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Casenotes: Constitutional Criminal Procedure — despite Discrepancy between Prior Description and Defendant's Actual Appearance, Eyewitness' Testimony of Pretrial and in-Court Identifications of Defendant Is Sufficient Evidence to Sustain a Conviction. *Branch v. State*, 305 Md. 177, 502 A.2d 496 (1986)

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CONSTITUTIONAL CRIMINAL PROCEDURE - DESPITE DISCREPANCY BETWEEN PRIOR DESCRIPTION AND DEFENDANT'S ACTUAL APPEARANCE, EYEWITNESS' TESTIMONY OF PRETRIAL AND IN-COURT IDENTIFICATIONS OF DEFENDANT IS SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION. *Branch v. State*, 305 Md. 177, 502 A.2d 496 (1986).

A woman was robbed at gunpoint by two men<sup>1</sup> and immediately reported the incident to the police.<sup>2</sup> The woman described the gunman as a black male, five feet seven inches tall, fifteen to sixteen years of age, and weighing 110 to 125 pounds.<sup>3</sup> Three and one-half hours after the incident, the investigating officer had the woman look through two books containing approximately 600 photographs, but the woman was unable to identify the gunman. The officer then took from his pocket three photographs, one of which the woman identified as the gunman. The defendant, when the incident occurred, was six feet three inches tall, nineteen years of age, weighed 185 pounds, and had two front teeth missing.<sup>4</sup> At the jury trial, the woman identified the defendant as the gunman.<sup>5</sup> Despite the discrepancies between the woman's initial description of the gunman and the physical appearance of the defendant,<sup>6</sup> the jury found the defendant guilty of robbery with a deadly weapon and use of a handgun in the commission of a crime of violence.<sup>7</sup> The conviction was affirmed by both the Court of Special Appeals of Maryland<sup>8</sup> and the Court of Appeals of Maryland.<sup>9</sup> The court of appeals held that the identification testimony of a single eyewitness was sufficient as a matter of law to sustain the conviction.<sup>10</sup>

If an appeal is based upon a due process violation that alleges insufficiency of evidence, the reviewing court must determine whether the record evidence is legally sufficient to support a finding of guilt. In *Jackson*

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1. Beatrice Mudge was robbed by two black men on April 14, 1983 at approximately 7:00 a.m. while walking to work. One of the men pointed a gun at her and grabbed her purse while the other acted as the lookout. The men escaped on foot. Brief for Appellant at 2, *Branch v. State*, 305 Md. 177, 502 A.2d 496 (1986).
  2. *Branch*, 305 Md. at 178, 502 A.2d at 496.
  3. *Id.* at 178, 502 A.2d at 496. The description also identified the gunman as wearing a dark jacket and carrying a silver handgun. *Id.*
  4. *Id.* at 179, 502 A.2d at 496.
  5. *Id.* at 179, 502 A.2d at 497.
  6. *Id.* at 185, 502 A.2d at 500. The defense also presented two alibi witnesses. The defendant's girlfriend testified that she was in bed with the defendant in the bedroom they shared at her mother's house until approximately 10:00 a.m. on the morning of the robbery. The defendant's aunt testified that on April 14, 1983 at approximately 10:00 a.m. she went to the home of the defendant's girlfriend where she found the defendant dressed in his nightclothes in the bedroom. *Id.*
  7. The defendant was sentenced to fifteen years for robbery with a deadly weapon and five years for the use of a handgun in the commission of a crime of violence, to run consecutively. Brief for Appellant at 1-2, *Branch v. State*, 305 Md. 177, 502 A.2d 496 (1986).
  8. *Branch v. State*, No. 84-351, slip op. (Md. Ct. Spec. App. Dec. 4, 1984).
  9. *Branch*, 305 Md. 177, 502 A.2d 496.
  10. *Id.* at 184, 502 A.2d at 499.

