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# MITIGATING THE DANGERS OF CAPITAL CONVICTIONS BASED ON EYEWITNESS TESTIMONY THROUGH TREASON'S TWO- WITNESS RULE

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## INTRODUCTION

The imposition of capital punishment is fast becoming a controversial issue in the United States, due to the news of the high number of innocents being released from prison and from death row.<sup>1</sup> This news is even forcing proponents of capital punishment who have always advocated the idea of an ultimate sanction for the most heinous crimes to question their strong support for such an irreversible sanction.<sup>2</sup> Specifically, recent advances in DNA testing leading to the release of innocent de-

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<sup>1</sup> See generally MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1992); BARRY SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000) (both discussing cases where prisoners whose innocence was later established were released from prison and from death row). In the twenty-five year period since the U.S. Supreme Court reinstated the death penalty in 1974, 553 people have been executed. *Id.* at 218. Within that period, eighty convicted prisoners have been released from death row, and ultimately had their convictions vacated altogether. *Id.* For every seven prisoners executed, one innocent person is freed. *Id.* Between 1973 and 1993, an average of 2.5 people a year were released from death row. *Id.* From 1993 to 1999, an average of 4.6 convicted people were set free annually. *Id.*

<sup>2</sup> Republican Governor George Ryan of Illinois, a longtime advocate of capital punishment, issued a moratorium against the death penalty, temporarily halting executions in his state in order to ensure that inmates were not being put to death for crimes they did not commit. Toni Locy, *Push to Reform Death Penalty Growing Advocates: Mistakes Could Shake Confidence in System*, USA TODAY, Feb. 20, 2001, at 5A. In many instances, other longtime supporters of capital punishment are also leading the push for death penalty safeguards. *Id.*

defendants from death row have brought capital punishment to the forefront of recent debate.<sup>3</sup> In these cases, the principal evidence offered by the prosecution linking the defendants to the crimes was the testimony of one or more eyewitnesses who either identified the defendant in a lineup or from a photo spread.<sup>4</sup> The subsequent DNA testing clearly demonstrated that the eyewitnesses were wrong and firmly established that such testimony is extremely fallible.<sup>5</sup>

Eyewitness error remains a substantial cause of wrongful convictions.<sup>6</sup> With the fallibility of eyewitness testimony being so high, capital cases that rely on such testimony as evidence should require a quantitative evidentiary standard to be met in

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<sup>3</sup> By the year 2000, at least sixty-two DNA exonerations took place in twenty-two states. SCHECK ET AL., *supra* note 1, at 262. In the past twelve years alone, eighty-two convicts have been exonerated by DNA testing. Locy, *supra* note 2, at 5A. Death row inmates have also been exonerated because of subsequent confessions by the real perpetrators; the discovery of new, exculpatory evidence; and the showing of perjured or otherwise faulty eyewitness testimony. *Cases of Innocence: 1973-Present*, at <http://www.deathpenaltyinfo.org/innocases.html> (last modified Jan. 9, 2001).

<sup>4</sup> For the purposes of this Article, an eyewitness is "one who personally observes an event." BLACK'S LAW DICTIONARY 608 (7th ed. 1999). An eyewitness identification is the "naming or description by which one who has seen an event testifies from memory about the person or persons involved." *Id.* According to The Innocence Project at Cardozo Law School, of the seventy-seven men whose convictions were overturned after DNA testing proved their innocence, sixty-five had been found guilty because of faulty eyewitness statements. Robyn Blumner, *Eyewitness Accounts Often Prove Unreliable*, CHICAGO SUN-TIMES, Jan. 2, 2001, at 21. Of the about 2,000,000 people incarcerated in the United States in 2001, it is estimated that 8,000-10,000 of them were wrongly convicted on the basis of eyewitness testimony. *Id.*

For examples of cases where eyewitness testimony was incorrect, see generally *People v. Cobb*, 455 N.E.2d 31 (Ill. 1983); *Bloodworth v. State*, 543 A.2d 382 (Md. Ct. Spec. App. 1988) (discussed *infra* p. 769); *People v. Williams*, 588 N.E.2d 983 (Ill. 1991) (discussed *infra* p. 770); and *Tibbs v. State*, 337 So. 2d 788 (Fla. 1976) (discussed *infra* p. 771).

<sup>5</sup> See *supra* note 4.

<sup>6</sup> SCHECK ET AL., *supra* note 1, at xvi; see also RADELET, *supra* note 1, at 18 (stating that the two most frequent causes of erroneous convictions are perjury by prosecution witnesses and mistaken eyewitness testimony); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 605 (1998) (stating that cases of proven wrongful convictions of innocent people have consistently shown that mistaken eyewitness identification is responsible for more of these wrongful convictions than all other causes combined). For the purposes of this Article, "wrongful" convictions are those that were secured with perjured or erroneous eyewitness testimony, and were subsequently overturned because of new, exculpatory evidence proving the defendants' innocence. The wrongful convictions discussed in this paper do not include those obtained through plea-bargaining.

order for such evidence to be even allowed at trial. If the prosecution wishes to offer eyewitness testimony as evidence in a capital case, a constitutionally based federal corroboration requirement must be instated.<sup>7</sup> This Comment proposes that the Supreme Court, when reviewing its next capital case where eyewitness testimony is offered as evidence, should hold that unless the testimony is corroborated in some way, the defendant's conviction, if based largely on such testimony, must be overturned and declared a violation of the defendant's Eighth Amendment rights.<sup>8</sup> This ruling does not suggest that a prose-

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<sup>7</sup> For the purposes of this Article, "capital" cases are those in which a death sentence *may* be imposed. Also, rather than having each state create its own rule regarding evidentiary requirements in capital cases, imposing a federal requirement would be preferred because it would ensure uniformity among the states. The Supreme Court should rule that because eyewitness testimony is so fallible, a heightened evidentiary standard is required when presenting eyewitness testimony in a capital case. The Court should further rule that if such a standard is not met, the criminal defendant's Eighth Amendment right to not have "cruel and unusual punishments inflicted" upon him would be violated. U.S. CONST. amend. VIII. Naturally, the Cruel and Unusual Punishments Clause would be fully applicable to the states through the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV; *see also* *Robinson v. California*, 370 U.S. 660, 667 (1962) (applying the Eighth Amendment ban against cruel and unusual punishment to a California statute via the Fourteenth Amendment).

After such a ruling, a defendant's lawyer, when appealing the imposition of the death penalty on his client, would argue that because the prosecutor had offered uncorroborated testimony of a single eyewitness as evidence against the defendant, the imposition of a death sentence constituted "cruel and unusual punishment" and thereby violated the defendant's Eighth Amendment rights. The defendant's lawyer would then cite the Supreme Court decision (advocated in this Article) mandating that some form of corroboration be offered with the single eyewitness testimony, and would argue that the Supreme Court's decision is binding on the state through the Fourteenth Amendment.

<sup>8</sup> See *supra* note 7 for the constitutional analysis. As is explained in further detail in Part III of this Comment, corroboration means presenting more than one witness who can testify to the same overt act, or presenting DNA evidence, fingerprint and footprint evidence, or a video or audiotape that can corroborate the eyewitness's testimony. The evidentiary requirement, then, would read as follows: if a prosecutor is going to present eyewitness testimony as evidence in a capital case, the prosecutor must also offer some type of corroborating evidence to support the eyewitness testimony, because such testimony, in general, is so fallible.

Of course, one could ask why a corroboration requirement should only be instated in capital cases and not in noncapital cases where a sentence of imprisonment is imposed. Surely an innocent defendant's due process rights are no less violated where a sentence of imprisonment is imposed over a sentence of death. Justice Brennan, in his concurrence in *Furman v. Georgia*, best explains why sentencing in capital and noncapital cases should be afforded differing treatment:

ctor could not try a defendant at all if there were no eyewitnesses to the crime. The ruling merely requires that *if* a prosecutor plans on using eyewitness testimony, he must provide some form of corroboration for the testimony because of the high likelihood of its fallibility. If no such corroboration is available, the prosecutor can get around the quantitative requirement by not presenting eyewitness testimony at all, or by seeking life imprisonment rather than capital punishment.<sup>9</sup>

The requirement of corroboration as a prerequisite to obtaining a conviction in a capital case is not foreign to our criminal system. The law of treason has a corroboration requirement

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Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose "the right to have rights." A prisoner retains . . . the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law . . . . A prisoner . . . retains the right of access to the courts. His punishment is not irrevocable . . . . [T]he finality of death precludes relief. An executed person has indeed "lost the right to have rights."

Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring). As Justice Brennan so aptly explains, imprisonment, unlike execution, does not constitute cruel and unusual punishment because the prisoner is still alive and thereby still retains the right to at least *have* and exercise constitutional rights. *Id.*

<sup>9</sup> See *supra* note 8 for an explanation as to why the imprisonment of an innocent defendant does not constitute cruel and unusual punishment and therefore should not receive the same treatment as a sentence of execution.

Of course, one could argue that with the advent of more accurate DNA testing, a proposal for eyewitness corroboration is no longer needed and that perhaps prosecutors should just shy away from presenting eyewitness evidence altogether. The problem with such an argument, however, is that only a fraction of serious crimes leave behind definitive biological evidence that lends itself to DNA testing. Videotape: Wrongful Convictions: Causes and Remedies (Gary Wells Jan. 2001). In other words, in cases where no biological evidence is found, eyewitness identification will still be needed as primary evidence against the defendant. *Id.* Therefore, notwithstanding recent advances in DNA technology, the fallibility of eyewitness testimony still needs to be addressed.

Other suggestions have been made concerning ways to improve the reliability of eyewitness testimony. For instance, Gary Wells suggests using a sequential lineup procedure, or encouraging blind testing. *Id.* In a sequential lineup, the witness would get to see one suspect at a time, rather than a few at a time. *Id.* Wells suggests that such a procedure would prevent the witness from making relative judgments, i.e. from selecting the person who looks most like the perpetrator *relative* to the other members of the lineup. *Id.* Blind testing would force the *tester* to have no knowledge concerning the desired result of the lineup, and therefore to have no influence over the witness's identification. *Id.* Note that these suggested procedures look to improve the *quality* of an eyewitness's testimony. This Comment is proposing more of a *quantitative* approach to eyewitness testimony.

that is explicitly stated in the Constitution.<sup>10</sup> The requirement is more commonly known as the two-witness rule and its main purpose is to protect those who are innocent of treason and to promote reliability.<sup>11</sup> The rule mandates that a person may not be convicted of treason unless at least two witnesses testify to the same overt act.<sup>12</sup>

This Comment uses the two-witness rule of treason as a model and justification for adopting a constitutional corroboration requirement in all state and federal capital cases. Part I discusses the inaccuracies of eyewitness testimony and describes in detail cases where such testimony wrongfully placed an innocent man on death row. Part II examines the three federal crimes that currently carry the possibility of a death sentence and discusses how none of these statutes list any type of quantitative evidentiary requirement that must be met before a capital sentence can be imposed.<sup>13</sup> Part III analyzes the two-witness rule of treason and its overt act requirement. In addition, Part III discusses the rule's applicability to cases involving murder.<sup>14</sup> Fi-

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<sup>10</sup> Article III, Section 3 of the Constitution states, "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." U.S. CONST. art. III, § 3. Canada has a similar codified evidentiary requirement for treason, which states, "No person shall be convicted of treason upon the evidence of only one witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused." R.S.C. C-34 §47 (2) (1970).

<sup>11</sup> In his treatise on Evidence, Wigmore states, "the very object of the [two-witness] rule is to protect those who are innocent of treason . . . ." 7 WIGMORE, EVIDENCE § 2038 (1978). See also Lawrence Herman, *The Unexplored Relationship between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part I)*, 53 OHIO ST. L.J. 101, 115 (1992) (stating "the two-witness rule was intended to advance an interest in reliability").

Of course, one could argue that if eyewitness testimony in general is unreliable, then merely increasing the number of eyewitnesses testifying would do little to enhance reliability. This Comment suggests that at the very least, requiring two eyewitnesses could mitigate (not eliminate) the possibility of a wrongful conviction. Furthermore, this Comment proposes a rule that would allow other corroborating evidence (such as that of DNA, etc.), and not just that of another eyewitness, to support an eyewitness's testimony.

<sup>12</sup> The justification of this rule and the definition of what constitutes an overt act is discussed *infra* pp. 775-82.

<sup>13</sup> The three crimes are espionage, first-degree murder, and treason. See generally 18 U.S.C. §§ 794, 1111, 2381 (2000).

<sup>14</sup> Even though this Comment is proposing that the two-witness rule apply to all capital cases, it will focus only on the rule's applicability to first-degree murder cases

nally, Part IV explains the justification for applying treason's two-witness rule to murder, and draws analogies between the two crimes.

### I. THE FALLIBILITY OF EYEWITNESS TESTIMONY

A study of 84% of DNA exonerations revealed that mistaken eyewitness identification was the primary evidence used to convict the actually innocent defendants.<sup>15</sup> This study was by no means the first one of its kind. In 1932, Edwin Borchard, a law professor at Yale University, published a collection of sixty-five cases where an innocent person was convicted for a crime he did not commit.<sup>16</sup> In his book, Borchard cited eyewitness error as the "major source of these tragic errors."<sup>17</sup> In fact, eyewitness

because the commission of that crime is more prevalent today than the commission of either treason or espionage.

<sup>15</sup> For the purposes of this Comment, "mistaken identification" is that which is simply incorrect because of the eyewitness's faulty memory, for example, or is erroneous due to perjured testimony. The study of DNA exonerations was conducted by The Innocence Project. The Project, founded by Barry Scheck and Peter Neufeld, is a group that uses DNA testing to help overturn convictions. See *supra* note 4; SCHECK ET AL., *supra* note 1, at 73; see also *Wrongful Convictions: Causes and Remedies*, *supra* note 9.

Eyewitness testimony is described here as "primary evidence" because of the definitive impression it leaves on a jury. *Id.* Gary Wells describes eyewitness testimony as "direct evidence" of the defendant's identity. *Id.* He explains that if a jury believes the eyewitness who points to the defendant in court and emphatically states, "I saw him do it," the jury is basically believing that the defendant is guilty of the crime. *Id.* Wells further explains that eyewitness testimony, unlike fingerprint evidence, for example, directly shows that the defendant committed the crime. *Id.* Fingerprint evidence would only prove that someone was at the crime scene, not that they committed the crime itself. *Id.*

<sup>16</sup> EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* vii (1961). Even though Borchard's study was conducted as long ago as 1932, it is discussed here to show that wrongful convictions are not merely a recent problem, but have been prevalent since the 1800s. Borchard's chief concern was not in preventing these innocent men from being convicted in the first place, but was in ensuring that some restitution be given them for their "loss and damage suffered." *Id.* Borchard selected cases from a cross-section of states, and, in each case, the convicted person's innocence was established either by a subsequent conviction of the real perpetrator, or by the discovery of new evidence. *Id.* at viii. Borchard selected cases that exemplified different types of error, which caused the erroneous convictions. *Id.* In most cases, the erroneous conviction was secured because of one of the following types of error: mistaken identification; circumstantial evidence (from which erroneous inferences were drawn); and perjury. *Id.* This Comment focuses only on those convictions that were obtained as a result of mistaken identification.

<sup>17</sup> *Id.* at xiii.

error was responsible for twenty-nine of the sixty-five erroneous convictions examined in the book.<sup>18</sup> Borchard opined:

These cases illustrate the fact that the emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception become distorted and his identification is frequently most untrustworthy. Into the identification enter other motives, not necessarily stimulated originally by the accused personally—the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support, consciously or unconsciously, an identification already made by another . . . . How valueless are these identifications by the victim of a crime is indicated by the fact that in eight of these cases the wrongfully accused person and the really guilty criminal bore not the slightest resemblance to each other, whereas in twelve other cases, the resemblance, while fair, was still not at all close.<sup>19</sup>

Even as long ago as 1932, Borchard recognized the different dangers inherent in eyewitness testimony, including the general distortion of a witness's perception and the possibility that a witness's identification would be encouraged by maleficent motives.

Psychologists and scholars have long tried to explain the phenomenon of inaccurate eyewitness testimony.<sup>20</sup> Some psychologists take a scientific approach and claim that what is seen by a witness goes through an entire process before it is fully comprehended and retained.<sup>21</sup> More specifically, they say that what happens in front of one's eyes is transformed inside the head, and is then refined, revisited, restored and embellished.<sup>22</sup> Elizabeth Loftus, a leading researcher in the field, believes that many erroneous identifications are caused by what is known as "unconscious transference," the phenomenon in which a person seen in one situation is confused with or recalled as a person seen in a second situation.<sup>23</sup>

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<sup>18</sup> *Id.* Some of these wrongful convictions were based on single eyewitness testimony while others were based on the testimony of as many as *seventeen* eyewitnesses. *Id.* at xxv n.1.

<sup>19</sup> *Id.* at xiii.

<sup>20</sup> *See, e.g.*, research conducted by Elizabeth Loftus and Gary Wells, *infra* note 23.

