

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO HOUSE OF DELEGATES

RECOMMENDATION

1 **RESOLVED**, That the American Bar Association urges federal, state, local, and
2 territorial jurisdictions to recognize that in particular cases cross-racial identification may
3 increase the risk of erroneous conviction.

4
5 **FURTHER RESOLVED**, That the American Bar Association urges federal, state, local,
6 and territorial jurisdictions to seek to assure that, in cases which the trial judge finds a
7 sufficient risk of misidentification based on cross-racial factors, expert testimony that
8 satisfies the applicable rules of evidence is admissible, adequate funding is available to
9 enable both the government and indigent defendants to obtain such testimony, and trial
10 judges have available model jury instructions that inform juries of all of the factors that
11 may enhance or detract from the reliability of an eyewitness identification, one of which
12 may be the cross-racial nature of the identification.

REPORT^{N.B.}**Discussion of Proposed Resolution**

The issue of mistaken eyewitness identification and the increased risk of cross-racial eyewitness identification is a serious problem in the United States. Thirty years of social science research and the available information on more than 200 wrongfully convicted persons exonerated through DNA evidence by The Innocence Project – a national organization dedicated to exonerating wrongfully convicted persons through DNA testing – provide very strong evidence to support this conclusion. A jury instruction on cross-racial identification sensitizes jurors to consider whether the fact that the defendant is of a different race than the identifying witness has affected the accuracy of the identification. Jurors are more apt to comfortably discuss racial differences with such an instruction.

Research results vary but they show a generally consistent pattern. Persons of one racial group may have greater difficulty distinguishing among individual faces of persons in another group than among faces of persons in own group. Persons who primarily interact within their own racial group, especially if they are in the majority group, will better perceive and process the subtlety of facial features of persons within their own racial group than persons of other racial groups. In terms of personal experience, who has never heard the phrase, “they all look alike to me”?

The issue is becoming of greater importance in many urban areas of the United States that continue to receive an influx of immigrants from countries around the world. For example, the Federal Emergency Management Agency (FEMA) reported that from August 1 through October 31, 2004, for all presidentially declared disasters, its partner, Language Line Services, provided services for 31,985 calls. Their translators handled calls in 55 different languages, including Akan (Ghana), Bengali (Bangladesh), Chamorro (Guam), Creole (Haiti), Farsi (Iran), Hausa (Nigeria), Ilocano (Philippines), Krio (Sierra Leone), Nuer (Sudan), Urdu (Pakistan), and Visayan (Philippines). See <http://www.fema.gov/news/newsrelease.fema?id=15381> (site visited 4-30-08).

There is a need to take prophylactic action on the front-end rather than take action many years down the road when mistakenly identified persons have served time in prison. The exonerations by DNA evidence - not available in most cases – suggest that

^{N.B.} This report is based, in part, on an article by David E. Aaronson, Professor of Law and B.J. Tennyer Scholar, Washington College of Law, American University, who is Co-Chair, ABA Criminal Justice Section, Committee on Rules of Criminal Procedure, Evidence, and Police Practices: “Cross-Racial Identification of Defendants in Criminal Cases: A Proposed Model Jury Instruction,” 23 *Criminal Justice* 4 (ABA, Spring, 2008).

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one or more other persons usually committed the crime. The true perpetrators remained in the community as a threat to public safety. But since DNA evidence may not be available in many ordinary routine cases, it is more important to consider giving a cross-racial identification jury instruction when the identification is the critical evidence controlling whether there will be a conviction or not, and, if the person is convicted, he or she might never be exonerated, even though actually innocent.

This proposal is an effort to improve the quality of justice at the adjudication stage. The Committee believes that this proposal should not be viewed as being “soft on crime,” nor is it an attack on the prosecution. If properly implemented, it should be viewed as an aid to prosecution by focusing on the issue of correct identification at the front end at the very time of trial. If a defendant is, in fact, acquitted, the police can return to an investigation much sooner to apprehend the true offender in the case.

