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“EYE SEE YOU”: HOW CRIMINAL DEFENDANTS HAVE UTILIZED THE NERD DEFENSE TO INFLUENCE JURORS’ PERCEPTIONS

*Sarah Merry**

For the great enemy of truth is very often not the lie—deliberate, contrived and dishonest—but the myth—persistent, persuasive and unrealistic. Too often we hold fast to the clichés of our forebears. We subject all facts to a prefabricated set of interpretations. We enjoy the comfort of opinion without the discomfort of thought.¹

Eyeglasses are “one of the most important artifacts used in the courtroom.”² In 2012, a defendant’s use of eyeglasses at trial went to appeal in the District of Columbia Court of Appeals in *Harris v. United States*.³ “[A]t the heart of” the appeal was whether the defendant’s rights were prejudiced by the Superior Court’s issuing a change-of-appearance instruction,⁴ prompted by

* J.D. Candidate, Brooklyn Law School, 2014; B.S., Santa Clara University, 2009. I would like to thank my parents for their continued support and encouragement. I would also like to offer a special thanks to Professor Kathleen Darvil for her thoughtful suggestions and research advice, and to the staff of the *Journal of Law and Policy* for their careful edits and insightful comments.

¹ President John F. Kennedy, Yale University Commencement Address 2 (June 11, 1962) (transcript available in the National Archives), *available at* <http://research.archives.gov/description/193922>.

² LAWRENCE J. SMITH & LORETTA A. MALANDRO, *COURTROOM COMMUNICATION STRATEGIES* § 1.21, at 42 (1985).

³ *See Harris v. United States*, No. 08-CF-1405, at 4–6 (D.C. Cir. 2012), *available at* <http://legaltimes.typepad.com/files/moj-08-cf-1405.pdf>.

⁴ A change-of-appearance instruction is given to a jury in circumstances in which a defendant has changed his or her appearance after the commission

the defendant's use of unnecessary eyeglasses at trial.⁵ This was the first time that the appeals court considered a defendant's instructional challenge to a change-of-appearance instruction issued solely because the defendant donned unnecessary eyewear at trial.⁶ The court of appeals upheld the change-of-appearance instruction and determined that the evidence supported the instruction because the defendant had, among other things, donned unnecessary eyeglasses.⁷ Importantly, the defendant's

of a crime and such alteration in appearance may be considered by the jury as "an indication of the defendant's awareness of guilt and fear of identification." See comments to BARBARA BERGMAN, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 2.303(B) (5th ed. 2008). The change-of-appearance instruction issued in *Harris* states:

You heard evidence that Donnell Harris attempted to change his appearance to avoid being identified. It is up to you to decide that he took these actions. If you find he did so, you may consider this evidence as tending to show his feelings of guilt which you may in turn consider as tending to show actual guilt. On the other hand, you may also consider that he may have taken these actions for reasons fully consistent with innocence in this case. If you find that Donnell Harris attempted to change his appearance to avoid being identified, you should consider such evidence along with all the other evidence in this case and give it as much weight as you think it deserves.

Trial Transcript at 87–88, *United States v. Harris*, No. CF1-18801-07 (D.C. Super. Ct. 2008), reprinted in Appellant's Limited Appendix, *Harris*, No. 08-CF-1405.

⁵ Zoe Tillman, *Glasses an Issue in Appeal over Public Defender Intern's Slaying*, BLT: BLOG OF LEGAL TIMES (Sept. 13, 2012, 1:32 PM), <http://legaltimes.typepad.com/blt/2012/09/glasses-an-issue-in-appeal-over-public-defender-interns-slaying.html%20/> (highlighting Donnell Harris' use of eyeglasses at trial, "a seemingly innocuous detail [that was] a key issue at the heart of Harris' appeal").

⁶ Compare Brief for Appellee at 32, *Harris*, No. 08-CF-1405 (noting that the D.C. Court of Appeals has never directly considered a defendant's challenge to a change-of-appearance instruction prompted solely by a defendant's use of eyewear at trial), with *United States v. Carr*, 373 F.3d 1350, 1353 (D.C. Cir. 2004) (rejecting a defendant's instructional challenge to a change-of-appearance instruction because the lower court considered a combination of the defendant's beard, weight, and eyeglasses to equate to "profound alterations" in appearance and therefore justifying the resulting jury instruction).

⁷ *Harris*, No. 08-CF-1405, at 5 (quoting the trial court, which informed

identity was a key issue in the case.⁸ However, the court of appeals left open a critical question: can a court issue a change-of-appearance instruction if a defendant wears nonprescriptive eyeglasses to trial when the defendant's identity is not specifically at issue? This tactic is known as the "nerd defense"—a persistent and unrealistic change in one's appearance aimed at persuading a jury of the defendant's low propensity to commit a crime.⁹ The court in *Harris* highlighted the importance of the "glasses issue" by observing that an increasing number of defendants have appeared at trial wearing nonprescriptive eyeglasses.¹⁰

Evidence concerning a defendant's appearance is rarely admitted because it is often considered more prejudicial to the defendant than it is probative.¹¹ However, it is well documented

the jury that "there is no evidence in the record that Mr. Harris needs glasses to read or anything else" and found that Harris' explanation for the use of eyeglasses was mere "speculation"); *see also* Brief for Appellee, *supra* note 6, at 30 n.32.

⁸ While one witness heard "'two muffled gunshots' and 'could see the gun being held and . . . most of the [shooter's] arm,'" the witness did not see the shooter's face. Another witness also heard the gunshots but did not see the shooter. *Harris*, No. 08-CF-1405, at 2.

⁹ Keith L. Alexander, *Trendy, Non-Prescription Eyewear Latest in Criminal Defendant Strategic Attire*, WASH. POST (Mar. 27, 2012), http://www.washingtonpost.com/local/crime/trendy-non-prescription-eyewear-latest-in-criminal-defendant-strategic-attire/2012/03/17/gIQA62xJeS_story.html (quoting New York defense lawyer Harvey Slovis, who encourages "all his clients [to] wear glasses" to make them "appear less intimidating"); *see also* Michael J. Brown, *Is Justice Blind or Just Visually Impaired? The Effects of Eyeglasses on Mock Juror Decisions*, JURY EXPERT, Mar. 2011, at 1, 3, available at http://www.thejuryexpert.com/wp-content/uploads/2011/03/TJEVol23Num2_Mar2011.pdf (finding that defendants who wear eyeglasses appear to be more intelligent and less physically threatening).

¹⁰ Tillman, *supra* note 5 (noting that Chief Judge Eric Washington found the eyeglasses issue particularly "compelling" because "a growing number of defendants had been showing up for trial wearing glasses").

¹¹ *See* FED. R. EVID. 404 advisory committee's notes ("Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened." (quoting CAL. LAW

that juries do consider a defendant's appearance at trial.¹² Lisa Wayne, President of the National Association of Criminal Defense Lawyers, stated, "the bottom line is we know people judge a book by its cover," a fact that implicates "the fundamental fairness process."¹³ A defendant who intends to mislead the jury with respect to his or her altered appearance—for instance, by wearing nonprescriptive eyeglasses to trial—circumvents character evidence rules¹⁴ by unofficially introducing into evidence positive character traits associated with eyeglasses (e.g., intelligence, honesty, decreased propensity to commit a violent crime).¹⁵ Unless a defendant's identification is

REVISION COMM'N, TENTATIVE RECOMMENDATION AND A STUDY RELATING TO THE UNIFORM RULES OF EVIDENCE (ART. VI. EXTRINSIC POLICIES AFFECTING ADMISSIBILITY) 615 (1964)).

¹² See, e.g., Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 48 n.137 (1990) ("[P]hysical appearance of the litigant . . . can influence the verdict."). See generally Brown, *supra* note 9 (discussing a study linking juror perceptions of defendant appearance with the likelihood of guilty or not-guilty verdicts); Annie Murphy Paul, *Judging by Appearance*, PSYCHOL. TODAY (Nov. 1, 1997), <http://www.psychologytoday.com/articles/200909/judging-appearance> (commenting that the influence of a defendant's appearance inside the courtroom is so great that an "entire industry has emerged to advise lawyers, plaintiffs, and defendants on their aesthetic choices").

¹³ Jenny Montgomery, *Dressing Defendants*, IND. LAW. (May 23, 2012), <http://www.theindianalawyer.com/article/print?articleId=28848> (quoting Lisa Wayne).

¹⁴ See FED. R. EVID. 404(a)(1) (stating that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait"). A defendant's appearance serves as a "substitute for any real discussion of character during a trial." Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 231 n.10 (2004).

¹⁵ See SMITH & MALANDRO, *supra* note 2, § 1.21, at 42 (suggesting that defendants should wear eyeglasses with wider lenses because people with a "wide-eyed look or open-eyed look are considered to be more trustworthy, more likable, and oftentimes more innocent"); Brown, *supra* note 9, at 3 (discussing a study finding that defendants who wear eyeglasses appear more intelligent and less physically threatening); see also CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE § 4:23 (3d ed.

relevant at trial, wearing unnecessary eyeglasses to artificially alter appearance will not *officially* put a defendant's appearance at issue.¹⁶ Under the Federal Rules of Evidence, when a defendant's identification is not specifically at issue, the prosecution is unable to counter this unofficial introduction of character evidence.¹⁷ Allowing a defendant to purposefully falsify a vision defect by wearing nonprescriptive eyeglasses is akin to allowing a defendant to appear in a wheelchair before the jury when he or she is perfectly mobile.¹⁸ Both actions fabricate

2009) (stating that “[c]haracter embraces qualities like honesty or dishonesty, [and] being peaceful or prone to violence”).

¹⁶ Generally, *only* when a defendant's identification is a relevant trial issue may a prosecutor comment on the defendant's change in appearance from the time that the crime was committed to the time that the defendant appears at trial. GARY MULDOON, *HANDLING A CRIMINAL CASE IN NEW YORK* § 9:262 (2012–2013); *see also* *People v. Sanders*, 622 N.Y.S.2d 986, 987 (App. Div. 1995) (reasoning that the prosecutor's comment on the defendant's change in hairstyle was not prejudicial, in part, because the defendant's identification was a factor in the trial).

¹⁷ A defendant must first introduce evidence of his or her pertinent character traits at trial, and only when such evidence is *officially* admitted may the prosecution offer evidence to rebut it. *See* FED. R. EVID. 404(a)(2)(A); *see also* FED. R. EVID. 405 (stating that proof of “character” at trial through instances of specific conduct is limited to situations in which “a person's character or character trait is an essential element of a charge, claim, or defense” or is otherwise admissible). However, when a defendant's identity is contentious at trial, eyeglasses may serve as a disguise, thereby hindering identification and thus making a defendant's use of eyeglasses admissible as evidence relevant to the case. *See* Steve D. Charman & Gary L. Wells, *Eyewitness Lineups: Is the Appearance-Change Instruction a Good Idea?*, 31 *LAW & HUM. BEHAV.* 3, 5 (2007), available at http://www.psychology.iastate.edu/~glwells/wells_articles_pdf/charman&wells_appearance_change.pdf (noting that disguises typically involve the addition of items such as hats, eyeglasses, or masks, and observing the “strong debilitating effect of disguise on accurate recognition rates”); *District of Columbia v. Carter*, No. 2010 CF1 005677 (D.C. Super. Ct. 2012) (offering an example of a prosecutor questioning a defendant's sudden use of eyeglasses at trial when the defendant's identification is at issue).

¹⁸ *See* Jack Marshall, *The Perplexing “Nerd Defense,”* *ETHICS ALARMS* (Feb. 21, 2011, 8:18 AM), <http://ethicsalarms.com/2011/02/21/the-perplexing-nerd-defense/#more-4880> (“Glasses convey information about physical capabilities the same way coming into court on crutches or in a wheelchair does.”).

a physical disability in order to mislead the jury. Wearing nonprescriptive eyeglasses can be deceptive because jurors might not be able to discern whether a defendant truly requires eyeglasses,¹⁹ and a defendant's unnecessary use of eyeglasses may subtly persuade the jury by playing upon one of society's most deeply rooted stereotypes: that wearing eyeglasses equates to higher intelligence.²⁰ Additionally, the jury may never even consider the motive behind the defendant's use of such a prop.²¹ Such intentional misdirection undermines the truth-seeking principles of the judicial system.²²

Part I of this Note focuses on how the wearing of eyeglasses significantly affects the way an individual is perceived and briefly examines the influence of popular culture on the deeply ingrained stereotype that wearing eyeglasses correlates to increased intelligence. Part II analyzes the unofficial role of a defendant's appearance in the courtroom and discusses cases that highlight the impact of a defendant's appearance on criminal

¹⁹ See generally Brown, *supra* note 9, at 3 (discussing a controlled study of jurors' perceptions of eyeglasses); Alexander, *supra* note 9 (finding that eyeglasses often "escape notice").

²⁰ See Åke Hellström & Joseph Tekle, *Person Perception Through Facial Photographs: Effects of Glasses, Hair, and Beard on Judgments of Occupation and Personal Qualities*, 24 EUR. J. SOC. PSYCHOL. 693, 695 (articulating that judgments about intelligence and success can be traced back to the development of myopia caused by extensive schoolwork in childhood days); see also Brown, *supra* note 9, at 3 (finding that eyeglasses have a positive correlation to increased intelligence in juror perceptions of defendants); Francine C. Jellesma, *Do Glasses Change Children's Perceptions? Effects of Eyeglasses on Peer- and Self-Perception*, EUR. J. DEVELOPMENTAL PSYCHOL. 1, 5 (2012) (arguing that "the association between eyeglasses and intelligence is part of the nerd stereotype" because "almost 50% of the people think eyeglasses are part of the physical appearance of nerds").

²¹ Wolfgang Manz & Helmut E. Lueck, *Influence of Wearing Glasses on Personality Ratings: Crosscultural Validation of an Old Experiment*, 27 PERCEPTUAL & MOTOR SKILLS 704, 704 (1968) (describing the wearing of eyeglasses as "an irrelevant cue," which may lead jurors to be unconsciously persuaded by a defendant's use of unnecessary eyeglasses).