v. *Virginia*,<sup>11</sup> the Supreme Court established a constitutional standard for appellate review of the sufficiency of evidence. Concluding that due process requires the use of the reasonable doubt standard at all levels of the criminal process,<sup>12</sup> the Court held that courts reviewing the sufficiency of the evidence must determine whether any rational fact finder, after reviewing the record evidence in the light most favorable to the prosecution, could have found the essential elements of the crime beyond a reasonable doubt.<sup>13</sup> Maryland courts have developed a sufficiency standard which is consistent with that espoused in *Jackson*.<sup>14</sup>

A majority of jurisdictions hold that the uncorroborated testimony of a single eyewitness is sufficient evidence to sustain a conviction.<sup>15</sup> Professor Wigmore states the rule as follows: "In general, the testimony of a *single witness*, no matter what the issue or who the person, *may legally suffice as evidence upon which the jury may found* [sic] *a verdict*."<sup>16</sup> Courts follow this "one-witness" rule because the testimony of an eyewitness is frequently the only evidence in the prosecution's case and is perhaps the most convincing evidence that the prosecution can offer a jury

11. 443 U.S. 307 (1979).

12. In *In re Winship*, 397 U.S. 358 (1970), the Supreme Court held that the due process clause of the fourteenth amendment protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. Prior to *Jackson v. Virginia*, 443 U.S. 307 (1979), a federal habeas corpus court would find a state conviction unconstitutional only if the charge were totally devoid of evidentiary support. See *Thompson v. Louisville*, 362 U.S. 199 (1960).

13. *Jackson*, 443 U.S. at 319. See 9 J. WIGMORE, EVIDENCE § 2495, at 391 (Chadbourne rev. 1981).

14. *Williams v. State*, 5 Md. App. 450, 459, 247 A.2d 731, 737 (1968); accord *Bedford v. State*, 293 Md. 172, 176 n.1, 443 A.2d 78, 80 n.1 (1982); *State v. Rusk*, 289 Md. 230, 240, 424 A.2d 720, 728 (1981). Maryland established appellate review of sufficiency of evidence in criminal cases in 1950 by constitutional amendment. MD. CONST. art. XV § 6 (prior to 1950 amendment) provided, "In the trial of all criminal cases, the Jury shall be the Judges of the Law, as well as of fact." MD. CONST. D. OF R., art. 23 (art. XV as amended in 1950, and transferred to Declaration of Rights) provides: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." See generally *Williams*, 5 Md. App. 450, 247 A.2d 731 (tracing statutory development of appellate review of sufficiency); Editorial, *Criminal Procedural Reform Achieved in Maryland*, 11 MD. L. REV. 319 (1950) (reviewing the effects of the amendment as adopted in November 1950 election). The first case to apply this amendment was *Shelton v. State*, 198 Md. 405, 84 A.2d 76 (1951), in which the court of appeals held that it would not reverse the judgment of the lower court if there were *any* proper evidence before the jury that would sustain a conviction. *Id.* at 412, 84 A.2d at 80.

15. See, e.g., *U.S. v. Larios*, 640 F.2d 938 (9th Cir. 1981); *U.S. v. Hoskins*, 628 F.2d 295 (5th Cir.), cert. denied, 449 U.S. 987 (1980); *U.S. v. Danzey*, 594 F.2d 905 (2nd Cir.), cert. denied, 441 U.S. 951 (1979); *Shelton v. State*, 382 So. 2d 1175 (Ala. Crim. App. 1980); *I.R. v. State*, 385 So. 2d 686 (Fla. App. 1980); *People v. Perez*, 94 Ill. App. 3d 377, 418 N.E.2d 969 (1981); *Sheckles v. State*, 272 Ind. 509, 400 N.E.2d 121 (1980); *People v. Richards*, 76 Mich. App. 695, 256 N.W.2d 793 (1977); *State v. Newberry*, 605 S.W.2d 117 (Mo. 1980); *State v. Radi*, 176 Mont. 451, 578 P.2d 1169 (1978).