The Resolution does not mandate that judges give a cross-racial jury instruction. The first paragraph of the Resolution recommends that trial judges should have the discretion to give an instruction on cross-racial identification in certain cases where there is a heightened risk of misidentification. Case law discussed in this report suggests that these circumstances are very limited and that the instruction would not be frequently given. In *New Jersey v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999) the court held that “...a cross-racial instruction should be given only when, as in the present case, identification is a critical issue in the case, and an eyewitness’ cross-racial identification is not corroborated by other evidence giving it independent reliability.”

Some who oppose giving trial judges the discretion to give a cross-racial jury instruction contend that, if a jury is to be given any information about the cross-racial nature of the identification, an expert witness is preferable to a cross-racial jury instruction. The prosecutor, then, has an opportunity to cross-examine the expert about what is known and is not known about the so-called cross-race effect. The Committee supports the use of expert testimony where resources are available. It recommends that jurisdictions take a careful look at the problem of cross-racial eyewitness misidentification and come-up with a range of approaches. The wording of the second paragraph of the Resolution provides a broad authorization for “procedures” with procurement and use of expert witnesses and developing model jury instructions being but two of such procedures. Jurisdictions are encouraged to consider other procedures which could include, for example, appointment of Task Forces and Commissions to study the scope of the problem, to provide for judicial training seminars on the issue to their judges, and in other ways to be innovative.

The Committee, however, opposes exclusive reliance on expert witnesses for the following reasons: First, there are only a relatively small number of persons qualified to testify as expert witnesses on cross-racial identification in the United States. An experienced criminal lawyer member of the Council of the ABA Criminal Justice Section Council recently stated that there are less than a handful of such experts in Los Angeles, California, and that no expert witnesses are available in many rural areas. Second, most

persons accused of crime are indigent, especially those involved in street crime. There is insufficient funding to provide expert witnesses to most indigent defendants who need them, especially when there is a problem in many States of having adequate funds to pay attorneys even to represent the indigent accused. Third, appellate courts in some states have held that expert eyewitness identification evidence is inadmissible. In other jurisdictions, trial judges have exercised their discretion to prohibit expert testimony. In *Maine v. Kelly*, 752 A2d 188 (Me. 2000), the trial judge instructed the jury that it could consider whether race had any bearing on the reliability of the identification, but denied expert testimony on the basis that the testimony would not be helpful. As a practical matter, prosecutors often oppose the admissibility of expert witnesses when proffered by the defense. Fourth, expert testimony usually requires the judge to give an instruction explaining to the jury how to handle this testimony, which, in effect, becomes a cross-racial identification jury instruction.

Opponents of a cross-racial jury instruction also argue that it is impossible to know in an individual case whether the cross-racial identification actually had an effect on the identification. Other standard jury instructions are not subject to this requirement. For example, jurors are usually instructed that they should evaluate the testimony of an accomplice “with caution” or suspicion. There is no way to know in an individual case whether an accomplice is lying or not. In addition, jurisdictions may select which jury instruction language they prefer. They may adopt cross-racial jury instruction language that tells the jury that they don’t have to consider the cross-racial effect in every case, but they should bear it in mind as a possibility.

The Committee’s resolution leaves the wording of a cross-racial jury instruction to the courts in each jurisdiction to select the language that they conclude is most appropriate. The next section provides the language of six (6) different jury instructions on cross-racial identification that jurisdictions may want to consider.

Various Jury Instructions on Cross-Racial Eyewitness Identification

1. Recommended Instruction of the ABA Criminal Justice Section’s Committee on Rules of Criminal Procedure, Evidence, and Police Practices

The Committee recommends the following proposed model jury instruction on cross-racial identification for use in appropriate cases:

In this case, the identifying witness is of a different race than the defendant. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness’ original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.

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You may also consider whether there are other factors present in this case which overcome any such difficulty of identification. [For example, you may conclude that the witness had sufficient contacts with members of the defendant's race that [he] [she] would not have greater difficulty in making a reliable identification.]

The proposed jury instruction draws on the language of various Federal and state jury instructions, especially *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972) and *New Jersey v. Cromedy*, 727 A.2d 457 (N.J. 1999).

2. "Telfaire" Jury Instruction

United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972) (Bazelon, C. J., concurring)

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 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.

3. California Jury Instruction

California Jury Instruction No. 2.92 includes the cross-racial instruction in a short "laundry list" of items that may be considered. The California jury instruction states:

Eyewitness testimony has been received in this trial for the purposes of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given to eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:

. . . The cross racial [or ethnic] nature of the identification. . . .