²² See Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 99 (1996) ("None of the trial's functions are more central to its legitimacy than the search for truth.").

trials despite the inadmissibility of such character evidence. Part III introduces the so-called “nerd defense” and examines the effect of a defendant’s use of eyeglasses on juror perceptions. This section further explores the use of the nerd defense by criminal defendants to purposefully mislead jurors. Part IV examines the intersection of the nerd defense and change-of-appearance instructions. Additionally, this section criticizes the *Harris* opinion for failing to address the use of eyeglasses for the purpose of jury persuasion. Part V of this Note acknowledges the need to balance a defendant’s right of free expression against the potential for jury manipulation and proposes two solutions: (1) imposing a modified change-of-appearance instruction that removes language relating to consciousness of guilt and (2) allowing for an eyeglasses inquiry when a defendant suddenly dons eyeglasses at trial.

I. THE PSYCHOLOGY BEHIND EYEGLASSES

The National Eye Institute reports that, as of 2008, more than 150 million Americans used corrective eyewear.²³ Eyeglasses are specifically designed to correct “congenital or acquired vision deficits such as myopia, presbyopia, or astigmatism.”²⁴ However, it is clear that wearing eyeglasses is no longer only for those with vision deficiencies.²⁵ As of 2011, the Vision Council estimates that approximately sixteen million Americans wear nonprescriptive eyeglasses for the purpose of changing their appearances.²⁶

²³ PREVENT BLINDNESS AM. & NAT’L EYE INST., VISION PROBLEMS IN THE U.S. 12 (2008), available at http://www.preventblindness.net/site/DocServer/VPUS_2008_update.pdf.

²⁴ Helmut Leder et al., *The Glasses Stereotype Revisited: Effects of Eyeglasses on Perception, Recognition, and Impression of Faces*, 70 SWISS J. PSYCHOL. 211, 211 (2011).

²⁵ *See id.* (describing how eyeglasses not only serve to correct eyesight but also function as facial accessories that are linked to fashion demands); *see also* ESSILOR OF AM. & LUXOTTICA GRP., 20/20 OPTICIANS’ 2008 HANDBOOK 4–5 (4th ed. 2008) (observing that eyeglasses can be useful for those who wish to project their individualism or who simply desire to appear fashionable).

²⁶ Michelle Healy, *Prescription Eyeglass Frames Get Softer Look*, USA

A. The Impact of the Eye Region on Perception of the Face

Humans, from their earliest stages of life, are drawn to the eye region.²⁷ In fact, infants recognize eyes before they are able to recognize faces.²⁸ The eyes play a critical role in developing perceptions of the face.²⁹ The eye region is also fundamental to nonverbal communication because emotions, attention, and intentions are all perceived through observing one's eye gaze.³⁰ For example, wide-open eyes signal the emotions of surprise and fear.³¹ A study designed specifically to measure the relative time a subject looks at the eye region during a "social impression-formation task" revealed that eyes are the facial feature that people spend the most time analyzing.³² When presented with static facial displays,³³ subjects spent 43.4% of their visual inspection time on the eye region and only 12.6% of their visual inspection time on the mouth region.³⁴ The social impression-formation task is pertinent in a courtroom setting because a

TODAY (Sept. 15, 2011), http://usatoday30.usatoday.com/LIFE/usaedition/2011-09-15-eyeglass-frames_ST_U.htm.

²⁷ Jellesma, *supra* note 20, at 2.

²⁸ M.J. Taylor et al., *Eyes First! Eye Processing Develops Before Face Processing in Children*, 12 NEUROREPORT 1671, 1676 (2001).

²⁹ Dan Nemrodov and Roxane J. Itier, *The Role of Eyes in Early Face Processing: A Rapid Adaptation Study of the Inversion Effect*, 102 BRIT. J. PSYCHOL. 783, 793 (2011).

³⁰ R.J. Itier & M. Batty, *Neural Bases of Eye and Gaze Processing: The Core of Social Cognition*, 33 NEUROSCIENCE & BIOBEHAVIORAL REVS. 843, 844 (2009) (noting that "the human brain has developed a very complex cognitive system of gaze direction analysis based on perceptual elements of faces and eyes").

³¹ *Id.* at 845.

³² Stephen W. Janik et al., *Eyes as the Center of Focus in the Visual Examination of Human Faces*, 47 PERCEPTUAL & MOTOR SKILLS 857, 857-58 (1978); *see also* Leder et al., *supra* note 24, at 211 (noting that eyes are located in a "prominent position in the visual field").

³³ Static facial displays depict no movement in the facial region of the person shown in the slide. Janik et al., *supra* note 32, at 858.

³⁴ Subjects spent a greater portion of their looking time on the eye region as compared to the hair, nose, ear, or mouth regions, regardless of the facial expression or sex of the person depicted in the slide. *Id.*

defendant's facial features will be seemingly static to the jury.³⁵ Generally, if a defendant does not take the stand to speak in his or her own defense,³⁶ there will not be occasion for prolonged interaction between a defendant's eyes and mouth that may affect the viewer's primary focus on the defendant's eye region.³⁷ Because eyeglasses significantly alter the appearance of the eye region, wearing eyeglasses impacts the type of social information that is perceived through facial processing.³⁸

B. Studies Concerning the Effect of Eyeglasses on Judgment and Perception

Social information about others is gleaned through facial processing, and “even the briefest of glances at a face is sufficient to furnish a wealth of knowledge about its owner.”³⁹ To form judgments and perceptions of others, people rely heavily on their cognitive representations (schemata).⁴⁰ Collectively shared schemata can be described as widely held

³⁵ Compare *id.* at 857–58 (discussing a study conducted by presenting the subjects with various slides depicting static faces), with SMITH & MALANDRO, *supra* note 2, § 1.12, at 22 (noting that “[m]ost of the time jurors are watching what is referred to as ‘static’ facial behavior in the courtroom”).

³⁶ See Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 329–30 (1991) (describing a sample study of Philadelphia felony defendants that revealed that only half of criminal defendants took the stand); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1561 (1998) (finding that “most defendants [in California capital jury trials] did not testify”). But see HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 146–48 (1966) (finding that the percentage of defendants who testify depends on the defendants' prior records and the amount of evidence against the defendants).

³⁷ See Janik et al., *supra* note 32, at 858 (concluding that the study does not determine the extent to which a subject's primary focus would change due to a person's eye and mouth movements during prolonged inspection by the subject).

³⁸ Jellesma, *supra* note 20, at 2.

³⁹ K.A. Quinn & C.N. Macrae, *Categorizing Others: The Dynamics of Person Construal*, 88 J. PERSONALITY & SOC. PSYCHOL. 467, 476 (2005).

⁴⁰ *Id.* at 467.

social stereotypes.⁴¹ Character traits are associated with schemata, and, when one schema is activated, “the associated traits are attributed to the target person in the form of a first impression.”⁴² Eyeglasses greatly impact both the perception and recognition of others because they frame the eyes and make more distinct the facial region found to receive the most notable fixation.⁴³

Numerous studies demonstrate that a perceived correlation between wearing eyeglasses and heightened intelligence develops in early childhood and continues to strengthen with age. This perception also exists among children who wear eyeglasses themselves, suggesting that some children, through their own experiences, might learn to associate myopia with intelligence.⁴⁴ Sarah Sandow, Reader in Education at the West London Institute, conducted a study revealing that children as young as eight years old draw a connection between wearing eyeglasses and possessing intelligence.⁴⁵ Children ages eight to ten consistently drew a “very clever” person with eyeglasses but did not do the same for stupid or nasty people.⁴⁶ Hannu Rätty and Leila Snellman, professors at the University of Joensuu in Finland, led a similar study that asked children to draw an “intelligent” person and found that children consistently drew eyeglasses in their images.⁴⁷ However, when asked to draw an

⁴¹ Roger L. Terry & John H. Krantz, *Dimensions of Trait Attributions Associated with Eyeglasses, Men’s Facial Hair, and Women’s Hair Length*, 23 J. APPLIED SOC. PSYCHOL. 1757, 1757 (1993).

⁴² *Id.*

⁴³ Leder et al., *supra* note 24, at 221.

⁴⁴ Jeffrey J. Walline et al., *What Do Kids Think About Kids in Eyeglasses?*, 28 OPHTHALMIC & PHYSIOLOGICAL OPTICS 218, 223 (2008) (noting that another origin of children’s development of the stereotype that wearing eyeglasses equates to higher intelligence could be the media’s depictions of “intelligent-nerds”).

⁴⁵ See Sarah Sandow, *The Good King Dagobert, or Clever, Stupid, Nice, Nasty*, 12 DISABILITY & SOC’Y 83, 86–91 (1997) (commenting that “[i]t was fascinating that the wearing of glasses has survived as a stereotype for cleverness” and that “spectacles lend an air of dignity and bookishness, and the wearers are cool and confident”).

⁴⁶ *Id.* at 91–92.

⁴⁷ Hannu Rätty & Leila Snellman, *Children’s Images of an Intelligent*

“ordinary” person, children rarely sketched a person with eyeglasses.⁴⁸ David Chambers, Director of the Sciences in Society Centre at Deakin University, developed the well-known Draw-a-Scientist-Test (“DAST”), designed to determine when children develop stereotypical images of a scientist (“a man of knowledge”).⁴⁹ Chambers’ test was administered over an eleven-year period to nearly 5,000 children and found that the association between scientists and eyeglasses continues to increase with age.⁵⁰ When Mark Thomas, a doctoral student in the Department of Psychology at Mississippi State University, administered a modified DAST to college-aged students (with a mean age of roughly twenty-one years), it revealed that the stereotype of eyeglasses correlating to higher intelligence does not fade with age: the drawings depicted a scientist with eyeglasses nearly seventy percent of the time.⁵¹

Person, 12 J. SOC. BEHAV. & PERSONALITY 773, 778 (1997) (noting that older children depicted eyeglasses more frequently than younger children and that “eyeglasses are an almost archetypal sign of a ‘bookworm,’ a person absorbed in mental activity”); see also Hannu Rätty & Leila Snellman, *On the Social Fabric of Intelligence*, 4 PAPERS ON SOC. REPRESENTATIONS 1, 2–3 (1995) (concluding that “children have captured some central value-bound ideas of intelligence prevalent in our culture well before being capable of understanding them conceptually”).

⁴⁸ Rätty & Snellman, *Children’s Images of an Intelligent Person*, *supra* note 47, at 778.

⁴⁹ David Wade Chambers, *Stereotypic Images of the Scientist: The Draw-a-Scientist Test*, 67 SCI. EDUC. 255, 256–58 (1983) (noting that eyeglasses are associated with eyestrain and therefore are associated with acute observation). In Chambers’ study, each drawing was analyzed for seven predetermined indicators of a scientist: lab coat, eyeglasses, growth of facial hair, symbols of research, symbols of knowledge, technology (products of science), and relevant captions. *Id.*; see also Rätty & Snellman, *Children’s Images of an Intelligent Person*, *supra* note 47, at 781 (noting significant overlap between the results of the Children’s Images of an Intelligent Person study and Chambers’ DAST results of children’s portrayals of the scientist as “a man of knowledge”).

⁵⁰ Chambers, *supra* note 49, at 257–58 (reporting that the number of indicators in children’s standard images of a scientist increased from fourteen in kindergarten-age children to 1,524 in fifth-grade-aged children).

⁵¹ Mark D. Thomas et al., *The Draw a Scientist Test: A Different Population and a Somewhat Different Story*, 40 C. STUDENT J. 140, 144 (2006).

The following studies indicate that perceptions and judgments of those who wear eyeglasses permeate cultural, gendered, and racial divides. As far back as 1944, G.R. Thornton, a professor in the Department of Psychology at Purdue University, found that people who wear eyeglasses are judged as being more intelligent, more industrious, more honest, and more dependable than those who do not wear eyeglasses.⁵² A subsequent cross-cultural study conducted twenty-five years later paralleled Thornton's findings.⁵³ A study led by Åke Hellström, professor in the Department of Psychology at Stockholm University, conducted a facial attributes rating analysis that directly linked the wearing of eyeglasses with professionalism and intellect.⁵⁴ Specifically, this study revealed a strong perceived correlation between the wearing of eyeglasses and both prestigious occupations and positive character traits.⁵⁵ In 1991, a gender-based study on stereotypes associated with eyeglasses found that both men and women who wear eyeglasses are perceived as

⁵² G.R. Thornton, *The Effect of Wearing Glasses upon Judgments of Personality Traits of Persons Seen Briefly*, 28 J. APPLIED PSYCHOL. 203, 203 (1944). Subjects wearing eyeglasses and judged via photographic slides were rated as more intelligent, more industrious, more honest, and more dependable. *Id.* However, subjects wearing eyeglasses and judged in person were rated as more intelligent and more industrious, but not necessarily as more honest. *Id.* at 207. When judged only by photographs, the subjects' dress, demeanor, and overall appearance were excluded, supporting the proposition that a person's demeanor is also taken into account when personality traits are judged. *Id.*; see also G.R. Thornton, *The Effect upon Judgments of Personality Traits of Varying a Single Factor in a Photograph*, 18 J. SOC. PSYCHOL. 127, 127 (1943).

⁵³ Manz & Lueck, *supra* note 21, at 704 (replicating Thornton's study with German students 25 years later, with subjects in photographs wearing eyeglasses producing higher ratings than subjects not wearing eyeglasses in the categories of intelligence, industriousness, dependability, and honesty).

⁵⁴ Hellström & Tekle, *supra* note 20, at 694.

⁵⁵ Hellström and Tekle's study found that wearing eyeglasses positively correlates to the occupations of physician, lawyer, professor, engineer, pastor, politician, psychologist, and bank clerk, and positively correlates to judged character attributes of trustworthiness, helpfulness, and intelligence. *Id.* at 699. However, the study found that wearing eyeglasses negatively correlates to the occupations of factory worker, colonel, farmer, and salesman, and to the character attributes of masculinity and being suspect. *Id.*

being more intelligent, well-educated, well-read, and better employed.⁵⁶ In 1993, a study examining the effects of eyeglasses and gender on perceived social forcefulness and mental competence confirmed that, overall, both men and women who wear eyeglasses are judged as having decreased forcefulness and heightened mental capacity.⁵⁷ However, this study found that eyeglasses tend to detract from social appeal more in women than in men.⁵⁸ In 2011, a study found that faces depicted with eyeglasses were consistently judged to be significantly more successful, more trustworthy, and more intelligent than faces depicted without eyeglasses.⁵⁹ Even details such as whether the eyeglasses worn are rimless or full-rimmed can have an impact on trustworthiness and facial recognition.⁶⁰ An earlier study using African-American and Caucasian subjects analyzed the effects of wearing eyeglasses in a courtroom setting.⁶¹ Echoing the results of previous studies, researchers found a strong link between wearing eyeglasses and perceived intelligence and a correlation between perceived intelligence of a defendant and decreased likelihood of a juror to render a guilty verdict.⁶²

The perceived correlation between wearing eyeglasses and heightened intelligence may be the result of a “nerd stereotype” that is deeply rooted in one’s schemata, in one’s social

⁵⁶ See Mary B. Harris, *Sex Differences in Stereotypes of Spectacles*, 21 J. APPLIED SOC. PSYCHOL. 1659, 1674–75 (1991).

