RACIALIZED MEMORY AND RELIABILITY: DUE PROCESS APPLIED TO CROSS-RACIAL EYEWITNESS IDENTIFICATIONS

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Currently, defendants accused of a crime based on a cross-racial eyewitness identification are not afforded due process under the United States Constitution. In Manson v. Brathwaite, the Supreme Court developed a test to govern admissibility standards for eyewitness identification evidence. The test relies on the assumption that erroneous convictions occur mainly because police obtain identifications through procedures that improperly suggest whom the eyewitness should choose. While this assumption may be true for same-race identifications, cross-racial identifications present a further problem. Scientists agree that people are far better at recognizing members of their own race than they are at recognizing members of another race and that this own-race bias causes mistaken identifications. In fact, according to studies, a Black innocent suspect has a 56% greater chance of being misidentified as the perpetrator by a White eyewitness than a Black eyewitness, even without suggestiveness. In order to ensure compliance with the Due Process Clause in cases involving cross-racial identifications, a new admissibility test must account for the racialized nature of memory. In this Note, Radha Natarajan develops an alternative test for cross-racial eyewitness identification evidence that is consistent with constitutional guarantees and scientific reality.

INTRODUCTION

Eyewitness testimony[1] plays a vital role in the prosecution of

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[1] An eyewitness identification is the confrontation in which an eyewitness to a crime—often the victim—views and recognizes a suspect as having committed that crime. The confrontation can be in the form of a "lineup," where the person whom the police suspect is guilty (the target) is placed with others who resemble him (fillers) and the witness is asked whether she recognizes anyone as the perpetrator. Police can also use "showups," where the eyewitness only views the suspect, and photographic arrays, in which the suspect's picture is placed with the pictures of other "similar-looking" people. These identifications occur when the witness is not able to name or locate the perpetrator because the perpetrator is a stranger. See, e.g., Christopher Slobogin, Criminal Procedure: Regulation of Police Investigation 463, 477 (3d ed. 2002).

crimes in the United States.[2] More than seventy-seven thousand suspects face indictment based on eyewitness identification evidence each year.[3] Yet, much of this evidence is faulty.[4] In a study by the U.S. Department of Justice of twenty-eight cases in which appellate courts overturned felony convictions, over eighty-five percent of the original convictions were based primarily on erroneous eyewitness identifications.[5] And the Supreme Court has noted that "the annals of criminal law are rife with instances of mistaken identifications."[6]

While all eyewitness identifications are prone to error,[7] cross-racial eyewitness identifications are more often wrong than same-race identifications.[8] Evidence from the Innocence Project[9] suggests that

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2 See Otto H. MacLin & Roy S. Malpass, Racial Categorization of Faces: The Ambiguous Race Face Effect, 7 Psychol. Pub. Pol'y & L. 98, 98 (2001) ("Eyewitness identification is considered one of the most important methods in apprehending criminals, is considered direct evidence of guilt, and is accorded a high degree of importance by juries." (citations omitted)); see also Ronald J. Allen et al., Constitutional Criminal Procedure 365 (3d ed. 1995) ("Eyewitness testimony is often crucial to the outcome of criminal litigation . . . ."); James M. Doyle, Discounting the Error Costs: Cross-Racial False Alarms in the Culture of Contemporary Criminal Justice, 7 Psychol. Pub. Pol'y & L. 253, 254 (2001) ("In the contemporary American criminal justice system, an eyewitness guess (if that is what it is) occupies a central place in a criminal process . . . .").

3 Dori Lynn Yob, Comment, Mistaken Identifications Cause Wrongful Convictions: New Jersey's Lineup Guidelines Restore Hope, But Are They Enough?, 43 Santa Clara L. Rev. 213, 215 (2002).

4 See, e.g., Stephen A. Saltzburg & Daniel J. Capra, American Criminal Procedure 745 (6th ed. 2000) ("[I]t is well known that eyewitness evidence is not very reliable. . . .").

5 Edward Connors et al., National Institute of Justice, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial 16-17 exhibit 3 (June 1996); see also Barry Scheck et al., Actual Innocence 361 (2001) (finding that eyewitness misidentification was at least partially responsible for eighty-one percent of seventy-four wrongful convictions documented).

6 United States v. Wade, 388 U.S. 218, 228 (1967) (citations omitted).

7 See, e.g., David L. Feige, I'll Never Forget That Face: The Science and Law of the Double-Blind Sequential Lineup, 26 Champion 28, 29 (2002) ("Both archival studies and psychological research support this acknowledged truth—that eyewitness identifications, which are among the most common forms of evidence presented in criminal trials, are frequently wrong."). One commentator has written that

> [t]he alarming error rate of eyewitness testimony is now well documented. One recent nationwide study concluded that in the cases of 86 convicted and then exonerated persons, over half involved eyewitness testimony, many in which more than one eyewitness mistakenly identified the defendant as the perpetrator. This clearly is the single most common cause of conviction of innocent persons.

Thomas P. Sullivan, Three Police Station Reforms to Prevent Convicting the Innocent, CBA Rec., April 2003, at 30, 32 (2003). Indeed, many experts believe that erroneous identifications are "conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished." Carl McGowan, Constitutional Interpretation and Criminal Identification, 12 Wm. & Mary L. Rev. 235, 238 (1970).

8 Social science researchers and commentators have uncovered meaningful differences in accuracy between a same-race identification (where the witness and suspect are of the same race) and a cross-racial identification (where the witness and suspect are of different

cross-racial identifications are one of the leading causes of erroneous convictions,[10] and experimental data has confirmed the unique difficulties that exist in recognizing faces of members of another race, a phenomenon termed the own-race bias.[11] More importantly, research suggests that safeguards that could prove useful in preventing mistaken same-race identifications are inapposite for cross-racial identifications.[12]

Despite empirical and anecdotal evidence that distinguishes same-race identifications from cross-racial identifications, however, the Supreme Court has never differentiated between them.[13] Indeed, this Note reveals that the Court has never considered or decided a case to develop standards specifically for cross-racial identifications.[14]

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races). For example, the American Psychological Association devoted Volume Seven of its Journal of Psychology, Public Policy, and Law to examining the differences between same-race and cross-racial identifications. See Special Theme, The Other Race Effect and Contemporary Criminal Justice: Eyewitness Identification and Jury Decision Making, 7 Psychol. Pub. Pol'y & L. 3 (2001). Additionally, Judge Easterbrook declared in a dissenting opinion that "[a]ll eyewitness testimony is problematic, given the frailties of human memory. Identification by members of other races is especially so." Cunningham v. Peters, 941 F.2d 535, 541 (7th Cir. 1991) (Easterbrook, J., dissenting); see also Sheri Lynn Johnson, Cross-Racial Identification Errors in Criminal Cases, 69 Cornell L. Rev. 934 (1984); John P. Rutledge, They All Look Alike: The Inaccuracy of Cross-Racial Identifications, 28 Am. J. Crim. L. 207 (2001). Like psychologists Otto MacLin and Roy Malpass, I use the term "race" here to refer to "popular categorizations of persons on the basis of their perceived physical appearance," not to espouse any "scientific" theory of race. See MacLin & Malpass, supra note 2, at 98 n.1.

9 Barry Scheck and Peter Neufeld created the Innocence Project at the Benjamin N. Cardozo School of Law in 1992 to handle cases where DNA testing of evidence "can yield conclusive proof of innocence." See The Innocence Project, About This Innocence Project, at http://www.innocenceproject.org/about/index.php (last visited Sept. 29, 2003).

10 Of the mistaken identifications reported by the Innocence Project, the largest percentage, forty-four percent, came from White eyewitnesses erroneously naming Black defendants as the perpetrator. Scheck et al., supra note 5, at 362.

11 The own-race bias simply refers to the psychological phenomenon in which people are better at remembering faces of members of their own race than they are at remembering faces of members of another race. For a more extensive discussion of the own-race bias, see infra Part II.A.

12 See infra Part III.B.

13 See infra Part I.A.

14 The only Supreme Court case that discusses cross-racial identifications is *Arizona v. Youngblood*, 488 U.S. 51, 72 n.8 (1988) (Blackmun, J., dissenting). However, *Youngblood* did not decide admissibility standards for eyewitness identifications. Rather, it held that the failure of the police to maintain and perform tests on biological evidence does not violate the Due Process Clause unless done in bad faith. Id. at 58. In dissent, Justice Blackmun, joined by Justices Brennan and Marshall, questioned the reliability of the eyewitness identification, partly because it was cross-racial. Id. at 72 n.8. In fact, the cross-racial identification in the case *was* erroneous: Larry Youngblood was exonerated through DNA evidence in 2000 after serving a total of eight years in prison. See The Innocence Project, Profile of Larry Youngblood, at http://www.innocenceproject.org/case/display_profile.php?id=66 (last visited Sept. 29, 2003).

The Court has adopted a test to determine the admissibility of identification evidence generally,[15] but that test fails to address the specific problems cross-racial identifications pose. The Court's current test only examines whether an identification procedure is unduly suggestive when determining whether it is sufficiently reliable to be admitted into court.[16] While suggestiveness may be, as the Court assumes, the cause of most erroneous *same-race* identifications,[17] psychologists point to an additional root cause for mistaken *cross-racial* identifications: the own-race bias in memory for faces.[18] Without openly acknowledging and addressing this phenomenon, the Court cannot safeguard the due process rights of defendants who stand accused of a crime premised on a cross-racial identification.[19] This Note suggests an approach to cross-racial identification evidence that is consistent with due process while remaining grounded in scientific reality.

