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"We Can't Tell them Apart": When and How the Court Should Educate Jurors on the Potential Inaccuracies of Cross-Racial Identifications

Aaron H. Chiu

"WE CAN'T TELL THEM APART": WHEN AND HOW THE COURT SHOULD EDUCATE JURORS ON THE POTENTIAL INACCURACIES OF CROSS-RACIAL IDENTIFICATIONS

AARON H. CHIU*

I. INTRODUCTION

In August 1994, McKinley Cromedy was convicted of first-degree aggravated sexual assault, second-degree robbery, second-degree burglary, and third-degree terroristic threats.[1] He was sentenced to sixty years in prison,[2] despite the fact that no forensic evidence presented at court linked him to the crime.[3] Instead, Cromedy, a black man, was convicted solely by eyewitness testimony produced by the victim of the crime, a white woman, who had identified him on the street nearly eight whole months after the crime occurred.[4]

At trial, the jurors found Cromedy guilty, apparently satisfied by the confidence of the victim's testimony.[5] Cromedy appealed the decision on the basis that he was not permitted to use a special jury instruction that addressed the difficulties of an eyewitness properly identifying a member of a different race.[6] The Supreme Court of New Jersey reversed and remanded the conviction on the basis of this issue, but the jury again found Cromedy guilty of all charges.[7] Cromedy remained in prison until December 1999, when DNA tests finally showed that he was not the true perpetrator of the crime; Cromedy had been wrongly incarcerated for five years before he was released, despite the victim's certainty that she had correctly identified her assailant.[8]

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*J.D., University of Maryland School of Law, 2008.

1. State v. Cromedy, 727 A.2d 457, 460 (N.J. 1999).

2. *See* Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821, 1845 (2003).

3. *Cromedy*, 727 A.2d at 459–60 ("No forensic evidence linking defendant to the offenses was presented during the trial. The police did not lift any fingerprints belonging to defendant from the apartment . . . [nor could] the genetic markers found in the semen and spermatozoa . . . be said to have come from the defendant . . . .").

4. Natarajan, *supra* note 2, at 1844–45.

5. *Id.*

6. *Cromedy*, 727 A.2d at 458.

7. Natarajan, *supra* note 2, at 1844–45.

8. *Id.*

Criminal convictions hinged upon a cross-racial identification similar to the one made in the case of Cromedy pose a significant problem in the American justice system.[9] Cross-racial identifications are identifications in which an eyewitness identifies a member of a different race.[10] Cross-racial identifications prove especially troublesome when identification occurs when an eyewitness is asked to identify a person of a different race.[11]

Eyewitness testimonies, in general, are far less reliable than jurors tend to believe.[12] Courts have acknowledged that cases where defendants are convicted by the testimony of a single eyewitness present the greatest danger of erroneous conviction.[13] The Supreme Court has recognized that eyewitness identifications by members of different races are even less likely to be accurate than identifications made by members of the same race.[14]

Scholars have long studied the subject of cross-racial identification and the potential errors of jurors convicting innocent defendants based on identifications made by eyewitnesses of other races.[15] While scholars have propounded numerous suggestions on how this subject should be approached in the courtroom, the Supreme Court has yet to adopt a uniform standard to deal with this problem.[16] Most jurisdictions defer to the discretion of lower courts on whether

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9. *Cromedy*, 727 A.2d at 460; Brown v. Davis, 752 F.2d 1142, 1146 (6th Cir. 1985).

10. John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 211 (2001) (citing *Cromedy*, 727 A.2d at 461) ("A cross-racial ID occurs when an eyewitness of one race is asked to identify a particular individual of another race.").

11. Arizona v. Youngblood, 488 U.S. 51, 72 n.8 (1988); *see also Cromedy*, 727 A.2d at 464; People v. Radcliffe, 764 N.Y.S.2d 773, 775 (N.Y. App. Div. 2003) ("The greatest danger of conviction of the innocent exists in 'sole eyewitness' cases. . . . The potential for inaccuracy in visual identification is well known to the legal community . . . and has been recognized by the Supreme Court of the United States . . . ." (citations omitted)).

12. C. Ronald Huff, *Wrongful Conviction: Societal Tolerance of Injustice*, 4 RES. IN SOC. PROBS. & PUB. POL'Y 99, 101–03 (1987) (stating that a study implicated mistaken eyewitness identifications as the cause of more than 60% of the five hundred wrongful convictions studied); *see also* United States v. Wade, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.").

13. *Radcliffe*, 764 N.Y.S.2d at 776 (noting that courts have recognized "that cross-racial identifications are much less likely to be accurate than same race identifications" (citations omitted)).

14. *Youngblood*, 488 U.S. at 72 n.8; *see also Cromedy*, 727 A.2d at 464.

15. *See Cromedy*, 727 A.2d at 461–62 (compiling authorities).

16. *See* Natarajan, *supra* note 2, at 1823–24.

the topic of difficulties in making cross-racial identifications may be presented to jurors[17]

II. CURRENT LAWS/RECENT DEVELOPMENTS

A. Background

1. Studies on "Other Race" Effect

Several academic articles and studies have been written on the subject of cross-racial identification.[18] Patrick Wall's classic study of eyewitness identification[19] includes a dramatic case of erroneous cross-racial identifications.[20] In this study, five victims of a kidnapping, rape, and robbery episode were each asked to identify the perpetrator, with whom each victim had spent several hours.[21] All five victims independently identified a man who was later proven to have been several hundred miles away at the time of the offense.[22] However, when authorities apprehended the true criminal, results showed that the true criminal bore no resemblance, other than the color of his skin, to the other suspects identified by the victims.[23]

Witnesses are often unconsciously influenced by their subjective expectations.[24] Studies have increasingly supported the idea that some witnesses are better at identifying members of their own race and that the same witness would be significantly impaired when asked to identify persons of another race or ethnicity.[25] Social scientists have labeled this tendency using terms such as the "own race" effect, "other race" effect, or "own race" bias.[26]

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17. *See also* Rutledge, *supra* note 10, at 215 (stating that the "denial of a defense request for a special jury instruction detailing the pitfalls of cross-racial IDs has generally been upheld on appeal as within the trial court's discretion").