⁵⁷ Terry & Krantz, *supra* note 41, at 1757, 1765–66.

⁵⁸ *Id.* at 1759.

⁵⁹ Leder et al., *supra* note 24, at 218–19.

⁶⁰ *Id.* at 216–19 (noting that “faces without eyeglasses [are] judged to be less successful and less intelligent than faces with full-rim glasses or rimless glasses,” and observing that it takes longer to recognize faces with full-rim glasses than it does to recognize faces either without glasses or with rimless glasses).

⁶¹ See Brown, *supra* note 9, at 3 (finding no significant difference in the number of guilty verdicts rendered against African-American defendants (forty-nine percent) and Caucasian defendants (fifty-one percent) and concluding that, overall, participants rendered “guilty” verdicts forty-four percent of the time against defendants who wore eyeglasses while rendering “guilty” verdicts fifty-six percent of the time against defendants who did not wear eyeglasses).

⁶² *Id.*

experiences, and in the media's portrayal of intelligent people.⁶³ Stereotypes about people who wear eyeglasses abound in popular culture—in Hollywood film characters,⁶⁴ highly rated television series,⁶⁵ best-selling novels,⁶⁶ classic comic books,⁶⁷ and,

⁶³ Jellesma, *supra* note 20, at 2–5.

⁶⁴ In 1918, Harold Lloyd's "Glasses Character" became the "persona for which he would ultimately be celebrated." Maurizio Giammarco, *Harold Lloyd: Horatio Alger in Straw Hat and Horn-Rims*, in PLAYBILLS TO PHOTOPAYS: STAGE PERFORMERS WHO PIONEERED THE TALKIES 1, 143–47 (Brenda Loew ed., 2010). Lloyd's eyeglasses marked him as "more gentle, kind, and clever in nature." *Id.*; see also Annette M. D'Agostino, *Harold Lloyd: The Glasses*, SILENTS ARE GOLDEN (1998), <http://www.silentsaregolden.com/hlloydglassesarticle.html> (quoting Harold Lloyd) ("There is more magic in a pair of horn-rimmed glasses than the opticians dream of, nor did I guess the half of it when I put them on in 1917."). Later, the screwball comedy *Bringing Up Baby* portrayed David Huxley as a bespectacled paleontologist marked by horn-rimmed eyeglasses that were intended to function as the visual marker of his "nerd" persona. See Eddie Deezen, *Why Do Nerds So Often Wear Glasses?*, NEATORAMA (Jan. 11, 2012, 5:03 AM), <http://www.neatorama.com/2012/01/11/why-do-nerds-so-often-wear-glasses/>.

⁶⁵ Steve Urkel, a character on the popular television show *Family Matters*, was known for his nerd persona marked by thick-rimmed eyeglasses and suspenders. See Hannah Jones, "Urkel" Is Now a Verb—and a High-School Fashion Don't, TIME (Dec. 9, 2010), <http://newsfeed.time.com/2010/12/09/urkel-is-now-a-verb-and-a-high-school-fashion-dont/#ixzz2KS3ABLYn>. For a suggestion of the influence of Urkel's eyeglasses on both American culture and the American legal system, see Bruce Carton, "Change of Appearance" Instruction Upheld in Case of Defendant Wearing Eyeglasses to Court, LEGAL BLOG WATCH (Oct. 25, 2012, 4:15 PM), http://legalblogwatch.typepad.com/legal_blog_watch/2012/10/change-of-appearance-instruction-upheld-in-case-of-defendant-wearing-hipster-glasses.html ("So in D.C. courts, at least, defendants wear their Urkel glasses at their own peril.").

⁶⁶ In the popular *Superman* comic book, Clark Kent used eyeglasses to disguise himself as an astute reporter. See LES DANIELS, SUPERMAN: THE COMPLETE HISTORY (2004); see also *Superman Sales Figures*, COMICHRON (Oct. 25, 2009), <http://www.comichron.com/titlespotlights/superman.html> (documenting that, from 1960 to 1986, *Superman* sold an estimated 110–15 million copies).

⁶⁷ The *Harry Potter* novels became a wildly successful global phenomenon that influenced millions of people. See SUSAN GUNELIUS, HARRY POTTER: THE STORY OF A GLOBAL BUSINESS PHENOMENON (2008); Guy Dammann, *Harry Potter Breaks 400m in Sales*, GUARDIAN (June 18,

recently, in the media's coverage of professional athletes.⁶⁸ The aforementioned studies, coupled with popular culture's portrayal of intelligent people, demonstrate the significant impact of wearing eyeglasses on the development of judgments and perceptions of others.

II. THE UNOFFICIAL ROLE OF APPEARANCE IN THE COURTROOM

Physical appearance is intimately tied to stereotypes about a person's character traits,⁶⁹ and the triggering of stereotypes based on appearance does not fade in a courtroom setting.⁷⁰

2008, 7:30 AM), <http://www.guardian.co.uk/books/2008/jun/18/harrypotter.news> (noting that *Harry Potter* book sales "have topped 400m worldwide"). In the novels, Harry is marked by his thick-rimmed eyeglasses and consistently outsmarts his nemeses. See, e.g., J.K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* 20 (1998).

⁶⁸ Harvard economist Roland Fryer suggests that professional athletes use eyeglasses to convey a message: a positive, but false, message that eyeglasses imbue the wearer with greater intelligence. See Stephen J. Dubner, *Playing the Nerd Card: A New Marketplace Podcast*, FREAKONOMICS (May 31, 2012, 9:26 AM), <http://www.freakonomics.com/2012/05/31/playing-the-nerd-card-a-new-marketplace-podcast/>. The "nerd" appearance is transforming the images of National Basketball Association (NBA) players, with eyeglasses intended to signify, "We're much, much smarter than you think." Sean Gregory, *NBA Nerd Alert*, TIME (May 14, 2012), <http://www.time.com/time/magazine/article/0,9171,2113816-2,00.html>; see also Matt Ufford, *NBA Finals Fashion: Shut Up, Everyone Looks Fine*, SBNATION (June 13, 2012, 9:00 AM), <http://www.sbnation.com/nba/2012/6/13/3079618/nba-finals-fashion-fake-glasses> (quoting Dwayne Wade) (stating that NBA players wear eyeglasses because "[i]t's cool to be smart [and] educated").

⁶⁹ SMITH & MALANDRO, *supra* note 2, §1.48, at 86.

⁷⁰ A study conducted on the interplay between a defendant's appearance and an evaluation of a defendant found that attractive females (long hair and cosmetics as opposed to short hair and no cosmetics) were more often given short-term imprisonment ratings rather than long-term imprisonment ratings. Angela S. Ahola et al., *Is Justice Really Blind? Effects of Crime Descriptions, Defendant Gender and Appearance, and Legal Practitioner Gender on Sentences and Defendant Evaluations in a Mock Trial*, 17 PSYCHIATRY, PSYCHOL. AND LAW 304, 319–20 (2010). This study further noted that faces often trigger stereotypes, such that "[a] baby-faced defendant will be considered less likely to have committed an offence intentionally, and

While inferences drawn about a defendant's character based on his or her appearance may not be entirely inaccurate,⁷¹ such inferences are arbitrarily drawn and difficult to verify.⁷² Thus, a jury is generally precluded by the Federal Rules of Evidence from taking into consideration a defendant's character.⁷³ However, the physical appearance of a defendant still plays a substantive role at trial.⁷⁴ In fact, a defendant's physical appearance is of such vital importance to a trial that an entire industry has developed for the purpose of advising a defendant on his or her aesthetic appearance at trial.⁷⁵

*A. Character Evidence—Evidence the Jury Can Consider
Versus Evidence the Jury Does Consider*

The courtroom, comprised of individuals who fill specialized and particular roles,⁷⁶ provides a dynamic platform for discovering the truth. The jury trial is a central component of the American adversarial system, its purpose being to sort

more likely to have committed an offence by negligence than a defendant with a mature face." *Id.* at 312.

⁷¹ Robert Agnew, *Appearance and Delinquency*, 22 CRIMINOLOGY 421, 424, 429 (1984) (finding a positive correlation between delinquency rates and unattractive appearance and noting that unattractive people—premised on the appearance of physical traits, dress, and grooming—are perceived as having significantly less favorable characteristics than attractive people).

⁷² See FED. R. EVID. 404 advisory committee's notes (cautioning against the use of character evidence at trial because it raises questions of relevancy and proof).

⁷³ See *id.*

⁷⁴ See David L. Wiley, *Beauty and the Beast: Physical Appearance Discrimination in American Criminal Trials*, 27 ST. MARY'S L.J. 193, 209 (1995); M.G. Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task*, 8 J. RES. PERSONALITY, 45, 45 (1974) (finding that physically attractive defendants were judged with less certainty of guilt and received milder punishments than unattractive defendants).

⁷⁵ See Paul, *supra* note 12 (observing that jury consultants, "often trained in both psychology and law," advise defendants on what to wear and how to appear in the courtroom).

⁷⁶ These individuals include the judge, defendant(s), legal counsel, audience, and witness(es).

through competing positions in order to arrive at the truth.⁷⁷ However, jurors hinder the truth-seeking process when they consider evidence that is deemed inadmissible due to its prejudicial effects.⁷⁸ Though not always irrelevant,⁷⁹ character evidence that is used to prove that a defendant acted, in a specific instance, in conformity with a character trait is often so weakly probative of guilt that the prejudice of admitting such evidence is likely to substantially outweigh the evidence's probative value.⁸⁰ Character evidence is traditionally forbidden because evidence of a defendant's particular character trait does not necessarily correlate to a defendant having "acted in

⁷⁷ Strier, *supra* note 22, at 100 ("Arguably, the most compelling claim supporting the adversary system of trial court dispute resolution is that it is the best judicial system for truth-finding."); *see also* Barbara A. Babcock, *Introduction: Taking the Stand*, 35 WM. & MARY L. REV. 1, 9 n.31 (1993) (noting that the Supreme Court "has recognized that the purpose of a trial is to sort truth from untruth").

⁷⁸ *See* Michelle Pan, *Strategy or Stratagem: The Use of Improper Psychological Tactics by Trial Attorneys to Persuade Jurors*, 74 U. CIN. L. REV. 259, 262 (2005); *see also* Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1928-29 (2012) (stating that "[l]egal historians have commonly understood courts to have developed the law of evidence to prevent jurors' 'cognitive and decisional failings' from impacting their solemn duty to find the truth," but also noting that despite such laws, jurors are often unable to properly consider character evidence) (citing Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 199 (2006)).

⁷⁹ A defendant's appearance may become relevant evidence if it "forms the basis for identification." Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 577 n.19 (2008).

⁸⁰ Aviva A. Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 669-70 (1998) ("Even assuming that such [character] evidence is reliable, a proposition which is itself open to doubt, character evidence can be invasive, unfair, and prejudicial."); *see also* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."); *United States v. Baytank*, 934 F.2d 599, 614 (5th Cir. 1991) (noting that an instruction to introduce character evidence should be refused where character evidence is not "central or crucial").

conformity with that trait or characteristic.”⁸¹ Nevertheless, a defendant’s physical appearance at trial, whether consciously or unconsciously acknowledged, significantly influences perception of the defendant’s character and can influence the outcome of a case.⁸²

Behind the decision to refrain from giving jurors a proper instruction about consideration of a defendant’s appearance at trial lie two incorrect assumptions: (1) jurors are unbiased⁸³ and (2) jurors consider only relevant evidence at trial.⁸⁴ However, jurors tend to favor defendants whom they find more relatable, regardless of the facts.⁸⁵ If jurors do, in fact, follow a court’s

⁸¹ Orenstein, *supra* note 80, at 668.

⁸² See Steven Fein et al., *Hype and Suspicion: The Effects of Pretrial Publicity, Race, and Suspicion on Jurors’ Verdicts*, 53 J. SOC. ISSUES 487, 488–89 (1997) (observing that one factor contributing to “prejudicial effects of nonevidentiary information” is a juror’s inability to block out an image or thought of the defendant); Ross, *supra* note 14, at 227, 232 (“[T]he perceived character of an accused affects the outcome of jury trials . . .”); see also Steven Shepard, Note, *Should the Criminal Defendant Be Assigned a Seat in Court?*, 115 YALE L.J. 2203, 2208 (2006) (“A defendant’s appearance matters to the jury and can affect the outcome of a trial.”).

⁸³ See HAZEL THORNTON, HUNG JURY: THE DIARY OF A MENENDEZ JUROR 101–02 (1995); see also Brown, *supra* note 9, at 6 (quoting Tara Trask, a jury consultant with seventeen years of experience in litigation strategy, who observed that “jurors tend to assign credibility to those who fit the stereotypes they have”).

⁸⁴ THORNTON, *supra* note 83, at 101–02. Jurors operate as “detectives, assimilating important visual information to add to evidence,” even when the visual information is irrelevant to the facts of the case. SMITH & MALANDRO, *supra* note 2, § 1.50, at 90.