CALJIC No. 2.92 (7th ed. 2003) (emphasis added).

4. Utah Jury Instruction

You should also consider whether the witness is of a different race than the criminal actor. Identification by a person of a different race may be less reliable than identification by a person of the same race.

State v. Long, 721 P.2d 483, 494-95, n.8. (Utah 1986)

5. New Jersey Jury Instruction – “Cromedy” Instruction

[T]he 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 identifying members of a different race.

New Jersey v. Cromedy, 727 A.2d 457 (N.J. 1999); *New Jersey Model Criminal Jury Charges*, 2002 WL 32976451 (Revised Oct. 1999).

6. Massachusetts Jury Instruction

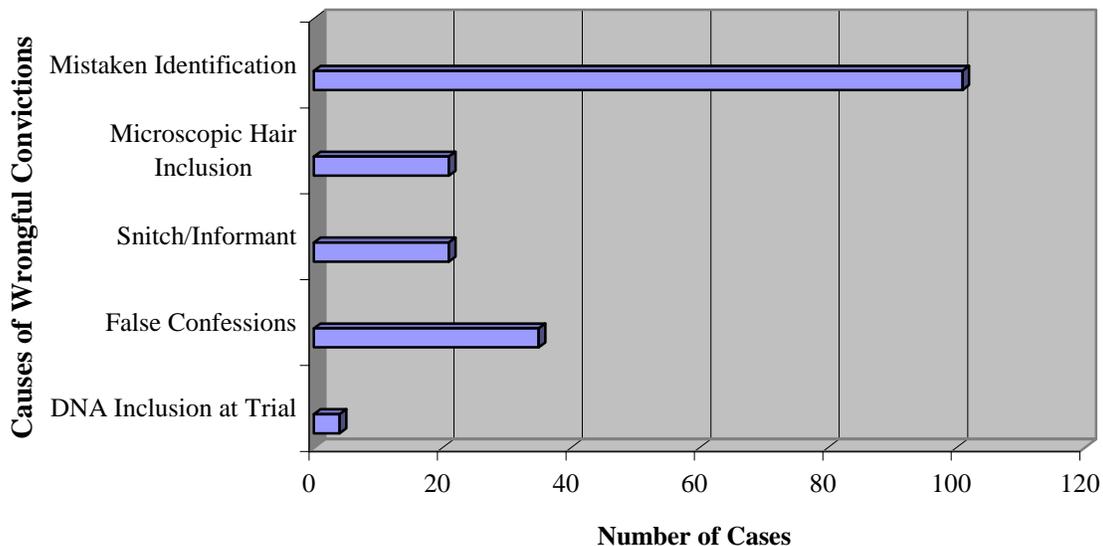
In this case, the defendant is of a different race than the race of the witness who has identified [him][her]. You may consider this fact and whether identification of the defendant by a person of a different race from [his][her] race may be less reliable than identification of a person of the same race as [his][hers].

See, e.g., *Commonwealth v. Hyatt*, 647 N.E.2d 1168, 1171 (Mass. 1995); *Commonwealth v. Ingram*, 686 N.E.2d 1080, 1082 (Mass. App. 1997).

The Nature and Seriousness of the Problem of Cross-Racial Eyewitness Misidentifications

Approximately three-quarters of the more than 200 wrongful convictions in the United States overturned through DNA testing resulted from eyewitness misidentifications. Of that 77 percent, where race is known, 48 percent of the cases involved cross-racial eyewitness identifications. (*See Innocence Project Fact Sheets, Eyewitness Misidentification and Facts on Post-Conviction DNA Exonerations*, at <http://www.innocenceproject.org>).

Causes of Wrongful Convictions (First 130 DNA Exonerations)



(Based on Barry Scheck, Peter Neufeld, & Jim Dwyer, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* 365 (2003).)

Eyewitness identifications are often reliable and persuasive evidence. Yet 30 years of social science research and the contributions of the Innocence Project, a national organization dedicated to exonerating wrongfully convicted persons through DNA testing, have shown that erroneous eyewitness identifications are the single greatest cause of wrongful convictions nationwide.