<sup>21</sup> SCHECKET AL., *supra* note 1, at 43.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 44; *see also* ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 142 (1979). Loftus further explains this phenomenon through her "paradigm for changes in [one's] recollection." GARY WELLS & ELIZABETH LOFTUS, EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 127 (1984). Loftus' paradigm describes three essential stages that a person's memory goes through after witnessing an event:



Extensive research has been conducted, analyzing the correlation between the strength of a witness's confidence in his identification and the accuracy of that identification.<sup>24</sup> The studies revealed that witnesses who were highly confident in their identifications were more likely to be correct as compared to witnesses who displayed little confidence.<sup>25</sup> The following case, however, demonstrates an exception to this finding.

In 1984, Jennifer Thompson, a high-achieving college student, was raped.<sup>26</sup> During the rape, Thompson carefully studied the face of her assailant so that she might be able to identify him later.<sup>27</sup> Without doubt, she identified Ronald Junior Cotton as the man who had raped her.<sup>28</sup> Cotton served eleven years in prison before DNA testing exonerated him and revealed that a man named Bobby Poole had actually committed the assault.<sup>29</sup> Thompson was naturally shocked, and has since been very active in speaking about the dangers of eyewitness testimony.<sup>30</sup> Thompson was face to face with her attacker, did nothing but study his face during their entire encounter, and still made an

1. *Acquisition*: A witness views an initial complex event, which might also include viewing one or more faces.
2. *Retention and change*: A witness encounters new information subsequent to the initial event. The source of new information might include biasing suggestions, viewing photographs, a combination of pictures and messages, or even rehearsal of the original event. Whatever the source, postevent experiences make possible changes in recollections. New information can be added, old information altered, or perhaps even erased.
3. *Retrieval*: A test of memory for the original event reveals that postevent experiences have produced substantial changes in recollection. Indeed, the witness reacts as if original memory and postevent information have been inextricably integrated.

*Id.* (italics added).

<sup>24</sup> Wells et al., *supra* note 6, at 622.

<sup>25</sup> *Id.* In his videotape, however, Wells stresses that "more likely" does not mean "always." Wrongful Convictions: Causes and Remedies, *supra* note 9. Wells describes the concept of "false certainty," whereby an eyewitness is highly certain of his identification and it in fact is mistaken. *Id.* In instances of false certainty, Wells explains that innocent people are convicted because the eyewitness is *both* mistaken *and* highly certain in his or her testimony. *Id.* The case of Jennifer Thompson, discussed next, is an example of false certainty.

<sup>26</sup> John Carman, *Memory Doesn't Serve Justice*, S.F. CHRON., February 25, 1997, at E1; Tom Humphries, *Fight to the Death (Part 2)*, THE IRISH TIMES, July 8, 2000, at 62.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; see also *State v. Cotton*, 351 S.E.2d 277 (N.C. 1987). Note that this was not a capital case. It is being discussed nevertheless because it is a good example of the fallibility of eyewitness testimony.

<sup>29</sup> *Fight to the Death (Part 2)*, *supra* note 26, at 62.

<sup>30</sup> *Id.*

incorrect identification. What follows are cases where the eyewitnesses made observations from a distance and were similarly wrong in their subsequent identifications.<sup>31</sup>

On July 25, 1984, police discovered the partially nude body of nine-year-old Dawn Hamilton in a wooded area in Baltimore.<sup>32</sup> On March 22, 1985, twenty-four year old Kirk Bloodsworth was sentenced to death for the rape and first-degree murder of Dawn.<sup>33</sup> Five eyewitnesses identified Bloodsworth as the man who was last seen with Dawn. On the morning of the murder, Dawn had come into the woods and had asked ten year-old Christian Shipley and seven year-old Jackie Poling if they could help her look for her cousin Lisa.<sup>34</sup> Christian and Jackie had refused to help, and said that a man agreed to assist Dawn, and the two of them walked off together.<sup>35</sup> After Dawn's body was found, Christian described the man's appearance to the police and a composite sketch was drawn.<sup>36</sup> Christian then picked Bloodsworth from a photo spread and identified him as the man who walked off with Dawn.<sup>37</sup> Jackie also identified Bloodsworth from a line-up.<sup>38</sup> Donna Ferguson testified that she saw Bloodsworth talking to Dawn near the woods on the day of the murder.<sup>39</sup> She too identified him at a line-up.<sup>40</sup> James Keller testified that as he was driving near the murder scene on the morning of the murder, he saw a man standing on the side of

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<sup>31</sup> Three out of the four cases that follow are rape and murder cases. Cases where rape was committed were not specifically sought out for the purposes of this Comment. They are included in this Article only because there was a substantial amount of information available concerning the crimes, the convictions, and the subsequent reversals.

<sup>32</sup> See *Bloodsworth v. State*, 543 A.2d 382, 384 (Md. Ct. Spec. App. 1988).

<sup>33</sup> SCHECK ET AL., *supra* note 1, at 218.

<sup>34</sup> *Bloodsworth*, 543 A.2d at 384-85.

<sup>35</sup> *Id.* at 385.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Christian's identification was questionable because he initially described the man as having had blond hair, and Bloodsworth was a redhead. SCHECK ET AL., *supra* note 1, at 217.

<sup>38</sup> *Bloodsworth*, 543 A.2d at 385. Jackie's identification was quite problematic. When he first attended the line-up, he identified a man who was in the third position, not Bloodsworth, who was in the sixth position. SCHECK ET AL., *supra* note 1, at 216. Jackie later told his mom and police that in reality, he had meant to pick out Bloodsworth, but had been afraid. *Id.* The police took down Jackie's statement and recorded it as his new identification. *Id.*

<sup>39</sup> *Bloodsworth*, 543 A.2d at 385.

<sup>40</sup> *Id.*

the road and he also identified Bloodsworth from both a photo spread and the line-up.<sup>41</sup>

With the exception of Christian and Jackie (and even their identifications were questionable), none of the other eyewitnesses saw the man with Dawn from a close distance. And yet, they were all able to identify confidently Bloodsworth as the murderer. In 1994, it was discovered that Dawn's underwear had been stained with semen, and after DNA testing was conducted, Kirk Bloodsworth was released from prison, given a pardon by the governor, and awarded \$300,000 in special compensation by the state.<sup>42</sup> Because of erroneous eyewitness testimony, Bloodsworth had spent nine years in jail.<sup>43</sup>

In another case, in 1978, a twenty-three year old woman was gang-raped and both she and her fiancée were murdered in Ford Heights, Illinois.<sup>44</sup> Four men named Dennis Williams, Kenny Adams, Verneal Jimerson, and Willie Rainge were convicted for the crimes.<sup>45</sup> Jimerson and Williams were sentenced to death.<sup>46</sup> The men were convicted based on the testimony of Charles McCraney and Paula Gray.<sup>47</sup> McCraney lived near the crime scene and claimed that he saw the four defendants in the vicinity around the time of the murders.<sup>48</sup> McCraney testified that on the day of the murders, he looked through his back

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<sup>41</sup> *Id.*

<sup>42</sup> SCHECK ET AL., *supra* note 1, at 220.

<sup>43</sup> Note that in this case there were five eyewitnesses, each of whom testified to a different event. As this Comment later discusses, the two-witness rule would have required the testimony of two witnesses for *each* overt act. In other words, a total of ten eyewitnesses would have been required. Rather than strictly follow the two-witness rule, however, this Article is suggesting that some form of corroboration should have been presented along with *each* witness's testimony. The corroboration would not have had to come from another witness. *See supra* note 8; *see also* discussion concerning overt acts *infra* pp. 779-82.

<sup>44</sup> *People v. Williams*, 588 N.E.2d 983, 989 (Ill. 1991). This case is more commonly known as the Ford Heights Four case.

<sup>45</sup> *Id.* at 990.

<sup>46</sup> *Id.*

<sup>47</sup> Gray, Kenny Adams's girlfriend, testified before the Grand Jury and implicated the four defendants in the crimes. *Id.* at 989. She testified that she was with the defendants during the rape and the murders, and that she had witnessed both victims being shot in the head twice by the defendants. *Id.* Gray later recanted her entire testimony, admitted that she in fact was not present during the commission of the crimes, and that the police had coerced her into falsely implicating her friends. Edward Helmore, *Death Row Innocents Freed by Students*, THE OBSERVER NEWS, July 7, 1996, at 21.