⁸⁵ E.H. SUTHERLAND & D.R. CRESSEY, PRINCIPLES OF CRIMINOLOGY 442 (7th ed. 1966) (“The main work of a trial lawyer is to make a jury like his client, or, at least, to feel sympathy for him; facts regarding the crime are relatively unimportant.”); see also Douglas Keene, *Tattoos: When Should You Clean Up Your Witness?*, KEENE TRIAL CONSULTING (Dec. 6, 2010), <http://keenetrial.com/blog/2010/12/06/tattoos-when-should-you-clean-up-your-witness/> (“The goal of the attorney presenting a witness is to help the jury see the witness as ‘kind of like me’ or ‘someone I can trust.’ Appearance is a part of that. If someone looks scary or unfamiliar, they are judged as less trustworthy and less believable. The goal is to help them be more ‘relatable,’ regardless of the facts.”); Melanie Tannenbaum, *Casey’s Case: What Psychology Says About Anthony’s Acquittal*, PSYSOCIETY (July 10, 2011),

cautionary instructions to consider only relevant evidence,⁸⁶ then why do courts,⁸⁷ jury consultants,⁸⁸ and defense teams⁸⁹ go to such lengths to alter a defendant's appearance at trial? Such

<http://psysociety.wordpress.com/2011/07/10/casey-anthony/> (“Overall, jurors are more likely to be lenient towards defendants that are similar to them in some meaningful way. For example, jurors are less likely to convict defendants if they are of the same gender or race, or if they come from a similar socioeconomic background.”); John Schwartz, *Extreme Makeover: Criminal Court Edition*, N.Y. TIMES (Dec. 5, 2010), <http://www.nytimes.com/2010/12/06/us/06tattoo.html> (“‘It’s easier to give someone who looks like you a fair shake,’ said [defense attorney] Bjorn E. Brunvand.”).

⁸⁶ CTJNY § 3:2 (2012) (describing to the jury what kind of evidence may be considered during deliberations by stating that “[e]vidence consists of the sworn testimony elicited both on direct examination and cross-examination, and redirect and recross, if any, plus any concessions made during the trial by counsel, and any exhibits received and marked in evidence”); *see also* FED-JI § 12:03 (6th ed. 2013) (“The evidence in this case consists of the sworn testimony of the witnesses—regardless of who may have called them—all exhibits received in evidence—regardless of who may have produced them—all facts which may have been agreed to or stipulated and all facts and events which may have been judicially noticed.”); PATTERN JURY INSTRUCTIONS, Fifth Circuit, Criminal Cases, § 1.01, 3–4 (2012) (explaining to the jury what is *not* evidence, which includes “[s]tatements, arguments, and questions by lawyers . . . [o]bjections to questions . . . [t]estimony that the court has excluded . . . [and] [a]nything [the jurors] may have seen, heard, or read outside the courtroom . . .”).

⁸⁷ *See, e.g.*, Neil Nagraj, *Court Pays \$150 a Day to Cover Neo-Nazi John Ditullio’s Tattoos During Murder Trial*, N.Y. DAILY NEWS (Dec. 7, 2009), http://articles.nydailynews.com/2009-12-07/news/17940784_1_neo-nazi-compound-tattoos-extreme-makeover (describing a Florida court’s order that required the state to pay a cosmetologist \$150 for each day of trial in an effort to cover the defendant’s facial tattoos (barbwire and teardrops) and neck tattoos (large swastikas and a vulgar phrase)).

⁸⁸ Literature on trial practice devotes significant portions to how to alter a defendant’s appearance in accordance with known juror perceptions and stereotypes. *See generally* SMITH & MALANDRO, *supra* note 2, §§ 1.01–2.08.

⁸⁹ *See, e.g.*, Ivy Bigbee, *Fashioning a Defense: Casey Anthony’s Evolving Style*, CRIM. REP. DAILY (Apr. 29, 2011), http://web.archive.org/web/20120520050256/http://blogs.discovery.com/criminal_report/2011/04/fashioning-a-defense-casey-anthonys-evolving-style.html (noting that, due to her defense team, “Anthony’s courtroom appearances at hearings ironically have spoken volumes, without her uttering a single word”).

measures are taken because it is ingrained in American society to judge others based on physical appearance:

We live in a society where people are bombarded with so much information each day that they have learned to use shortcut techniques to make decisions. One of these shortcut techniques is to judge people based on initial perceptions of their appearance, background, and behavior. Once we have made these initial decisions about an individual, all further communication is filtered through this arrived-at perception. If we decide a person “looks like a law student,” then we will proceed to treat that perception as if it were an actual fact. We will respond to the individual as though he actually was in law school; that is, we might assume that he is an intellectually capable, academically motivated, and career-oriented person. It makes little difference whether the initial perception is correct. People treat the perception as accurate and make decisions from this base of information.⁹⁰

Juries—composed of a cross-section of American society—judge in this same way.⁹¹ Jurors tend to consider any artificial altering of a defendant’s physical appearance, including: eyeglasses,⁹² clothing style,⁹³ clothing color,⁹⁴ makeup,⁹⁵

⁹⁰ SMITH & MALANDRO, *supra* note 2, §1.48, at 86.

⁹¹ Levenson, *supra* note 79, at 576–77.

⁹² *See generally* Brown, *supra* note 9, at 1 (finding that appliances that “alter the appearance of eyes—namely eyeglasses—may influence our perceptions of an individual who uses such devices”).

⁹³ SMITH & MALANDRO, *supra* note 2, § 1.19, at 36–37 (“It is important to coach your client and witnesses with regard to personal appearance factors. Witnesses do not have a good understanding of how much their clothing can affect the total impact in the courtroom.”). Although clothing alone may not change perception, it takes only one juror to notice clothing details and to share them with others in order to have an impact on the decision-making process. *Id.* § 1.16, at 29.

⁹⁴ An industry has emerged, called “color consulting,” in which consultants advise defendants on what clothing and make-up to wear at trial. Black colors should not be worn by defendants on trial for murder because “the connotations associated with black tend to be consistent across cultures and are deeply embedded in our minds.” *Id.* § 1.28, at 55. Red is associated

jewelry,⁹⁶ and hairstyle.⁹⁷ Yet, unless given specific instruction, jurors might not know how to properly consider those judgments in relation to the facts of the case.⁹⁸

B. The Impact of the Defendant's Appearance on Juror Perceptions

As the following cases highlight, a defendant's appearance, although generally inadmissible as evidence, can still impact jurors' perceptions at trial. In *Estelle v. Williams*, the Supreme Court recognized the impact of a defendant's appearance on

with "passion, violence, excitement, and blood," and should not be worn by defendants. *Id.*

⁹⁵ W.J. McKeachie, *Lipstick as a Determiner of First Impressions of Personality: An Experiment for the General Psychology Course*, 36 J. SOC. PSYCHOL. 241, 242 (1952) (concluding from a study that women who wear lipstick are judged as being more frivolous, more conscientious, and having more overt interest in males).

⁹⁶ SMITH & MALANDRO, *supra* note 2, § 1.23, at 44 ("Jewelry, to the juror-detective, offers many stereotypes which will affect the total perception of the individual."). For a discussion of rings, see *id.* § 1.50, at 91 (explaining that a ring worn on the ring finger indicates a stable relationship). For a discussion of defendants wearing watches to trial, see Martha Neil, *Defendant Puts Best Face Forward, After Extreme Makeover, in Capital Murder Case*, A.B.A. J. (Dec. 6, 2010, 1:43 PM), <http://www.abajournal.com/news/article/defendant-puts-best-face-forward-sans-most-tattoos-in-capital-murder-case/> (reporting that, in the Enron Trial, consultant Douglas Keene told his clients "to be sure they didn't wear their \$10,000 watches to trial").

⁹⁷ See SMITH & MALANDRO, *supra* note 2, § 1.24, at 50 ("Hair that is curly will make the person appear energetic. For the perception of credibility, the hair should be short, tailored, and professional.").

⁹⁸ The jury may be instructed on how to specifically consider a defendant's appearance at trial when the defendant's appearance is relevant, such as when the defendant's identification is at issue. See MULDOON, *supra* note 16, § 9:262 (stating that "[w]ith the time lag between the occurrence of the crime and the trial, the defendant's appearance may change, whether with time, fashions or because of an attempt at disguise for trial" and "[t]he defendant's appearance at the time of the crime is relevant for purposes of identification"); see also *Joseph v. State*, 642 So. 2d 613, 615 (Fla. Dist. Ct. App. 1994) (noting that the trial court had the authority to instruct jurors on how to properly consider religious dress in the courtroom).

juries.⁹⁹ The Court found that forcing a defendant to wear prison attire before a jury infringed upon his or her Fourteenth Amendment due process rights.¹⁰⁰ A defendant clothed in an orange jumpsuit at trial can give the jury the impression that the defendant is more likely to have committed the crime, something the Court deemed inconsistent with the presumption of innocence in the American justice system.¹⁰¹ Even though the character evidence derived from the defendant's appearance was inadmissible, the Court recognized the likely prejudicial effect of the defendant's clothing on the jury.¹⁰² The Court concluded that jurors, at least in some instances, are unable to ignore a defendant's appearance.¹⁰³

In 2010, a Florida judge recognized the likelihood of a defendant's appearance impacting the jury.¹⁰⁴ John Ditullio faced the death penalty for charges related to the violent stabbing and death of a teenager but ultimately received life in prison without the possibility of parole.¹⁰⁵ Ditullio's defense team successfully argued that his neo-Nazi tattoos—although acquired after his arrest—would be too distracting and too prejudicial for the

⁹⁹ *Estelle v. Williams*, 425 U.S. 501, 505 (1976) (“The defendant’s clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play.”).

¹⁰⁰ *Id.* at 512–13.

¹⁰¹ *Id.* at 503 (“The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.”); see also THORNTON, *supra* note 83, at 111–12 (supporting the proposition that a defendant who wears prison attire is more likely to be convicted); Shepard, *supra* note 82, at 2208.

¹⁰² *Estelle*, 425 U.S. at 505.

¹⁰³ *Id.* at 518 (finding that prison attire “surely tends to brand [the defendant] in the eyes of the jurors with an unmistakable mark of guilt”).

¹⁰⁴ *State v. Ditullio*, No. CRC06-05827CFAWS (Fla. Cir. Ct. 2009); see also Schwartz, *supra* note 85.

¹⁰⁵ Carlin DeGuerin Miller, *John Allen Ditullio Guilty Verdict: Neo-Nazi Convicted of Murder, Sentenced to Life in Prison*, CBS NEWS (Dec. 17, 2010, 1:14 PM), http://www.cbsnews.com/8301-504083_162-20026011-504083.html.

jurors to see.¹⁰⁶ Alternatively, Alan Dershowitz, a criminal defense attorney and Harvard Law School professor, suggested that “the swastika and other tattoos [were] an extension of Ditullio’s persona, and masking the marks could be construed as misleading to a jury.”¹⁰⁷ Nonetheless, the court agreed with Ditullio’s defense attorney that unless Ditullio’s neo-Nazi tattoos were covered, his physical appearance could prejudice the jury.¹⁰⁸ Ditullio’s tattoos may have suggested to the jury that he had unfavorable characteristics—essentially, that embodied in Ditullio’s persona was an outwardly racist and hateful being.¹⁰⁹

In one of the most publicized capital murder trials in history,¹¹⁰ Casey Anthony’s defense team strategically selected preppy clothing to project a childish and innocent image.¹¹¹

¹⁰⁶ Schwartz, *supra* note 85 (reporting that Ditullio’s lawyer argued for his client’s tattoos to be covered up because “[t]here’s no doubt in my mind without the makeup being used, there’s no way a jury could look at John and judge him fairly”). Ditullio’s second trial was widely discussed because of the court’s decision to have the state pay for his neo-Nazi tattoos to be covered at trial. *Id.*

¹⁰⁷ Cindy E. Rodriguez, *Neo-Nazi Accused of Hate-Crime Murder Gets Make-over*, ABC NEWS (Dec. 7, 2010), <http://abcnews.go.com/US/neo-nazi-accused-hate-crime-murder-makeover/story?id=12324409#.UIXSiUKRrww>.

¹⁰⁸ *Ditullio*, No. CRC06-05827CFAWS; *see also* K. McKinney, *Brunvand Wins Motion to Have Murder Defendant’s Tattoos Covered During Trial*, ACQUITTER.COM (Dec. 7, 2009), <http://acquitter.com/news/florida/brunvand-wins-motion-cover-tattoos/>.

¹⁰⁹ Greg Wims, the President of the Victims’ Rights Foundation, stated, “People should be able to see these tattoos. The jury should see what kind of person he is. Of course those tattoos are central to the case.” Rodriguez, *supra* note 107; *see* Ryan Lozar, *Tattoos as Evidence*, CALIFORNIA LAWYER 57–58 (2012) (explaining that snap judgments about a defendant’s character that are based on physical appearance are especially severe when the defendant has a tattoo, and noting that depending on the subject of the tattoo, the defendant may be perceived as “seedy, provocative, or downright dangerous”).

¹¹⁰ *State v. Anthony*, No. 48-2008-CF-015606-O (Fla. Cir. Ct. 2011); *see also State of Florida v. Casey Marie Anthony*, NINTH JUD. CIRCUIT CT. FLA., <http://www.ninthcircuit.org/news/High-Profile-Cases/Anthony/> (last visited Mar. 16, 2013) (highlighting the court’s media policies).

¹¹¹ *See* Bigbee, *supra* note 89 (describing a change in Casey Anthony’s courtroom attire from “stylish in a sexually-suggestive way” to “a modest, plaid shirt under a drab gray cardigan sweater”). Casey Anthony was accused

Anthony's appearance evolved throughout the trial: from oversized¹¹² and pastel-colored shirts¹¹³ to preppy sweaters and long hair.¹¹⁴ Anthony's defense team crafted a story about her

of murdering her two-year-old daughter, Caylee Anthony, but the jury acquitted her of first-degree murder. Michael Winter, *Casey Anthony Acquitted of Murder*, USA TODAY (July 5, 2011), <http://content.usatoday.com/communities/ondeadline/post/2011/07/casey-anthony-jury-reaches-verdict/1>. In the infamous case of the Menendez brothers, the defendants used a similar preppy look. The brothers were convicted of violently murdering their parents. Throughout their trial, the brothers donned preppy sweaters. Although the jurors acknowledged that the defendants' appearance was not admissible evidence, they still "discussed the fact that the defendants wore sweaters as opposed to suits to court." THORNTON, *supra* note 83, at 111; *see also* Dominick Dunne, *The Menendez Murder Trial*, VANITY FAIR (Oct. 1993), <http://www.vanityfair.com/magazine/archive/1993/10/dunne199310> (reporting that the Menendez brothers' "Armani-type clothes [were] replaced in the courtroom by sensible shirts, slacks, and sweaters, brought freshly washed and ironed each morning for them to change into from the L.A. County Jail uniforms they [were] wearing when they arrive[d] at court").