18. *See* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 936 (1984).

19. PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. MICHAEL J. SAKS & REID HASTIE, SOCIAL PSYCHOLOGY IN COURT 175 (1978).

25. Smith v. State, 880 A.2d 288, 294 (Md. 2005).

26. *See* Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL'Y & L. 230, 230 (2001) (coining "other-race" effect); Christian A. Meissner & John C. Brigham, *Thirty Years of the*

While studies have yet to show the extent to which the other race effect may hinder a witness's ability to identify a member of a different race,[27] a growing body of data suggests that this effect may indeed be true for some witnesses.[28] Many researchers have conducted facial recognition experiments in controlled laboratory environments.[29] Most often, these studies are conducted by showing subjects photographs of a number of faces that are later mixed with a new set of faces at random.[30]

One study has demonstrated that when shown a new face, eyewitnesses are 56% more likely to incorrectly believe they have seen it before if the face is of a race different from their own.[31] Another study reported that people who tried to identify persons of another race made four times as many errors as those who attempted to identify members of their own race.[32] Many of these studies have shown the consistency of the own race bias effect across racial and ethnic groups.[33]

In addition, there are other perceptions that may cause an eyewitness to remember a perpetrator of a crime incorrectly,[34] including prejudicial attitudes that a witness might have toward a members outside of their race.[35] In one experiment, Professor Gordon Allport showed his students a photograph of a white man holding a straight razor towards a black man in a threatening manner.[36] A majority of the students, however, later recalled the photo as one in which the black man held the razor.[37]

Own-Race Bias in Memory for Faces: A Meta-Analytical Review, 7 PSYCHOL. PUB. POL'Y & L. 3, 4 (2001) (coining "own race" effect and "own race" bias).

27. State v. Cromedy, 727 A.2d 457, 462 (N.J. 1999).

28. Rutledge, *supra* note 10, at 210.

29. Siegfried Ludwig Sporer, *The Cross-Race Effect: Beyond Recognition of Faces in the Laboratory*, 7 PSYCHOL. PUB. POL'Y & L. 170, 173 (2001); *see also* Johnson, *supra* note 18, at 938 (describing a typical laboratory experiment in face recognition).

30. Johnson, *supra* note 18, at 938.

31. Meissner & Brigham, *supra* note 26, at 4.

32. Johnson, *supra* note 18, at 943 (citing Rahaim & Brodsky, *Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 LAW & PSYCHOL. REV. 1, 2 (1982)).

33. Meissner & Brigham, *supra* note 26, at 5 ("Several of these reviews have also examined the consistency of the ORB effect across racial/ethnic groups.").

34. Rutledge, *supra* note 10, at 209–11.

35. *See* Meissner & Brigham, *supra* note 26, at 7 ("Early research indicated that racial attitudes appeared to influence the degree of stereotypic likeness assigned to other-race members.").

36. GORDON W. ALLPORT & LEO POSTMAN, THE PSYCHOLOGY OF RUMOR 104, 111 (1965).

37. *Id.*

It should be carefully noted, however, that one's racial attitude is not the only factor that plays a role in the other race effect.[38] This problem is significant because both courts and jurors may incorrectly assume that cross-racial identification only presents a problem if the witness making the identification is shown to harbor racist attitudes.[39] Currently, the causes of the other race effect are still unknown,[40] although many theories have been explored.[41]

Given the lack of conclusive factual data, many judges are reluctant to allow the issue of cross-racial identification to be introduced at trial.[42] In addition, courts also hesitate to allow discussion of the issue due to its possible racially inflammatory nature.[43]

2. Effects on Jurors

Several factors may lead a juror to give improper weight to eyewitness testimony. One problem with eyewitness testimony is that jurors generally tend to believe eyewitness accounts and take them at face value, even in "extremely doubtful" circumstances.[44] Juries naturally want to "punish [someone for] a vicious crime."[45] The results of one survey showed that 75% of prosecutors and 56% of jury-eligible citizens incorrectly believed that confident witnesses are more likely to be accurate.[46] For example, when an eyewitness "exclaims with conviction" that the defendant is the perpetrator of that crime, a

38. *See* Meissner & Brigham, *supra* note 26, at 7.

39. *See id.*

40. Steven M. Smith et al., *Postdictors of Eyewitness Errors: Can False Identifications be Diagnosed in the Cross-Race Situation?*, 7 PSYCHOL. PUB. POL'Y & L. 153, 165–67 (2001).

41. *See, e.g.*, Meissner & Brigham, *supra* note 26, at 6–13; *see also Smith*, 880 A.2d 288, 297 (Md. 2005) (listing three possible theories that have been suggested in order to explain the existence of the cross-racial effect. One theory suggested that individuals "with prejudicial attitudes toward members outside of their race were more likely to exhibit own-race bias." A second theory suggested that "people exhibit own-race bias because members of a particular race have similar characteristics making it difficult to differentiate among the members." A third theory suggests that the "number of interracial contacts may play a role in the extent of own-race bias demonstrated by a particular individual.").

42. Johnson, *supra* note 18, at 963–64.

43. *See id.* at 936 ("Furthermore, many judges may fear that merely to mention race in a criminal case is to stir racial animosity.").

44. *Id.* at 946.