<sup>48</sup> *Williams*, 588 N.E.2d at 990.

bedroom window, which is located on the second floor of his two-story apartment.<sup>49</sup> McCraney claimed that from this vantage point, he could see the defendants below inside their cars.<sup>50</sup> While he could identify the defendants after having observed them from such a distance, he stated that he could not tell whether the group included any white persons or women.<sup>51</sup> Nevertheless, his testimony was enough to enable the prosecutors to obtain their convictions. Years later, in February of 1996, the rape victim's body was exhumed for DNA testing.<sup>52</sup> The testing revealed that the semen found inside her could not have come from any of the four defendants.<sup>53</sup> The testing led to the real perpetrators who subsequently confessed to the crimes.<sup>54</sup> The four original defendants were finally exonerated and freed in July 1996.<sup>55</sup>

In 1974, Delbert Tibbs was convicted of rape and first-degree murder and was sentenced to death.<sup>56</sup> The principal testimonial evidence against Tibbs came from the rape victim, Cynthia Nadeau.<sup>57</sup> The rape had taken place in Ft. Myers, Florida, and except for Nadeau's testimony, there was no other evidence placing Tibbs in the Ft. Myers area at the time.<sup>58</sup> After the rape and murder, Nadeau gave police a detailed description of her assailant.<sup>59</sup> Because he fit the description, Tibbs was stopped several times for questioning.<sup>60</sup> Nadeau was subsequently shown two photographs of Tibbs, whom she identified as her attacker.<sup>61</sup> She then identified him in a four-man lineup, and again at trial.<sup>62</sup> In 1976, the Florida Supreme Court recognized the insufficiency and the potential dangers of eyewitness testimony. The court reversed Tibbs's conviction and re-

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 991.

<sup>52</sup> Helmore, *supra* note 47, at 21.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Eric Zorn, *Ford Heights 4 Case Also Calls for Special Prosecutor*, CHI. TRIB., December 12, 1996, at 1.

<sup>56</sup> *Tibbs v. State*, 337 So. 2d 788, 789 (Fla. 1976).

<sup>57</sup> *Id.* at 790.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* Because Nadeau had been shown photographs of Tibbs *prior* to the line-up, Tibbs maintained that the line-up identification was tainted.

manded the case for a new trial because of insufficient evidence.<sup>63</sup> The court opined, "Rather than risk the very real possibility that Tibbs had nothing to do with these crimes, we reverse."<sup>64</sup>

In another case, Larry Hicks, a nineteen year-old African-American man from Gary, Indiana, was convicted for the February 1978 murders of Norton Miller and Stephen Cosby.<sup>65</sup> Hicks and the victims had attended a party at the apartment of two women who lived near Hicks.<sup>66</sup> At Hicks's trial, the state's evidence consisted mostly of the testimony of these two women, who said they had seen Hicks arguing with the victims and waving a knife.<sup>67</sup> The victims were found stabbed to death in an alley outside the apartment building.<sup>68</sup> There was no physical evidence linking Hicks to the crime.<sup>69</sup>

A jury convicted Hicks of the murders, and the Judge sentenced him to death.<sup>70</sup> Hicks subsequently filed a motion asking for a new trial, and it was granted.<sup>71</sup> Hicks's new lawyers interviewed the two women who had testified against Hicks and both recanted their testimony and admitted they had not seen Hicks

<sup>63</sup> In so ruling, the court, citing an earlier Florida Supreme Court decision where the only evidence identifying the defendant as a robbery participant was the sole testimony of an eyewitness, said:

While the weight of the evidence and the credibility of the witnesses is ordinarily a matter which is exclusively within the province of the jury to decide, and this court will as a rule not reverse a judgment based upon a verdict returned by the jury and approved by the trial judge, when there is substantial evidence to support the verdict rendered, it is also the rule that the evidence relied on to have this effect must be substantial in character.

...

When such evidence is not substantial in character, this court is committed to the rule that a conviction will be reversed and a new trial ordered, where the evidence relied on is not satisfactory to establish the identity of an accused as a participant in a crime of which he has been found guilty.

*Id.* at 791 (quoting *McNeil v. State*, 139 So. 791, 792 (Fla. 1932)).

<sup>64</sup> *Tibbs v. State*, 337 So. 2d 788, 791 (Fla. 1976).

<sup>65</sup> Paula Sites, *Another Wrongly Convicted Man*, THE INDIANAPOLIS STAR, Feb. 10, 2000, at A21.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* Hicks's new lawyers alleged that his initial trial lawyer had been ineffective in representing him and that Hicks himself had not been competent to stand trial.

with a knife.<sup>72</sup> One woman said she had lied during the first trial because she was afraid of the real killer, whom she then identified.<sup>73</sup> During the new trial, the two women gave substantially different testimony and revealed the name of the man they said was the real killer.<sup>74</sup> The jury deliberated for six hours and returned with a verdict of not guilty.<sup>75</sup>

These cases are just a few examples where innocent people's lives may have been taken because of extremely fallible evidence. Because of the highly inaccurate nature of eyewitness testimony, a corroboration requirement must be instated whenever such testimony is offered as evidence in a capital case. Currently, the United States federal statutes for capital crimes include no evidentiary requirements. In her speech to the Baltimore County jury in Kirk Bloodsworth's trial, defense lawyer Leslie Stein said:

Just because the state seeks the death penalty doesn't mean that their evidence is strong. In fact, it is no comment on their evidence at all. It is merely a comment on the kind of crime that was committed . . . . I want to remind you of one other thing: that awful facts, ghastly evidence, is not a substitute for proof.<sup>76</sup>

## II. CAPITAL CRIMES IN THE UNITED STATES

In the United States, there are three federal crimes for which a death sentence may be imposed—espionage, murder, and treason.<sup>77</sup> Each statute merely states that a possible sen-

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> SCHECK ET AL., *supra* note 1, at 213.

<sup>77</sup> The federal statute criminalizing espionage states that whoever gathers or delivers defense information to aid foreign government:

shall be punished by death or by imprisonment for any term of years or for life, except that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, further finds that the offense resulted in the identification by a foreign power . . . of an individual acting as an agent of the United States and consequently in the death of that individual . . . .

18 U.S.C. § 794 (2000).

The federal murder statute reads:

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison . . . or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first-degree. Whoever is guilty of murder in the first-degree shall be punished by death or by imprisonment for life.

tence for the commission of the crime may be death. The statutes do not list or state any evidentiary requirements that need to be met before a death sentence can be imposed.<sup>78</sup> Perhaps this deficiency is due to the fact that there is a separate federal statute governing the imposition of the death sentence.<sup>79</sup> However, this statute also fails in establishing specific evidentiary requirements that must be met before a defendant may be sentenced to death.<sup>80</sup> The only guidelines the United States Code offers concerning the imposition of a capital sentence are a list of mitigating and aggravating factors to be considered in determining whether a sentence of death is justified.<sup>81</sup> These mitigating and aggravating factors have nothing to do with the *quantity of evidence* that must be offered by the prosecution in order to secure an indictment in a capital case. Similarly, the

18 U.S.C. § 1111 (2000).

Finally, the federal treason statute states, "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies . . . is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000 . . ." 18 U.S.C. § 2381 (2000).

<sup>78</sup> While it is true that no criminal statutes list any evidentiary requirements for either capital or noncapital offenses, this Comment is arguing that because of the irreversible nature of a sanction such as death, a specific evidentiary requirement should be imposed for capital offenses.

<sup>79</sup> The "sentence of death" statute provides:

A defendant who has been found guilty of (1) an offense described in section 794 or section 2381; or (2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593—

(a) intentionally killed the victim;

...

shall be sentenced to death if, after consideration of the factors set forth in section 3592 . . . it is determined that imposition of a sentence of death is justified . . .

18 U.S.C. § 3591 (2000).

<sup>80</sup> 18 U.S.C. § 3591 (2000) does require proof beyond a reasonable doubt, but this Article is suggesting that such a proof requirement is deficient and needs to more explicitly delineate what exactly constitutes *sufficient* proof.

<sup>81</sup> See 18 U.S.C. § 3592 (2000). The statute lists impaired capacity, duress, minor participation, and no prior criminal record as some of the mitigating factors that may be taken into consideration. There is a separate list of aggravating factors for the crimes of espionage and treason, and the aggravating factors for homicide include death during the commission of another crime, previous convictions, and a grave risk of death to additional persons.

Model Penal Code neglects to set any sort of quantitative requirement for the type of evidence offered in a capital case.<sup>82</sup>

Because of the extreme fallibility of eyewitness testimony, some type of standard governing this particular form of evidence must be instated. The next section of this Article examines the United States law of treason, analyzes its corroboration requirement, and explains how and why it should apply to other capital offenses as well.

### III. THE LAW OF TREASON

The law of treason is comprised of two elements: a two-witness rule and an overt act requirement.<sup>83</sup> Each element will be examined separately, and finally, the elements' applicability to other capital cases will be discussed.