This Note proceeds in four Parts. Part I describes the current legal landscape with respect to eyewitness identifications to understand the Supreme Court's standard for admissibility of eyewitness identifications, its application in the lower courts, and its shortcomings. Part II discusses the psychological research, specifically focusing on the differences between same-race and cross-racial identifications to underscore the importance of an admissibility standard that is distinct for each. Part III critiques the existing safeguards courts apply as they relate to cross-racial identifications. Finally, Part IV suggests procedures to protect defendants from erroneous cross-racial identifications and analyzes these alternatives from practical and constitutional standpoints. This Note concludes that only a test that distinguishes same-race and cross-racial identification evidence can comply with the Due Process Clause.

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[15] See infra Part I.A.1.

[16] The Court is concerned with suggestiveness when police are obtaining an identification from an eyewitness. The term refers to cues by police officers for the witness to select a particular person and identify that person as the perpetrator. For example, a procedure whereby a witness is shown only one suspect is more suggestive than one where the witness is shown many people and is asked if she recognizes any of them as being the perpetrator. See also infra text accompanying notes 45-46.

[17] This Note does not take a position on the truth of this proposition.

[18] See infra Part II.A.

[19] In the context of eyewitness identifications, the Court has found that the Due Process Clause of the Fourteenth Amendment requires that evidence admitted against a defendant at trial have features of reliability. An identification would violate the Due Process Clause if it is conducive to irreparable misidentification. Compare Stovall v. Denno, 388 U.S. 293, 301-02 (1967) (introducing due process approach to identifications, focusing on unnecessary suggestiveness) with Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (determining that "reliability is the linchpin" and that unnecessary suggestiveness is not sole factor in due process analysis).

I
CONSTITUTIONAL MANDATES, EVIDENTIARY RULES, AND TRIAL COURT DISCRETION

The Supreme Court first confronted the issue of eyewitness identifications in 1967, when it decided the *Wade-Gilbert-Stovall* trilogy.[20] Between 1967 and 1977, the Court issued eight major decisions establishing procedures to govern the admissibility of eyewitness identifications and testimony.[21] Since that time, the Court has not addressed the issue.[22]

Because most identifications are admissible under the Supreme Court's test,[23] it has been left to trial courts to determine the weight of identifications and to fashion procedural safeguards to protect defendants from erroneous identifications once these identifications are admitted. Section A of this Part outlines Supreme Court precedent, arguing that the Court's test for admissibility of identifications does

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[20] United States v. Wade, 388 U.S. 218 (1967) (requiring defense counsel at lineup); Gilbert v. California, 388 U.S. 263 (1967) (same); *Stovall*, 388 U.S. 293 (introducing due process fundamental fairness approach to identifications not governed by *Wade* or *Gilbert*).

[21] See *Wade*, 388 U.S. 218; *Gilbert*, 388 U.S. 263; *Stovall*, 388 U.S. 293. The *Wade-Gilbert-Stovall* trilogy was followed by a series of decisions addressing identification procedures, beginning with *Simmons v. California*, 390 U.S. 377 (1968), which held that the due process test applies to impermissibly suggestive identifications. The series continued with *Kirby v. Illinois*, 406 U.S. 682 (1972) (holding that defense counsel is required at lineup only after initiation of formal adversary proceedings); *Neil v. Biggers*, 409 U.S. 188 (1972) (holding that identification can be reliable despite suggestiveness of procedure); and *United States v. Ash*, 413 U.S. 300 (1973) (holding that defendant has no constitutional right to counsel at photographic lineup). Finally, in *Manson*, the Court developed a test to determine whether identification is reliable despite the suggestiveness of the procedure that was used. See *Manson*, 432 U.S. at 114.

[22] *Watkins v. Sowders*, 449 U.S. 341 (1981), did not address safeguards for erroneous identifications, though it did hold that the trial court had no constitutional obligation to conduct a hearing outside the presence of the jury to determine whether identification evidence was admissible. Additionally, in *Foster v. California*, 394 U.S. 440 (1969) (finding police procedure impermissibly suggestive), and *Moore v. Illinois*, 434 U.S. 220 (1977) (finding that identification conducted after initiation of adversarial proceedings and in absence of counsel violated defendant's Sixth Amendment rights), the Court simply applied the principles decided in its previous cases rather than developing new rules.

[23] Cf. Saltzburg & Capra, supra note 4, at 771 ("It is fair to state that, for better or worse, after *Kirby*, *Ash*, *Neil*, and *Manson*, many courts are not very careful in their handling of eyewitness evidence."). In fact, the Supreme Court has only ruled one identification so suggestive as to render it inadmissible. In *Foster*, the police first placed the defendant in a lineup with men considerably shorter than him. After the witness failed to make an identification, the police then arranged for the witness to view the defendant by himself. Finally, after a second nonidentification, the police placed the defendant in another lineup, in which he was the only person who had also been in the first lineup. The witness then identified the defendant. The Court ruled that this series of events rendered the identification so conducive to irreparable misidentification as to be a denial of due process. *Foster*, 394 U.S. at 442-43.

not apply to cross-racial identifications. Section B details the evidentiary approaches lower courts have taken once a cross-racial identification is admitted.

A. *The Supreme Court's Approach to Identifications*

While courts and commentators have generally assumed that the Supreme Court's mandates apply equally to cross-racial and same-race identifications,[24] the Supreme Court has never explicitly addressed the issue of cross-racial identifications. This Note suggests that the applicability of the Court's general test to cross-racial identifications is still an open question and that, in fact, the Supreme Court's standards for admissibility should apply only to same-race identifications.[25]

1. *Supreme Court Precedent*

The Court first addressed the "vagaries of eyewitness identification"[26] by focusing on the police practices used to obtain an identification at the "critical stage"[27] of pretrial confrontation between the victim and the accused. In the *Wade-Gilbert-Stovall* trilogy, all decided on the same day in 1967, the Court held that defense counsel must be present at the lineup in order to prevent any suggestiveness in the lineup procedure or reveal suggestiveness to the trial court.[28] The Court also held that certain procedures, such as a showup—where the police show an individual to the complainant for identification rather than placing the suspect in a lineup with other individuals—may be, under the totality of circumstances, so suggestive as to render a resulting identification inadmissible.[29]

The Court subsequently diluted these protections. It held that due process requires the presence of counsel at a lineup only after the

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[24] See, e.g., United States v. Rogers, 126 F.3d 655, 658 (5th Cir. 1997) (applying *Manson* to cross-racial identification); Burch v. Carey, No. C 01-1583 CRB (PR), 2002 WL 31689370, at *3, 6 (N.D. Cal. Nov. 23, 2002) (same); Johnson, supra note 8, at 951-85 (discussing Court's due process test as if it applies to all identifications).

[25] See infra Part I.A.2.

[26] *Wade*, 388 U.S. at 228.

[27] See, e.g., id. at 224, 236-37 (noting "critical" nature of pretrial confrontations and that Sixth Amendment applies to critical stages).

[28] See supra note 20.

[29] Stovall v. Denno, 388 U.S. 293, 302 (1967). However, the Court did find that exigency could excuse the use of suggestive procedures. The Court found that the confrontation in this case, where the defendant was brought alone to the hospital room of the victim witness for identification, was "imperative" because the victim might not live much longer. Id. Therefore, according to the Court, the suggestiveness of the procedure, under the totality of circumstances, did not violate due process. Id.

initiation of formal proceedings,[30] such as the preliminary hearing or indictment, but not during the stage where most lineups are used—when police determine if there is enough evidence to bring a formal charge.[31] The Court also ruled that the presence of counsel was not necessary at photographic lineups, even after the initiation of formal proceedings.[32] Finally, the Court held that an identification could still be reliable even if the confrontation procedure was unnecessarily suggestive.[33]

After eroding many of the safeguards it had created through its decisions in 1967, the Court shifted its focus from the procedures themselves to the reliability of identifications. To that end, the Court developed a test to determine whether an identification could be admissible despite the potentially troubling impact of suggestiveness.[34]

The Court developed a two-prong test in *Manson v. Brathwaite* to determine the standard by which an identification's admission complies with the Due Process Clause.[35] Under the *Manson* test, a court must first determine whether the confrontation procedure is suggestive.[36] If it is, the court must next decide whether the identification still "possesses certain features of reliability" by examining five factors: (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 prior description of the offender, (4) the level of certainty demonstrated at the confrontation, and (5) the time elapsed between the crime and the confrontation.[37] Against these factors, the court must weigh the "corrupting effect of the suggestive identification itself" to determine whether or not exclusion is warranted.[38] The court then must decide whether, under the totality of circumstances, there is a "very substantial likelihood of irreparable misidentification."[39] If there is, then admission of

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30 Kirby v. Illinois, 406 U.S. 682 (1972).

31 Saltzburg & Capra, supra note 4, at 755 ("The vast majority of identification procedures are conducted before a formal charge has been filed.").

32 United States v. Ash, 413 U.S. 300 (1973).

33 Neil v. Biggers, 409 U.S. 188 (1972) (deciding that, whereas *Stovall* had focused on *necessity* of suggestiveness for compliance with due process, unnecessarily suggestive identification can be admissible as long as it is deemed reliable).