45. Rutledge, *supra* note 10, at 208–09 (quoting Kampshoff v. Smith, 698 F.2d 581, 585 (2d Cir. 1983)).

46. Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817, 818 (1995).

juror may ignore his or her own doubt over the strength of the evidence of the defendant's guilt and convict the defendant.[47]

This problem is compounded with cross-racial identifications in eyewitness testimonies. In 1984, Sheryl Johnson of Cornell University wrote that many "laymen" and lawyers do not even find cross-racial identification to be a difficult problem in determining the credibility of eyewitness accounts.[48] One study in particular found that only 58% of "laymen" expressed an understanding of the "other race" effect.[49]

In this study,[50] 500 students were asked the following question:

> Two women are walking to school one morning, one of them is an Asian and the other white. Suddenly, two men, one black and one white, jump into their path and attempt to grab their purses. Later, the women are shown photographs of known purse snatchers in the area. Which statement best describes your view of the women's ability to identify the purse snatchers?[51]

The study showed that 13% of the test subjects incorrectly believed that "[t]he white woman will find the black man easier to identify than the white man,"[52] and 29% even felt that either "[b]oth the Asian and the white woman will find the white man harder to identify than the black man,"[53] or that "[t]he Asian woman will have an easier time than the white woman making an accurate identification of both men."[54]

This misunderstanding of cross-racial identifications indicates that prospective jurors may not be properly educated regarding potential errors caused by cross-racial identifications. A juror who is generally uneducated about the potential inaccuracies of the other race effect in eyewitness testimonies may not be properly equipped with the knowledge to adequately assess the facts at trial.[55] Many jurisdictions

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47. Rutledge, *supra* note 10, at 208–09 (quoting *Kampshoff*, 698 F.2d at 585).

48. *See* Johnson, *supra* note 18, at 946–49.

49. *See id.* at 947.

50. ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 172–73 (1979).

51. *See* Johnson, *supra* note 18, at 947.

52. *Id.*

53. *Id.*

54. *Id.*

55. *See* Rutledge, *supra* note 10, at 224 (quoting State v. Cromedy, 727 A.2d 457, 460 (N.J. 1999) ("A jury instruction that contains no direct reference to the hidden fires of prejudice and bias . . . and fails to call the jury's attention to the problems of cross-racial

have yet to set a clear procedure in determining when and how to educate the jurors of the potential errors made in cross-racial identifications.[56]

3. Suggested Solutions

There are numerous suggestions for providing the defendants with opportunities to neutralize the errors that the other race effect may produce.[57] Unfortunately, many of the traditional protections inadequately protect against identification errors of the potential other race effect.[58]

Many scholars strongly support the idea of allowing the defense to include expert testimony as the best solution to educate the jurors of cross-racial identification.[59] Few trial judges, however, permit this option at trial.[60] Instead, "many courts reject expert psychological testimony as 'a superfluous attempt to put the gloss of expertise, like a bit of frosting, upon inferences which lay persons were equally capable of drawing from the evidence.'"[61] Other tools, such as cross-examinations, closing arguments, and special jury instructions, may better serve defendants.

Traditionally, cross-examination was one of the only available methods in many jurisdictions that allowed the defense to expose issues of cross-racial identification.[62] Yet some "research indicates that it may not be as effective as intended."[63] While this approach may call into question the reliability of eyewitness identification, it is unclear whether jurors' decisions are improved as a result.[64] In addition, cross-

identification, so well documented . . . denies minority defendants . . . their constitutional right to a fair trial.").

56. *Cf.* Natarajan, *supra* note 2, at 1823–24.

57. *See e.g.*, Johnson, *supra* note 18, at 951 ("The own-race effect would be of little concern if defense counsel had adequate techniques for revealing and neutralizing the errors it produces.").

58. *Id.*

59. *Id.* at 958–59.

60. *See* Natarajan, *supra* note 2, at 1832–33 n.67–70 and accompanying text.

61. Rutledge, *supra* note 10, at 215 (quoting State v. Kemp, 507 A.2d 1387, 1390 (Conn. 1986) (citations omitted)).

62. *Id.* at 214–15; *see also* United States v. Curry, 977 F.2d 1042, 1052 (7th Cir. 1992) (expressing that "vigorous cross-examination by the [defense] exposed the weakness of the [eyewitness] identifications"); United States v. Thevis, 665 F.2d 616, 641 (5th Cir. 1982) (finding no error in excluding expert testimony regarding eyewitness examinations because the accuracy of the identification "can be adequately addressed in cross-examination and [] the jury can adequately weigh these problems through common-sense evaluation").

63. Rutledge, *supra* note 10, at 214–15.

64. *Id.* at 215.

examination proves to be ineffective if the eyewitness believes that he or she has a good memory of faces of other races.[65]

Another alternative is to allow the defense counsel to address the subject of cross-racial identifications and its difficulties in its closing argument.[66] Courts, however, may prohibit the defense from mentioning the difficulties of cross-racial identification because they deem it "racially inflammatory."[67] Additionally, there may also be a "lack of factual foundation for such arguments," as "[b]oth defense attorneys and prosecutors are limited to arguments of facts in evidence or inferences from those facts."[68]

Finally, the issue of cross-racial identification may be addressed in special jury instructions given to jurors before they reach a decision.[69] While this approach has yet to gain wide acceptance,[70] it has been recently required in some circumstances in at least one jurisdiction.[71] It is difficult to determine how often this approach is used in other jurisdictions,[72] but a majority of jurisdictions hold that the decision of whether to utilize this approach is largely left to the discretion of the trial court.[73] Courts may deny the use of specific jury instructions if the victim was terrorized in broad daylight[74] or if numerous eyewitnesses identified the defendant at close range.[75]

Jury instructions, however, may be inadequate for a number of reasons. For example, they may not convey any psychological data or may inaccurately convey that the other race "may not operate where the witness has had interracial experiences."[76] On the other hand, a more detailed jury instruction "may be criticized for focusing on one source of identification error."[77]

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65. Johnson, *supra* note 18, at 953; *see also Smith*, 880 A.2d 288, 300 (Md. 2005).