#### A. THE TWO-WITNESS RULE

Treason is "the breach of the allegiance which a person owes to the state under whose protection he lives, and the most serious crime known to the law."<sup>84</sup> The Treason Clause of the United States Constitution was written and adopted by men whose ideas regarding the law of treason were derived from English law.<sup>85</sup> The phraseology of Article III, Section 3 is largely derived from the Statute of 25 Edward III—an English treason statute that was enacted in 1350.<sup>86</sup> The statute divided the alle-

<sup>82</sup> Similar to the federal statutes, the Model Penal Code states that a death sentence may not be imposed where no aggravating factors were established by the evidence or where substantial mitigating factors were established. MODEL PENAL CODE § 210.6 (1962). Concerning evidence, the Code states only:

In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence . . . which the Court deems to have probative force, may be received . . . provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence.

*Id.* While the Code lists what may constitute evidence in a murder case, the Code does not at all speak to the quantity of the evidence offered.

<sup>83</sup> See *supra* note 10.

<sup>84</sup> JULES ARCHER, TREASON IN AMERICA 1 (1971) (quoting 27 ENCYCLOPEDIA AMERICANA 45 (1980)).

<sup>85</sup> JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES 15 (1945).

<sup>86</sup> *Id.* Indeed, some of the phrases in Article III, Section 3 were lifted exactly from the statute, which states that Treason exists:



giance which every English subject owed his sovereign into two categories, petit treason and high treason.<sup>87</sup> Petit treason, which later came to be considered murder, included the killing of a master by his servant, a husband by his wife, and a prelate by a man owing him faith and obedience.<sup>88</sup> High treason, which denoted crimes against the sovereign, listed the seven offenses that constituted the crime, including planning or imagining the death of the king, his wife, or their heir, or even raping the king's wife or eldest daughter.<sup>89</sup>

The two-witness requirement included in the Treason Clause of the Constitution existed in some of the laws of the colonies as early as the late seventeenth century and was based on the Statute of 7 William III.<sup>90</sup> According to this statute, the

In case where a man doth compass or imagine the death of our Lord the King, the Lady his Consort, or of their eldest son and heir; or if a man violatē the King's Consort or the King's eldest daughter being unmarried, or the consort of the King's eldest son and heir. And if a man *levy war* against our said Lord the King in his realm, or *be adherent to the enemies* of our Lord the King in the realm, *giving to them aid and support* in his realm or elsewhere; and thereof be attainted upon due proof of open deed by people of their condition.

*Id.* at 106-07 n.1 (emphasis added); see also ENCYCLOPEDIA AMERICANA, *supra* note 84, at 45.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> See statute quoted *supra* note 86.

<sup>90</sup> HURST, *supra* note 85, at 81. The earliest act requiring two or more witnesses for capital offenses seems to be Laws of New Haven Colony, which was enacted in 1656 and reads:

That no man shall be put to death, for any offense, or misdemeanour in any case, without the testimony of two witnesses at least, or that which is Equivalent thereunto, provided, and to prevent, or suppressē much inconvenience, which may grow, either to the publick, or to particular Persons, by a mistake herein, it is Ordered, and declared, by the Authority aforesaid, that two, or three single witnesses, being of competent age, of sound understanding, and of good Reputation, and witnessing to the case in question (whither it concerne the publick peace, and welfare, or any one, and the same particular person) shall be accounted (the party concerned having no just exception against them) sufficient prooffe, though they did not together see, or heare, and so wisse to the same individuall, any particular Act, in reference to those circumstances of time, and place.

*Id.* at 114-15.

The General Laws and Liberties of New Plimouth [sic] Colony, enacted in 1671, provides:

That no Man be Sentenced to Death without Testimonies of two witnesses at least, or that which is equivalent thereunto, and that two or three Witnesses, being of competent Age, Understanding and of good Reputation, Testifying to the case in question, shall be accounted and accepted as full Testimony in any case, though they did not together see or hear, and so Witness to the same individual Act, in reference to circumstances of time and place; Provided the Bench and Jury be satisfied with such Testimony.

witnesses must testify to the same treasonable offense, and one witness to each of two separate, or different, types of treason would not suffice.<sup>91</sup>

During the American Revolution, new legislation on treason was enacted, but it still maintained a great similarity to the statutes of Edward III and of William III.<sup>92</sup> During this time period, almost all the basic treason acts required the same thing: the testimony of two lawful and credible witnesses.<sup>93</sup> When America gained its independence in 1776, retaining the two-witness requirement remained a concern of the founding fathers and delegates involved in the drafting of the Constitution.

The framers of the Constitution ultimately decided to very restrictively define treason in the United States.<sup>94</sup> History had shown them that men in power might falsely or loosely charge

*Id.* at 115.

In New Jersey, the Act of May 30, 1668 stated that:

Concerning taking away of a Man's life, It is Enacted . . . that no Man's Life shall be taken away under any Pretence but by Virtue of some Law established in this Province, that it be proved by this Mouth of two or three sufficient Witnesses.

*Id.*

<sup>91</sup> *Id.* at 82; see also L.M. Hill, *The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law*, 12 AM. J. LEGAL HIST. 95, 95 (1968).

<sup>92</sup> HURST, *supra* note 85, at 83. The Continental Congress, on June 24, 1776, adopted the following:

*Resolved*, That all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons passing through, visiting, or make [sic] a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage . . . owe, during the same time, allegiance thereto:

That all persons, members of, or owing allegiance to any of the United Colonies, . . . who shall levy war against any of the said colonies within the same, or be adherent to the king of Great Britain, or others the enemies of the said colonies, or any of them, within the same, giving to him or them aid and comfort, are guilty of treason against such colony:

That it be recommended to the legislatures of the several United Colonies, to pass laws for punishing . . . such persons before described, as shall be proveably attainted of open deed, by people of their condition, of any of the treasons before described.

*Id.* at 83-84. Mosaic law may also have influenced the new legislation: "One witness shall not rise up against a man for any iniquity, or for any sin, in any sin that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established." *Cramer v. United States*, 325 U.S. 1, 24 n.37 (1944) (quoting *Deuteronomy* 19:15); see also *Deuteronomy* 17:6 (stating, "At the mouth of two witnesses, or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death").

<sup>93</sup> HURST, *supra* note 85, at 106.

<sup>94</sup> THE NEW ENCYCLOPEDIA BRITANNICA 906 (15th ed. 1998).

their opponents with treason, and therefore, they denied Congress the authority to enlarge or reshape the offense.<sup>95</sup>

In Number 43 of *The Federalist*, James Madison wrote:

As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.<sup>96</sup>

Indeed, Madison described the convention's goal of ensuring the existence of a safeguard in the law of treason against the "peculiar danger" of corruptly motivated accusations directed towards those who were really innocent.

Interestingly, while all of the major books and articles written about treason mention the framers' desire to keep the two-witness requirement in the Constitution, none of them discusses the exact reason for this desire.<sup>97</sup> One could argue that if the framers' main goal in keeping such a requirement was to protect innocents from perjuring witnesses, the framers' goal might not be entirely successful because there would be no guarantee that the corroborating witness would not commit perjury. If one witness is willing to provide perjured testimony, nothing prevents another witness from doing the same.<sup>98</sup>

<sup>95</sup> *Id.*, see also *Cramer*, 325 U.S. at 15. In *Cramer*, Justice Jackson opined:

The Convention numbered among its members men familiar with government in the Old World, and they looked back upon a long history of use and abuse of the treason charge . . . . But the basic law of treason in this country was framed by men who, as we have seen, were taught by experience and by history to fear abuse of the treason charge almost as much as they feared treason itself.

*Id.* at 15, 21.

Note, however, that during the beginning of the Constitutional Convention in 1787, Charles Pinckney proposed that only Congress should have the exclusive power to declare what should be treason and misprision of treason against the United States. *Id.* at 22.

<sup>96</sup> J.S. MILL, *AMERICAN STATE PAPERS: THE FEDERALIST* 140 (1989).

<sup>97</sup> See, e.g., ARCHER, *supra* note 84; CHAPIN, *infra* note 101; HURST, *supra* note 85; Hill, *supra* note 91.

<sup>98</sup> Surprisingly, none of the literature on treason addresses how a two-witness rule would preclude both witnesses from committing perjury. See generally treason sources cited *supra* note 97.

Fortunately, more information concerning the framers' intent is available with regard to the next element—the overt act requirement.