34 Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

35 Id. The test derives from factors the Court outlined in *Neil*. See 409 U.S. at 199-200.

36 See *Manson*, 432 U.S. at 114.

37 Id.

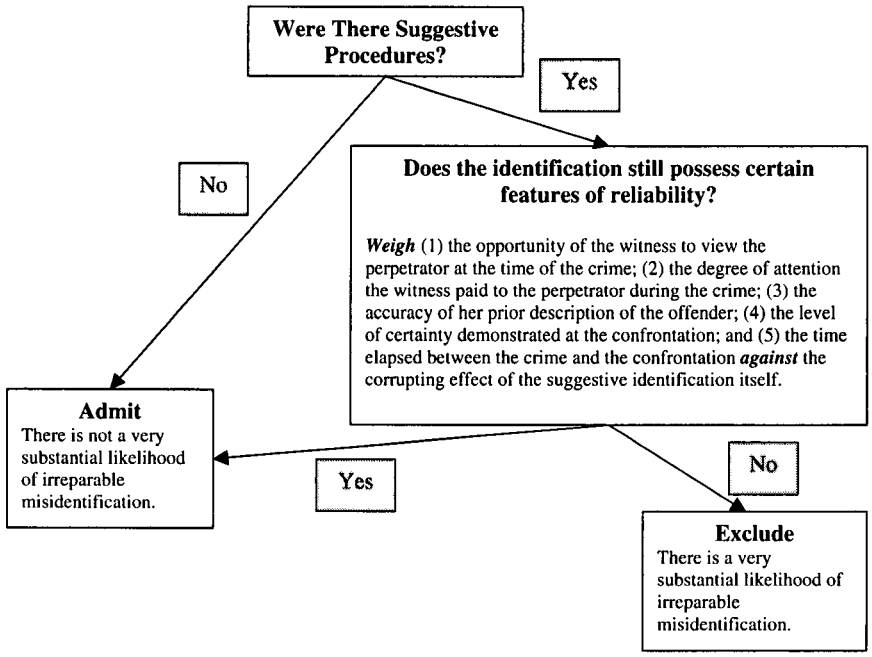
38 Id.

39 Id. at 116 (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)).

the identification would violate the defendant's due process rights under the U.S. Constitution and the identification must be excluded.[40]

FIGURE A

The Current Test for Admissibility of Eyewitness Identifications
Manson v. Brathwaite



2. *Does Supreme Court Precedent Apply to Cross-Racial Identifications?*

The idea of a different due process test for the admissibility of cross-racial identifications would be an issue of first impression.[41] In the eight cases decided by the Supreme Court to develop standards for identification evidence,[42] only one—*Manson v. Brathwaite*—mentioned the race of the defendant in relation to the race of the witness, noting that it was a same-race identification.[43] Analyzing the degree

[40] The court will exclude both the out-of-court identification and the in-court identification if the procedures are found to be so suggestive as to cause an unreliable identification. Saltzburg & Capra, supra note 4, at 770.

[41] The Court has not developed any due process test for identification evidence except that adopted in *Manson*, which did not specifically address cross-racial identifications.

[42] See supra note 21.

[43] Manson v. Brathwaite, 432 U.S. 98, 115 (1977).

of attention paid by the witness to the perpetrator during the crime, the Court acknowledged that because the eyewitness and the defendant were both Black, it was more likely that the witness's perception was accurate.[44] Thus, when fashioning its due process test for admissibility, the Court only specifically considered a same-race situation. While this does not, in and of itself, prove that the Court's test does *not* apply to cross-racial identifications, it illustrates the limits of the factual premise for the Court's analysis of an identification's constitutionality. The *Manson* principles may not tell the whole story with respect to cross-racial identifications.

The assumptions implicit in the Court's approach to identification evidence also militate against applying its due process test to cross-racial identifications. Its approach rests on the idea that suggestive confrontation procedures alone lead to unreliable identifications and that addressing suggestiveness is sufficient to make an identification reliable. In *Wade*, the Court stated, "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification."[45] Additionally, the Court quoted a commentator as saying that improper suggestion is perhaps "responsible for more such errors than all other factors combined."[46]

Because of its focus on suggestiveness as the cause of the majority of erroneous identifications, the Court's due process test for admissibility holds that if there is no suggestiveness, then there is no claim for exclusion of identification evidence.[47] If there is suggestiveness, the court must next determine whether other aspects of the identification can *counter* the effect of the suggestiveness. In other words, if suggestiveness does not exist or if it can be balanced out, a defendant has no due process claim. As Part II discusses in more detail, suggestiveness is only one aspect, and arguably not the most important aspect, of reliability for a cross-racial identification. Because the Court never considered other factors of reliability, including the effect of the own-race bias on identifications, it cannot be said that the Court designed its test for admissibility to apply equally to same-race and cross-racial identifications.

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[44] The Court stated that "[the witness] himself was a Negro and unlikely to perceive only general features of 'hundreds of Hartford black males.'" Id. (quoting Brathwaite v. Manson, 527 F.2d 363, 371 (1975)).

[45] United States v. Wade, 388 U.S. 218, 228 (1967).

[46] Id. at 228-29.

[47] See *Manson*, 432 U.S. at 110, 114 (indicating that reliability, and therefore admissibility, of identification depends on "corrupting effect" of suggestiveness).

It is likely, however, that when the Court decided *Manson*, it thought it was determining the admissibility of *all* identification evidence. Indeed, the psychological studies on cross-racial identifications and factors influencing their reliability were never before the Court when it developed these standards.[48] Because recent research demonstrates that there are sufficient differences between same-race and cross-racial identifications,[49] the Court might now be convinced to treat them differently.

B. The Lower Court Approach to Identifications[50]

Trial courts have two main functions with respect to identification evidence: (1) to apply the Supreme Court's due process test to determine *admissibility* of identification evidence at a suppression hearing and (2) to determine and apply rules that affect the *weight* of identification evidence if admitted at trial. This second function is accomplished through a variety of means, including regulation of the direct and cross-examinations of eyewitnesses and of the closing arguments of the parties, framing of jury instructions, and ruling on the admissibility of expert testimony.[51] Lower courts have consistently applied the *Manson* test to admit cross-racial identifications. However, some lower courts have distinguished between same-race and cross-racial identifications in their use of evidentiary safeguards.[52]

Trial courts are given broad discretion over the use of these tools to undermine or bolster the impact of identification evidence.[53] Consequently, lower courts have diverged over time and across jurisdictions on the appropriateness of using these methods when a defendant

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[48] By 1971, a year before *Neil*, only "a handful" of studies had examined the own-race bias. Christian A. Meissner & John C. Brigham, Thirty Years of the Own-Race Bias in Memory for Faces: A Meta-Analytic Review, 7 Psychol. Pub. Pol'y & L. 3, 4 (2001). Additionally, of the thirty-nine research articles cited by Meissner and Brigham in their meta-analysis, only nine were published before the decision in *Manson v. Brathwaite*. See id. at 27-35 (providing list of references). Therefore, it seems likely that scientific evidence on the own-race bias was underdeveloped at the time that the Supreme Court established the due process test.

[49] See infra Part II.

[50] This Section is not meant to be an exhaustive survey of lower court decisions. Rather, it is intended merely to illustrate the different approaches that exist and provide examples of each approach.

[51] See, e.g., Rutledge, supra note 8, at 214-47 (listing these as options for lower courts after admission of eyewitness evidence).

[52] See infra notes 57-69.

[53] See, e.g., People v. Lee, 750 N.E.2d 63, 66 (N.Y. 2001) ("As a general rule, the admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court."); see also Garden v. State, 815 A.2d 327, 338-41 (Del. 2003) (reviewing trial court's decision to exclude expert testimony and jury instruction about cross-racial identification for abuse of discretion).

requests them specifically because of a cross-racial identification. This Section will describe the different approaches and justifications lower courts generally give for each approach.

The Constitution allows for cross-examination of witnesses in all instances.[54] Cross-examination is deemed important not only to test the credibility of the witness but also to question the specific conditions under which the witness viewed the suspect.[55] While cross-examination is always a permissible tool for the defense, it has been criticized as inadequate, on its own, to determine the reliability of a cross-racial identification.[56]

Similarly, closing argument is always allowed.[57] Some courts, however, have not permitted reference to the racial nature of an identification in the closing,[58] finding such a discussion to be unnecessarily prejudicial.[59] For example, in *People v. Alexander*, the New York Court of Appeals ordered a new trial when the prosecutor stated in the closing that the "[i]ntraracial identification . . . [is] inherently . . . more reliable."[60] The court premised its ruling on two factors: (1) the issue of race-based identification was not part of the trial record, and

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[54] See Davis v. Alaska, 415 U.S. 308 (1974) (holding that denying defendant opportunity to cross-examine key prosecution witness denied him his constitutional right to confront witnesses); see also Douglas v. Alabama, 380 U.S. 415 (1965) (holding that right of cross-examination is secured by Sixth Amendment Confrontation Clause).

[55] See, e.g., Pointer v. Texas, 380 U.S. 400, 404 (1965) ("And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case." (citation omitted)).

[56] See, e.g., Johnson, supra note 8, at 953 (pointing out that cross-examination can only elicit facts known to witness, while own-race bias is subconscious); see also United States v. Wade, 388 U.S. 218, 235-36 (1967) ("And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability.").

[57] Herring v. New York, 422 U.S. 853 (1975) (finding that criminal defendants' Sixth Amendment right to assistance of counsel includes fundamental right to make closing summation before trier of fact).

[58] This is particularly true in New York. See, e.g., People v. Hearns, 238 N.Y.S.2d 173, 174 (App. Div. 2d Dep't 1963) (reversing and ordering new trial based on prosecutor's summation that referenced races of witnesses in relation to race of defendant); see also People v. Green, 453 N.Y.S.2d 228, 229 (App. Div. 2d Dep't 1982) (same).

[59] In *Hearns*, the court reasoned that

> such an argument . . . seeks to separate the racial origin of witnesses in the minds of the jury, and to encourage the weighing of testimony on the basis of the racial similarity or dissimilarity of witnesses. The argument offends the democratic and logical principle that race, creed or nationality, in themselves, provide no reason for believing or disbelieving a witness's testimony.

238 N.Y.S.2d at 174-75.

[60] People v. Alexander, 727 N.E.2d 109, 110 (N.Y. 1999).