66. Johnson, *supra* note 18, at 955–57.

67. *Id.* at 955.

68. *Id.* at 956.

69. Rutledge, *supra* note 10, at 215.

70. *Id.*

71. *See e.g.*, State v. Cromedy, 727 A.2d 457, 459 (N.J. 1999) (holding that "the trial court's failure to submit to the jury an instruction similar to the one requested by defendant requires a reversal of defendant's convictions").

72. Rutledge, *supra* note 10, at 224.

73. *Id.*

74. *See e.g.*, Commonwealth v. Hyatt, 647 N.E.2d 1168, 1171 (Mass. 1995).

75. *See e.g.*, Commonwealth v. Engram, 686 N.E.2d 1080, 1082 (Mass. 1997).

76. Johnson, *supra* note 18, at 976 (critiquing Judge Bazelon's proposed jury instruction in United States v. Telfaire, 469 F.2d 552, 561 (D.C. Cir. 1972) (Bazelon, C.J., concurring)).

77. *Id.*

4. Legal Background in Other Jurisdictions

i. Case Law in Other Jurisdictions

Despite the numerous studies that have been conducted on the other race effect, very little case law exists regarding the use of cross-racial identification by the defendant. A handful of decisions acknowledge the difficulties of cross-racial identifications in eyewitness testimonies,[78] but the actual implementation of the various courtroom mechanisms to defend against erroneous testimonies is largely discretionary.[79]

Prior to the development of cases that focused on cross-racial identifications, one of the leading cases in determining the admissibility of general eyewitness testimonies was *Manson v. Brathwaite*.[80] In *Manson*, the court established a two-prong test for eyewitness testimonies.[81] First, the court must determine whether the confrontation procedure is suggestive.[82] Second, the court must determine whether the identification still "possesses certain features of reliability" by examining five factors.[83] These factors include (1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the degree of attention the witness paid to the perpetrator during the crime, (3) the accuracy of her initial description of the offender, (4) the level of certainty demonstrated at initial identification, and (5) the time elapsed between the crime and the confrontation.[84] While *Manson* does not provide direct assistance regarding cross-racial identification specifically, it lists several relevant factors to consider in any identification testimony.[85]

Years later, in *State v. Cromedy*, [86] New Jersey adopted a definitive approach for determining when to allow the subject of cross-racial identification to be included in jury instructions.[87] In *Cromedy*, the defendant McKinley Cromedy appealed his initial conviction of

78. *See, e.g.*, State v. Cromedy, 727 A.2d 457, 464 (N.J. 1999) ("The Supreme Court of the United States has acknowledged that problems exist with eyewitness identifications in general and cross-racial identifications in particular.").

79. *Id.*

80. 432 U.S. 98 (1977).

81. *Id.* at 110.

82. *Id.*

83. *Id.* at 110, 114–16.

84. *Id.* at 114–16.

85. However, Radha Natarajan has offered a test developed from the *Manson* test for determining when a cross-racial identification testimony should be admitted as evidence. Natarajan, *supra* note 2, at 1846–54.

86. 727 A.2d 457 (N.J. 1999).

87. *Id.* at 458.

rape and robbery on the basis that a substantial agreement in the scientific community on the topic of cross-racial identification warrants a special jury instruction.[88]

The Supreme Court of New Jersey ruled that "a cross-racial instruction should be given only when . . . identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability."[89] The lack of positive identification for nearly eight months after the incident's occurrence raised some concern about its reliability.[90] The court argued that under those circumstances, the jury may have been unable to evaluate the reliability of the eyewitness without a briefing on the potential errors in cross-racial identifications.[91]

However, as previously mentioned, even the specific jury instruction proved to be inadequate in protecting the innocent defendant. When the case was remanded to the jury, McKinley Cromedy was still found guilty.[92]

ii. Pattern Instructions in Other Jurisdictions

Although the *Cromedy* decision allowed special jury instructions to be used in some cases involving cross-racial identifications, it failed to provide rigid guidelines for the wording of such instructions.[93] Currently, only a handful of jurisdictions have pattern instructions for cross-racial identification situations. These jurisdictions vary in their approaches to formulating pattern instructions. Some jurisdictions include long and detailed instructions, while other jurisdictions only include a single line.[94]

The most well-known special jury instruction for cases involving cross-racial identification was suggested by Judge Bazelon in the case *United States v. Telfaire*.[95] The instruction reads:

> In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than

88. *Id.* at 460–61.

89. *Id.* at 467.

90. *Id.*

91. *Id.*

92. Natarajan, *supra* note 2, at 1844–45.

93. *See generally Cromedy*, 727 A.2d at 457. New Jersey has since adopted a cross-racial identification charge. Rutledge, *supra* note 10, at 226–27.

94. Currently, New Jersey uses the most detailed pattern instruction with a full paragraph and footnotes, while California uses only a few words.

95. 469 F.2d 552, 561 (D.C. Cir. 1972) (Bazelon, C.J., concurring).