## B. THE OVERT ACT REQUIREMENT

In treason trials, the offering of two witnesses is not in itself enough to obtain a conviction. The two witnesses must each testify to the *same overt act*.<sup>99</sup> Indeed, in the Federal Convention debates of 1787, the delegates discussed the wording of Article III, Section 3 and moved to insert the words “to the same overt act” after “two witnesses.”<sup>100</sup> According to the transcripts, Benjamin Franklin (a delegate from Pennsylvania) wanted this amendment to take place because “prosecutions for treason were generally virulent; and perjury too easily [was] made use of against innocence.”<sup>101</sup>

In *Cramer v. United States*, where the first conviction for treason was reviewed by the Supreme Court, Justice Jackson explained what dangers concerned the framers when they drafted the Treason Clause of the Constitution.<sup>102</sup> Jackson wrote:

Historical materials aid interpretation chiefly in that they show two kinds of dangers against which the framers were concerned to guard the treason offense: (1) perversion by established authority to repress peaceful political opposition; and (2) *conviction of the innocent as a result of perjury, passion, or inadequate evidence*. The first danger could be diminished by closely circumscribing the kind of conduct which should be treason . . . .

<sup>99</sup> See *supra* note 10.

<sup>100</sup> JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 433 (Gaillard Hunt & James Brown Scott eds., 1987). During the session of Monday, August 20, 1787, John Dickenson, a delegate from Delaware, apparently:

wished to know what was meant by the 'testimony of two witnesses,' whether they were to be witnesses to the same overt act or to different overt acts. He thought also that proof of an overt act ought to be expressed as essential to the case.

*Cramer v. United States*, 325 U.S. 1, 23 (1944).

Dr. Wm. Sam. Johnson, a delegate from Connecticut, also “considered . . . that something should be inserted in the definition concerning overt acts.” *Id.*

<sup>101</sup> *Id.* James Wilson of Pennsylvania responded to Dr. Franklin's concern and noted, “much may be said on both sides. Treason may sometimes be practised in such a manner, as to render proof extremely difficult—as in a traitorous correspondence with an Enemy.” *Id.* Nevertheless, the proposal to add the words “to the same overt act” was approved eight to three. *Id.*; see also BRADLEY CHAPIN, THE AMERICAN LAW OF TREASON 83 (1964); James Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395, 403 (1945).

<sup>102</sup> HURST, *supra* note 85, at vii; see also *Cramer*, 325 U.S. at 27.

The second danger lay in the manner of trial and was one which would be diminished mainly by procedural requirements . . . .<sup>103</sup>

The procedural requirement to which Jackson was referring was the one mandating that each witness testify to the same overt act. The reason for the requirement of an overt act had to do with the unique nature of the crime of treason. The members of the Federal Convention were familiar with and took into account the long history of use and abuse of the treason charge by the government and they wanted to ensure that people would not be tried for their thoughts or private opinions, but only for actual *acts* that demonstrated such opinions.<sup>104</sup>

In *Cramer*, the Court noted that the framers of the Constitution were greatly influenced by eighteenth century French and English liberal thought.<sup>105</sup> Benjamin Franklin in particular was influenced by French philosophy, specifically the philosophy of Montesquieu.<sup>106</sup> In his well-known multi-volume work *L'Esprit des Lois*, Montesquieu devoted an entire book to his philosophical reactions to the abuses of treason.<sup>107</sup> He wrote:

Nothing renders the crime of high treason more arbitrary than declaring people guilty of it for indiscreet speeches . . . . Words do not constitute an overt act; they remain only in idea . . . . Overt acts do not happen every day; they are exposed to the eye of the public; and a false charge with regard to matters of fact may be easily detected. Words carried into action assume the nature of that action. Thus a man who goes into a public market-place to incite the subject to revolt, incurs the guilt of high treason, because the words are joined to the action, and partake of its nature. It is not the words that are punished but an action in which the words are employed.<sup>108</sup>

Montesquieu expressed well the framers' interests in not punishing someone for their mere thoughts or "indiscreet speeches." The framers wanted to make sure that one would only be tried for treason if one's words were "joined" to some sort of action.

<sup>103</sup> *Cramer*, 325 U.S. at 27-28 (emphasis added).

<sup>104</sup> *Id.* at 15.

<sup>105</sup> *Id.* at 15 n.21.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 16 n.21. The main purpose of the overt act requirement is to prevent prosecutions of mere "word crimes." The possibility of such prosecutions is inherent in the nature of the crime of treason. While no such problem seems inherent to the crime of murder, applying the overt act requirement to homicide cases would still be useful, as is demonstrated *infra* pp. 783-86.

In constructing Article III, Section 3 of the Constitution, the framers combined known precedent from English law, French philosophy, and even religion, and finally agreed upon the requirement of two witnesses to the same overt act.<sup>109</sup> Much like Montesquieu, the framers wanted to ensure that a person would not be tried for treason unless he or she committed an *act* that breached his or her allegiance to the United States.<sup>110</sup> What the framers did not clarify, and thereby left the Courts to have to decide, was what exactly constituted an overt act.<sup>111</sup>

In three different decisions, the Supreme Court ultimately defined an overt act as that which manifested a criminal intention and tended toward the commission of the crime of treason.<sup>112</sup> The Court further stated that while two witnesses had to

<sup>109</sup> *Id.* at 24. See *supra* note 92 for the discussion of the religious influence upon early treason legislation.

In his treatise on Evidence, Wigmore sets out the details of the two-witness rule for treason and writes:

The rule of two witnesses means . . . that they must be effective witnesses, i.e., they must *both be believed by the jury*. A rule requiring a certain quantity of evidence is binding upon the jurors as well as upon the judge; they are not to convict unless in their judgment the required amount exists. If the testimony of one is rejected by the jury upon consideration, there remains but one witness, less than the rule requires . . . .

...

Each of the witnesses must testify to the *whole* of the overt act; or, if it is separable, there must be two witnesses to each part of the overt act.

7 WIGMORE, EVIDENCE § 2038 (1978). See also 87 C.J.S. *Treason* § 15 (1954):

Until this overt act of treason has been proved by two competent witnesses . . . all other testimony is irrelevant. The purpose of this constitutional requirement is to minimize the danger of convicting the innocent, and therefore the provision must be applied in the light of such purpose . . . . It is in effect a command that the overt acts must be established by direct evidence which must be that of two witnesses instead of one.

Deducing what constitutes an overt act is discussed *infra* note 112.

<sup>110</sup> *Haupt v. United States*, 330 U.S. 631, 645 (1946) (stating that "The requirement of an overt act is to make certain a treasonable project has moved from the realm of thought into the realm of action").

<sup>111</sup> In *Cramer*, Justice Jackson writes:

Our problem begins where the Constitution ends. That instrument omits to specify what relation the indispensable overt act must sustain to the two elements of the offense as defined . . . . It requires that two witnesses testify to the same overt act, and clearly enough the act must show something toward treason, but what?

*Cramer v. United States*, 325 U.S. 1, 30 (1944).

<sup>112</sup> In *United States v. Robinson*, Judge Learned Hand wrote:

Nevertheless a question may indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself, and getting its

testify to the same act, each witness's testimony did not have to be identical.<sup>113</sup> Finally, the Court said that the witnesses did not have to prove the defendant's intent because intent could be inferred from the circumstances surrounding the overt act.<sup>114</sup>

The framers decided to keep the overt act requirement in the Constitution because they wanted to ensure that people would not be prosecuted for their thoughts.<sup>115</sup> While the potential threat of being prosecuted solely for one's thoughts does not really exist where the crime of homicide is concerned, imposing the two-witness rule and the overt act requirement would still prove useful in decreasing the dangers inherent to eyewitness testimony in general. The application of the two-witness rule to homicide cases is discussed in this next section.<sup>116</sup>

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treasonable character only from some covert and undeclared intent . . . Lord Reading in his charge in *Casement's Case* uses language which accords with my understanding: "Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled."

*Id.* at 6-7 (quoting *United States v. Robinson*, 259 F. 685, 690 (S.D.N.Y. 1919)).

In *Haupt v. United States*, Justice Jackson elaborated on what he thought was meant by the overt act requirement:

The Constitution requires testimony to the alleged overt act . . . And while two witnesses must testify to the same act, it is not required that their testimony be identical. Most overt acts are not single, separable acts, but are combinations of acts or courses of conduct made up of several elements . . .

One witness might hear a report, see a smoking gun in the hand of defendant and see the victim fall. Another might be deaf, but see the defendant raise and point the gun, and see a puff of smoke from it. The testimony of both would certainly be "to the same overt act," although to different aspects. And each would be to the overt act of shooting, although neither saw the movement of a bullet from the gun to the victim. It would still be a remote possibility that the gun contained only a blank cartridge and the victim fell of heart failure. But it is not required that testimony be so minute as to exclude every fantastic hypothesis that can be suggested.

*Haupt v. United States*, 330 U.S. 631, 640 (1946).

Justice Douglas, in his concurrence, further opined:

As the *Cramer* case makes plain, the overt act and the intent with which it is done are separate and distinct elements of the crime. Intent need not be proved by two witnesses but may be inferred from all the circumstances surrounding the overt act.

*Id.* at 645.