(2) the studies on cross-racial identification did "not justify" the summation.[61]

Most of the controversy surrounding lower court approaches to cross-racial identifications centers around whether to give jury instructions or to admit expert testimony on the special nature of cross-racial identifications.[62] Courts vary significantly in their use of these evidentiary safeguards. In *State v. Cromedy*, for example, the New Jersey Supreme Court found reversible error when the trial court refused to give a jury instruction regarding the cross-racial nature of the identification.[63] In contrast, many courts routinely deny jury instructions for cross-racial identifications or give general identification instructions without making explicit the differences between a same-race and a cross-racial identification.[64] For example, in *United States v. Ingram*, the Tenth Circuit denied a defendant's request for a cross-racial jury charge, arguing that such an instruction would be "more in the realm of argument than law."[65] However, more recent decisions by the Supreme Judicial Court of Massachusetts have found that while giving an instruction on the cross-racial nature of an identification would not be *improper*, the decision rests squarely with the trial court.[66]

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[61] Id.

[62] See, e.g., Margaret J. Lane, Comment, Eyewitness Identification: Should Psychologists Be Permitted to Address the Jury?, 75 J. Crim. L. & Criminology 1321 (1984) (advocating for jury instructions but not expert testimony on eyewitness identifications); see also Michael R. Leippe, The Case for Expert Testimony About Eyewitness Memory, 1 Psychol. Pub. Pol'y & L. 909 (1995) (advocating for expert testimony but not jury instructions for eyewitness identifications); Andrew R. Tillman, Comment, Expert Testimony on Eyewitness Identification: The Constitution Says, "Let the Expert Speak," 56 Tenn. L. Rev. 735 (1989) (same).

[63] 727 A.2d 457, 467 (N.J. 1999). Similarly, concurring in *United States v. Telfaire*, Judge Bazelon argued for a jury instruction that would provide information on the own-race bias. 469 F.2d 552, 560 (D.C. Cir. 1972) (Bazelon, C.J., concurring).

[64] See, e.g., United States v. Ingram, 600 F.2d 260, 263 (10th Cir. 1979); Abney v. United States, 347 A.2d 402 (D.C. Cir. 1975); Commonwealth v. Engram, 686 N.E.2d 1080 (Mass. App. Ct. 1997).

[65] *Ingram*, 600 F.2d at 263.

[66] In *Commonwealth v. Hyatt*, the Supreme Judicial Court held that the trial court did not abuse its discretion in denying cross-racial jury charge, but that this finding was not meant

> to preclude a judge in the exercise of discretion from instructing a jury that, in determining the weight to be given eyewitness identification testimony, they may consider the fact of any cross-racial identification and whether the identification by a person of different race from the defendant may be less reliable than identification by a person of the same race.

647 N.E.2d 1168, 1171 (Mass. 1995); Commonwealth v. Charles, 489 N.E.2d 679, 684 (Mass. 1986) ("[I]t was not established that particular problems arise when the witness and the defendant are of different races. . . . [T]he judge was well within his discretion in denying the requested charge.").

Courts are reluctant to permit expert testimony on the unique aspects of cross-racial identifications.[67] Most courts require that expert testimony be in an area outside the jury's province.[68] This has proven to be fatal to the admission of testimony on eyewitness identification, because most courts rule that juries are well aware of the problems inherent in eyewitness identifications.[69] Furthermore, courts have viewed the weighing of eyewitness testimony as a determination of witness credibility, which is squarely within the jury's sphere.[70]

Currently, most efforts by defendants to protect themselves from an erroneous cross-racial identification suffer a similar response from the courts: The identification is admitted based on the Supreme Court's test in *Manson*, arguably relevant only to same-race identifications. Subsequently, the court is given wide latitude in deciding whether to differentiate between same-race and cross-racial identifications and what procedural protections to apply. Even when courts recognize greater reliability concerns in cross-racial identifications or mention the cross-racial nature of an identification, they rarely specifically discuss the own-race bias.[71] The following Part discusses this phenomenon and illustrates why courts should take account of it.

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[67] In *State v. Cromedy*, for example, the New Jersey Supreme Court found that the failure of the trial court to grant a jury instruction addressing cross-racial identification was reversible error, but ruled that there should be a categorical exclusion of expert testimony on the issue of cross-racial eyewitness identifications. 727 A.2d at 467-68.

[68] See Fed. R. Evid. 702 ("If scientific, technical, or other *specialized* knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . ." (emphasis added)); see also, e.g., United States v. Hall, 165 F.3d 1095, 1100-08 (7th Cir. 1999) (affirming exclusion of expert testimony on ground that it would not assist trier of fact under Federal Rule of Evidence 702); *Cromedy*, 727 A.2d at 467-68 ("[B]ecause of the widely held commonsense view that members of one race have greater difficulty in accurately identifying members of a different race, expert testimony on that issue would not assist a jury." (citations omitted)).

[69] See, e.g., United States v. Larkin, 978 F.2d 964, 971 (7th Cir. 1992) ("[E]xpert testimony regarding the potential hazards of eyewitness identification—regardless of its reliability—'will not aid the jury because it addresses an issue of which the jury already generally is aware, and it will not contribute to their understanding' of the particular factual issues posed." (quoting United States v. Hudson, 884 F.2d 1016, 1024 (7th Cir. 1989)); Utley v. State, 826 S.W.2d 268, 270 (Ark. 1992) (same).

[70] See, e.g., People v. Anderson, 630 N.Y.S.2d 77, 79 (App. Div. 1st Dep't 1995); Commonwealth v. Simmons, 662 A.2d 621, 630 (Pa. 1995).

[71] A search on Westlaw finds that, as of Sept. 29, 2003, 206 cases (federal and state) mention the words "cross-racial identification" and "eyewitness" together. In contrast, only eleven cases mention the "own-race bias," "own-race effect," or "same-race effect."

II
PSYCHOLOGICAL STUDIES

While courts have largely treated same-race and cross-racial identifications as requiring the same judicial safeguards, psychological research has consistently called for treating them differently. Section A summarizes the studies of the own-race bias in memory for faces and the scientific community's acceptance of it as a robust phenomenon. Section B discusses data that brings to the surface differences between same-race and cross-racial identifications with an eye toward factors that might help courts determine whether eyewitness identifications are reliable after they have been made.

A. The Own-Race Bias in Memory for Faces

Psychological studies have consistently found that people are far better at recognizing faces of members of their own race than those of other races.[72] This phenomenon, known as the own-race bias, marks the difference between same-race and cross-racial eyewitness identifications.

According to studies of the own-race bias, when eyewitnesses are shown a new face, they are fifty-six percent more likely to falsely believe they have seen it before if the face is of another race.[73] Translating this data, a Black innocent suspect has a fifty-six percent greater chance of being misidentified by a White eyewitness than by a Black eyewitness. When you factor in the reality that "[t]he chance of an innocent suspect being misidentified can be rather high *even when* the witness and suspect are of the same race,"[74] the unreliability of cross-racial identifications is apparent.

The own-race bias also plays a role in the amount of information a person needs before she can say with some confidence that she recognizes a suspect.[75] According to studies, an eyewitness uses looser or

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[72] See, e.g., Otto H. MacLin et al., Race, Arousal, Attention, Exposure, and Delay: An Examination of Factors Moderating Face Recognition, 7 Psychol. Pub. Pol'y & L. 134, 135 (2001) ("The cross-race effect is the phenomenon whereby people are better able to recognize persons of their own race as compared with those of other races. This effect has been widely studied in terms of its implications for eyewitness identification. . . . The cross-race effect is a robust phenomenon . . . ."); Meissner & Brigham, supra note 48, at 4 (noting that most researchers now agree that own-race bias is "reliable across cultural and racial groups").

[73] Meissner & Brigham, supra note 48, at 15.

[74] 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, 231 (2001) (emphasis added). Wells and Olson add that "[t]he fact that race can so dramatically increase the chance of misidentification is disturbing." Id.

[75] Psychologists refer to this as "response criterion." See, e.g., Meissner & Brigham, supra note 48, at 13.

"more liberal" criteria when examining a face of a member of another race.[76] In other words, other-race faces are seen as more similar to each other. This allows for more mistaken cross-racial identifications because "a witness is more likely to indict an out-group member as the culprit, irrespective of whether or not he or she had seen the person at the scene of the crime."[77]

Psychologists have studied the own-race bias for many years and have consistently found it to be a "robust phenomenon"[78]—many psychologists believe in its significance and would testify to it in court as expert witnesses.[79] In 2001, social scientists Christian Meissner and John Brigham conducted a meta-analysis of thirty-nine research studies from the last thirty years that together used nearly 5000 participants.[80] They found that "the magnitude of the [own-race bias] that has been found across many studies . . . indicates that this is an issue of considerable practical importance."[81] Additionally, they found that most researchers agree that the phenomenon is reliable across cultural and racial groups.[82]

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[76] Id. at 16.

[77] Siegfried Ludwig Sporer, Recognizing Faces of Other Ethnic Groups: An Integration of Theories, 7 Psychol. Pub. Pol'y & L. 36, 39 (2001).

[78] Two social scientists have written that

> [l]iterature reviews of the [own-race bias] have noted the robustness of the phenomenon, and researchers have endorsed the importance and reliability of the effect in several surveys. Furthermore, expert witnesses have cited the effect in cases involving disputed cross-race identification, and attorneys have acknowledged the importance of racial interactions in eyewitness identifications.

Meissner & Brigham, supra note 48, at 4 (citations omitted). See also MacLin et al., supra note 72, at 135; Sporer, supra note 77, at 48 (surveying four meta-analyses and concluding that "the differential recognition of members of another ethnic group can be regarded as a robust phenomenon"); Wells & Olson, supra note 74, at 230 ("[T]he consistency of the findings across a variety of methodologies converges on the conclusion that the other-race effect is real.").