> members of one's own. If this is also your own experience, you may consider it in evaluating the witness's testimony. You must also consider, of course, whether there are other factors present in this case which overcome any such difficulty of identification. For example, you may conclude that the witness has had sufficient contacts with members of the defendant's race that he would not have greater difficulty in making a reliable identification.[96]

While this instruction is sometimes used in various jurisdictions,[97] Judge Bazelon's instruction also has its share of critics.[98]

Currently, only New Jersey, California, and North Carolina have specific language regarding cross-racial identifications in their pattern jury instructions. In California, the instructions only provide for a one line description of the "cross-racial or ethnic nature" of the identification.[99] In contrast, the New Jersey's pattern instructions are much more detailed:

> The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness' original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.[100]

In addition, the New Jersey instruction includes a pair of footnotes.[101] Finally, North Carolina adopted a unique approach: its pattern jury instructions do not include a model, but instead an

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96. *Id.*

97. Johnson, *supra* note 18, at 977–78. Most of the federal circuit courts have approved of Judge Bazelon's instruction, except for the Fifth and Eleventh circuits, which have not ruled on the issue. State courts, however, have generally been less receptive. None of the state courts specifically require the use of Judge Bazelon's instruction.

98. *Id.* at 978.

99. CALIFORNIA JURY INSTRUCTIONS – Criminal 2.92 (West, Westlaw through Fall 2006 edition).

100. *See* New Jersey Model Criminal Jury Charges; Identification: In Court Identification Only (8) (West, Westlaw through 1999 revision).

101. *Id.*

attorney may request such an instruction on cross-racial identification by submitting a special form.[102]

B. Developments in Maryland

1. Smith v. State[103]

i. Facts

The courts in Maryland have only recently ruled on the use of cross-racial identification by the defendant in jury trials. In *Smith v. State*, a white female was nearly robbed by two black males as she parked her car in front of her residence in Baltimore City.[104] The incident occurred during the evening, but the victim alleged that the street lights allowed her to see the perpetrators clearly.[105] During the altercation, the two men attempted to obtain the keys from her.[106] However, one of the victim's neighbors saw the incident from her window, causing the two assailants to leave the scene.[107]

Police responded to the neighbor's call, but were unable to locate the two perpetrators.[108] The victim provided a general description of the men, including a statement that the man with the gun had "dreds."[109] The victim was unable to identify the perpetrators from various photograph arrays until two weeks after the incident when she identified the photographs of the two defendants as the men who attempted to rob her.[110] Both men were subsequently arrested.[111]

Defendants James Smith and Jason Mack were charged with "Attempted Armed Robbery, First and Second Degree Assault, Carrying a Handgun and Use of a Handgun in Commission of a Crime, and Attempted Theft."[112] Prior to the jury trial, the defendants submitted a motion *in limine*, "requesting that the jury be instructed on

102. N.C. Crim. Prac. Forms § 27:9 (West, Westlaw through 5th ed.).
103. 880 A.2d 288 (Md. 2005).
104. *Id.* at 289.
105. *Id.* at 291.
106. *Id.* at 289.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 290–91

cross-racial eyewitness identification to enable the parties to raise the issue in opening statements."[113] The trial judge denied the motion.[114]

During the trial, the State provided three witnesses.[115] The victim's neighbor testified that she did not have a clear view of the perpetrators of the crime.[116] The detective assigned to the case testified that the victim had "stated with certainty" that the two defendants were the men who attempted to rob her.[117]

The victim, however, testified in great detail about how she was able to identify the defendants as the perpetrators of the crime.[118] The victim provided a description of how she remembered the perpetrators, which fit both of the defendants.[119] When asked why she felt confident that her identifications were accurate, the victim testified that she was "extremely good with faces."[120] She further volunteered that she was a teacher that watched "lay mannerisms," and that she had been studying art and painting people since she was a child.[121]

The defendants requested on two subsequent occasions that they be allowed to argue cross-racial identification in their closing, but the trial judge denied both requests.[122] The jury then found the defendants guilty of attempted robbery, second degree assault, and attempted theft.[123] Both defendants appealed on the basis that the trial court abused its discretion by refusing to allow cross-racial identification to be used either in the closing argument or in the jury instruction.[124] The Court of Special Appeals affirmed the decision of the trial court.[125] The defendants filed a petition for a writ of certiorari to the Court of Appeals to consider whether the trial judge erred in "refusing to instruct the jury on cross-racial identification" and "precluding [the] defense counsel from discussing in their closing arguments the difficulties of cross-racial identification."[126]

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113. *Id.* at 291.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 291–92.
120. *Id.* at 292.
121. *Id.*
122. *Id.* at 292–93.
123. *Id.* at 293.
124. *Id.*
125. Smith v. State, 857 A.2d 1198, 1999 (Md. 2004).
126. *Smith*, 880 A.2d at 293.

ii. The Court's Reasoning

The Court of Appeals granted certiorari to review both of the issues raised by the defendants.[127] The court, however, only reached a decision on the question of the use of cross-racial identifications in closing arguments.[128] Writing for the majority, Judge Lynne A. Battaglia held that in a case in which the sole eyewitness voluntarily bolstered her own face recognition credentials, the defendants were entitled to have the opportunity to argue the difficulties of cross-racial identification in their closing argument.[129]

Judge Battaglia acknowledged that at the time of the decision, no conclusive studies on the subject clearly established cross-racial identification as a "matter of common knowledge."[130] Yet because "the victim's identification of the defendants was anchored" in the victim's self-proclaimed adeptness at recognizing faces, the defense should have been allowed to rebut the identification by introducing the difficulties of cross-racial identifications.[131]

Judge Glenn T. Harrell, Jr. followed with a dissenting opinion, to which Judges Alan M. Wilner and Clayton Greene both joined.[132] Judge Harrell listed several reasons for disagreeing with the majority.[133] First, the defendants failed to present any evidence that demonstrated a specific deficiency in the victim's ability to recognize and identify members of another race.[134] Second, Judge Harrell remained skeptical of the current research and academia conducted on problems with cross-racial identification.[135] Finally, the dissent also questioned the majority, because while the victim presented testimony to bolster her ability in recognizing faces, she did not make any mention of an "enhanced ability" to recognize people of different races.[136]

2. Other Developments

The Maryland Court of Special Appeals expanded on the ruling of *Smith* and addressed the issue of special jury instructions in *Janey v.*

127. *Id.*
128. *See id.* at 300.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* (Harrell, J., dissenting).
133. *Id.*
134. *Id.* at 301.
135. *Id.* at 302.
136. *Id.* at 304.