16. 7 J. WIGMORE, EVIDENCE § 2034, at 343 (Chadbourne rev. 1978).

to prove the defendant's guilt.<sup>17</sup> Courts also favor submitting identification evidence to juries for a determination of its accuracy because courts credit juries with the ability to appreciate and evaluate the complexities of eyewitness identifications.<sup>18</sup> Maryland courts follow the majority view in applying the one-witness rule.<sup>19</sup>

Several legal and psychological experts hold a contrary view.<sup>20</sup> These experts state that certain conditions exist that are not within the purview of the average juror and may detract from the accuracy of eyewitness identification.<sup>21</sup> For example, the human mind practices selective perception that can cause a witness to a crime to fail to observe those details that are crucial for an accurate identification.<sup>22</sup>

Additionally, psychological studies show that perceptual abilities are impaired when a witness is exposed to unexpected or stressful situations. The witness' defense mechanism is to focus only on aspects of a situation that seem most important, such as an escape route or the presence of a weapon.<sup>23</sup> The desire to reduce uncertainty and eliminate inconsistencies may cause a witness to fill in memory gaps by adding extraneous details to the perceived image.<sup>24</sup> These latent weaknesses are exacerbated by the tendency of a jury to place great faith in eyewitness testimony, even in the face of information that discredits it.<sup>25</sup> Although

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17. See *United States v. Levi*, 405 F.2d 380 (4th Cir. 1968) (discussing the rationale for the one-witness rule and the reasons for its persistence); Woocher, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 969 (1977).
  18. Woocher, *supra* note 17, at 995-96. See generally N. SOBEL, *EYEWITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS* 6-4 (2d ed. Supp. 1985) (discussing factors considered by courts to establish reliability).
  19. See, e.g., *Mobley v. State*, 270 Md. 76, 89, 310 A.2d 803, 811 (1973) (single eyewitness' identification of defendant as perpetrator of robbery held sufficient to convict); *Walters v. State*, 242 Md. 235, 237-38, 218 A.2d 678, 678 (1966) (victim's identification is ample evidence to sustain a conviction for assault); *Davis v. Warden*, 235 Md. 637, 639, 201 A.2d 672, 672-73 (1964) (identification by one eyewitness, if believed, is sufficient); *Coates v. State*, 232 Md. 72, 74, 191 A.2d 579, 579 (1963) (identification of accused by single eyewitness was held sufficient to sustain conviction for robbery with a deadly weapon).
  20. See generally SOBEL, *supra* note 18, at 9-30.3 (jurors rarely perceive the dangers of identification procedures); Woocher, *supra* note 17 (examining psychological dimensions of eyewitness identification as compared to factors that jurors find significant in reviewing identification evidence); E. LOFTUS, *EYEWITNESS TESTIMONY* 9-18 (1979) (discussing the impact of eyewitness testimony on jurors).
  21. Woocher, *supra* note 17, at 970.
  22. Woocher, *supra* note 17, at 977-85. See generally S. BARTLEY, *PRINCIPLES OF PERCEPTION* (2d ed. 1969); J. MARSHALL, *LAW AND PSYCHIATRY IN CONFLICT* 11-44 (1966); Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079 (1973).
  23. Woocher, *supra* note 17, at 980.
  24. *Id.* at 982-83. One expert characterizes the identification procedure as a multiple choice test lacking a "none of the above" alternative. The implicit suggestion that the criminal is present in the array may cause the witness to perceive his task as one of identifying the person who best matches the witness' recollection. *Id.* at 986.
  25. Loftus, *Reconstructing Memory: The Incredible Witness*, *PSYCHOLOGY TODAY*, Dec. 1974, at 1114.

psychological experiments suggest that there is no relationship between confidence and accuracy, jurors believe assertive, confident witnesses more readily than less confident witnesses.<sup>26</sup> Despite the wealth of literature indicating that eyewitness testimony is inherently unreliable but is nonetheless frequently regarded as credible by juries, the burden of assessing the value of eyewitness testimony generally rests with the jury.<sup>27</sup>