Traditional trial protections of suppression hearings, *voir dire*, cross-examination of witnesses, closing arguments, and jury instructions on the credibility of witnesses and evaluation of eyewitness testimony do not adequately address the special recognition impairments often present in cross-racial eyewitness identifications. Abshire and Bornstein state that “[m]uch of the reason for juries’ erroneous convictions based on faulty eyewitness identifications is that jurors are not very sensitive to the factors that determine eyewitness accuracy.” (See Jordan Abshire and Brian H. Bornstein, *Juror Sensitivity to the Cross-Race Effect*, 27 *LAW & HUM. BEHAV.* 471 (2003).) The additional protection of a cross-racial jury instruction is needed, as stated by Johnson, “because the own-race effect strongly influences the accuracy of identification, because that influence is not understood by the average juror, because cross-examination cannot reveal its effects, and because jurors are unlikely to discuss racial factors freely without some authorization to do so.” (See Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 *CORNELL L. REV.* 934, 982 (1984).)

The Need for a Jury Instruction on Cross-Racial Identification

The purpose of a specific jury instruction on cross-racial identification is to permit juries to consider the increased possibility of misidentification in determining whether or not there is sufficient evidence of guilt.

Research shows that persons of one racial or ethnic group may have more difficulty distinguishing among individual faces of another group than among faces of their own group. An inaccurate identification due to this so-called “own race” effect may result in higher wrongful conviction rates when defendants are of different races than the witnesses who identify them. Elizabeth F. Loftus, James M. Doyle, and Jennifer E. Dysart, *Eyewitness Testimony: Civil and Criminal* 103 (4th ed. 2007), state: “It is well established that there exists a comparative difficulty in recognizing individual members of a race different from one’s own”. (See e.g., Roy S. Malpass & Jerome Kravitz, *Recognition of Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOL. 330, 333 (1969); Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972, (1988).) Studies show that persons who primarily interact within their own racial group, especially if they are in the majority group, will better perceive and process the subtlety of facial features of persons within their own racial group than persons of other racial groups. (See Johnson, *supra*, at 934; see also Otto H. Maclin, *Racial Categorization of Faces*, 7 PSYCHOL. PUB. POL’Y & L. 98 (2001).)

A classic study by psychologists Roy Malpass and Jerome Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. Personality & Social Psychol. 330-34 (1969), compared recognition and memory of identification of persons among students at Howard University, a predominantly black university, and the University of Illinois, a predominantly white university. Photographs of black and white males were shown to the students and later the subjects were tested. Subjects recognized faces of their own race better than faces of the other race. A striking finding was that white subjects from Howard University made two to three times as many false identifications when attempting to identify black faces than when attempting to identify white faces.

Since the study by Malpass and Kravitz, many other studies “have been conducted with slightly different results from one study to another but with a generally consistent pattern”. Loftus, Doyle and Dysart, *supra*, at 103. (See also Christian A. Meissner and John C. Brigham, “*Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*,” 7 Psychol. Pub. Policy & L. 3 (2001)). The studies show not only a greater difficulty in recognizing faces of another race, but members of one race also have more difficulty reconstructing faces of other races. *Id.*

Studies and collected data indicate that this “own race” effect applies across racial groups: Caucasians, African Americans, Asian Americans and Latino Americans are better able to recognize members of their own race than members of another race.