¹¹² *Casey's Appearance Could Be Changed to Influence Jury*, (Apr. 7, 2008, 6:00 PM), <http://www.wftv.com/news/news/caseys-appearance-could-be-changed-to-influence-ju/nK99f/> (describing Anthony's clothes as "baggy and disheveled" and noting that she transformed her image to fit a "librarian look" and donned clothing that matched her defense team's attire); SMITH & MALANDRO, *supra* note 2, § 1.19, at 36 ("To create a victimized look or a look of helplessness, the individual should wear oversized clothing"). One explanation for matching attire might be the proximity between Anthony and one of her female attorneys. If there is a stark difference in dress between attorney and client, any images will be perceived as "more extreme." *Id.* at 35.

¹¹³ *Compare Lillian Glass, Jose Baez and Casey Anthony's Body Language Show Delight in Jurors' Negative Reactions Towards Nancy Grace, Casey's Courtroom Tension Builds on Day 6*, DR. LILLIAN GLASS BODY LANGUAGE BLOG, (May 15, 2011), <http://drlillianglassbodylanguageblog.wordpress.com/2011/05/15/jose-baez-and-casey-anthonys-body-language-show-delight-in-jurors-negative-reactions-towards-nancy-grace-caseys-courtroom-tension-builds-on-day-6/> (depicting Casey Anthony's use of pastel-colored and ruffled clothing at trial), *with* SMITH & MALANDRO, *supra* note 2, § 1.19, at 36 ("To create a submissive look for a woman, pastels and ruffles should be worn.").

¹¹⁴ *See* Jessica Hopper & Ashleigh Banfield, *Casey Anthony Trial: Defense Team Claims Caylee Anthony Drowned in Family Pool*, ABC NEWS, (May 24, 2011), http://abcnews.go.com/US/casey_anthony_trial/casey-

character through her appearance that suggested that Anthony was a child-like woman “forever stuck in adolescence.”¹¹⁵ Perhaps to the jurors, Anthony appeared as a woman incapable of having committed the brutal crime of which she was accused. The court did not consider Anthony’s appearance to be relevant admissible evidence, yet legal analysts suggested that the defense counsel attempted to “subtly influence the judge” by altering Anthony’s appearance.¹¹⁶ It follows that what may subtly influence the judge may also influence the jury.¹¹⁷ At the trial’s conclusion, the jury acquitted Anthony of the capital murder charge.¹¹⁸ As these cases highlight, the Supreme Court, defense attorneys, prosecuting attorneys, and law professors all recognize that a defendant’s appearance has the potential to encourage certain biases in jurors.

III. THE NERD DEFENSE

Since eyeglasses can drastically change one’s appearance, they are a particularly powerful tool with which to alter juror perceptions.¹¹⁹ A defendant who wears eyeglasses to trial without any need to correct vision impairment utilizes the nerd defense

anthony-trial-defense-claims-caylee-anthony-drowned/story?id=13674375; *see also* SMITH & MALANDRO, *supra* note 2, § 1.24, at 48 (noting that to help portray a soft and submissive look in the courtroom, a client’s hair should be longer).

¹¹⁵ Bigbee, *supra* note 89.

¹¹⁶ *Casey’s Appearance Could Be Changed to Influence Jury*, *supra* note 112.

¹¹⁷ Judges are more likely than jurors to notice defense teams’ strategies because judges are trained to examine the law and are attuned to the strategies that defense teams employ. *See* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 126 (1988) (discussing the argument against jury trials by acknowledging that judges and lawyers are “courtroom veterans” as compared to the jury).

¹¹⁸ Winter, *supra* note 111.

¹¹⁹ *See* Tom Davies, *Framed! Sharon Osbourne*, OPTICIAN ONLINE (Nov. 18, 2005), <http://www.opticianonline.net/Articles/2005/11/18/14675/Framed!+Sharon+Osbourne.htm> (stating that eyeglasses can cause the ugly to “become cool” and the cool to “become intelligent”).

in the hopes of appearing more intelligent¹²⁰ and therefore less likely to have committed a crime.¹²¹ Juries are less likely to convict defendants whom they find more “likeable,”¹²² and studies show that wearing eyeglasses helps to make a defendant appear more likeable.¹²³ Wearing nonprescriptive eyeglasses fabricates a defect in a defendant and plays upon one of society’s most deeply rooted stereotypes: that glasses are synonymous with higher intelligence.¹²⁴ In this sense, wearing nonprescriptive eyewear is analogous to using crutches or a wheelchair despite lacking a physical injury.¹²⁵ By contrast, dressing a defendant in a suit and tie, adding accessories (e.g., watches and rings), altering hairstyle, or applying makeup can affect juror perception, but such changes do not falsely represent a handicap or a physical defect.¹²⁶ Similarly, a defendant who

¹²⁰ Alexander, *supra* note 9; *see also* Brown, *supra* note 9, at 1.

¹²¹ Brown, *supra* note 9, at 3; *see also* Rita Handrich, *The Glasses Create a Kind of Unspoken Nerd Defense*, KEENE TRIAL CONSULTING (Mar. 7, 2011, 6:01 AM), <http://keenetrial.com/blog/2011/03/07/the-glasses-create-a-kind-of-unspoken-nerd-defense> (“The idea that the Nerd Defense might work (or help) is an extension of the fact that Nerds are evidently viewed as being less likely to commit crimes If they create an image of someone who ‘doesn’t look like they would do that sort of thing,’ it will aid in the defense.”).

¹²² SUTHERLAND & CRESSEY, *supra* note 85, at 442. However, attractiveness is also a component of likability, and glasses are perceived as making the wearer less attractive. Terry & Krantz, *supra* note 41, at 1766 (noting that the “negative” perceptions of those who wear eyeglasses lead to “increas[ed] ratings of character, compassion, honesty, and sensitivity [and] decreas[ed] ratings of attractiveness [and forcefulness]”); *see generally* Leder et al., *supra* note 24 (connecting the wearing of eyeglasses with increased intelligence and decreased attractiveness).

¹²³ *See, e.g.*, SMITH & MALANDRO, *supra* note 2, § 1.21 at 42 (noting that wide lenses help to create an open-eyed look that is associated with traits of trustworthiness, likability, and innocence).

¹²⁴ Thornton, *The Effect of Wearing Glasses upon Judgments of Personality Traits of Persons Seen Briefly*, *supra* note 52, at 203; Brown, *supra* note 9, at 3.

¹²⁵ *See* Marshall, *supra* note 18 (“Glasses convey information about physical capabilities the same way coming into court on crutches or in a wheelchair does.”).

¹²⁶ *Id.* (contrasting use of fake eyewear with “haircut, a shave, a suit and

chooses to wear contacts rather than eyeglasses to trial has not falsely represented a handicap. The real problem lies in concocting a handicap that brings with it such powerful social stereotypes. Richard Waites, the Chief Executive of a jury consulting firm, observes that “[j]urors expect to see defendants wearing [nice shirts and ties],” but “[j]urors don’t expect to see defendants wearing glasses if they don’t have to.”¹²⁷ Eyeglasses are now one of the world’s most popular fashion accessories,¹²⁸ viewed as possessing the unique power to “transform you like no other accessory.”¹²⁹ Defense attorneys have taken note of this pop-culture trend and are increasingly employing the nerd defense as a courtroom tactic.¹³⁰

A. Studies Concerning the Effect of Eyeglasses on Jurors’ Perceptions

In one analysis of a study conducted in 2008, psychologist Michael J. Brown examined the social-cognitive processes involved when individuals make decisions, attributions, and judgments.¹³¹ In Brown’s study, 220 students were presented with a portfolio containing the vignette of a fictitious trial involving a violent crime, the defendant’s photograph and physical description, and a survey asking the reader to render a

shined shoes,” which are not deceptive). Although eyeglasses are being increasingly worn as fashion accessories, their original purpose was to correct for an eye defect. Leder et al., *supra* note 24, at 211 (“The primary use of eyeglasses is their ability to correct congenital or acquired vision deficits such as myopia, presbyopia, or astigmatism.”).

¹²⁷ Alexander, *supra* note 9.

¹²⁸ Leder et al., *supra* note 24, at 211; Joel Stein, *The TIME 100 Most Influential Things in the World*, TIME (Apr. 21, 2011), http://www.time.com/time/specials/packages/article/0,28804,2066367_2066584_2066602-3,00.html (ranking “nerd glasses” as the 74th most influential thing in the world).

¹²⁹ Davies, *supra* note 119.

¹³⁰ Tillman, *supra* note 5; Debra Cassens Weiss, *Instruction on Slaying Defendant’s New Eyeglasses at Issue on Appeal*, A.B.A. J. (Sept. 14, 2012, 8:52 AM), http://www.abajournal.com/news/article/instruction_on_slaying_defendants_new_eyeglasses_at_issue_on_appeal/.

¹³¹ Brown, *supra* note 9, at 1.

verdict and to rate the defendant as either “more” or “less” physically threatening, intelligent, attractive, and friendly.¹³² The portfolio included the defendant’s photograph in one of four possible combinations: male Caucasian wearing eyeglasses; male Caucasian not wearing eyeglasses; African American wearing eyeglasses; or African American not wearing eyeglasses.¹³³ In this study, participants rendered a “guilty” verdict only forty-four percent of the time against defendants who wore eyeglasses, while defendants who did not wear eyeglasses were found “guilty” fifty-six percent of the time.¹³⁴ The study found no significant difference between the verdicts for Caucasian defendants and the verdicts for African-American defendants.¹³⁵

Brown’s follow-up study, using the same general format and method noted above, examined the effect of eyeglasses in a white-collar crime context.¹³⁶ Consistent with the previous study, defendants who wore eyeglasses were rated as being more intelligent.¹³⁷ However, increased ratings of intelligence positively correlated with an increased number of guilty verdicts. In Brown’s presentation of a white-collar crime, eyeglasses had a “detrimental indirect effect” on a defendant by making the defendant appear more intelligent.¹³⁸ Brown’s studies did not definitively conclude that wearing eyeglasses equates to

¹³² *Id.* at 3.

¹³³ *Id.* (using models comparable in age, weight, hair color, hair length, eye size, and facial hair, and wearing the same eyeglasses in each photograph).

¹³⁴ *Id.*

¹³⁵ *Id.* (concluding that Caucasians received guilty verdicts fifty-one percent of the time, while African Americans received guilty verdicts forty-nine percent of the time). Although there was not a significant difference in verdicts based on race, “race was a significant predictor of several perceived defendant characteristics.” *Id.* When both race and eyeglasses were taken into account, African Americans were perceived as more attractive and more friendly, while Caucasians were perceived as less attractive and less friendly. Moreover, African-American defendants wearing eyeglasses were perceived as less physically threatening than Caucasian defendants wearing eyeglasses. *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 3–4.

¹³⁸ *Id.* at 3.

either a “not guilty” verdict or a “guilty” verdict.¹³⁹ Rather, these studies found that wearing eyeglasses has a significant indirect effect on verdict outcome.¹⁴⁰ This is because wearing eyeglasses relates to increased ratings of intelligence, and perceived intelligence positively affects jurors’ verdicts in violent-crime scenarios and negatively affects jurors’ verdicts in white-collar-crime scenarios.¹⁴¹ While these studies merely scratch the surface of the effect of eyeglasses on juror perception, they lend support to the premise that jurors do not relinquish their biases concerning eyewear in a courtroom setting.¹⁴²

Research shows that jurors discriminate on the basis of appearance,¹⁴³ race,¹⁴⁴ and gender.¹⁴⁵ To compensate for juror biases,¹⁴⁶ defendants are urged to appear before the court well groomed and in business-type attire.¹⁴⁷ Are unnecessary eyeglasses simply another means to offset negative juror biases? Wearing unnecessary eyeglasses, like wearing proper courtroom

¹³⁹ *Id.* at 4.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2–4.

¹⁴² *Id.* at 3–4, 6 (including a response from Tara Trask, a jury consultant with 17 years of experience in litigation strategy, who stated, “I have seen jurors tend to assign credibility to those who fit the stereotypes they have”).

¹⁴³ Efran, *supra* note 74, at 45–54.

¹⁴⁴ See Fein et al., *supra* note 82, at 491 (indicating that “research has found that a jury’s racial composition . . . can have a significant effect on the verdict that jury reaches”); see also Wiley, *supra* note 74, at 214 (noting that “it is easier for jurors to imagine themselves in the defendant’s situation when the defendant is of the same race as the juror”).

¹⁴⁵ Ahola et al., *supra* note 70, at 321 (finding that “[i]n the courtroom situation, the defendant will be judged more severely by a judge or jurors of the same gender as the defendant him/herself; being sentenced by a judge of the opposite sex will be to the advantage of the defendant”).

¹⁴⁶ See THORNTON, *supra* note 83, at 103–08 (noting that the legal system acknowledges that jurors “bring to any new experience all past experiences and attitudes,” but that “it is not always possible to recognize those biases and eliminate those jurors” through the jury selection process).

¹⁴⁷ Mark J. Sullivan, *A Defendant’s Guide to Courtroom Etiquette*, CRIME, JUST. & AM. 34, 35 (2001) (suggesting to criminal defendants that jurors should, at first impression, be unable to discern through dress who is the defendant and who is the attorney).

attire, portrays favorable characteristics to the jury.¹⁴⁸ However, by analogy, a defendant who seeks to offset juror bias might utilize a multitude of props (such as unnecessary crutches or neck braces) that are designed to manipulate the jury and elicit misplaced sympathy and favorable judgment. Wearing proper courtroom attire does not fabricate a defect in any way. However, wearing unnecessary eyeglasses to trial is akin to telling the jury a lie without consequence. Such behavior undermines a judicial system that is designed to arrive at the truth.¹⁴⁹

B. Reception of the Nerd Defense in Criminal Trials

Strong opinions abound about a defendant's use of unnecessary eyeglasses at trial.¹⁵⁰ The use of nonprescriptive eyewear by defendants is becoming increasingly popular, with inmates strategically swapping eyeglasses before hearings, friends and family delivering eyeglasses during visits to inmates, and lawyers supplying clients with eyeglasses.¹⁵¹ The nerd defense has received significant media attention, with commentators both endorsing and criticizing the use of

¹⁴⁸ See *id.* (noting that formal dress for defendants in the courtroom leads jurors to believe that the defendant is serious and leads judges to believe that defendants have respect for the courtroom); see also Brown, *supra* note 9, at 2–4.