[79] According to psychologists MacLin and Malpass,

> Survey results revealed that approximately three-quarters of the experts in eyewitness testimony believed that there existed sufficient and reliable support for the other-race effect that they would personally testify as such. An up-to-date replication and extension finds approximately 90% of experts judging the effect reliable enough for testimony in court.

MacLin & Malpass, supra note 2, at 99 (citations omitted).

[80] Meissner & Brigham, supra note 48, at 13.

[81] Id. at 23.

[82] Id. at 4. However, it should be noted that all groups do not exhibit the own-race bias to the same degree. See, e.g., id. at 21 ("Results indicated that White participants were more likely to demonstrate the [own-race bias], especially with regard to false alarm responses [misidentifications].").

The causes of the own-race bias are still unknown,[83] though many theories have been tested.[84] For the purposes of this Note, it is only relevant that the bias exists, regardless of the underlying biological and/or psychological bases. It is relevant, however, that despite its intuitive appeal as an explanation, racial attitudes of the witness have been shown to play no direct role in the own-race bias.[85] This is significant because juries may assume that a cross-racial identification might only be problematic if the witness is shown to be a racist. Rather, the own-race bias is material in any case with a cross-racial identification, regardless of the specific character or racial biases of the witness.

While racial attitudes do not moderate the own-race bias, scientists have located some variables that do. For example, studies have shown that erroneous identifications occur more frequently when the witness is able to view the suspect for only a short period of time: "[I]t should be noted that many crimes involving eyewitnesses occur in a matter of seconds (e.g., assaults, murders, some robberies). This short period of time would involve very limited [viewing time] for the eyewitness, hence increasing the chances of subsequent false alarms (i.e., mistaken identifications) in cross-race situations."[86]

In addition to viewing time, studies have found that the amount of time between the witnessing of a crime and the identification can

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[83] See, e.g., MacLin & Malpass, supra note 2, at 99 ("Although the other-race effect is commonly accepted among experts in the areas of law and psychology, there is no widely accepted account of the reason for the effect and the mechanisms through which it works.").

[84] See, e.g., id. at 99-101; Meissner & Brigham, supra note 48, at 6-13. Several theories have been tested, and although none have emerged through scientific consensus as the explanation for the own-race bias, some have proven to be more plausible than others. The theory of "physiognomic homogeneity," that some races have less variability in facial structure than other races, has not found any support in either biological or psychological testing. See, e.g., Sporer, supra note 77, at 49-50. Additionally, little support has been found for the notion that racial attitudes directly stimulate the effect. See, e.g., MacLin & Malpass, supra note 2, at 99; Meissner & Brigham, supra note 48, at 7. Some scientists have found a correlation between the own-race bias and the *quality* of interracial contact one experiences, but have not found a correlation to the *amount* of contact alone. See, e.g., MacLin & Malpass, supra note 2, at 99-100. Others attribute the own-race bias to a more complicated perceptual learning model. See id. at 100 (defining perceptual learning hypothesis as positing that discriminating cues for own-race faces might be different from cues for other-race faces, thus making it difficult to learn cues and differentiate between other-race faces). Finally, others question whether Whites are more willing to guess where the identification of Black suspects are concerned because they discount the cost of such an error, believing that they are less likely to be wrong or feeling less concerned about the harm that might result by a misidentification, or both. See, e.g., Doyle, supra note 2, at 253.

[85] See, e.g., MacLin & Malpass, supra note 2, at 99; Meissner & Brigham, supra note 48, at 7.

[86] Meissner & Brigham, supra note 48, at 24.

have an impact on the degree of own-race bias: the longer the interval, the more liberal the criterion that is used by the witness.[87] Therefore, "the legal community should be cautious of cross-race identifications attempted after such extensive delays."[88] Because they affect the magnitude of the own-race bias, the viewing time and the delay between witnessing and identification can play a major role in assessing the potential unreliability of a cross-racial identification.

B. Is the Identification Reliable?

The key question for any court is to determine whether an identification is reliable.[89] To that end, researchers have looked into ways to evaluate the accuracy of the identification using factors related to the confrontation procedure as well as to characteristics of the witness. While the length of viewing time and the delay between viewing and identification are significant factors in determining the reliability of identifications, both courts and commentators continue to rely on many other factors that have proven to be irrelevant to evaluating the reliability of cross-racial identifications. This Section examines these factors.

The most commonly studied criterion to determine the accuracy of an identification is witness certainty.[90] The Supreme Court named it as one of the five *Manson* factors,[91] and juries commonly rely on it.[92] Despite courts' and jurors' reliance on this factor, witness certainty has been shown to be significant only to same-race

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87 See supra text accompanying notes 76-77.

88 Meissner & Brigham, supra note 48, at 24.

89 See Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (concluding that "reliability is the linchpin" with respect to admissibility of eyewitness identification evidence); see also Jacobs v. Cockrell, No. 3:97-CV-2728-M, 2002 WL 172629, at *16 (N.D. Tex. Jan. 31, 2002) ("The key factor in determining the admissibility of identification testimony is whether, under the totality of the circumstances, the identification was reliable." (citation omitted)).

90 See, e.g., 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, 154 (2001).

91 See supra text accompanying note 37.

92 See, e.g., Margaret Bull Kovera & Stacie A. Cass, Compelled Mental Health Examinations, Liability Decisions, and Damage Awards in Sexual Harassment Cases: Issues for Jury Research, 8 Psychol. Pub. Pol'y & L. 96, 107 (2002) ("[J]urors were influenced by one factor that is unrelated to the reliability of eyewitness identifications: eyewitness confidence."); Yob, supra note 3, at 224 ("Studies have shown that many decision-makers in the criminal justice system rely heavily on a particular eyewitness' confidence as a gauge of the accuracy of that eyewitness' identification.").

identifications[93] and has been found not to be an indicator of reliability for cross-racial identifications.[94]

Scientists have also looked to the amount of time it takes for a witness to choose a person (or a photo of a person) after viewing him (or it) in an identification. Studies have shown that if a witness takes more than fifteen seconds to recognize the suspect, there is a much greater likelihood that the identification will be erroneous.[95] While decision time affected the reliability of same-race identifications, researchers found that it was not useful for determining the accuracy of cross-racial identifications.[96]

Finally, psychologists have studied whether characteristics of a lineup affect the reliability of the identification.[97] Many commentators have advocated for sequential rather than simultaneous lineups.[98] Indeed, scientific studies have proven that sequential lineups produce more reliable identifications.[99] However, sequential lineups do not seem to produce correct cross-racial identifications more frequently

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[93] See, e.g., Smith et al., supra note 90, at 164-65; Daniel B. Wright et al., A Field Study of Own-Race Bias in South Africa and England, 7 Psychol. Pub. Pol'y & L. 119, 119 (2001) ("[W]itness confidence and accuracy were found to be correlated but only when the witness was the same race as the confederate."). It should be noted that many commentators do not believe that witness confidence should be used even for same-race identifications. See, e.g., Benjamin E. Rosenberg, Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal, 79 Ky. L.J. 259, 276-77 (1991) ("Scientific evidence conclusively establishes . . . that there is absolutely no correlation between an eyewitness's level of certainty in an identification and the correctness of an identification.").

[94] See, e.g., Meissner & Brigham, supra note 48, at 25; Smith et al., supra note 90, at 164-65.

[95] See Smith et al., supra note 90, at 160.

[96] See id. at 165.

[97] See id. at 155 (describing research examining how type of lineup affects false identification rates).

[98] A simultaneous lineup is a practice where the witness views more than one person at a time, whereas a sequential lineup requires the witness to view each person one at a time, one after another. See, e.g., Hugo Adam Bedau, Causes and Consequences of Wrongful Convictions: An Essay-Review, 86 Judicature 115, 119 (2002) (advocating for sequential rather than simultaneous lineups and noting support for this method from Barry Scheck, Peter Neufeld, and Jim Dwyer, as well as Illinois Governor Jim Ryan's Commission on Capital Punishment); Michael R. Headley, Note, Long on Substance, Short on Process: An Appeal for Process Long Overdue in Eyewitness Lineup Procedures, 53 Hastings L.J. 681 (2002).

[99] Witnesses use an "absolute judgment strategy" when asked to make a sequence of "yes or no" decisions for each potential suspect, while those presented with a simultaneous lineup use a "relative judgment strategy" because they are asked to determine *which* suspect most closely resembles the perpetrator. See Smith et al., supra note 90, at 155. Absolute judgment strategies have proven more accurate than relative judgment strategies. See id. at 161 (indicating that research results "provide *further* support for the suggestion that eyewitnesses who report using absolute judgment strategies are more likely to be accurate" (emphasis added)).

than simultaneous lineups, making them ineffective at increasing reliability in a cross-racial identification situation.[100]

The scientific data illustrate that cross-racial identifications and same-race identifications are different in nature. More importantly, it indicates that factors commonly used to determine the reliability of same-race identifications are unhelpful in a cross-racial context. Rather than focusing on suggestive procedures alone, determining the degree of own-race bias in a cross-racial identification situation can be a much greater predictor of the identification's reliability.[101] With this in mind, the next Part critiques the existing legal safeguards.

III

ADMISSIBILITY VERSUS WEIGHT: WHY EVIDENTIARY PRINCIPLES DO NOT APPLY TO CROSS-RACIAL IDENTIFICATIONS

Many have criticized the existing legal framework for addressing eyewitness identifications, but few have examined it with respect to cross-racial identifications specifically.[102] Many of those who have considered this phenomenon recommend either the use of expert testimony or jury instructions to remedy the problem of erroneous cross-racial identifications.[103] This Note uses a different framework for analysis. Rather than accepting the Supreme Court's due process test as a given, this Note critiques the test itself as it relates to the admissibility of cross-racial identifications. This is significant because this Note starts from the understanding that once a faulty cross-racial identification has been admitted, there is little that can be done

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[100] Id. ("In both own-race conditions, the correlations between accuracy and judgment strategy were consistent. . . . However, in both other-race conditions, this relationship disappears. . . ."); cf. Wright et al., supra note 93, at 128 ("The odds of correctly identifying the target with the sequential lineup procedure were 2.17 times higher for own-race identifications than for cross-race identifications.").