Recognizing that the one-witness rule may lead to unjust results because of the problems inherent in eyewitness identifications, two courts have sought to temper its harsh effects. In *United States v. Levi*,<sup>28</sup> the United States Court of Appeals for the Fourth Circuit identified four factors affecting the reliability of an uncorroborated identification by one witness to determine whether a substantial likelihood of irreparable misidentification existed:<sup>29</sup> (1) the lapse of time between the occurrence of the crime and the first confrontation; (2) the opportunity of the witness to identify during the crime as compared to the opportunity of other witnesses who were unable to identify; (3) the reasons for the failure to conduct a line-up or use similar techniques short of a line-up; and (4) the judge's appraisal of the witness' capacity to observe and remember facial and other features. The court held that a trial judge could refuse to submit a one-witness identification case to the jury if he were not persuaded that the identification was in all probability accurate based upon these factors.<sup>30</sup> Following *Levi*, the United States District Court for the District of Columbia in *United States v. Butler*,<sup>31</sup> also adopted a modified application of the one-witness rule.<sup>32</sup>

The *Levi* approach, which demonstrates concern with the reliability of eyewitness identifications, finds support in the line of Supreme Court cases dealing with the admissibility of eyewitness testimony. In a trilogy of cases decided on the same day in 1967, the Supreme Court focused on the constitutional implications of eyewitness testimony. In *United States v. Wade*,<sup>33</sup> the Court held that the sixth amendment to the United States

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26. *Id.* See also P. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 15-16 (1965).

27. *Smith v. State*, 51 Md. App. 408, 443 A.2d 985 (1982).

28. 405 F.2d 380. In *Levi*, the defendant moved for acquittal at the close of the government's case. The trial judge denied the motion on the basis that the record substantiated a finding of guilt. *Id.* at 383.

29. *Id.* The *Levi* court prefaced the test by stating that a judge should also consider the demeanor, appearance, and degree of certainty of the witness. *Id.*

30. *Id.*

31. 636 F.2d 727 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 1019 (1981).

32. *Id.* at 729. The defendant's claim of insufficiency of the evidence was based on the unreliability of uncorroborated testimony and alibi proof. The court affirmed the conviction and stated that the trial judge, in deciding whether a one-witness case should go to the jury, must consider the following factors to determine whether the totality of circumstances gives rise to a very substantial likelihood of irreparable misidentification: (1) the opportunity for identification; (2) the lighting conditions; (3) the duration of encounters; (4) the strength of the identification; and (5) the judge's appraisal of the witness' capacity to observe. *Id.*

33. 388 U.S. 218 (1967).

Constitution provided the right to have counsel present at pretrial identification procedures.<sup>34</sup> The Court recognized that the dangers inherent in eyewitness identifications and the unavoidable suggestiveness of the procedures presented a risk of unfairness to the accused,<sup>35</sup> and held that counsel's presence was necessary to promote fairness and to ensure the defendant the opportunity to fully litigate the issue of identification.<sup>36</sup> In *Gilbert v. California*,<sup>37</sup> the Court held that an in-court identification derived from an uncounselled pretrial identification procedure would be excluded unless corroborated by an independent source of identification.<sup>38</sup> In *Stovall v. Denno*,<sup>39</sup> the Court indicated that pretrial identification procedures could violate the due process rights of the accused under the fifth<sup>40</sup> and fourteenth<sup>41</sup> amendments if such procedures were "unnecessarily suggestive and conducive to irreparable mistaken identification."<sup>42</sup>

Five years later, in *Neil v. Biggers*,<sup>43</sup> the Court turned its focus from suggestiveness of the procedure to the reliability of the identification to determine the admissibility of identification evidence. The Court reasoned that the unreliability stemming from certain procedures, and not

34. *United States v. Wade*, 388 U.S. 218, 237 (1967).