State.[137] In *Janey*, an African American's conviction of second-degree murder and obstruction of justice hinged upon the testimony of his long-time friend who was under a grant of immunity.[138] One of the corroborating witnesses for the prosecution was a non-African American eyewitness who identified the defendant as a party at a scene in which the perpetrator was allegedly present.[139]

On cross-examination, the witness admitted that he had trouble identifying African Americans.[140] The defense, without mentioning race, emphasized the unreliability of the witness's identification in the closing argument.[141] The defense then requested that the trial court administer a special jury instruction that addressed the "reliability of cross-racial identification," which the trial judge refused to do.[142]

The Maryland Court of Special Appeals upheld the decision and deferred to the judge's discretion.[143] The Court of Special Appeals noted that while the *Smith* court focused on a defendant's right to use cross-racial identification in closing arguments, it did not impose any duty upon trial judges to use special jury instructions in similar cases.[144] Nonetheless, the Court of Special Appeals suggested that pattern instructions would be helpful[145] and called for the Court of Appeals to provide more guidance over this subject in the future.[146]

III. ANALYSIS

A. Evaluating the Available Remedies

There are four commonly suggested remedies for safeguarding potentially erroneous identifications made between members of different races.[147] Of the four remedies, which include cross-examination, closing arguments, special jury instructions, and expert

137. 891 A.2d 355, 356 (Md. Ct. Spec. App. 2006).

138. *Id.* at 356–57.

139. *Id.* at 357–58.

140. *Id.* at 358.

141. *Id.* at 364, n.1.

142. *Id.* at 359.

143. *Id.* at 367.

144. *Id.* at 365.

145. *Id.* at 368.

146. *Id.* (quoting Smith v. State, 857 A.2d 1198 (Md. 2004) (stating that "it would be helpful if the Court of Appeals provided guidance as to when and under what circumstances" a trial court may discuss cross-racial identifications).

147. *See supra* Part II.a.iii.

testimony, cross-examination is the most likely to be allowed, and expert testimony is the least likely.[148] Because no jurisdiction has imposed criteria for when expert testimony must be used, this discussion will only focus on the other three remedies: cross-examination, closing arguments, and special jury instructions.

Those who oppose the implementation of protective measures with regard to cross-racial identification cases may argue that the defendant has an adequate opportunity to uncover a witness's potential impairment by use of cross-examination.[149] In a case like *Janey v. State*, cross-examination can be very effective, [150] as the defense counsel immediately uncovered the witness's difficulty in identifying African Americans. In simpler cases like *Janey*, where the eyewitness testimony is not the sole charging evidence and the witness has already volunteered that the identification may not be reliable, [151] the defense counsel has adequate means to protect itself from inaccurate testimony.

Smith v. State, however, demonstrates that cross-examinations may serve the opposite of the desired effect.[152] A witness can bolster her credibility with regard to people recognition, and the jurors thus may be influenced to credit the witness with greater reliability than they may have been inclined to credit before. *Smith* permits a defendant to include statements in the closing argument about the potential inaccuracies caused by the other race effect in certain situations.[153] Chief among those situations is when there is a cross-racial identification and the evidence against the defendant is anchored by the witness's volunteered credentials.[154]

The second available remedy for cross-racial identifications involves permitting the defendant's counsel to address the issue of cross-racial identification during closing arguments.[155] *Smith v. State* required judges to allow defendants to reference the potential inaccuracies of cross-racial identifications when an eyewitness voluntarily offers information that bolsters her own ability to distinguish faces.[156] Yet closing arguments may not be the ideal

148. *Id.*
149. *Id.*
150. 891 A.2d 355 (Md. Ct. Spec. App. 2006).
151. *Id.*
152. 880 A.2d 288 (Md. 2005).
153. *Id.*
154. *Id.* at 300.
155. *See supra* Part II.a.iii.
156. *Smith*, 880 A.2d at 300.

solution to the problems of cross-racial identifications; jurors may feel pressured to ignore even the most persuasive arguments addressing cross-racial identifications because of a lack of testimony or other evidence supporting such claims.[157]

Because *Smith* has set criteria in Maryland for situations where judges are required to allow the topic of cross-racial identifications to be addressed in the closing argument, the next logical step is for the courts in Maryland to determine when it should require special jury instructions. Special jury instructions more accurately address issues in cross-racial identifications[158] but are less likely to be accepted by trial judges.[159] In addition, *Smith* permitted special jury instructions to be used to address cross-racial identifications, but did not set guidelines about when they should be used.[160]

B. When the Court Should Use Special Jury Instructions

Although the court in *Smith v. State* failed to rule on the issue of requiring a special jury instruction in cases involving a cross-racial identification, it permitted such instructions to be used.[161] A few jurisdictions already include instructions regarding cross-racial identifications, although only New Jersey has explicitly ruled on when the instruction must be used.[162] Unfortunately, even if Maryland drafted a special jury instruction, it currently lacks guidance as to when it would be appropriate to use this instruction.[163]

Radha Natarajan has proposed a specific test, based on the one adopted in *Manson v. Braithwaite*, for when cross-racial identifications should be admissible as evidence.[164] First, Natarajan suggests that the court ask the degree of other race effect on the witness making the identification.[165] If the degree of the other race effect was low, then the next question is whether there were suggestive procedures.[166] If there were no suggestive procedures, then Natarajan suggests that the

157. Johnson, *supra* note 18, at 957.

158. *See supra* Part II.a.iii.