<sup>113</sup> See Justice Jackson's opinion *supra* note 112.

<sup>114</sup> See Justice Douglas' concurrence *supra* note 112.

<sup>115</sup> See *supra* note 104.

<sup>116</sup> The phrase "two-witness rule" includes the overt act requirement.

### C. THE APPLICATION OF THE TWO-WITNESS RULE TO OTHER CAPITAL CASES

As discussed earlier, Kirk Bloodsworth was convicted based on the testimony of *five* eyewitnesses.<sup>117</sup> The two-witness rule would have required that two witnesses testified to *each* overt act that was witnessed. In other words, ten witnesses would have had to have been produced in order for a conviction to have been obtained. This Comment, however, is proposing that another witness need not be the only form of acceptable corroboration. As long as *some* form of corroboration is offered in conjunction with each witness's testimony, the conviction can be secured.<sup>118</sup> To corroborate a witness's testimony, the prosecutor can offer DNA evidence, fingerprint or footprint evidence, or even an audio or videotape of what the witness saw.<sup>119</sup> In the

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<sup>117</sup> See *supra* note 43.

<sup>118</sup> See *supra* note 8.

<sup>119</sup> Note that Connecticut has a statute that imposes a requirement similar to the one being proposed in this Comment. With regard to testimony required in a capital case, the Connecticut statute says, "No person shall be convicted of any crime punishable by death without the testimony of at least two witnesses, or that which is equivalent thereto." CONN. GEN. STAT. § 54-83 (1960); see also 7 WIGMORE, EVIDENCE § 2044 (1978).

The Connecticut statute was first adopted in 1672, and was then worded as follows: "It is ordered by this court; That no person for any fact committed shall be put to death without the testimony of two or three witnesses, or that which is equivalent thereto." *State v. Marx*, 60 A. 690, 691 (Conn. 1905). According to the court, the statute was based not on the law of treason, but on Mosaic code. *Id.*; see also *supra* note 92 (citing *Deuteronomy*). Interestingly, just as the literature on treason fails to explain how a two-witness rule would preclude both witnesses from committing perjury, the court in *Marx* fails to explain why Connecticut felt the need to adopt such a statute. See generally *Marx*, 60 A. 690 (failing to discuss why Connecticut adopted the statute); see also *supra* note 98. In a later case, the Connecticut Supreme Court only says that the statute was designed "to prevent a person from being put to death by the unsupported testimony of one witness." *State v. Schutte*, 117 A. 508, 510 (Conn. 1922). The court opined, "a single witness, however positive, and however credible, will not warrant a conviction, where life is in question." *Id.*

Connecticut's statute is only somewhat similar to the corroboration requirement being proposed in this Comment. In *Schutte*, the court explained that the statute did not require two witnesses to testify to the same fact. *Id.* The two witnesses just had to testify to "material and relevant circumstances . . . tending to show the guilt of the accused." *Id.* In other words, the Connecticut statute is unlike treason's two-witness rule and is unlike the corroboration requirement being suggested in this Article. The statute does not require that the witnesses testify to the *same overt act*, or that other forms of corroborating evidence be provided to support what the witness saw. Connecticut's statute fails to effectively prevent capital convictions based on erroneous eyewitness testimony.



case of Bloodsworth, one of the witnesses testified that she saw Bloodsworth near the woods on the day of the murder.<sup>120</sup> This Article is proposing that in order for her testimony to be admissible at Bloodsworth's trial, the prosecution would also have to offer either another eyewitness who can testify to the same sight, or perhaps evidence of Bloodsworth's footprint near the woods.<sup>121</sup>

The D.C. Circuit has recognized that the reasoning behind treason's two-witness rule is applicable to other types of crimes. In 1952, the circuit applied the reasoning behind and justification for the two-witness rule to a sex crime prosecution.<sup>122</sup> The issue before the court was whether a judgment of conviction for a sex offense could be sustained upon the testimony of one witness, without any corroboration.<sup>123</sup> The court noted that all courts in general are unusually skeptical toward accusations about sexual offenses.<sup>124</sup> The court stated that the reason for skepticism was probably fear of the stigma that would attach to an unjustly convicted defendant.<sup>125</sup> The court elaborated:

Moreover, the courts have been realistic about the effects of a threat to accuse one of sodomy . . . . So abominable is the crime, and so destructive is even the accusation of it, of all social right and privilege, that the law considers that the accusation is a coercion which men cannot resist. This seems to be the only case in which a threat to prosecute, will supply the place of actual force . . . .

There is virtually no protection, except one's reputation and appearance of credibility, against an uncorroborated charge of this sort. At the same time, the results of the accusation itself are devastating to the accused . . . .

So . . . the law must be exceedingly careful in its processes. While enforcement of this particular statute must seek the prevention of the of-

<sup>120</sup> Bloodsworth v. State, 543 A.2d 382, 385 (Md. Ct. Spec. App. 1988).

<sup>121</sup> Of course, there is the chance that even if Bloodsworth's footprint can be found near the woods, he may not have left it there at the time of the murder. *But see* Haupt v. United States, 330 U.S. 631, 640 (1946): "It would still be a remote possibility that the gun contained only a blank cartridge and the victim fell of heart failure. But it is not required that testimony be so minute as to exclude every fantastic hypothesis that can be suggested."

<sup>122</sup> Kelly v. United States, 194 F.2d 150 (D.C. Cir. 1952). Even though this is not a capital case, for the purposes of this Comment, it is useful to see how the D.C. Circuit applied the reasoning behind the two-witness rule to a non-treason case.

<sup>123</sup> *Id.* at 152.

<sup>124</sup> *Id.* at 153.

<sup>125</sup> *Id.*

... fense, it must also seek to prevent unwarranted irreparable destruction to reputations . . . .<sup>126</sup>

The court notes that while one of the statute's purposes is to deter the commission of the crime altogether, if the crime is committed, another purpose is to protect the irreparable ruin of one's reputation caused by a false or unwarranted accusation.<sup>127</sup>

The D.C. Circuit continues by recognizing that the problems of quantitative requirements of proof in criminal cases are not novel, and it is here that the court cites Wigmore's justification for the two-witness rule in treason prosecutions.<sup>128</sup> The court explains that by Wigmore's standards, a quantitative measure of proof in such cases is clearly justified "because the likelihood of false accusations is enormous and the harm done by failure to convict is relatively very small."<sup>129</sup>

While advancing support for a corroboration requirement in this sex crime prosecution, the court does offer an effective counter-argument to the requirement. The court states:

[T]here is a powerful consideration which operates against such absolute requirements. Rigid quantitative requisites of proof would seriously restrict prosecutions for this offense and to that extent impair enforcement of the statute. Probably only rarely is this offense committed in the presence of a third person, and only rarely is the verbal invitation [to commit a lewd act] corroborated by some proven circumstance which establishes that the invitation has actually been made.<sup>130</sup>

<sup>126</sup> *Id.* at 153-54.

<sup>127</sup> *Id.* at 154.

<sup>128</sup> *Id.* The court quotes Wigmore who, in his treatise on Evidence, wrote:

The true solution seems to depend on the relative proportion, in experience, of two elements, namely, the likelihood of false accusations, as compared with the harm of a guilty person's escape. When the former (relatively to the specific crime) is large, and the latter (relatively to the specific crime) is small, then the two-witness rule may be justified as being often effective, and seldom harmful when not effective.

*Id.* (quoting 7 WIGMORE, EVIDENCE § 2037(1978)).

<sup>129</sup> *Kelly v. United States*, 194 F.2d 150, 154 (D.C. Cir. 1952).

<sup>130</sup> *Id.* The court responds to this counter-argument by stating that its opinion in this case is by no means setting forth rigid requirements that must be adhered to in future sex offense prosecutions. *Id.* The court is rather setting forth "certain considerations" that trial courts should take into consideration when next prosecuting a similar case. *Id.* The three considerations are: (1) the testimony of a single witness to a verbal invitation to sodomy should be considered with great caution; (2) evidence of the defendant's good character, while not particularly impressive, should nonethe-

The court correctly recognizes that the problem with any rigid quantitative requirement, especially that of corroboration, is that it may not be possible for such a requirement even to be met.

This Article, however, is not proposing a rigid or absolute rule. The corroboration requirement proposed in this Article is not as rigid as and slightly deviates from the absolute two-witness treason rule. This Comment suggests that *if* a prosecutor plans on offering eyewitness testimony at trial in a capital case, the prosecutor must also provide some form of corroboration to that testimony. If no such corroboration is available, the prosecutor can get around the requirement by not presenting eyewitness testimony at all or by presenting the uncorroborated testimony and seeking life imprisonment rather than capital punishment. The corroboration requirement would only be triggered *when* the prosecution *chose* to use eyewitness testimony as evidence in a capital case.

