors in understanding how specific factors influence witness accuracy.¹⁹² If jury instructions fail to inform jurors of psychological effects on eyewitness identification, then jurors will rely on their own erroneous beliefs to evaluate witness accuracy. The Pattern Instructions for Kansas are a perfect example of how listing factors in the jury instructions can lead to erroneous judgments and wrongful convictions. For example, one Kansas pattern instruction directs jurors to consider eyewitness testimony by evaluating, “the emotional state of the witness at the time including that which might be

179. See *McMurtrie*, *supra* note 165, at 1276–77.

180. *Wise et al.*, *supra* note 7, at 827.

181. *McMurtrie*, *supra* note 165, at 1276.

182. See *Wise et al.*, *supra* note 7, at 819, 823.

183. *Id.* at 828.

184. *Id.*

185. *Id.*

186. *Id.* at 830; see *Thompson*, *supra* note 24, at 620.

187. *McMurtrie*, *supra* note 165, at 1277.

188. *Id.*

189. See *Thompson*, *supra* note 24, at 630.

190. See *Wise et al.*, *supra* note 7, at 830–33.

191. See e.g., PIK Crim. 4th 51.110. See generally *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972) (creating model special jury instruction for defendant identification).

192. *Ramirez et al.*, *Judges’ Cautionary Instructions on Eyewitness Testimony*, 14 AM. J. FORENSIC PSYCHOL. 31, 34 (1996).

caused by the use of a weapon or threat of violence.”¹⁹³ This instruction alerts jurors of factors to consider, but it does not inform jurors that high-stress situations and crimes involving weapons greatly impact witnesses’ abilities to make accurate identifications.¹⁹⁴ To the contrary, jurors tend to assume high stress situations and the presence of weapons will result in greater eyewitness accuracy.¹⁹⁵ Furthermore, Kansas Pattern Instructions fail to notify the jury of multiple factors known to affect eyewitness accuracy.¹⁹⁶ For example, the Kansas instructions fail to mention the effects of cross-racial bias and violence on eyewitness accuracy, even though these factors affect identifications.¹⁹⁷ Therefore, the jury can easily draw faulty conclusions about how psychological factors affect eyewitness accuracy.

One way to combat the misuse of jury instructions is to include further instructions describing how each factor affects witness accuracy.¹⁹⁸ However, these instructions do not provide the “flexibility and specificity” that expert testimony offers.¹⁹⁹ Detailed and lengthy jury instructions can confuse and frustrate the jury.²⁰⁰ Studies also suggest that jury instructions make jury members suspicious of any eyewitness evidence in the case, regardless of whether the eyewitness’ reliability is strong or weak.²⁰¹ Expert witnesses are preferable over jury instructions because experts understand eyewitness research and can explain this research specifically so that jury members possess the tools to evaluate eyewitness identifications, rather than dismiss all identifications.²⁰²

Traditional safeguards are flawed and do not educate the jury as well as expert testimony.²⁰³ The stakes are high in criminal jury trials, and courts must implement every feasible safeguard to prevent wrongful convictions. Kansas courts should continue to use cross-examination, jury instructions, and other traditional safeguards to prevent the devastating effects of misidentifications in the justice system. However, Kansas needs to couple these traditional safeguards with guidelines for admission of expert testimony in certain eyewitness cases.

VI. CONCLUSION

Eyewitness identifications are invaluable to the justice system in the United States because identifications allow authorities to prosecute criminals in cases that lack biological material, like DNA.²⁰⁴ This means that eyewitness reliability

193. PIK Crim. 4th 51.110.

194. *Id.*; GIANNELLI ET AL., *supra* note 10.

195. Shelton, *supra* note 12, at 964–68.

196. PIK Crim. 4th 51.110.

197. *Id.*; GIANNELLI ET AL., *supra* note 10.

198. *See* Wise et al., *supra* note 7, at 832.

199. *Id.* at 833.

200. *Id.* at 832; NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *supra* note 2, at 43.

201. NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *supra* note 2, at 43.

202. *Id.* at 40.

203. *See, e.g.*, McMurtrie, *supra* note 165, at 1276.

204. *See* NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *supra* note 2, at 11.

and accuracy is crucial when prosecuting cases with little to no additional evidence. While many jurisdictions adapted to incorporate psychological research in eyewitness cases, Kansas fell behind.²⁰⁵ Kansas must adopt a limited-admissibility view towards eyewitness-expert testimony to protect Kansans from wrongful convictions based on eyewitness misidentifications.

In adopting a limited-admissibility view, Kansas can implement specific guidelines for judges to use in eyewitness cases. These guidelines must be firmly rooted in current psychological research and incorporate elements to protect defendants from misidentification and erroneous jury convictions. This guideline will promote justice because judges will know when to admit expert testimony on a case-by-case basis.²⁰⁶ When judges rely on guidelines rooted in science, rather than legal precedent, eyewitness-expert testimony will be admitted with more frequently.²⁰⁷ This testimony teaches jurors how to handle specific cases, and prevents convictions based on juror misinformation.²⁰⁸

Sir William Blackstone once exclaimed “it is better that ten guilty persons escape than that one innocent suffer.”²⁰⁹ Kansas must evolve to protect innocent individuals from suffering a grisly fate, while continuing to prosecute guilty ones. Eyewitness misidentifications create disastrous effects on wrongly convicted individuals. If Kansas incorporates modern psychological science into the law, then Kansas can prosecute guilty individuals, but not at the expense of innocent Kansans’ lives and freedoms.

205. *See supra* text accompanying notes 69–75.

206. *See supra* text accompanying notes 107–23.

207. *See supra* text accompanying notes 95–101.

208. *See supra* text accompanying notes 124–63.

209. *Blackstone’s Formulation*, WIKIPEDIA, https://en.wikipedia.org/wiki/Blackstone%27s_formulation [<https://perma.cc/CZ4E-9VA8>].