35. *Id.* at 229-35. The suggestive manner in which the prosecution presents the suspect to the witnesses for pretrial identification is a factor contributing to the dangers inherent in eyewitness identification. *Id.* at 228-29. Suggestive procedures are identification procedures conducted in a manner that suggest guilt. Placing the accused in handcuffs or asking "is this the man?" would imply that the accused is guilty. P. WALL, *supra* note 26, at 20; *see also* SOBEL, *supra* note 18, at 1-4 to 1-5.

A line-up, rather than a photo identification or show-up, should be conducted unless circumstances make the use of the line-up impractical. A show-up will always be slightly suggestive because the witness is given no other choice. Photo identifications are also less preferable because they may be dated. Thus, a properly conducted line-up is generally the best means for an accurate pretrial identification. *Id.*

36. *Wade*, 388 U.S. at 236-37. The presence of counsel at the confrontation will aid the defendant in reconstructing at trial any unfairness that occurred at the confrontation. Counsel also will be better able to detect conditions prejudicial to the defendant, reveal any improper influences, and attack the credibility of a courtroom identification. *Id.* at 230-32.

37. 388 U.S. 263 (1967).

38. *Gilbert v. California*, 388 U.S. 263, 272 (1967). In *Gilbert*, the Court attempted to eliminate the possibility that an in-court identification would be predicated upon a witness' pretrial identification conducted in violation of the defendant's sixth amendment right to have counsel present. The state must show that the in-court identification was of an independent origin and was not tainted by the illegal pretrial procedure. *Id.*

39. 388 U.S. 293 (1967).

40. The fifth amendment to the United States Constitution provides, "No person shall . . . be deprived of life, liberty or property, without due process of law . . ." U.S. Const. amend. V.

41. The fourteenth amendment to the United States Constitution provides, "[N]or shall any state deprive any person of life, liberty or property without due process of law . . ." U.S. Const. amend. XIV, § 1.

42. *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

43. 409 U.S. 188 (1972).

the suggestiveness of those procedures, violated due process.<sup>44</sup> The Court identified five factors which should be applied to determine whether an identification procured by an unnecessarily suggestive procedure is reliable:<sup>45</sup> (1) the opportunity of the witness to observe the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. If these factors indicate that the identification is reliable, evidence of the identification is admissible even though the identification was procured by an unnecessarily suggestive procedure.<sup>46</sup>

In *Manson v. Brathwaite*,<sup>47</sup> the Court reiterated its support for those factors listed in *Biggers*.<sup>48</sup> The Court held that pretrial identifications obtained through unnecessarily suggestive procedures are admissible provided the identification possesses features of reliability.<sup>49</sup> Following *Brathwaite*, lower courts applied a two part test to determine whether identification evidence procured by suggestive procedures is admissible.<sup>50</sup> If the procedure is not inherently suggestive, further inquiry is unnecessary and the evidence is admissible.<sup>51</sup> If the procedure is inherently suggestive, the reliability factors listed in *Biggers* must be applied.<sup>52</sup> The evidence is deemed admissible only if the positive factors or reliability

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44. *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

45. *Id.* at 199-200.

46. Emergency or exigent circumstances sometimes require that police conduct an identification procedure in a suggestive manner in order to obtain an identification. For example, in a situation where the only witness to the crime is critically injured, the police may be justified in employing suggestive procedures to procure the identification. Outside of the emergency or exigent situations, the procedure will be deemed unnecessarily suggestive. *See Stovall*, 388 U.S. 293.

47. 432 U.S. 98 (1977).

48. *Manson v. Brathwaite*, 432 U.S. 98, 110 (1977).