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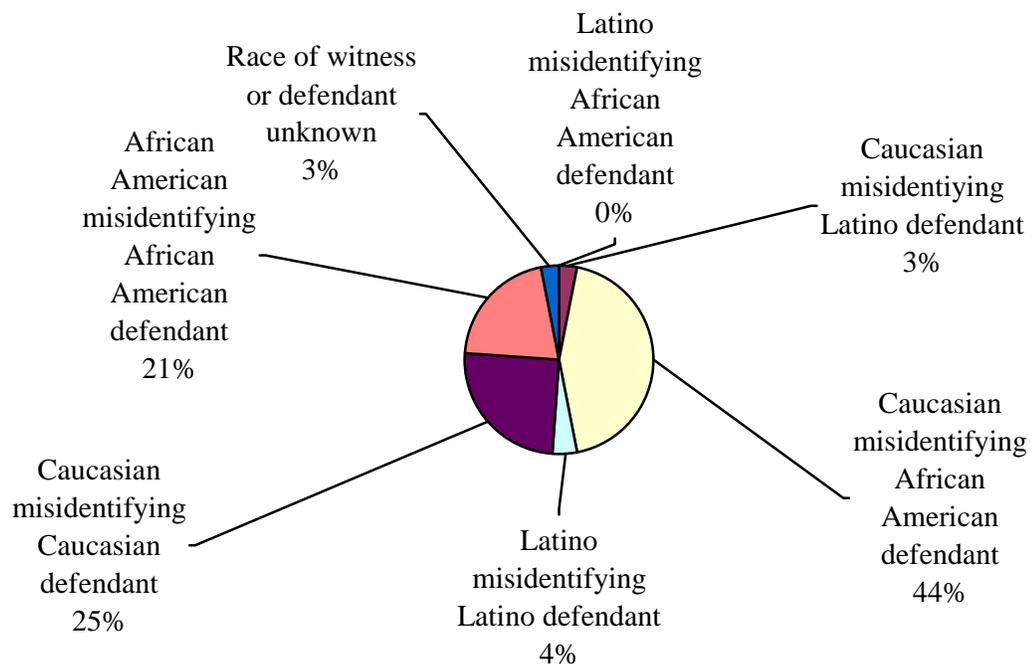
For example, one study found that both Japanese and Chinese Americans are significantly better at recognizing Asian faces than African American faces and are also better at recognizing African American faces than white faces. (See Terrence S. Luce, *The Role of Experience in Inter-Racial Recognition*, 1 PERSONALITY & SOC. PSYCHOL. BULL. 39, 40 (1974).) The study also reported that Japanese Americans are only marginally better at recognizing Japanese American faces than Chinese Americans faces, and the reverse is equally consistent for Chinese Americans recognizing Japanese American faces. (*Id.*)

For a more extensive analysis of recent empirical studies relating to the accuracy of cross-racial identifications, see:

- Gary Wells, *Eyewitness Identification: Systematic Reforms*, 2006 WISC. L. REV. 615 (2006)
- Sam R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005)
- Christian A. Meissner & John A. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POLICY & L. 3 (2001)
- American Psychology Association, Symposium Issue, *The Other Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making*, 7 PSYCHOL. PUB. POLICY & L. 3 (2001)
- Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 PSYCHOL. PUB. POL'Y & L. 36 (2001)

A recent ABA report concluded: “Cross-racial identifications are generally inferior to within-race identifications.” (Report of the ABA Criminal Justice Section’s Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 30 (2006).)

Comparison of Cross-Racial and Same-Race misidentifications



(Based on the first 74 exonerations resulting from DNA analysis. See Barry Scheck, Peter Neufeld, & Jim Dwyer, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* 366 (2003)).

Why do persons of one racial group generally have greater difficulty identifying persons of another racial group than among faces of their own group? Loftus, Doyle and Dysart, *supra*, 105, state:

Many possible explanations of the cross-racial effects have been offered: for example, the effects are due to differential experience with members of a different race, to prejudicial attitudes about members of different races, or to different modes of processing faces of another race. These have been thoroughly reviewed. The best explanation seems to be that people make more mistakes on a cross-racial identification for a number of reasons, including, but not limited to, the amount of contact with persons from other racial groups, the amount of attention paid to other-race persons, and time spent encoding features that are less useful in discriminating people from other groups. (footnotes omitted)

The research on cross-ethnicity identification is less clear-cut. At least one state supreme court, authorizing a cross-racial jury instruction in certain situations, has held that studies on cross-*ethnicity* identification—as opposed to studies of cross-*racial* identification—do

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not provide enough support to warrant a specific jury instruction. (*See State v. Romero*, 922 A.2d 693, 700 (N.J. 2007).)

Case Law Discussion - Jurisdictions that Authorize the Use of a Cross-Racial Identification Jury Instruction

Federal jurisdictions

In *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), the D.C. Circuit affirmed the defendant's conviction when the trial court refused, in the absence of a request, to give a special instruction on identification finding that the witness had an adequate opportunity to observe the defendant. (*Id.* at 555-556.) The court went on to create a model identification instruction to deal with the shortcomings in the identification process, though this instruction omitted consideration of the races of the defendant and the witness. (*Id.* at 557-560.) To address this deficiency, Chief Judge David L. Bazelon in a concurring opinion stressed the problems surrounding cross-racial identifications and advocated for the addition of the following language to the court's model identification instruction:

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 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.