159. *Id.*

160. *See* Janey v. State, 891 A.2d 355, 367–68 (Md. Ct. Spec. App. 2006) (discussing Smith v. State, 857 A.2d 1198 (Md. 2004)).

161. *Id.*

162. *See supra* note 71 and accompanying text.

163. *See Janey*, 891 A.2d at 368.

164. Natarajan, *supra* note 2, at 1848, Figure B.

165. *Id.* at 1848.

166. *Id.*

eyewitness testimony should be admitted.[167] If there were suggestive procedures, Natarajan suggests that the court should move on to a second question.[168]

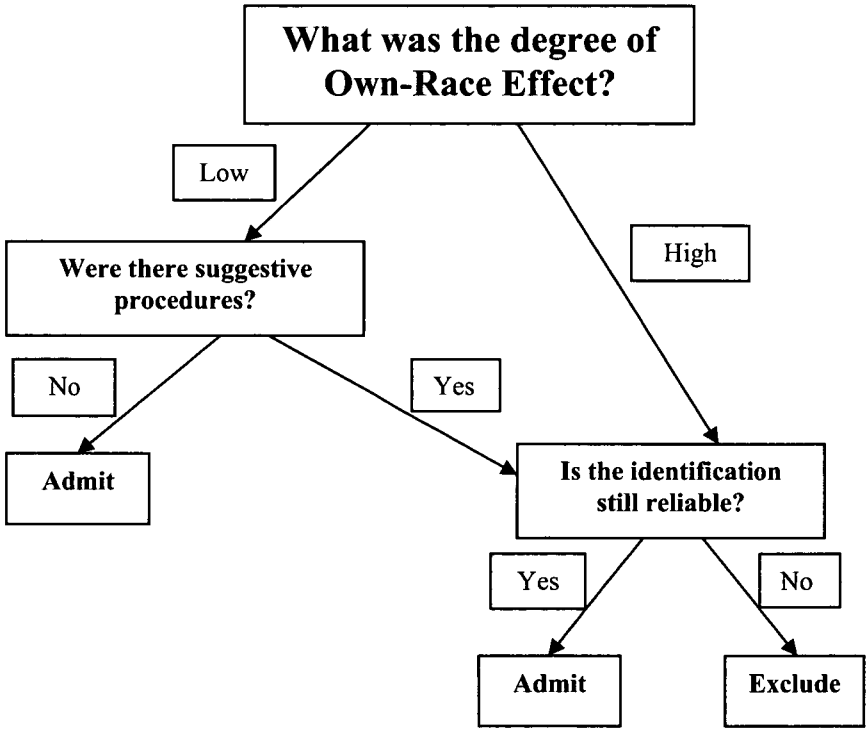

Figure 1. Natarajan's Proposed Test for Admissibility of Cross-Racial Identifications[169]

167. *Id.*
168. *Id.*
169. *Id.*

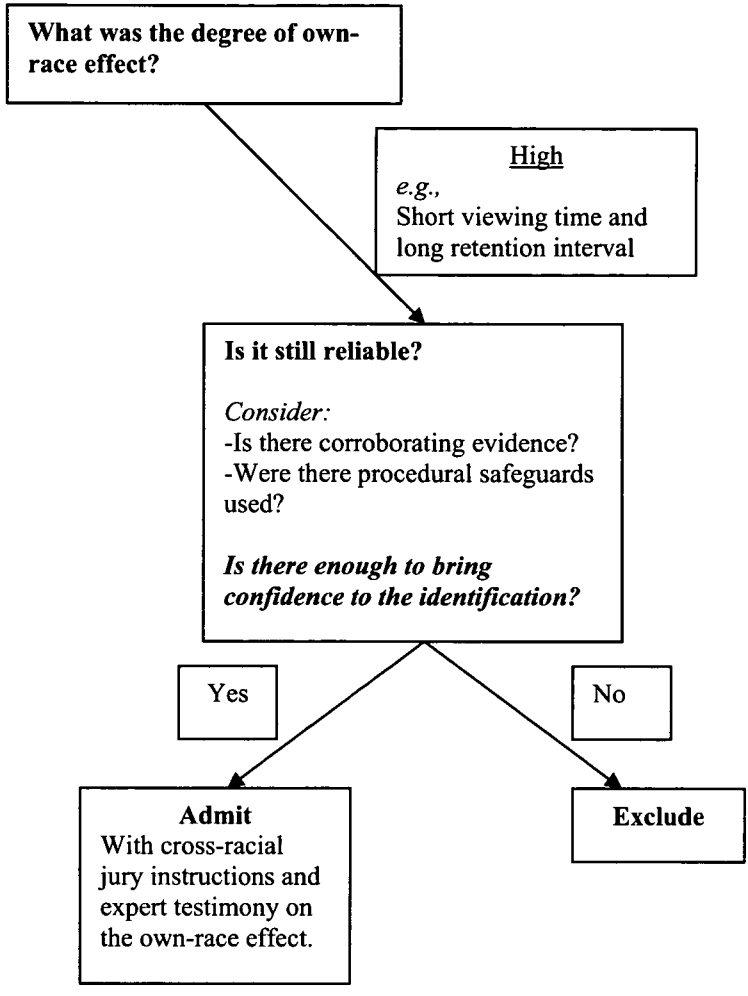

Figure 2. Natarajan's Proposed Test for Admissibility of Cross-Racial Identifications: Focus on When Own-Race Effect is Great

If the degree of other race effect was high, or if there were suggestive procedures involved in the eyewitness testimony, Natarajan suggests the court should ask if the identification is still reliable.[170] If the identification was reliable, the testimony should be admitted.[171] If the identification was not reliable, however, the identification should be excluded as evidence in the case.[172]