¹⁴⁹ See Anderson, *supra* note 78, at 1928 (stating that the jury has a “solemn duty to find the truth”).

¹⁵⁰ Kevin Deutsch, *Defense Lawyers Swear by Gimmick of Having Defendants Wearing Glasses at Trial*, N.Y. DAILY NEWS (Feb. 13, 2011), http://articles.nydailynews.com/2011-02-13/news/28613008_1 (“If a jury thinks the defendant looks incapable of a brutal crime, then it’s certainly an advantage for the defense The glasses create a kind of unspoken nerd defense.”); Marshall, *supra* note 18 (“If glasses made a guy like Larry Davis look gentle, they can work for anybody I always tell clients to get a pair. The nerdier the better.”); Alexander, *supra* note 9 (noting that “[o]ften times it’s about perception, and glasses help with that perception” and “[eyeglasses are] masks . . . [t]hey’re designed to confuse the witness and influence the jury”); Weiss, *supra* note 130 (quoting Harvey Slovis, who stated that “I’ve tried cases where there’s been a tremendous amount of evidence, but my client wore glasses, dressed well and got acquitted”).

¹⁵¹ Alexander, *supra* note 9.

nonprescriptive eyewear by defendants in a courtroom setting.¹⁵² The following cases provide examples of the utilization of the nerd defense in criminal trials.

In the infamous case of *People v. Davis*, a twenty-one-year-old defendant was charged with the attempted murder of nine police officers as they sought to arrest him.¹⁵³ During a lengthy trial period, the prosecution used police testimony to portray Larry Davis, the defendant, as a “gold chain-clad thug.”¹⁵⁴ The defense countered by altering Davis’ appearance, giving him a clean-cut look and a pair of horn-rimmed eyeglasses¹⁵⁵ to make him “look like Mr. Peepers.”¹⁵⁶ In a trial that spanned seven months, Davis was acquitted of the attempted murder of the officers.¹⁵⁷

In 2011, a Bronx jury acquitted Thomas Cordero, known as “[the] nude housekeeper,” on charges of stabbing John Conley to death.¹⁵⁸ On the advice of his lawyer, Harvey Slovis, Cordero donned eyeglasses throughout the trial.¹⁵⁹ Despite Cordero’s

¹⁵² See Marshall, *supra* note 18 (raising concerns about whether putting nonprescriptive eyeglasses on a defendant with 20-20 eyesight rises to the level of deceit prohibited by New York Legal Ethics Rule 8.4); see also MODEL RULES OF PROF’L CONDUCT R. 8.4 (2002); John Pertzborn, *Chet Pleban: Nerd Defense in the Courtroom*, FOX2NOW ST. LOUIS (Apr. 2, 2012, 8:18 AM), <http://fox2now.com/2012/04/02/chet-pleban-nerd-defense-in-the-courtroom/>.

¹⁵³ *People v. Davis*, 537 N.Y.S.2d 430 (Sup. Ct. 1988).

¹⁵⁴ Deutsch, *supra* note 150.

¹⁵⁵ See *id.* (observing that at trial, Davis resembled a studious young adult “dressed like a college student, sporting horn-rimmed glasses and sweaters”).

¹⁵⁶ Marshall, *supra* note 18.

¹⁵⁷ See William G. Blair, *Jury in Bronx Acquits Larry Davis in Shooting of Six Police Officers*, N.Y. TIMES (Nov. 21, 1988), <http://www.nytimes.com/1988/11/21/nyregion/jury-in-bronx-acquits-larry-davis-in-shooting-of-six-police-officers.html>.

¹⁵⁸ Kevin Deutsch & Bill Hutchinson, “Nude Housekeeper” Acquitted of Stabbing Client to Death Despite DNA Evidence, Confession, N.Y. DAILY NEWS (Jan. 13, 2011), http://articles.nydailynews.com/2011-01-13/news/27087260_1_dna-evidence-confession-thomas-cordero.

¹⁵⁹ Deutsch, *supra* note 150; see also Hannah Rand, *The “Nerd Defense”: How Violent Criminals Are Turning to Thick-Framed Hipster Glasses to Persuade Juries They Are “More Intelligent, More Honest,”* MAIL

confession and the admission of DNA evidence linking him to the murder, Cordero was acquitted.¹⁶⁰ Cordero “ditched [the eyeglasses] the moment he was free.”¹⁶¹

In perhaps the most publicized use of the nerd defense thus far, five young men went on trial in Washington, D.C. in 2010 for first degree murder committed during “one of the District’s deadliest outbreaks of violence.”¹⁶² Each of the defendants arrived to court wearing large-framed and heavy-rimmed glasses.¹⁶³ This sparked the attention of the prosecution, prompting Assistant U.S. Attorney Michael Brittin to ask his key witness if he had ever seen any of the men wearing eyeglasses prior to trial.¹⁶⁴ In the dozens of hearings before the

ONLINE (Mar. 30, 2012, 3:52 PM), <http://www.dailymail.co.uk/news/article-2122990/The-nerd-defense-How-violent-criminals-turning-framed-hipster-glasses-persuade-juries-intelligent-honest.html> (reporting that defense attorney Harvey Slovis gives “all his defendants thick-rimmed, nonprescription glasses before court appearances to make them look less threatening”).

¹⁶⁰ Minara El-Rahman, *Nude Housekeeper Not Guilty of Murder*, FINDLAW (Jan. 21, 2011, 6:15 AM), <http://blogs.findlaw.com/blotter/2011/01/nude-housekeeper-not-guilty-of-murder.html> (reporting that in a taped statement, Cordero confessed to police that John Conley attempted to rape him, at which time he took a knife from Conley and stabbed him, but that at trial Cordero stated that he wanted to recant his confession because “he was coerced by Detective Steven Berger”).

¹⁶¹ Deutsch, *supra* note 150.

¹⁶² Keith L. Alexander, *Deliberations Begin in Five-Man District Murder Trial*, WASH. POST (Apr. 25, 2012, 4:26 PM), http://www.washingtonpost.com/blogs/crime-scene/post/deliberations-in-five-man-district-murder-trial/2012/04/25/gIQAT15RhT_blog.html; *see also* *South Capitol Street Murders: Sanquan Carter, Orlando Carter, Jeffrey Best, Robert Bost and Lamar Williams to be Sentenced*, ABC NEWS (Sept. 11, 2012 5:47 AM), <http://www.wjla.com/articles/2012/09/south-capitol-street-murders-sanquan-carter-orlando-carter-jeffrey-best-robert-bost-and-lamar-willia.html>.

¹⁶³ Alexander, *supra* note 9.

¹⁶⁴ The defendants’ identities were at issue in the case, allowing the prosecution to question two witnesses. Key witness Nathaniel Simms, who had previously pled guilty in the case, responded with an unequivocal “no” to U.S. Attorney Michael Brittin’s question concerning Orlando Carter’s use of eyewear prior to trial. The answer was the “same for each of Carter’s co-defendants.” *Id.*; *see also* *District of Columbia v. Carter*, No. 2010 CF1 005677 (D.C. Super. Ct. 2012).

trial, only one defendant had donned eyeglasses.¹⁶⁵ Prosecutors took advantage of the opportunity to suggest to jurors that the defendants were being “dishonest in misrepresenting their appearance.”¹⁶⁶ All five defendants were found guilty.¹⁶⁷ After the trial, one prosecutor suggested that the defendants were putting on a “schoolboy act.”¹⁶⁸ Patricia Jefferies, grandmother of one of the victims, agreed, arguing that the defendants’ strategy was aimed at “influencing the jury, trying to make them think they’re Boy Scouts or something.”¹⁶⁹ Together, these cases demonstrate the ease with which a defendant can add eyeglasses to his or her look to influence the jury.

IV. THE INTERSECTION OF THE NERD DEFENSE AND THE CHANGE-OF-APPEARANCE INSTRUCTION

A. *Harris v. United States*

The case of *Harris v. United States* marks the first instance in which a defendant’s use of nonprescriptive eyewear at trial became an explicit issue on appeal.¹⁷⁰ In July 2008, a jury for the Superior Court of the District of Columbia found Donnell

¹⁶⁵ See Benjamin R. Freed, *Murder Defendants Try Wearing Hipster Glasses in Fashionable Attempt to Win Over Juries*, DCIST (Mar. 27, 2012, 4:15 PM), http://dcist.com/2012/03/defense_attorneys_try_giving_client.php (noting that Lamar Williams was the only defendant known to have ever worn eyeglasses before trial).

¹⁶⁶ *Id.*

¹⁶⁷ *Five Men Convicted of Charges for Their Roles in Crimes That Led to Five Murders, Nine Other Shootings*, U.S. DEP’T OF JUSTICE (May 7, 2012), <http://www.justice.gov/usao/dc/news/2012/may/12-161.html> (reporting that all five men were convicted of murder, conspiracy, and other charges related to violent crimes that culminated in the March 30, 2010 fatal shootings on South Capitol Street); see also Carter, No. 2010 CF1 005677; District of Columbia v. Carter, No. 2010 CF1 005176 (D.C. Super. Ct. 2012); District of Columbia v. Best, No. 2010 CF1 007370 (D.C. Super. Ct. 2012); District of Columbia v. Bost, No. 2010 CF1 007155 (D.C. Super. Ct. 2012); District of Columbia v. Williams, No. 2010 CF1 007157 (D.C. Super. Ct. 2012).

¹⁶⁸ Alexander, *supra* note 9.

¹⁶⁹ Freed, *supra* note 165.

¹⁷⁰ *Harris v. United States*, No. 08-CF-1405, at 5 (D.C. Cir. 2012).

Harris guilty of second degree murder for the fatal shooting of Michael Richardson.¹⁷¹ Soon after sentencing, Harris filed a notice of appeal with the District of Columbia Court of Appeals.¹⁷² Harris' use of eyewear, a "seemingly innocuous detail" during the trial, was a "key issue at the heart of [his] appeal."¹⁷³ On appeal, Chief Judge Eric Washington found Harris' use of eyeglasses to be one of the case's most compelling issues.¹⁷⁴ Throughout trial, Harris consistently donned eyeglasses despite not having worn eyeglasses prior to trial.¹⁷⁵ This prompted the prosecution to request a change-of-appearance instruction, a request that the judge granted.¹⁷⁶

When a court issues a change-of-appearance instruction, the language used by the court can be damning to the defendant if the jury determines that the defendant has, in fact, changed his or her appearance.¹⁷⁷ This is due to the inference of a

¹⁷¹ The government presented evidence that Harris entered Joe's Steak and Egg Restaurant at approximately 2:00 AM on June 29, 2007. Harris asked to use the phone, and, when his request was denied, he left the restaurant. Harris subsequently reentered the restaurant, where witnesses saw him arguing with Richardson, an intern with the D.C. Public Defender Service. Some time later, multiple gunshots were fired, fatally wounding Richardson. *Id.*

¹⁷² See *Court Cases Online Database*, D.C. CTS., <https://www.dccourts.gov/cco/maincase.jsf> (last visited Dec. 1, 2012) (search for "Harris, Donnell") (reporting that Harris first filed a notice of appeal on Oct. 21, 2008).

¹⁷³ Tillman, *supra* note 5. On appeal, Harris also argued that the trial court erred by (1) overruling the defendant's objections to statements made during the prosecution's closing argument, (2) excluding from jury instructions the defendant's theory that someone else committed the murder, and (3) denying a motion for acquittal despite there being insufficient evidence against the defendant. See Brief of Appellant, *Harris*, No. 08-CF-1405.

¹⁷⁴ Tillman, *supra* note 5.

¹⁷⁵ *Harris*, No. 08-CF-1405, at 5.

¹⁷⁶ *Id.* at 6.

¹⁷⁷ Change-of-appearance instructions "contemplate[] some independent evidence" that the defendant is the one who actually changed his or her appearance. *United States v. Perkins*, 937 F.2d 1397, 1403 (9th Cir. 1991). For example, this occurs where a defendant, shortly after committing a crime, cuts or colors his or her hair or shaves his beard. *Id.*

defendant's consciousness of guilt, which "flows from any change of appearance" instruction that is given to the jury.¹⁷⁸ Change-of-appearance instructions generally contain language that attributes to the defendant "consciousness of guilt" or "fear of being identified."¹⁷⁹ In *Harris*, the change-of-appearance instruction, issued as a result of the defendant's sudden use of eyeglasses, raised questions as to whether the defendant's rights had been prejudiced.¹⁸⁰ Defense counsel asserted that the change-of-appearance instruction is reserved for situations that "refer[]

¹⁷⁸ *Id.*

¹⁷⁹ *See, e.g.,* United States v. Carr, 373 F.3d 1350, 1353 (D.C. Cir. 2004) ("A defendant's attempt to change his appearance after a crime has been committed does not create a presumption of guilt. An innocent person charged with a serious offense may resort to various means, both lawful and unlawful, to avoid prosecution. On the other hand, you may consider evidence of the defendant's attempt to change his appearance as tending to prove the defendant's *fear of being identified and therefore his consciousness of guilt*. You are not required to do so." (emphasis added)); *see also* Perkins, 937 F.2d at 1402 n.3 (discussing a defendant's appeal of a conviction for bank robbery because the district court instructed the jury that "[a] defendant's intentional change of his appearance immediately after the commission of a crime or after he is accused of a crime that has been committed, is not, of course, sufficient in itself to establish his guilt, but may be considered by the jury in the light of all other evidence in the case in determining guilt or innocence," and noting that "[w]hether or not evidence of a change of appearance shows a *consciousness of guilt* and the significance to be attached to any evidence, are matters exclusively within the province of the jury" (emphasis added) (citing Devitt & Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 15.08)).