(*Id.* at 561.) (Bazelon, C. J., concurring)

Most circuits have approved the recommended model identification instruction, but not the specific instruction on cross-racial identification in Judge Bazelon's concurring opinion.

In *United States v. Cannon*, 26 M.J. 674 (1988), the Air Force Court of Military Review held that the refusal of the trial court to give the requested instruction on cross-racial identification by eyewitnesses was reversible error because identification was a primary issue and defense counsel requested a cross-racial jury instruction. In *United States v. Thompson*, 31 M.J. 125 (1990) and *United States v. McLaurin*, 22 M.J. 310 (1986), the Court of Military Appeals affirmed the convictions but noted approval of Judge Bazelon's concurring opinion in *Telfaire* in cases where defense counsel requests the instruction and cross-racial identification is a primary issue in the case.

State Jurisdictions

A few state appellate courts either require or authorize a cross-racial identification jury instruction. Listed in chronological order, the jurisdictions are: California, Utah, New Jersey, and Massachusetts. Maryland's appellate court upheld the refusal to give a jury instruction on cross-racial identification, but stated that such an instruction may be appropriate under different facts. Most state appellate courts have yet to address this issue.

California: California Jury Instruction No. 2.92 includes the cross-racial instruction in a short “laundry list” of items that may be considered. The California jury instruction states:

Eyewitness testimony has been received in this trial for the purposes of identifying the defendant as the perpetrator of the crime[s] charged. In determining the weight to be given to eyewitness identification testimony, you should consider the believability of the eyewitness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:
 . . . *The cross racial [or ethnic] nature of the identification.* . . .

(CALJIC No. 2.92 (7th ed. 2003) (emphasis added).)

People v. Palmer, 154 Cal. App. 3d 79 (Cal. Ct. App. 1984), is an example of a case in which the California Court of Appeal reversed a robbery conviction based solely on eyewitness identifications of uncertain reliability. The court held on retrial that the defendant would be entitled to an instruction that included, as one factor, the cross-racial nature of the identifications.

Utah: In 1986, the Utah Supreme Court abandoned the discretionary approach and mandated trial courts to give the instruction whenever eyewitness identification is a central issue and is requested by the defense. (*See State v. Long*, 721 P.2d 483, 492 (Utah 1986).) The Utah court stated that a well-constructed cautionary jury instruction would pinpoint identification as a central issue, and highlight the factors that bear on its reliability. Furthermore, a cautionary instruction must “respect the jury’s function and strike a reasonable balance between protecting the innocent and convicting the guilty.” (*Id.*) The *Long* court noted that a proper instruction sensitizes the jury to external and internal or subjective factors that empirical research has shown to be important in determining the accuracy of eyewitness identifications. The Utah Supreme Court indicated that the following instruction would “certainly satisfy our expressed concerns about the need for cautionary instructions:”

You should also consider whether the witness is of a different race than the criminal actor. Identification by a person of a different race may be less reliable than identification by a person of the same race.

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(*Id.* at 494-95, n.8.)

New Jersey: The New Jersey instruction provides more specificity than the California instruction. New Jersey permits the jury to consider the following specific factors in an appropriate case:

[T]he 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 identifying members of a different race.

(New Jersey Identification Instruction: In-Court and Out of Court Identification, *New Jersey Model Criminal Jury Charges*, 2002 WL 32976451 (Revised Oct. 1999).)

See *New Jersey v. Cromedy*, 727 A.2d 457 (N.J. 1999), for an example of a case in which the use of a cross-racial jury instruction should be considered.

New Jersey also has permitted cross-racial jury instructions in other cases. (*See, e.g.*, *State v. Dixon*, 787 A.2d 211 (N.J. 2001) (permitting cross-racial instruction after defense request); *State v. Robinson*, 754 A.2d 1153 (N.J. 2000) (endorsing charge enumerating several factors a jury may need to consider, including cross-racial factors).)