49. *Id.* The Court noted that in the wake of the *Biggers* decision, the federal courts of appeal had developed two approaches to identification evidence: the per se approach and the reliability approach — also referred to as the totality of circumstances approach. Under the per se approach, pretrial identifications obtained through unnecessarily suggestive procedures are per se inadmissible. This test implicates two aspects of the procedure: the degree of suggestiveness (permissive or impermissive), and necessity (exigent or emergency circumstances may require that the procedure be conducted before counsel can be present). The per se approach allows the admission of testimony concerning a subsequent identification if the identification is determined to be reliable. *Id.* at 110 n.10. In comparing the reliability approach with the per se approach, the Court found that the reliability approach best served the interests of society for determining admissibility of identification evidence. The Court identified three societal interests: (1) preventing unreliable evidence from reaching the jury; (2) deterring improper police procedures; and (3) furthering the administration of justice. *Id.* at 111-13. The Court also indicated two sources of distortion of an eyewitness' recollection: (1) circumstances surrounding the witness' observation of the crime; and (2) later actions of the police conducting the identification procedure. *Id.* at 112.

50. SOBEL, *supra* note 18, at 4-8.

51. *Id.*

52. *Id.* at 4-9.

outweigh the suggestiveness of the procedure.<sup>53</sup> Maryland courts follow this interpretation.<sup>54</sup>

In *Branch v. State*,<sup>55</sup> the Court of Appeals of Maryland, relying upon the one-witness rule, held that the uncorroborated testimony of a victim<sup>56</sup> is sufficient to sustain a conviction.<sup>57</sup> The court did not view the victim's inaccurate description of the gunman as an inconsistency affecting the sufficiency of the evidence, but rather as a factor to be considered by the jury in assessing the credibility of the witness.<sup>58</sup>

*Branch* presented the Court of Appeals of Maryland with the opportunity to adopt the *Levi* approach<sup>59</sup> and thereby consider the reliability of

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53. *Id.* at 4-10. Some jurisdictions specifically require the weighing of the prejudicial effect of the suggestive procedure against the *Biggers* factors to determine reliability. Under this test, only evidence found to be both suggestive and unreliable would be suppressed. *Id.* at 4-10. *See, e.g.*, U.S. v. Thevis, 665 F.2d 616, 643 (5th Cir.) (identification procedure is not unduly suggestive when witness inadvertently observes defendant; such identification is likely to be reliable), *cert. denied*, 458 U.S. 1109 (1982); U.S. v. Mefford, 658 F.2d 588, 590 (8th Cir.) (photo display not suggestive; even if photo display were suggestive, identification would have been admissible because *Biggers* reliability factors were satisfied), *cert. denied*, 449 U.S. 1089 (1981). In a third version of the two part test, courts assume the suggestiveness of the procedures and automatically proceed to the second part of the test, applying the factors to determine whether the evidence possesses the requisite indicia of reliability. Project, *Twelfth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1981-1982*, 71 GEO. L.J. 339, 421 (1982).
54. *See, e.g.*, *Rustin v. State*, 46 Md. App. 28, 33-36, 415 A.2d 631, 634-35 (1980) (trial court erred in admitting pretrial identification evidence when the suggestiveness of the procedure outweighed the reliability factors); *Adams v. State*, 43 Md. App. 528, 542-43, 406 A.2d 637, 645-46 (1979) (suggestive line-up identification held admissible; under totality of circumstances, identification was reliable and there was no substantial likelihood of misidentification), *aff'd*, 289 Md. 221, 424 A.2d 344 (1981); *Bonner v. State*, 43 Md. App. 518, 523, 406 A.2d 646, 649-50 (1978) (reliability factors were applied to evaluate the likelihood of misidentification; finding of reliability precluded exclusion on basis of impermissible suggestiveness).
55. 305 Md. 177, 502 A.2d 496 (1986).
56. Although the testimony was characterized as that of a victim, the court did not identify a difference between testimony by a victim and a nonvictim when determining the reliability of an identification. *Branch v. State*, 305 Md. 177, 183, 502 A.2d 496, 499 (1986).
57. *Id.* The court did not address the issue of suggestiveness because it was not raised on appeal. *Id.* at 178 n.1, 502 A.2d at 496 n.1.
58. *Id.* at 183-84, 502 A.2d at 499. In the dissent, Judge Eldridge criticized the majority's harsh application of the one-witness rule. *Id.* at 184-90, 502 A.2d at 499-502. Judge Eldridge responded to the arguments set forth by the parties and to the issue of reliability of eyewitness testimony. *Id.* *See* Brief for Appellant at 8-12, *Branch v. State*, 305 Md. 177, 502 A.2d 496 (1986) (citing cases demonstrating unreliability of eyewitness identification). *But see* Brief for Appellee at 5-11, *Branch v. State*, 305 Md. 177, 502 A.2d 496 (1986) (citing cases holding that discrepancies in description do not negate the value of subsequent identifications). Judge Eldridge discussed the reliability factors to illustrate the unreliability of the identification and cited civil cases in which the Court of Appeals of Maryland recognized the inherent unreliability of eyewitness testimony. *Id.* at 186-90, 502 A.2d at 500-02. In the absence of other indicia of reliability, Judge Eldridge argued against the application of the one-witness rule. *Id.* at 190, 502 A.2d at 502.
59. *See supra* text accompanying notes 28-30.