¹⁸⁰ Trial Transcript at 87–88, United States v. Harris, No. CF1-18801-07 (D.C. Super. Ct. 2008), *reprinted in* Appellant's Limited Appendix, *Harris*, No. 08-CF-1405 ("You heard evidence that Donnell Harris attempted to change his appearance to avoid being identified. It is up to you to decide that he took these actions. If you find he did so, you may consider this evidence as tending to show his *feelings of guilt* which you may in turn consider as *tending to show actual guilt*. On the other hand, you may also consider that he may have taken these actions for reasons fully consistent with innocence in this case." (emphasis added)); *see also* BARBARA BERGMAN, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA § 2.303(B) (5th ed. 2008). The defense argued that the trial court issued this instruction in error because the government did not establish that Harris was "attempting to conceal his identity by wearing glasses." Brief of Appellant, *supra* note 173, at 6.

to [a defendant] doing things like shaving his head, as opposed to having dreadlocks . . . [and] shaving his beard, as opposed to having facial hair.”¹⁸¹ The defense further argued that Harris needed the eyeglasses in order to “read through voluminous material,” although there was no such evidence presented at trial to back this assertion.¹⁸² The prosecution rebutted the defense’s stance by calling two key witnesses to testify that they had never previously seen Harris wearing eyeglasses.¹⁸³ At trial, the government argued that Harris’ eyewear was “an attempt at concealment” because “eyeglasses do change appearance”¹⁸⁴ The D.C. Court of Appeals agreed with the trial court that the “wearing of glasses at trial had some probative value[] and that the prejudicial effect did not outweigh its probative value.”¹⁸⁵ The appeals court affirmed the lower court’s ruling, in part, because the appeals court determined that Harris’ rights had not been prejudiced by the change-of-appearance instruction.¹⁸⁶

¹⁸¹ *Harris*, No. 08-CF-1405, at 4–5.

¹⁸² *Id.* at 5. The trial court informed the jury that “there is no evidence in the record that Mr. Harris needs glasses to read or anything else,” finding Harris’ explanation for his use of eyeglasses to be mere “speculation.” *Id.*; see also Brief for Appellee, *supra* note 6, at 30 n.32.

¹⁸³ See Brief of Appellant, *supra* note 173, at 6 (noting that the defense argued that eyeglasses could not conceal the identity of the defendant to someone who knew him well and pointing out that one witness knew Harris his entire life and another witness encountered Harris on a regular basis as a routine customer); see also *Harris*, No. 08-CF-1405, at 4–5 (observing that Francis Iwuh knew Harris since infancy and Marion Sesay knew Harris as a regular customer at the Steak and Egg Restaurant where the shooting took place).

¹⁸⁴ Brief of Appellant, *supra* note 173, at 5; Leder et al., *supra* note 24, at 212; Tillman, *supra* note 5 (quoting U.S. Attorney John Gidez, who argued “that even if [wearing eyeglasses] was not a profound change, it could still alter Harris’ appearance enough to potentially cause a non-identification or misidentification by witnesses who didn’t know Harris well enough to recognize him with or without glasses”).

¹⁸⁵ *Harris*, No. 08-CF-1405, at 5. The trial court’s reasoning aligns with the proposition that a defendant’s appearance may become relevant evidence if it “forms the basis of identification” in the case. Levenson, *supra* note 79, at 577 n.19.

¹⁸⁶ *Harris*, No. 08-CF-1405, at 6 (affirming the lower court ruling and

The D.C. Court of Appeals premised its justification for upholding the lower court's change-of-appearance instruction on two factors: (1) a defendant's identification must be at issue and (2) a defendant must have "significant[ly]" changed his or her appearance before trial.¹⁸⁷ The fundamental problem with this opinion is that it does not define the scope of "identification" matters for purposes of issuing a change-of-appearance instruction.¹⁸⁸ Does the defendant's identification need to be specifically at issue, as it was in *Harris*, for the court to properly issue a change-of-appearance instruction? Or can the holding in *Harris* be interpreted to encompass all situations in which a witness is asked to identify the defendant simply as a procedural requirement—even when no genuine issue of identification is present?¹⁸⁹ *Harris* leaves unanswered two critical

holding that even if the change-of-appearance instruction was in error, it was harmless under *Kotteakos v. United States*, 328 U.S. 750, 764–65 (1946)); Zoe Tillman, *Appeals Court Rules Glasses Instruction Not Prejudicial in Murder Trial*, BLT: BLOG OF LEGAL TIMES (Oct. 24, 2012, 1:33 PM), <http://legaltimes.typepad.com/blt/2012/10/appeals-court-rules-glasses-instruction-not-prejudicial-in-murder-trial.html>.

¹⁸⁷ *Harris*, No. 08-CF-1405, at 5–6 (focusing on identification by relying heavily on *United States v. Carr*, 373 F.3d 1350, 1353 (D.C. Cir. 2004), which reasoned that a defendant's change in appearance should have been coupled with "anticipa[tion] that witnesses would be called at trial to identify him").

¹⁸⁸ *Harris*, No. 08-CF-1405, at 5 (noting that the trial court recognized that a change in the defendant's appearance must be significant to warrant a change-of-appearance instruction). The trial court touched on the scope of the change-of-appearance instruction when the trial judge stated, "I'm not sure if [wearing glasses] is [an] attempt to change his appearance so he couldn't be identified. It's not like he changed his appearance before a lineup or before some photographic identification. He's wearing glasses now." Brief of Appellant, *supra* note 173, at 5. Still, the trial court issued the instruction and the appeals court affirmed the instruction without any further clarification. *Harris*, No. 08-CF-1405, at 6.

¹⁸⁹ When the defense stipulates to a defendant's identification, there is no genuine issue as to identification. *Compare* *United States v. Alexander*, 48 F.3d 1477, 1490 (9th Cir. 1995) ("Identification of the defendant as the person who committed the charged crime is always an essential element which the government must establish beyond a reasonable doubt."), *with* *United States v. Darrell*, 629 F.2d 1089, 1091 (5th Cir. 1980) ("[A] witness need not physically point out a defendant so long as the evidence is sufficient

questions: (1) Can the change-of-appearance instruction be given in a case in which a defendant's identification is not specifically at issue but the defendant wears nonprescriptive eyeglasses to trial? and (2) How should a judge instruct the jury concerning a defendant's "significant" change of appearance when the defendant's identity is not specifically at issue?¹⁹⁰ This type of defendant is not attempting to avoid identification;¹⁹¹ rather, he or she is attempting to misguide the jury with persistent and subtle changes in appearance that are intimately linked with society's most deeply rooted stereotypes.¹⁹² To avoid such misguidance, a jury should be instructed in a manner that balances a defendant's right of expression against the jury's right to the truth.

*B. Carefully Balancing a Defendant's Constitutional Rights
Against Potential Jury Manipulation*

A defendant's right to a fair trial is one of his or her fundamental liberties, a right protected by the Due Process Clause of the Fourteenth Amendment.¹⁹³ Due Process Clause principles firmly hold that the State cannot force a defendant to appear before a jury in a manner that suggests that the defendant

to permit the inference that the person on trial was the person who committed the crime.").

¹⁹⁰ This question is unanswered by the court in *Harris*. *Harris* is the first case focusing solely on a defendant's use of unnecessary eyeglasses to signal a "significant" change in appearance and thus justifying the resulting jury instruction. Compare *Harris*, No. 08-CF-1405, at 5, with *Carr*, 373 F.3d at 1353 (looking at a combination of the defendant's beard, weight, and glasses to signal "profound alterations" in appearance and justifying the resulting jury instruction).

¹⁹¹ A defendant who stipulates to identification is not attempting to avoid being identified. Attempting to avoid identification through a significant change in appearance would warrant the issuing of a change-of-appearance instruction to the jury. See *Harris*, No. 08-CF-1405, at 4-5.

¹⁹² See Hellström & Tekle, *supra* note 20, at 695 (articulating that judgments about intelligence and successfulness can be traced back to the development of myopia caused by extensive schoolwork in childhood days).

¹⁹³ U.S. CONST. amend. XIV; *Estelle v. Williams*, 425 U.S. 501, 503 (1976).

is guilty.¹⁹⁴ During trial, a defendant is “on display for the jury.”¹⁹⁵ Consequently, members of the jury might notice and take into account details of the defendant’s appearance that nonjurors might find irrelevant.¹⁹⁶ But how far may a defendant go to change his or her appearance in order to convey innocence? Courts have held that a defendant may wear to trial such clothing items as religious cult wear,¹⁹⁷ sweatshirts with religious symbols,¹⁹⁸ and official military academy dress uniforms.¹⁹⁹ A defendant has a First Amendment right to control his or her appearance at trial.²⁰⁰ Generally, this right is subject to the judge’s discretion.²⁰¹ However, when a defendant’s dress in the courtroom involves religious attire, the standard for

¹⁹⁴ Shepard, *supra* note 82, at 2208.

¹⁹⁵ Levenson, *supra* note 79, at 575.

¹⁹⁶ THORNTON, *supra* note 83, at 112; *see also* Levenson, *supra* note 79, at 574 (noting that “the outcome of the case is affected by many factors that are technically not evidence: the quality of the lawyers’ presentations, the appearance and reaction of the defendant in the courtroom, and even the presence of the victim’s representatives”).

¹⁹⁷ *See* United States v. Yahweh, 779 F. Supp. 1342, 1345 (S.D. Fla. 1992) (holding that defendants may choose to wear to trial religious cult uniforms, including white robes and white turbans).

¹⁹⁸ Joseph v. State, 642 So. 2d 613, 613 (Fla. Dist. Ct. App. 1994) (holding that defendants may wear to trial shirts with religious symbols).

¹⁹⁹ Johnson v. Commonwealth, 449 S.E.2d 819, 820–21 (Va. Ct. App. 1994) (holding that defendants may wear to trial official military uniforms).

²⁰⁰ U.S. CONST. amend. I; *see In re Palmer*, 386 A.2d 1112, 1115 (R.I. 1978) (recognizing the mandate in *Sherbert v. Verner*, 374 U.S. 398 (1963), to strike a balance between a defendant’s First Amendment right and the “interest of the court in maintaining decorum in its proceedings by regulating dress in the courtroom”); *see also Yahweh*, 779 F. Supp. at 1345 (stating that defendants may choose to wear “suitable clothing of their choice in the courtroom”).

²⁰¹ *Johnson*, 449 S.E.2d at 820–21 (“The conduct of a trial includes courtroom decorum. The trial court has the duty and the authority, in the exercise of sound discretion, to require persons attending court to dress in a manner appropriate to their functions and consistent with the publicity and dignity of the courtroom.”); *see also* Catherine Theresa Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 1001 (1991) (noting the concern that some clothing can distract or offend judges as “a breach of etiquette because it undermines the serious, professional atmosphere of the proceedings”).

regulating such dress is higher: the government must demonstrate a compelling interest.²⁰²

By wearing nonprescriptive eyeglasses to trial, a defendant attempts to cultivate an image premised on potentially misleading character traits that are associated with wearing eyeglasses.²⁰³ A defendant's use of nonprescriptive eyeglasses therefore presents a unique challenge to the criminal court system: it is inconsistent with the First Amendment to prohibit a defendant's free expression through the use of nonprescriptive eyeglasses at trial, but it is also inconsistent with the truth-seeking principles of the judicial system to allow a defendant to purposefully mislead a jury. This Note proposes a modified change-of-appearance instruction that mitigates potential jury manipulation and that does not carry with it the same presumption of guilt as a standard change-of-appearance instruction concerning specific identification matters.

V. PROPOSED SOLUTIONS

Harris confirms that the prosecution may inquire into a defendant's use of unnecessary eyeglasses and request a change-

²⁰² See *In re Palmer*, 386 A.2d at 1115 (noting the need in the courtroom to “accommodate the right to exercise the religious freedoms safeguarded by the first amendment with the right of the state to regulate these individual freedoms for the sake of societal interests”); see also *McMillan v. State*, 265 A.2d 453, 456 (Ct. App. Md. 1970) (stating that “[w]e are fully aware that the orderly administration of courts of justice requires the maintenance of dignity and decorum and for that reason rules of conduct and behavior to govern participants are essential . . . Understandably, respect for the courts is something in which the State has a compelling interest”).

²⁰³ See *Brown*, *supra* note 9, at 2–6 (finding that defendants who wear eyeglasses appear more intelligent and less physically threatening); *Terry & Krantz*, *supra* note 41, at 1766 (finding that wearing eyeglasses increases ratings for character, compassion, honesty, and sensitivity—but that eyeglasses decrease ratings of attractiveness and forcefulness); *Harris*, *supra* note 56, at 1674 (finding that those who wear eyeglasses appear more timid and more intelligent than those who do not wear eyeglasses); Aylin Zafar, “Hipster” Glasses Might Get You Off the Hook in Court, *TIME* (Mar. 30, 2012), <http://newsfeed.time.com/2012/03/30/hipster-glasses-might-get-you-off-the-hook-in-court/> (noting that eyeglasses help make an individual appear “a little emasculated”).

of-appearance instruction when the defendant's identification is specifically at issue.²⁰⁴ Presumably, this is because eyeglasses tend to cover a significant portion of the eye region and can restructure the appearance of facial features,²⁰⁵ making it difficult to recognize a defendant who wears eyeglasses.²⁰⁶ In *Harris*, the appeals court agreed with the lower court that the "wearing of glasses at trial [has] some probative value" which is not outweighed by its prejudicial effect.²⁰⁷ However, when a defendant's identification is not specifically at issue, the prosecution cannot request a change-of-appearance instruction because such an instruction is designed to address changes in appearance related to potential misidentification.²⁰⁸ This Note proposes two possible solutions to this problem.

A. Modifying the Change-of-Appearance Instruction When the Defendant's Identification Is Not Specifically at Issue

A defendant's use of nonprescriptive eyewear at trial generally constitutes a specific attempt to intentionally misguide the jury, and it works against the fundamental principles of a judicial system that seeks the truth in all cases. Jury awareness of this tactic will help to lessen the impact of intentional jury manipulation. As currently utilized by courts, the change-of-appearance instruction is particularly harsh because it can imply a consciousness of guilt.²⁰⁹ Although change-of-appearance

²⁰⁴ *Harris v. United States*, No. 08-CF-1405, at 5–6 (D.C. Cir. 2012).