Massachusetts: Although Massachusetts does not require the instruction to be given, the Appeals Court of Massachusetts has held that “a judge should consider a request for such an instruction with a measure of favorable inclination to grant it.” (*See Commonwealth v. Jean-Jacques*, 712 N.E.2d 1150, 1152 (Mass. App. 1999); *see also Commonwealth v. Hyatt*, 647 N.E.2d 1168, 1171 (Mass. 1995) (“[T]he giving of a [cross-racial jury] instruction may be appropriate in the judge’s discretion.”).) .” Massachusetts courts have approved of the following instruction:

In this case, the defendant is of a different race than the race of the witness who has identified [him][her]. You may consider this fact and whether identification of the defendant by a person of a different race from [his][her] race may be less reliable than identification of a person of the same race as [his][hers].

(*See, e.g.*, *Hyatt*, 647 N.E.2d at 1171; *Commonwealth v. Engram*, 686 N.E.2d 1080, 1082 (Mass. App. 1997).)

Maryland: In 2004, the Maryland intermediate appellate court, the court of special appeals, in *Smith v. State*, 857 A.2d 1198 (Md. App. 2004), affirmed the conviction of the defendant, an African American man, of attempted robbery and related

offenses, based on the identification and testimony of the victim, a Caucasian woman. At trial, the defendant's counsel requested Chief Judge Bazelon's jury instruction on cross-racial identification from his concurring opinion in *Telfaire*. The trial court refused to give the instruction, instead instructing the jury on the shortcomings of eyewitness identification in general. (*Id.* at 1202.)

In reviewing the trial record, the court of special appeals noted that the victim had significant opportunity to observe the defendant at the time of the crime and gave the police a detailed description immediately afterwards. (*Id.* at 1202-1205.) At trial, the victim stated that she was "extremely good with faces." (*Id.* at 1206.) The victim, an artist and teacher, lived in a mixed-race neighborhood and had the ability to focus on facial features. The jury heard the victim cross-examined and could find her credible as an observer of human faces. (*Id.* at 1216, 1218.) The court held that the evidence did not indicate that the victim had problems distinguishing the faces of different African Americans and, therefore, the trial court did not abuse its discretion both in refusing to give a specific jury instruction on cross-racial identification and in rejecting the defendant's claim that the cross-racial identification required special emphasis in closing argument. (*Id.*)

Maryland's highest court, the court of appeals, reviewing the decision of the court of special appeals, held that the trial court did not abuse its discretion in this case, but given another set of facts, it may be appropriate for a trial court to give an instruction on cross-racial identification. (*See Smith*, 880 A.2d at 299-300.) The court held, however, that the trial court erred in prohibiting defense counsel from commenting on the cross-racial identification in its closing argument, (*see id.* at 299), stating that "[g]enerally, counsel has the right to make any comment or argument that is warranted by the evidence proved or the inferences therefrom." Because the victim's identification of the defendant was anchored in her "enhanced ability" to identify faces, the defense counsel's request to discuss the problems that arise as a result of cross-racial identification should have been allowed. (*Id.* at 300.)

Other issues

Should a preliminary showing be required of an increased risk of error due to cross-racial factors?

Should courts require defense counsel to elicit information to determine the level of contact and familiarity of the witness with persons of the defendant's race as a condition of giving the suggested jury instruction? When requesting the cross-racial identification instruction, some courts have required a preliminary showing of a risk that the witness may have been mistaken due to cross-racial factors. (*See e.g.*, *Murrell v. Indiana*, 747 N.E.2d 567 (Ind. Ct. App. 2001); *Miller v. State*, 759 N.E.2d 680 (Ind. Ct. App. 2001) (affirming trial court's denial to give the instruction absent a showing of a specific risk that the witnesses were mistaken due to cross-racial factors).) In *Miller v. State*, the Indiana Court of Appeals held that the defense's requested jury instruction

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regarding cross-racial identification improperly singled out the eyewitness testimony. (*See Miller*, 759 N.E.2d at 684). The court further held that the cross-racial instruction was adequately covered by the general instruction regarding eyewitness identification. (*See id.*)

Should courts permit expert witnesses to testify on factors affecting the risk of mistaken cross-racial identification?