a witness' identification in determining the legal sufficiency of the evidence. Unfortunately, the *Branch* court adhered to the principle of *stare decisis* and maintained its alliance with the majority of jurisdictions by strictly applying the one-witness rule.<sup>60</sup> The one-witness rule is too convenient a mechanism for finding sufficiency. By permitting a court to satisfy the due process standard without a meaningful review of the evidence, the majority's approach to the one-witness rule evades the problems inherent in the area of eyewitness identifications.<sup>61</sup> The *Levi* approach affords a more comprehensive review of the evidence. By assuring that juries hear only eyewitness testimony that passes the four factor test for reliability,<sup>62</sup> the *Levi* approach renders a more accurate result in jury trials. If the Maryland judiciary were to adopt the *Levi* approach, it would prevent unreliable information from reaching the jury. Consequently, fewer convictions would result from less than reliable evidence, thus serving the ultimate public policy of reducing the likelihood of convicting innocent persons.

By characterizing the discrepancy between the description of the gunman and the actual appearance of the defendant as an element going to the weight rather than the sufficiency of evidence,<sup>63</sup> the *Branch* court allowed for an interpretation that the discrepancy should affect only the jury's assessment of the credibility of the witness and should not be an indication that the identification was unreliable. The discrepancies in *Branch* indicated either an inaccurate description or a misidentification by the witness and should have alerted the court to the questionable reliability of the identification.<sup>64</sup> In suggestive procedure cases, the Supreme Court has held that an inaccurate prior description may indicate an unreliable identification.<sup>65</sup> The Supreme Court articulated that the driving force behind the *Wade-Gilbert-Stovall* trilogy was the concern with the problems inherent in eyewitness identification.<sup>66</sup> The emergence of the reliability test set forth in *Biggers* suggests that the Supreme Court has recognized the importance of looking beyond the mere fact of an eyewitness identification and focusing instead on the accuracy of that identifica-

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60. *See supra* text accompanying notes 15-19.

61. *See supra* text accompanying notes 20-27.

62. For the reliability test set forth in *Levi*, see *supra* text accompanying note 29. *Cf. Biggers* reliability factor (3), *supra* text accompanying note 45.

63. *Branch*, 305 Md. at 184, 502 A.2d at 499.

64. Compare *supra* text accompanying note 3 with *supra* text accompanying note 4.

65. *Neil v. Biggers*, 409 U.S. 188, 198 (1967). In *Biggers*, the Court identified reliability of an identification as the key issue in determining the validity of a due process claim. *Id.* at 199. The Court stated that it was the likelihood of misidentification that violated the right to due process. *Id.* at 198. Stating that "reliability is the linchpin in determining the admissibility of identification testimony," the *Brathwaite* Court magnified the importance of preventing convictions based upon unreliable identification evidence. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). See generally Grossman, *Suggestive Identifications: The Supreme Court's Due Process Test Fails to Meet its Own Criteria*, 11 U. BALT. L. REV. 53, 58, 71 (1981).