[101] Cf. Smith et al., supra note 90, at 165-66 (characterizing cross-racial identification as "very different than when someone is trying to identify someone of their own race" and finding that typical safeguards against misidentification do not improve reliability of cross-racial identification).

[102] Only Johnson and Rutledge seem to consider the applicability of judicial safeguards to the cross-racial situation. See Johnson, supra note 8 (describing current safeguards and proposing new tools); Rutledge, supra note 8 (same).

[103] See Johnson, supra note 8, at 986 (recommending specialized variations to traditional expert testimony and jury instructions to inform jurors of unique problems of cross-racial identifications); Rutledge, supra note 8, at 227-28 (advocating for trial court judge to give summary of social science data to jury in addition to jury instructions and expert testimony).

through evidentiary safeguards to diminish its taint on the criminal process.[104]

Once an identification has been admitted, moreover, it seems clear that only the admission of expert testimony or the use of more focused jury instructions can prevent the jury from placing undue weight on the identification.[105] This Part addresses both the admissibility and evidentiary issues in turn.

A. The Current Due Process Test Is Inapposite to a Cross-Racial Identification

While the Court may not have intended that the due process test in *Manson* apply to cross-racial identifications,[106] this Section explains why, even if the Court did so intend, the test *should* not apply to cross-racial identifications.

The Court's due process test begins with an assessment of whether the identification procedure was unnecessarily suggestive.[107] The Court's assumption is that an identification, if made without suggestive procedures, is reliable. This assumption does not hold true for cross-racial identifications. Psychological studies have found that even without suggestive procedures, people fare worse at accurately remembering faces of another race.[108] Therefore, the Court's starting point is flawed with respect to cross-racial identifications because it does not take into account the own-race bias, thereby ignoring a factor that significantly impacts the reliability of a cross-racial identification. Furthermore, the factors in the second prong of the Court's test do not make up for the Court's failure to take account of the own-race bias in a cross-racial identification.[109]

The first two *Manson* factors—the opportunity of the witness to view the perpetrator at the time of the crime and the witness's degree of attention[110]—are *self-reported* and therefore of questionable

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104 Cf. Smith et al., supra note 90, at 166 ("In other-race situations, . . . once a suspect has been selected from a lineup by an eyewitness, there is no known way to make a useful judgment about the likelihood that the eyewitness is correct or has made an error."); id. at 167 ("[T]hese findings suggest that the legal system should endeavor to reduce the number of false identifications before they are made, because once a false, other-race identification has been made from a lineup, innocent people cannot rely on the legal system to keep them from being wrongfully convicted and imprisoned.").

105 See infra Part III.B.

106 See supra Part I.A.2.

107 See supra notes 36-37 and accompanying text.

108 See supra Part II.A.

109 In fact, the Court's factors can be criticized even in their ability to counter suggestiveness. See, e.g., Rosenberg, supra note 93, at 276-81 (illustrating "infirmities" of *Manson* test). This argument, made elsewhere, is beyond the scope of this Note.

110 Manson v. Brathwaite, 432 U.S. 98, 114 (1977).

accuracy. Witnesses are impacted by the stressful circumstances and are usually unable to reflect precisely on their own ability to see the perpetrator.[111] Further, witnesses usually have an inflated sense of their own perspective, believing, for example, that the crime elapsed over a much longer period of time than it did in reality.[112]

The third *Manson* factor, the accuracy of the witness's prior description,[113] is particularly problematic for cross-racial identifications. Witnesses who identify suspects of another race may provide only the race and what can be termed "race-cumulative" information about the suspect.[114] For example, when a White witness describes a Black man, she may also state that he has black hair and dark eyes. While hair color and eye color can be distinguishing features for a White suspect (imagine the difference between a brown-haired, green-eyed man and a blond-haired, blue-eyed man), they are not necessarily distinguishing features for a Black man.[115] Therefore, even if a Black defendant meets such a "description," it does not indicate that the identification is more reliable than if the witness had provided the race alone.

The fourth *Manson* factor is the level of certainty demonstrated at the confrontation.[116] As discussed previously, this does not aid the jury in determining whether a cross-racial identification is reliable because witness certainty does not correlate to accuracy in memory for cross-racial identifications.[117]

Finally, the time between the crime and the confrontation, the fifth *Manson* factor,[118] could play a role in determining the potential magnitude of the own-race bias present in the situation.[119] Under the Supreme Court's current test, however, it alone cannot form the basis for admitting or excluding eyewitness evidence and therefore cannot counterbalance the inadequacy of the four other *Manson* factors in assessing the reliability of a cross-racial identification.

Given the failure of the Supreme Court's test to account for the effect of the own-race bias in the initial stage, and the inability of the

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111 See Elizabeth F. Loftus, Eyewitness Testimony 32-36 (1996).

112 See Rosenberg, supra note 93, at 278-79 (citing psychological studies).

113 *Manson*, 432 U.S. at 114.

114 See Bela August Walker, Note, The Color of Crime: The Case Against Race-Based Suspect Classifications, 103 Colum. L. Rev. 662, 671 (2003) (describing use of racial categories in police investigation).

115 Cf. Meissner & Brigham, supra note 48, at 7-8 ("[A] number of studies have indicated that different physiognomic facial features may be more appropriate for discriminating between faces of certain races.").

116 *Manson*, 432 U.S. at 114.

117 See supra notes 90-94 and accompanying text.

118 *Manson*, 432 U.S. at 114.

119 See supra text accompanying note 87.

subsequent five-factor analysis to mitigate that failure and to assess accurately the reliability of cross-racial identifications, the Supreme Court's test should not apply to cross-racial identifications. A separate test must be developed.

B. An Analysis of Evidentiary Safeguards

Even if the evidentiary safeguards for admitted identifications were perfect, a defendant must still be afforded due process with respect to the admission itself. Indeed, the Supreme Court has noted that once an identification is made, the defendant's fate might be sealed.[120] However, if a cross-racial identification is considered under more appropriate due process standards and is admitted, the application of evidentiary safeguards becomes important. This Section examines the evidentiary safeguards available to defendants and the inability of these safeguards to adequately protect defendants where there is a cross-racial identification. It concludes that only properly phrased jury instructions, in conjunction with expert testimony, are sufficient to protect defendants from wrongful convictions.

Cross-examination does not help a jury distinguish between a reliable and an unreliable cross-racial identification because a witness's credibility has nothing to do with the degree of own-race bias that has infected an identification.[121] A witness can be—and, this Note assumes, often is—telling what she believes is the truth but still be wrong.[122] More significantly, a witness's certainty or positive racial

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[120] United States v. Wade, 388 U.S. 218, 235-36 (1967) ("The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—'that's the man.'").

[121] See Meissner & Brigham, supra note 48, at 25 ("[C]ross-examination has not been shown effective in allowing jurors to distinguish accurate from inaccurate eyewitnesses." (citations omitted)); see also Johnson, supra note 8, at 953-55 (giving two reasons why cross-examination would not help reveal cross-racial recognition impairment: (1) witnesses can honestly believe they have good memory for other-race faces, when in fact they do not; and (2) "[b]ecause there are no known and commonly understood correlates for the own-race effect, ordinary cross-examination will never elicit facts from which the jury can infer the impairment" (citation omitted)).

[122] Another case of mistaken cross-racial identification illustrates the point:

> In 1984, a man broke into a young college student's apartment, held a knife to her throat, and raped her. Shortly thereafter, she went to the police station and identified the man who she believed was her assailant, through the use of a photo lineup. She later picked the same man out of a live lineup and identified him as her attacker at his criminal trial in 1985. She stated that she was "absolutely, positively, without-a-doubt certain he was the man who raped [her] when [she] got on that witness stand and testified against him." She was wrong. Nine years later, a DNA test proved that the man was innocent.

attitude may mislead jurors when these have no relevance to the accuracy of the identification.[123]

A closing argument alone cannot address the potential flaws with a cross-racial identification. Indeed, in order to be effective at counteracting the own-race bias, an attorney would need to reference the studies that discuss the importance of the own-race bias to identification. This type of information would not be admitted unless such testimony was elicited from an expert witness during the trial, however, because it would be assuming facts not in evidence.[124]

The scientific literature has severely criticized jury instructions in cases involving eyewitness identifications for not containing accurate information about cross-racial identifications.[125] Past instructions have largely been based on the *Manson* factors,[126] which this Note has shown do not adequately protect defendants in the context of cross-racial identifications.[127] In some cases, they have instructed the jury that they can "consider" the cross-racial nature of an identification, but they have failed to indicate whether the cross-racial nature would make the identification more or less susceptible to error. For example, in *State v. Cromedy*, the cross-racial jury charge proposed by defense counsel read as follows:

> [Y]ou know that the identifying witness is of a different race than the defendant. When a witness who is a member of one race identifies a member who is of another race we say there has been a cross-racial identification. You may consider, if you think it is appropriate to do so, whether the cross-racial nature of the identification has affected the accuracy of the witness's original perception and/or accuracy of a subsequent identification.[128]

According to some experiments, a number of people actually believe that a cross-racial identification might be more reliable than a

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> During her testimony at the trial of the man that she believed was her attacker, she was presented with a picture of the man who turned out to be her actual attacker and she swore that she had never seen him.

Yob, supra note 3, at 213 (quoting Mark Hansen, Scoping Out Eyewitness IDs, A.B.A. J., April 2001, at 39).