170. *Id.*
171. *Id.*
172. *Id.*

This test may be adapted and applied to questions regarding when a special jury instruction should be administered,[173] and it is consistent with recent court decisions in Maryland and other jurisdictions.[174] First, if the degree of other race effect was low and there were no suggestive procedures, then a special jury instruction would not be required.[175] If the degree of other race effect was low, and there were suggestive procedures, such as in *Cromedy* and *Smith*, the issue would qualify for the next part of the test.[176]

The second part of the test holds that if the identification had a high degree of other race effect or if there were suggestive procedures, the court should then ask if the identification was reliable.[177] Cases similar to *Janey v. State*, where the identification was only part of the evidence corroborating another witness's testimony, [178] should not require special jury instructions because the identification was not a critical issue in the case.[179] Identifications in which the victim was terrorized in broad daylight, or when numerous eyewitnesses identified the defendant at close range[180] are also arguably reliable identifications, and also may not require special jury instructions.[181]

State v. Cromedy falls into the fourth category of cases, however. In *Cromedy*, while there may not have been proof to show that there was a high degree of other race effect involved, the identification was suggestive because the jury convicted Cromedy based on the identification.[182] The identification was also unreliable because there was no other evidence to corroborate that the defendant identified was the perpetrator.[183] The Supreme Court of New Jersey held that a special jury instruction was necessary because the jury may have been unable to evaluate the reliability of the witness without the insights of the special instruction.[184]

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173. *Id.* at 1849.

174. *See generally* Janey v. State, 891 A.2d 355 (Md. Ct. Spec. App. 2006); Smith v. State, 880 A.2d 288 (Md. 2005); State v. Cromedy, 727 A.2d 457 (N.J. 1999).

175. *See* Natarajan, *supra* note 2, at 1848.

176. *Id.*

177. *Id.*

178. 891 A.2d 355.

179. *See id.* at 367.

180. *See supra* Part II.a.iii.

181. *See id.*

182. Natarajan, *supra* note 2, at 1844–45.

183. *See id.*

184. State v. Cromedy, 727 A.2d 457, 467 (N.J. 1999).

Along this line of reasoning, the Maryland Court of Appeals also should have required a special jury instruction in *Smith v. State*.[185] Like *Cromedy*, the defense counsel did not offer any evidence that there was a high degree of other race effect that may have influenced the witness.[186] Yet unlike *Cromedy*, the identification in *Smith* was even more suggestive because the witness claimed to possess a skill above normal in recognizing faces.[187] With such information volunteered to the jury, the jurors likely would have had a more difficult time evaluating the reliability of the witness without being educated of the potential identification errors caused by the other race effect. Therefore, the Court of Appeals should have permitted the subject of cross-racial identification in the jury instructions, as it allowed in the closing argument.

C. Wording of the Jury Instructions

Finally, if Maryland elects to formally adopt special jury instructions on cross-racial identifications into its procedures, it must also consider how the instructions should be worded in order to most effectively educate jurors.

There are currently three jurisdictions that have language in their pattern jury instructions that address the problems in cross-racial identifications[188] that Maryland may look to for guidance in constructing its own instruction. The California instruction includes as little as one line, while the New Jersey instruction includes a full paragraph.[189] The North Carolina instruction does not contain specific language in the actual jury instructions, but provides a form for defense counsel to request jury instructions.[190]

The California instruction hardly seems to sufficiently educate a juror of an issue of which 58% of laymen have an incorrect understanding.[191] Meanwhile, the New Jersey instruction is more complete than Judge Bazelon's suggested instruction in *United States v. Telfaire*.[192] Although it does not convey any psychological data, the New Jersey instruction frames the cross-racial identification issue in a

185. Smith v. State, 880 A.2d 288 (Md. 2005).
186. *Id.* at 291.
187. *Id.* at 300.
188. *See supra* notes 100–103 and accompanying text.
189. *See supra* notes 100–102 and accompanying text.
190. *See supra* note 103 and accompanying text.
191. *See supra* note 50 and accompanying text.
192. 469 F.2d 552 (D.C. Cir. 1972).

fairly neutral manner and does not state any inaccurate information.[193] If Maryland intends to adequately pursue the formulation of a specific pattern jury instruction for cross-racial identifications, it should aim to follow the pattern of New Jersey, despite its relative verbosity.

Maryland may also consider including psychological data in its jury instruction; although in doing so, it must also maintain neutrality.[194] The inclusion of psychological data would not only make the Maryland instructions more complete than the instructions of the other three jurisdictions, but may also encourage other states to include similar language. While opponents of such an instruction may criticize this wording for both its verbosity and focus on one source of identification error,[195] the benefits of such an instruction would outweigh these concerns.

IV. CONCLUSION

The Court of Appeals of Maryland undertook great responsibility in following New Jersey and recognizing the right of a defendant to the other race effect theory argument when a cross-racial identification is a critical element of the case. With that responsibility comes the expectation that the Court of Appeals will continue to provide guidance to its lower courts and courts in other jurisdictions as to when courts should be required to allow defendants to protect themselves from potentially erroneous cross-racial identifications. While the decision of the Court of Special Appeals in *Janey v. State* permitted the use of special jury instructions, Maryland's highest court has yet to break its silence on how and when this measure is to be used.[196] However, with the opening that the Court of Appeals provided in *Smith v. State*, this is an issue that the Court of Appeals will hopefully resolve in the near future.

193. *See* Johnson, *supra* note 18, at 976 (noting that one criticism of Judge Bazelon's suggested instruction is that it "conveys inaccurate information by suggesting that the own-race effect may not operate where the witness has had interracial experiences").

194. *See supra* Part II.a.iii.

195. *See id.*

196. *See supra* Part II(b) (stating the various legal developments in Maryland on the subject of cross-racial identification).