²⁰⁵ SMITH & MALANDRO, *supra* note 2, § 1.21, at 42.

²⁰⁶ See Leder et al., *supra* note 24, at 216–18 (finding that "glasses impede the immediate recognition of faces" because it takes longer to recognize faces with full-rim glasses than it does to recognize faces either without glasses or with rimless glasses).

²⁰⁷ *Harris*, No. 08-CF-1405, at 5.

²⁰⁸ *United States v. Perkins*, 937 F.2d 1397, 1403 (9th Cir. 1991); see also MULDOON, *supra* note 16, § 9:262 ("The prosecutor may properly comment on the defendant's changed appearance at trial, as compared to the time of the crime, where identification is a trial issue.").

²⁰⁹ Inferences drawn about a defendant's "consciousness of guilt" reasonably "flow[] from any change of appearance" instruction that is given to the jury. *Perkins*, 937 F.2d at 1403; *People v. Slutts*, 259 Cal. App. 2d

instructions typically specify that the charge does not carry a presumption of guilt, jurors might be unable to ignore the harsh language of the instruction or jurors might give the inference too much weight.²¹⁰ For these reasons, the standard change-of-appearance instruction should be reserved for situations in which a defendant has significantly changed his or her appearance and where his or her identification is specifically at issue in the case.

A defendant who seeks to encourage misidentification through the use of unnecessary eyewear should be distinguished from a defendant who requires a prescription for eyeglasses.²¹¹ When a defendant dons unnecessary eyeglasses for purposes of persuasion²¹²—but *not* for purposes of misidentification—the jury should be made aware through a modified change-of-appearance instruction.

This Note's proposed modification of the change-of-appearance instruction removes the language connecting a defendant's change of appearance to his or her consciousness of guilt in order to account for a defendant's right of free expression. The modification expands the scope of a standard change-of-appearance instruction to cover a defendant's use of eyeglasses as a means to unofficially introduce persuasive and

886, 890, 893 (1968) (noting that the defendant's significant change in appearance correlated to consciousness of guilt because "consciousness of guilt can reasonably be inferred from [defendant's] action in shaving off his beard shortly after the [crime]"); *see also Harris*, No. 08-CF-1405, at 5 (quoting *Lazo v. United States*, 930 A.2d 183, 187 (D.C. Cir. 2007)) ("When supported by the evidence, we have recognized the legitimacy of the change of appearance argument based on the attempted change of appearance jury instruction.").

²¹⁰ *See generally* Levenson, *supra* note 79, at 581 ("Juries are not machines and courtrooms are not laboratories. Laboratories are controlled environments in which trial and error are accepted protocol. Even with rules of evidence, trials do not assume the same type of controlled, sterile environment.").

²¹¹ A defendant who "significantly changes" his or her appearance before trial in a case where his or her identity is specifically at issue has, by default, changed appearance to avoid identification. Attempting to avoid identification would warrant the issuing of a standard change-of-appearance instruction. *Harris*, No. 08-CF-1405, at 5–6.

²¹² For example, a defendant with no history of wearing eyeglasses who then wears eyeglasses to trial *and* whose identity is not specifically at issue.

misleading character evidence and further instructs the jury on how to properly consider such a tactic. This change-of-appearance instruction should be given when: (1) a defendant dons unnecessary eyeglasses to trial and (2) identification of the defendant is not specifically at issue. The proposed modification, adapted from the instructions given in *Carr*²¹³ and *Harris*,²¹⁴ reads as follows:

During trial, the defendant changed his or her appearance by wearing eyeglasses that he or she does not need. This particular alteration in appearance after the commission of a crime and in preparation for trial does not create a presumption of guilt. It is entirely possible that an innocent person would resort to both lawful and unlawful means to avoid prosecution. The wearing of unnecessary eyeglasses at trial is lawful.

In this case, the defendant's wearing of eyeglasses constituted a falsification of a vision deficiency. You may consider this falsification an attempt by the defendant to gain favorable judgment based upon the positive social stereotypes associated with the wearing of eyeglasses, which can include truthfulness, intelligence, and nonaggressive demeanor.

When you consider the evidence presented in this case, you may take into account the defendant's choice to appear at trial wearing eyeglasses that he or she does not need. You are not required to do so.

A defendant's use of unnecessary eyeglasses at trial silently and unofficially introduces character evidence.²¹⁵ Consequently, when

²¹³ See *United States v. Carr*, 373 F.3d 1350, 1353 (D.C. Cir. 2004).

²¹⁴ See Trial Transcript at 87-88, *United States v. Harris*, No. CF1-18801-07 (D.C. Super. Ct. 2008), reprinted in Appellant's Limited Appendix, *Harris*, No. 08-CF-1405.

²¹⁵ See *Brown*, *supra* note 9, at 3 (using a case with "purposefully ambiguous evidence" to examine the effect of eyeglasses on juror perceptions of defendants and finding both a direct link between eyeglasses and perception of increased intelligence and a correlation between increased intelligence and fewer guilty verdicts). Everything about a defendant's appearance has an "impact in the courtroom." SMITH & MALANDRO, *supra* note 2, § 1.26, at 54.

a defendant's identity is only at issue as a procedural requirement,²¹⁶ the prosecution is limited to informing the jury of the defendant's use of unnecessary eyewear through relevant admitted evidence, such as photographs,²¹⁷ answers to juror inquiries,²¹⁸ or evidence first introduced by the defendant.²¹⁹ However, these methods are insufficient because they are unpredictable and leave jurors to consider evidence concerning the defendant's use of unnecessary eyeglasses but *without* proper instruction as to how to consider such conduct.²²⁰

Any inquiry into a defendant's unnecessary use of eyeglasses at trial will likely be aimed at attacking a defendant's truthfulness.²²¹ However, even if a defendant first introduces evidence of his or her truthfulness by taking the stand,²²² Federal

²¹⁶ For example, if the defense stipulates to the defendant's identity before trial.

²¹⁷ If a photograph presented as evidence at trial depicts a defendant without eyeglasses and the defendant subsequently wears eyeglasses at trial, the jury may acknowledge the defendant's change in appearance.

²¹⁸ Certain states allow jurors to pose questions to defendants during trial. During Jodi Arias' capital murder trial, the jury posed two specific questions concerning her eyeglasses: "What is your eye prescription?" and "If you are so nearsighted then how could you drive?" Graham Winch, *Arias Grilled With Questions By Jurors*, HLN LIVE BLOG (Mar. 6, 2013), <http://www.hlnv.com/article/2013/03/06/live-blog-what-will-jurors-ask-jodi-arias>.

²¹⁹ See FED. R. EVID. 404(a)(2)(A).

²²⁰ See generally 3 CLIFFORD S. FISHMAN & ANNE T. MCKENNA, JONES ON EVIDENCE § 16:26 (7th ed. 1997) (stating that twelve federal circuits express a strong preference that when a jury is instructed on the issue of a defendant's character, "the judge instruct the jury to consider evidence relating to defendant's character together with the rest of the evidence in the case").

²²¹ "Character" embraces the quality of truthfulness, and although "character" does not include having either "good eyesight or impaired vision," a defendant's eyesight becomes linked to his or her truthfulness when determining whether the defendant truly requires eyeglasses. MUELLER & KIRKPATRICK, *supra* note 15, § 4:23.

²²² 2 MUELLER & KIRKPATRICK, *supra* note 15, § 4:43 (stating that "[w]hen defendants [who take the stand] describe good behavior, patterns, an honest, hardworking, nonviolent, or caring disposition, they open to prosecutors the right to cross-examine on specific acts relevant to that testimony").

Rule of Evidence 608(b) precludes the prosecution's use of extrinsic evidence for the sole purpose of attacking the defendant's truthfulness.²²³ Subject to the court's discretion, on cross-examination a prosecutor may inquire into the defendant's use of unnecessary eyeglasses if the court deems such information to be "probative of the [defendant's] character for truthfulness or untruthfulness."²²⁴ Nonetheless, this evidence may still be excluded under Federal Rule of Evidence 403 due to its potential for prejudice.²²⁵ Therefore, the modified change-of-appearance instruction is necessary to adequately inform jurors of the defendant's purposeful attempt to misguide the jury and to ensure that jurors are properly instructed as to *how* to consider the defendant's actions. This Note's proposed instruction functions as a safeguard against potential jury manipulation because it provides the prosecution with a means of countering a defendant's strategic use of eyeglasses as a prop to elicit juror biases. It ensures that jurors are made aware of and know how to consider such information, while at the same time it informs jurors that the nerd defense does not correlate to a defendant's consciousness of guilt.

B. Making an Eyeglasses Inquiry the "Norm" at Trial

Prosecution teams and law students should be exposed to the tactics employed by defense teams. It is important for current and future prosecutors to learn how and under what circumstances to request a change-of-appearance instruction and to learn how to ask questions about a defendant's misleading utilization of eyeglasses. This will ensure that a jury is better

²²³ See FED. R. EVID. 608 advisory committee's notes (stating that Rule 608(b) "has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness"); see also *United States v. Fusco*, 748 F.2d 996, 998 (5th Cir. 1984) (noting that the principles "embodied in Federal Rule of Evidence 608 . . . limit the use of evidence designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se").

²²⁴ FED. R. EVID. 608(b).

²²⁵ FED. R. EVID. 403.

equipped to properly consider a defendant's strategic change of appearance.

If the prosecution is suspicious of a defendant's sudden use of eyeglasses at trial, the prosecution should be allowed to inquire, in the absence of the jury, into the defendant's need for eyeglasses. If the defendant is unable or unwilling to offer proof of his or her need for eyeglasses—for example, through a prescription, evidence of prior use of eyeglasses, or an eye exam—then the court should grant the prosecution's request for a modified change-of-appearance jury instruction. One likely objection to this rule is that indigent defendants might be unable to pay for an eye exam that is necessary to prove their need for eyeglasses. As such, any rule requiring defendants to offer proof of their need for eyeglasses needs to be accompanied by a rule requiring the state to pay for any necessary eye exams. Another objection to this rule might be that defendants should not be required to assist in their own prosecution. However, wearing unnecessary eyeglasses is a defendant's choice and such a strategic accessory serves to mislead the jury. Making an eyeglasses inquiry the norm might lead defense attorneys and defendants to think twice before employing the nerd defense—and therefore lessen the ability of defendants to hinder the truth-seeking process by purposefully eliciting deep-seated biases in jurors.

CONCLUSION

The Supreme Court has long recognized that the right to an impartial jury, afforded by the Sixth Amendment,²²⁶ is fundamental to a fair trial.²²⁷ The right to an impartial jury includes the right to exclude potentially biased jurors.²²⁸ While

²²⁶ See U.S. CONST. amend. VI (providing that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”).

²²⁷ See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 525 (1975) (stating that the Sixth Amendment guarantees an impartial jury trial).

²²⁸ See *Turner v. Murray*, 476 U.S. 28, 36 (1986) (holding that “by refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner’s constitutional right to an impartial

the trial process offers a system to exclude jurors with potential biases, “jurors may not be willing to reveal their biases, or they simply may not recognize they have any biases.”²²⁹ To counteract unconscious biases held by jurors,²³⁰ the Court has held that empaneling jurors from “a cross-section of the community” is a necessary ingredient of the selection of an impartial jury.²³¹ However, when a bias is widely held,²³² selection of a jury in this manner is insufficient by itself to counteract such a bias.²³³ Research shows that stereotypes about those who wear eyeglasses are so powerful as to cross cultural,²³⁴ gendered,²³⁵ and racial divides.²³⁶ The biases

jury”); Wiley, *supra* note 74, at 227.

²²⁹ THORNTON, *supra* note 83, at 108 (noting that “it is very difficult, if not impossible, to empanel a jury of twelve ‘blank slates’ capable of hearing evidence free of influence of past experiences”); *see also* SUTHERLAND & CRESSEY, *supra* note 85, at 442 (noting that in certain cases, “several thousand prospective jurors have been examined before twelve were secured” and “[i]n one Chicago trial 9,425 persons were summoned for jury duty and 4,821 were examined before twelve were finally selected”).

²³⁰ *See* Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 122 (1994) (noting that the fair-cross-section doctrine is designed to address juror biases resulting from “deep-seated hunches and judgments about social life”).

²³¹ *See Taylor*, 419 U.S. at 530 (holding that “[w]e accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation”). For a discussion of the jury-selection process in the context of gender discrimination, *see Ballard v. United States*, 329 U.S. 187, 192 (1946). For a discussion of the jury-selection process in the context of racial discrimination, *see Smith v. State of Texas*, 311 U.S. 128, 130 (1940).

²³² Wiley, *supra* note 74, at 230 (arguing that discrimination based on physical appearance may be even more “menacing” in American culture than racial or gender discrimination because everyone discriminates based on appearance).

²³³ *See People v. Wheeler*, 583 P.2d 748, 755 (1978) (“The only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.”).

²³⁴ *See Manz & Lueck*, *supra* note 21, at 704.

²³⁵ *See Harris*, *supra* note 56, at 1674–75.

²³⁶ *See Brown*, *supra* note 9, at 3.

associated with those who wear eyeglasses are deeply ingrained in our minds in early stages of life.²³⁷

The United States judicial system is designed to eliminate juror biases. Purposefully eliciting *any* biases from the jury undermines the goal of the judicial system, which is to seek the truth in all cases.²³⁸ While defendants have the right to control their appearance at trial, there exists a distinction between a defendant who simply presents himself or herself in “neat and clean attire” and with “good grooming” and a defendant who uses attire to present “an unrealistic suggestion of character.”²³⁹ A defendant who wears *unnecessary* eyeglasses fabricates a vision handicap that is intimately tied to stereotypes of favorable characteristics and manipulates the jury into believing a lie: that the defendant truly requires eyeglasses. By providing a jury with a modified change-of-appearance instruction, a court will enable the jury to have a more complete and truthful base of knowledge when considering the facts of the case and the jury will be better equipped to consider the defendant’s change in appearance.

²³⁷ Walline et al., *supra* note 44, at 223 (describing a study finding that children as young as six years old correlate wearing eyeglasses with character traits of intelligence and honesty).

²³⁸ Strier, *supra* note 22, at 99.

²³⁹ Johnson v. Commonwealth, 449 S.E.2d 819, 821 (Va. Ct. App. 1994).