123 See supra notes 90-94 and accompanying text.

124 Fed. R. Evid. 611. See also 18 Am. J. Trial Advoc. 353, 376 & n.89 (describing Rule 611 as "judicial economy rule[ ]" designed to preclude the assumption of facts not in evidence).

125 See, e.g., Meissner & Brigham, supra note 48, at 25-26 (stating that cautionary jury instructions "are typically written by legal scholars who have little knowledge of the research findings" and arguing for use of model instructions describing problems common to cross-racial identifications).

126 See, e.g., United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1972) (providing model jury instructions that are based on *Manson* factors).

127 See supra Part III.A.

128 727 A.2d 457, 460 (N.J. 1999).

same-race identification.[129] Therefore, a curative instruction would need to state explicitly that cross-racial identifications are less reliable; it is not enough that the instruction mentions the word "cross-racial."

Of all the procedures used by the courts, expert testimony is advocated the most by researchers but is allowed the least often by judges.[130] The own-race bias, and factors relating to it, is often beyond jurors' common knowledge.[131] Given the "general agreement among researchers regarding the importance of the [own-race bias]"[132] and the lack of information commonly known about the phenomenon, it makes little sense to exclude such testimony, assuming it meets general standards for admissibility.

The case of McKinley Cromedy[133] provides an example of the inadequacy of evidentiary safeguards when eyewitness evidence is uncorroborated by other evidence. On August 28, 1992, a White woman was raped by a Black man in her apartment in New Jersey. Immediately after the incident, the victim telephoned the police and provided a description of the perpetrator.

The police showed the victim many photographs at the police station, including one of Cromedy, but she could not identify her assailant. Almost eight months later, she saw a man on the street whom she believed was her attacker. She identified Cromedy in a showup fifteen minutes later.

The trial judge refused defense counsel's request for a cross-racial jury charge. He also refused to allow expert testimony. On appeal, the New Jersey Supreme Court reversed and ordered a new trial. The court ruled that refusing to grant the cross-racial jury charge constituted reversible error;[134] however, it agreed with the trial court that expert testimony should not be allowed and even suggested that it should be categorically excluded.[135]

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129 See Johnson, supra note 8, at 947-48 (discussing results of study finding that only 58% of "laymen" expressed understanding of own-race bias; 13% believed that "[t]he white woman will find the black man easier to identify than the white man"; and 29% felt that either "[b]oth the Asian and the white woman will find the white man harder to identify than the black man" or "[t]he Asian woman will have an easier time than the white woman making an accurate identification of both men").

130 See supra notes 67-70 and accompanying text.

131 See supra note 129 and accompanying text.

132 Meissner & Brigham, supra note 48, at 26.

133 *Cromedy*, 727 A.2d 457. Unless otherwise specified, the facts presented in this discussion come from the opinion itself. See id. at 459-60.

134 Id. at 467.

135 Id. at 467-68 ("Because of the 'widely held commonsense view that members of one race have greater difficulty in accurately identifying members of a different race,' expert testimony on this issue would not assist a jury and for that reason would be inadmissible." (quoting United States v. Telfaire, 469 F.2d 552, 559 (1972) (Bazelon, C.J., concurring))).

At his second trial, a jury convicted Cromedy of aggravated sexual assault, second-degree robbery, third-degree burglary, third-degree aggravated criminal sexual contact, and third-degree terroristic threats and sentenced him to sixty years in prison.[136] The jury found him guilty on the basis of the eyewitness identification and the testimony of a detective who corroborated the fact that Cromedy had a "strange walk," part of the victim's description of her attacker.[137] No forensic evidence linked him to the crime.[138]

On December 8, 1999, after over five years in prison, DNA tests were conducted that excluded Cromedy as the attacker. He was released within a week of the test.[139]

McKinley Cromedy's case is only one of numerous mistaken cross-racial identifications that have occurred in this country.[140] It is impossible to know whether Cromedy would have been acquitted if the New Jersey Supreme Court had required that expert testimony be admitted on the own-race bias. However, it is clear that the procedural safeguards the court used were inadequate to ferret out this unreliable identification. The next Part suggests and analyzes an alternative approach to cross-racial identifications, one that offers greater protection for the defendant's due process rights.

IV
DUE PROCESS APPLIED TO CROSS-RACIAL IDENTIFICATIONS

As this Note has argued, attempting to address cross-racial identifications within the existing framework would be futile and, in the end, ineffective. Instead, it is important to consider the *rationale* behind the Court's approach to devise an alternative that furthers the

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136 See The Innocence Project, McKinley Cromedy Case Profile, at http://www.innocenceproject.org/case/display_profile.php?id=69 (last visited Sept. 29, 2003) [hereinafter Cromedy Case Profile].

137 Id.

138 *Cromedy*, 727 A.2d at 459-60.

139 See Cromedy Case Profile, supra note 136.

140 Cf. Johnson, supra note 8, at 935-36 ("Legal observers have long recognized that cross-racial identifications by witnesses are disproportionately responsible for wrongful convictions."). Anecdotally, several examples have been previously cited. To name one, the case of the "Quincy Five" in 1971 involved five Black men who were wrongfully indicted for the murder of Khomas Revels in Tallahassee, Florida. Five White eyewitnesses positively identified them as among the perpetrators. See Meissner & Brigham, supra note 48, at 3. The state argued, "What better evidence can there be than, 'I saw him,' from unprejudiced witnesses? This has been used since time immemorial. This is proof beyond a reasonable doubt. Five eyewitnesses!" Id. (citation omitted). Despite the lack of physical evidence, two of the five were found guilty. Expert testimony was not allowed in the case. All of the men were later exonerated when the *three* actual perpetrators were found. Id. at 3-4.

Court's purpose in adopting its test for admissibility while assuring the defendant adequate due process protections. To that end, the first Section of this Part sets out guidelines for a test that is more attuned to the scientific realities of cross-racial eyewitness identifications. The second Section then analyzes its merits, both prudentially and constitutionally.

A. Coping with Reality

The Supreme Court's test in *Manson* focuses on the reliability of an identification in light of procedural failures—suggestiveness.[141] While the own-race bias cannot be considered a "procedural failure," it inherently raises the same, if not greater, concerns with respect to potential for error as do suggestive lineup procedures. Simply because a cross-racial identification raises its own special considerations, such as the magnitude of the own-race bias, does not make procedural fairness less important. Moreover, because the *Manson* factors do not adequately uncover unreliable cross-racial identifications, a test governing their admissibility requires different criteria to assess an identification's reliability despite the existence of the own-race bias. To these ends, this Note proposes a three-part test.

1. Assessing the Magnitude of the Own-Race Bias and Other Factors Related to the Crime Itself

Because the own-race bias renders cross-racial identifications more unreliable, a court should first determine the degree of the bias. It is only then that a court can accurately determine the necessity for judicial safeguards.

A court should consider several factors when assessing the degree of the own-race bias. Two factors related to the witness are known to exacerbate or moderate the own-race bias: viewing time (the amount of time for which a witness views the suspect during the crime) and retention interval (the duration between the crime itself and the identification).[142] Additionally, factors related to the crime itself, such as lighting conditions,[143] affect all eyewitness identifications and impact the reliability of the identification when coupled with the own-race bias.

Imagine two reports: (1) A White man claims that a Black man has mugged him. He reports it immediately and provides a description. The police call him into the police station one week later and he

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141 See supra notes 35-40 and accompanying text.

142 See supra Part II.B.

143 See Wells & Olson, supra note 74, at 239.

makes an identification, and (2) A White woman claims to have been kidnapped by an Asian man. She is held captive for two weeks. She provides a description immediately after escaping and makes an identification in a month.[144]

In the first hypothetical, the viewing time seems to be a matter of seconds, perhaps up to a minute or two. The exact amount of time is not as important (and most likely would not be known by the court) as the suddenness of the nature of the crime. Coupled with stress and other potential attention-distractors, the own-race bias in the first example would be rather large. The short retention interval would not be able to mitigate the lack of contact between the witness and the suspect, though it could add to the unreliability of the identification.[145] One week might not exacerbate the own-race bias significantly, though one month most likely would.

In the second example, the viewing time is extensive, although it would vary depending on the actual amount of contact between the kidnapper and the victim. The own-race bias in this example would therefore be significantly reduced. As before, the retention interval would not be as important because the victim would have been able to memorize her captor's face and potentially distinctive details as well. In the first example, the likelihood of misidentification is great; in the second, it is small.[146]

Most crimes do not fit neatly into these two extremes—having almost no viewing time versus having ample viewing time. In these more ambiguous cases, the retention interval becomes more important and other factors that bear on the quality of the contact become more relevant. Since a court should evaluate all identification evidence with a fact-intensive inquiry, evaluating the magnitude of the own-race bias should not add difficulty to the court's task. Evaluating own-race bias does necessitate the court's acceptance of the phenomenon, however, which may be a substantial departure from existing practices.

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[144] While there are many additional material facts of the crime (such as lighting, whether the alleged perpetrator wore a mask, etc.) that go to the initial evaluation of an identification, these two examples are intended to focus on viewing time and retention interval.