66. *Brathwaite*, 432 U.S. at 112.

tion.<sup>67</sup> Although the identification in *Branch* was not procured by an unnecessarily suggestive procedure, based upon the policy set forth by the Supreme Court, the *Branch* court could have brought the reliability of the evidence into the scope of review in determining whether the evidence was sufficient to support a conviction.

By identifying the discrepancy as an element going to weight rather than the sufficiency of the evidence, the court also implicitly delegated the authority to determine the reliability of the evidence to the jury.<sup>68</sup> This delegation reflects the court's faith in the competency of the fact-finding body, but it is inconsistent with established Supreme Court policy<sup>69</sup> and opinions of legal and psychological commentators in the area of eyewitness identifications.<sup>70</sup> Despite substantial evidence pointing to the innocence of the accused, most jurors will place unwarranted faith in the veracity of the eyewitness.<sup>71</sup> Therefore, the presence of eyewitness identification in a jury trial provides an increased likelihood that a conviction will result. Notwithstanding the trust that the *Branch* court places in the competency of the jury, trial courts should be aware that jurors may not be cognizant of the hazards inherent in eyewitness identification testimony.<sup>72</sup>

Criminal defense attorneys can reduce the impact of the *Branch* court's holding by focusing the jury's attention on the weaknesses of eyewitness identification,<sup>73</sup> introducing expert testimony on factors that affect the accuracy of the identification,<sup>74</sup> and requesting special jury instructions on the fallability of eyewitness identification.<sup>75</sup> In addition, if the identification procedure is suggestive, the defense attorney should move to suppress the identification.<sup>76</sup> The court of appeals has failed to address the problems underlying eyewitness testimony; therefore, it is im-

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67. See *supra* text accompanying notes 43-46.

68. *Branch*, 305 Md. at 184, 502 A.2d at 499. The reviewing court cannot measure the weight of the evidence. Cf. *Smith v. State*, 51 Md. App. 408, 443 A.2d 985 (1982). The function of the appellate court in reviewing a ruling on a motion for acquittal is not to inquire into and measure the weight of evidence, but merely to determine whether there is legally sufficient evidence to sustain a conviction. *Id.* at 418, 443 A.2d at 991.

69. See *supra* text accompanying notes 33-54.

70. See *supra* text accompanying notes 20-26.

71. *LOFTUS*, *supra* note 20, at 9.

72. For a discussion of weaknesses of eyewitness identifications, see *supra* text accompanying notes 22-26.

73. *Id.*

74. See generally *Grossman*, *supra* note 65, at 99-108 (suggesting that expert psychological testimony is helpful in explaining the impact of suggestive procedures upon reliability, but the use of expert testimony in every case involving eyewitness identification could cause delays effecting judicial economy).

75. For the leading decision on cautionary instructions, see *U.S. v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (stressing several factors which the jury should consider in weighing eyewitness testimony). See generally *Woocher*, *supra* note 17, at 1002-05.

76. See MD. R. 4-251 (motion in district court) and MD. R. 4-252 (mandatory motions in circuit court).

perative that counsel take measures to reduce the likelihood that the jury will convict an innocent defendant on the basis of a mistaken identification.

In *Branch v. State*, the Court of Appeals of Maryland perpetuates the life of the anachronistic one-witness rule. Although the decision rests upon a solid foundation of prior case law, it disregards the inherent weaknesses of eyewitness identification testimony. The factual discrepancy in *Branch* presented the court of appeals with the opportunity to adopt the *Levi* approach and consider the reliability of the evidence in determining its sufficiency. Instead, the court employed a mechanical application of the one-witness rule that creates a precedent with the potential to restrict the due process rights of persons criminally accused.

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