There are certain analogies that can be drawn with respect to prosecutions for treason and homicide, and these analogies further support applying treason's two-witness rule to the homicide cases. These analogies are discussed in this next section.

#### IV. THE JUSTIFICATION FOR APPLYING THE TWO-WITNESS RULE TO ALL CAPITAL CASES

One could argue that the two-witness rule should not apply to crimes such as murder because the opportunities for falsely-made accusations in sodomy and treason cases are quite different than those behind homicide cases.<sup>131</sup> By their very nature, sodomy and treason cases more readily lend themselves to false accusations. One could accuse someone of committing either sodomy or treason, and no explicit proof such as a dead body or a murder weapon would be required to substantiate the accusation. Furthermore, the accuser in sodomy and treason cases is generally a private individual. In murder cases, the state is usually the accuser, and without explicit evidence of either a dead body or a murder weapon or blood, for instance, an accusation alone cannot prove that the crime even occurred.

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less be considered; and (3) corroboration of the circumstances surrounding the involved parties should be required. *Id.* at 154-55.

<sup>131</sup> Sodomy is included here to recall the D.C. Circuit's adoption of the reasoning behind the two-witness rule to a sex crime prosecution. *See supra* note 122.

The differences between sodomy, treason and murder, however, do not bar the application of the two-witness rule to homicide cases because while the opportunities for false accusations differ among the crimes, the motives behind the unjust accusations do not. With respect to treason, false accusations were largely driven by political motivations—men with political power were likely to accuse their opponents of treason for personal gain.<sup>132</sup> Similarly, with respect to homicide, false accusations are often encouraged due to political pressures.<sup>133</sup> With respect to truly heinous homicide cases, especially those commanding great public interest, police and prosecutors alike are under tremendous pressures to secure convictions.<sup>134</sup> In many instances, these pressures lead to perjured eyewitness testimony.<sup>135</sup>

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<sup>132</sup> THE NEW ENCYCLOPEDIA BRITANNICA 906 (15th ed. 1998).

<sup>133</sup> See, e.g., SCHECK ET AL., *supra* note 1, at 79; Helmore, *supra* note 47.

<sup>134</sup> In *Oklahoma v. Robert Lee Miller*, ninety-two year old Zelma Cutler was found dead in her bed. SCHECK ET AL., *supra* note 1, at 79. Zelma had been raped and suffocated by the weight of her perpetrator. *Id.* Five months earlier, the same thing had happened to another elderly woman in the neighborhood. *Id.* The public, quite naturally, was outraged, and the police and district attorney were under tremendous public pressure to find the man who had committed these heinous crimes. *Id.* at 80. One young woman had said, "My grandmother lived out there. I was among many citizens wanting the police to get this case solved." *Id.*

The police gave all of their suspects blood tests, and Robert Miller's blood was among a few whose blood matched that of the perpetrator. *Id.* Miller went to the police station for questioning and told the police that he had had a dream about the murders and could guess at how they had occurred. *Id.* at 80-81. Based on this story, the detectives decided they had found their man and District Attorney Robert Macy immediately announced that he was moving quickly to file capital murder charges against Miller. *Id.* at 81. Macy said, "I want to let the public know this man is in custody, and the danger has been removed." *Id.* In 1988, Miller was sentenced to two death penalties, plus 725 years. *Id.* at 84. It was not until ten years later that Miller was found innocent and released because advanced DNA testing proved that he could not have raped the two victims. *Id.* at 101, 106.

<sup>135</sup> As discussed earlier in Part I of this Comment, one of the two witnesses in the Ford Heights Four case ultimately recanted her testimony and stated that the police had coerced her into falsely implicating her friends. Helmore, *supra* note 47, at 21.

Most recently, thirty-four-year-old Christopher Ochoa was released from prison where he was serving a life sentence for the murder of twenty-year-old Nancy DePriest. *2 Cases Plead for Life*, USA TODAY, Jan. 23, 2001, at 14A. DNA evidence proved Ochoa's innocence. *Id.* Ochoa had been coerced into confessing to the murder by investigators who tapped his arm where they said a lethal injection would take place if he did not admit his guilt. *Id.* The investigators told Ochoa if he pled guilty, he would get a life sentence instead. *Id.*

Justice Brennan, in *United States v. Wade*, addressed the prevalence of prosecutorial influence upon eyewitness identification. He opined:

The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter 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 . . ." 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. *A commentator has observed that "the 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."*<sup>136</sup>

Justice Brennan's opinion in *Wade* very nicely articulates the dangers that are inherent in eyewitness testimony.

In order to protect innocents from being unjustly accused of treason because of improper political motivations, the framers decided to retain England's two-witness rule and include it in our Constitution.<sup>137</sup> In order to protect innocents from being unjustly accused of murder because of political pressures, the Supreme Court should rule that if a prosecutor plans on presenting eyewitness testimony as evidence in a capital case, unless the prosecutor can also offer some corroboration for that testimony, the testimony will be inadmissible at trial. Again, this ruling would not prevent prosecutors from prosecuting a defendant at all if there were no eyewitnesses—it would merely require that *if* a prosecutor planned on using eyewitness testimony, he would have to provide some form of corroboration for the testimony because of the high likelihood of its fallibility.

One could argue that the motives behind *committing* the crimes of treason and murder are too different, and that because the nature of the crimes differs, so too should the evidentiary requirements for each offense. While the motives behind the commission of treason and homicide are different, the re-

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<sup>136</sup> *United States v. Wade*, 388 U.S. 218, 228-29 (1967) (emphasis added).

<sup>137</sup> In his treatise, Wigmore wrote that the purpose of the two-witness rule is to "secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages." 7 WIGMORE, EVIDENCE § 2037 (1978) (quoting BLACKSTONE, 3 COMMENTARIES 358 (4th ed. 1770)).

sulting injury to the falsely accused defendant is still very much the same, and it is this result that the two-witness rule was designed to prevent. As mentioned earlier, the D.C. Circuit was able to recognize this goal of the two-witness rule when it applied the rule to a sex prosecution case.<sup>138</sup> The court wanted to protect an unjustly accused defendant from the negative stigma that would attach to him because of the nature of the offense being charged.<sup>139</sup> One could certainly say that the nature of the crimes of treason and murder is such that a negative stigma would probably attach to the person accused of committing either crime. The two-witness rule was placed to prevent citizens from unjustifiably being tried for treason. Similarly, a corroboration requirement should be instated to prevent people from being unjustifiably tried for any capital offense.

### CONCLUSION

Irrespective of one's motive, the fact is that false accusations are made and perjured testimony is offered whatever the crime, be it treason, sodomy, or murder, and the results of those accusations are all equally damaging.<sup>140</sup> Even in cases where maleficent motives are not at play, the reality is that innocent people are being convicted for crimes they did not commit because of an extremely fallible form of evidence—eyewitness identification.<sup>141</sup> Mistaken identification is the largest single factor accounting for wrongful convictions.<sup>142</sup>

Completely eliminating the dangers of capital convictions based on eyewitness testimony is an impossibility, but mitigating such dangers is at least possible through the instatement of a corroboration requirement in all capital cases. Allowing a de-

<sup>138</sup> See *Kelly v. United States*, 194 F.2d 150, 153-54 (D.C. Cir. 1952).

<sup>139</sup> *Id.*

<sup>140</sup> In his book, *The Spirit of Laws*, under the section entitled "Of Laws favorable to the Liberty of the Subject in a Republic," Montesquieu points out the importance of the two-witness rule because:

In popular governments it often happens that accusations are carried on in public, and every man is allowed to accuse whomsoever he pleases. This rendered it necessary to establish proper laws, in order to protect the innocence of the subject.

BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 199 (Thomas Nugent trans., 1899). Montesquieu in fact advocated applying the two-witness rule to all capital cases. *Cramer v. United States*, 325 U.S. 1, 24 (1944).

<sup>141</sup> See discussion *supra* note 4.

<sup>142</sup> See *Wrongful Convictions: Causes and Remedies*, *supra* note 9.

fendant to be sentenced to death where his conviction is largely based on evidence that is historically proven to be so fallible clearly violates the defendant's Eighth Amendment right to be free of cruel and unusual punishment.<sup>143</sup> In order to prevent such a situation from occurring, the Supreme Court, when reviewing its next capital case where eyewitness testimony is offered as evidence, should hold that unless the testimony is corroborated in some way, the defendant's conviction, if based solely on such testimony, must be overturned and declared a violation of the defendant's Eighth Amendment rights.<sup>144</sup>

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<sup>143</sup> See discussion *supra* note 7.

<sup>144</sup> See *supra* note 7.