Those who favor the admissibility of expert testimony argue that it is crucial to the deliberative process that jurors are educated on the potential errors in cross-racial identifications. Jurors are more apt to comfortably discuss racial differences without fear of discord in the jury room when they have received testimony from an expert considering the possible influence of racial differences as affecting the accuracy of the identification. Also, they argue that the possibility of error in cross-racial identifications is not within the ordinary knowledge of many jurors. (*See, e.g., People v. Beckford*, 532 N.Y.S.2d 462, 465 (S. Ct. Kings Cty. 1988).)

In *Brodes v. State*, 551 S.E.2d 757, 759 (Ga. Ct. App. 2002), the Georgia Court of Appeals stated that expert testimony would have aided the jury in evaluating the reliability of the identification because the expert would have testified about factors affecting the accuracy of the identification. The court suggested that those factors were highly relevant in the case, which involved cross-racial identifications by victims at gunpoint. The court also stated that producing an expert was the only way to present the proffered empirical evidence to the jury. (*Id.* at 759; *see also Beckford*, 532 N.Y.S.2d at 465.)

On the other hand, in *State v. Coley*, 32 S.W. 3d 831 (Tenn. 2000), the Supreme Court of Tennessee held that expert testimony concerning eyewitness identification is *per se* inadmissible because the reliability of eyewitness identification is within the common understanding of jurors aided by skillful cross-examination and an appropriate jury instruction. (Also, the court held that Tennessee Rule of Evidence 702, requiring that expert testimony be admissible only if it “substantially” assists the trier of fact, requires “a greater showing of probative force than the federal rules of evidence or the rules of evidence from those states that have followed the federal rules, making the *per se* exclusion appropriate.” (*Id.* at 838.))

Opponents of expert witness testimony argue that expert testimony is not needed on the cross-racial identification issue because it is not too complicated an issue and jurors are able to understand and apply the judges’ instructions. Deborah Bartolomey, deputy attorney general in the Criminal Division of the New Jersey Attorney General’s Office, argues that experts may be costly for defendants, confuse the jury rather than clarify the issues, and take up time. (*See Deborah Bartolomey, Cross-Racial Identification of Testimony and What Not to Do About It*, 7 PSYCHOL. PUB. POL’Y & L. 247, 252 (2001).) A principal drawback of the use of expert witnesses is the lack of their availability, especially for indigent defendants.

Some courts prefer a cross-racial instruction to expert testimony: “We believe that the problem can be alleviated by a proper cautionary instruction to the jury which sets forth the factors to be considered in evaluating eyewitness testimony.” (*See* *Maine v. Kelly*, 752 A.2d 188 (Me. 2000) (the trial judge instructed the jury that it could consider whether race had any bearing on the reliability of the identification, but denied expert testimony on the basis that the testimony would not be helpful).) In *Cromedy*, the New Jersey court held that the defendant was entitled to a cross-racial jury instruction, but not entitled to expert testimony. (*See* *State v. Cromedy*, 727 A.2d at 467-468.)

Conclusion

DNA exonerations resulting from work of the Innocence Project, supplemented by decades of scientific research, dramatically spotlight eyewitness misidentification as the leading cause of wrongful convictions in the United States. A high percentage of these cases involve cross-racial misidentifications. There is widespread consensus supported by a substantial body of evidence that persons are less able to recognize faces of a different race than their own. Cross-racial identifications are generally inferior to within-race identifications.

A specific jury instruction on cross-racial identification sensitizes jurors to consider whether the fact that the defendant is of a different race than the identifying witness has affected the accuracy of the identification. Jurors are more apt to comfortably discuss racial differences with such an instruction. A cross-racial jury instruction is needed most in the following circumstances: (1) identification is the critical issue in the case; (2) little or no evidence corroborating eyewitness evidence is presented; and (3) the circumstances raise doubts about the reliability of the identification.

When loss of liberty and, possibly, the life of a human being are at stake, the additional safeguard of a jury instruction on cross-racial identification is an important tool to help protect against the heightened risk of eyewitness misidentification and wrongful conviction. A jury instruction specifically tailored to safeguard against cross-racial identification errors should serve to enhance fairness and confidence in the criminal justice system.

Respectfully submitted,

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