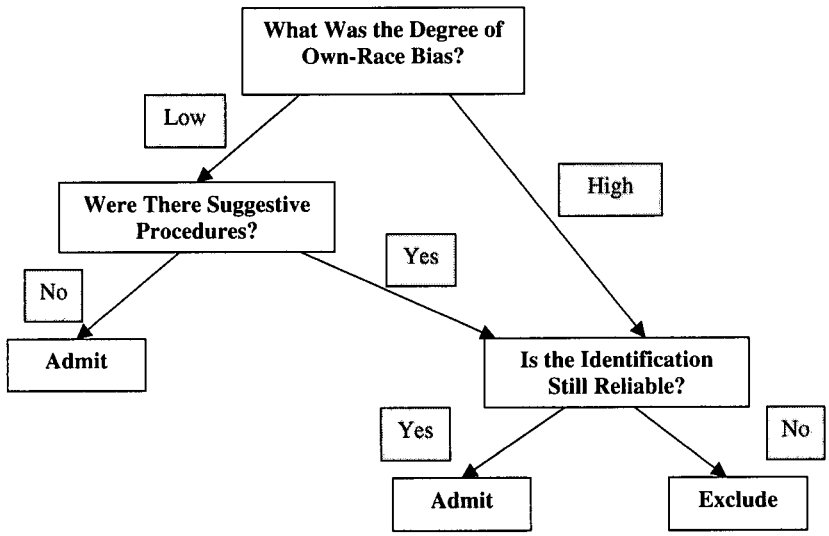
[145] This is because the viewing time directly affects the number of false alarms (or mistaken identifications), whereas retention interval only affects the response criterion. See supra notes 86-88 and accompanying text.

[146] It is worth noting that the own-race bias is only significant when it involves the identification of strangers. Therefore, a cross-racial identification of a person already known to the victim would be found to have greater indicia of reliability. The kidnapping example comes close to this situation.

A court's determination of the degree of own-race bias is similar to the Court's initial inquiry in *Manson* of the suggestiveness of the confrontation procedure. Like suggestiveness, the magnitude of the own-race bias is then weighed against other considerations in subsequent analyses. If the degree of own-race bias is great, the identification will have to prove reliable in other ways to be admissible. If the own-race bias is not significant, as with same-race identifications, suggestive procedures can still affect an identification's reliability; however, barring any suggestive procedures, it can be tested sufficiently through evidentiary safeguards.[147]

FIGURE B

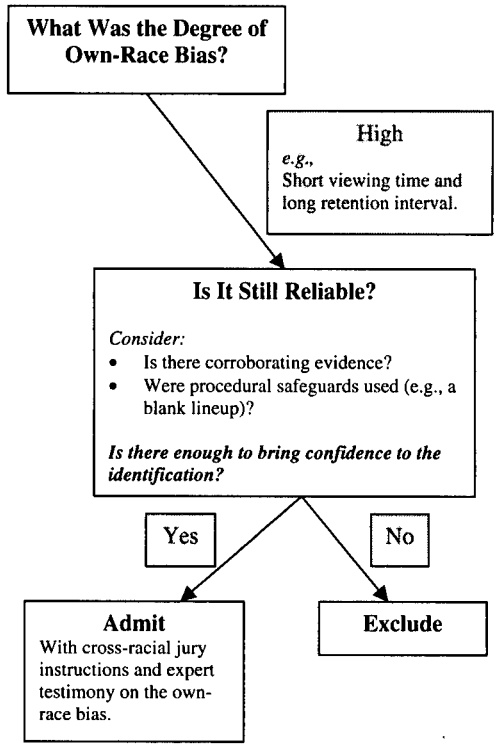
Proposed Test for Admissibility of Cross-Racial Eyewitness Identifications



[147] The test presented here proposes that special jury instructions and expert testimony be allowed where the own-race bias is large. However, if the own-race bias is found to be small, evidentiary safeguards would be left to the trial court's discretion, as is done now.

FIGURE C

Proposed Test for Admissibility of Cross-Racial Eyewitness Identifications Focus: When the Own-Race Bias is Great



2. *Requirements for Cross-Racial Identifications in Which the Own-Race Bias Is Great*

When the own-race bias is great, this proposed test would require corroboration or procedural safeguards for the identification to be admissible. By increasing the identification's reliability, either of these protections, or perhaps a combination of the two, would safeguard a defendant's due process rights in a way that is impossible under the Court's current test.

Corroboration is evidence that can independently verify the identification. Corroboration would allow a cross-racial identification found unreliable due to the significance of the own-race bias to be admitted.[148] To ensure that the corroboration actually makes the identification more reliable, there must be specific guidelines for what

[148] However, corroboration would *not* be required.

constitutes corroboration. For example, corroboration by another witness prone to the same own-race bias and witnessing conditions would not be sufficient. However, forensic evidence would always be sufficient. Other levels of corroboration, such as circumstantial evidence, might be sufficient, but such evidence would have to be weighed against the degree of own-race bias and unreliability determined in the first inquiry.

If other evidence does not corroborate a cross-racial identification, the circumstances of the identification come into greater scrutiny. For example, if the suspect meets distinctive elements of a description (tattoos, scars, etc.), this would suggest greater reliability of the identification. Additionally, if the police used safeguards at the lineup itself, the identification might be considered more reliable.[149] These procedures include, but are not limited to, the use of a "blank lineup" that does not contain the suspect before using a lineup containing the defendant, and the use of a lineup constructor[150] of the same race as the defendant. Scientific studies have shown that both of these make an identification more sound.[151] However, if the prosecutor called an expert witness to testify that the government relied on procedures designed to reduce error, such evidence alone would not render the identification reliable, and indeed, such testimony would probably be inadmissible as impermissible bolstering.[152]

The identification may still have qualities of unreliability, even if the identification were corroborated and protective procedures were used. Therefore, where the own-race bias is significant, courts should always allow jury instructions that specifically discuss the scientific findings relating to the own-race bias and the errors of cross-racial identifications. Courts should also allow the parties to bring experts to testify to the latest scientific developments in the area of cross-racial identifications.

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149 See Wells & Olson, supra note 74, at 241-43 (describing various safeguards found to be effective at reducing erroneous identifications).

150 A lineup constructor is one who creates a lineup by selecting the fillers.

151 See Wells & Olson, supra note 74, at 242-43 ("The blank lineup control procedure appears to be effective in weeding out eyewitnesses who are overly eager to make a selection, and the rate of misidentifications for those who survive the procedure is very low in comparison with those who were not subjected to the blank lineup prior to being shown the actual lineup." (citations omitted)); id. at 242 ("Those who select fillers for use in a lineup should be of the same race as the suspect in the case, because it appears that other-race observers cannot readily detect potential biases that make the suspect stand out as distinctive.").

152 Fed. R. Evid. 403. See also Biddy v. State, No. 03-01-00182-CR, 2002 WL 533652 (Tex. Ct. App. Apr. 11, 2002) (employing Texas equivalent of Rule 403 to evaluate alleged bolstering); Charles Alan Wright & Victor James Gold, 28 Federal Practice and Procedure § 6116, at 77 (1993) (describing use of Rule 403 to exclude bolstering evidence).

If neither corroboration nor additional safeguards are shown, a cross-racial identification should not be admitted. If either is present to some degree, the court should assess whether, under the totality of circumstances, there is enough to bring confidence to the identification. Such a standard would not be significantly different from the standard in *Manson*.[153] If the court has confidence in the reliability of the identification, despite the strength of the own-race bias, it should be admitted.[154]

3. Suggestiveness

Taking into account the own-race bias does not cure any unreliability that flows from suggestive procedures. Therefore, a court must also consider suggestiveness for cross-racial identifications. However, if the court determined that the own-race bias was great, and that no corroboration or procedures could cure its unreliability, the identification evidence would be excluded without necessitating a suggestiveness inquiry. Additionally, if the court deemed the own-race bias large, but there was sufficient corroboration or other factors to bring confidence to the identification, a suggestiveness determination would not be necessary.[155] Therefore, a court would only examine suggestiveness in the situation where it initially deemed the own-race bias small.

If the court finds the confrontation procedure suggestive,[156] it must assess whether the identification still has indicia of reliability. Because this analysis is limited to situations where the own-race bias is

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[153] The *Manson* test requires that the court decide whether, under the totality of the circumstances, there is a "very substantial likelihood of irreparable misidentification." If so, the identification must be excluded. Manson v. Brathwaite, 432 U.S. 98, 116 (1977) (quoting Simmons v. United States, 390 U.S. 377, 384 (1968)).

[154] Of course, defense counsel would still be able to cross-examine the witness and argue to the jury regarding the weight it should give to the identification.

[155] After assessing corroborative evidence or additional safeguards used by the police, any suggestiveness in the procedure already would have been counterbalanced.

[156] The Court never defines suggestiveness, even as it uses the term in its identification decisions. See, e.g., *Manson*, 432 U.S. at 106 (discussing relationship between suggestiveness and misidentification); United States v. Ash, 413 U.S. 300, 305 (1973) (noting that appellate court did not consider suggestiveness issue). It does provide examples of suggestiveness, such as a showup. See Stovall v. Denno, 388 U.S. 293, 302 (1967). However, the Court complicates the matter by distinguishing between those suggestive procedures that are necessary and those that are unnecessary. Id.; see also supra note 29. A suggestive procedure undermines the already questionable reliability of a cross-racial identification. Therefore, it is important to consider whether the circumstances make suggestiveness necessary, excusing the unreliability of an identification. This Note argues that if reliability is the linchpin, *Manson*, 432 U.S. at 114, then the necessity for suggestive procedures does not excuse an identification's flaws. Rather, an identification procured through necessarily or unnecessarily suggestive procedures should be admitted only if there are other indicia of reliability.

small, it is logical to treat it as if it were a same-race identification and apply the *Manson* factors. Because courts are already aware of this standard and are accustomed to its application, there is no need to expound on it in this Section.

4. Applying the Test

To clarify the practical administration of the test, this Section applies it to the facts of McKinley Cromedy's case.[157] For the purposes of this Section, imagine the decisionmaker as the judge at a suppression hearing where the defense is requesting the suppression of the pretrial cross-racial identification.

First, the court should look to the circumstances of the crime itself to determine the magnitude of the own-race bias. Recall that in this case a White woman was raped by a Black man. The incident occurred at night, but she described her apartment as brightly lit. He entered the apartment and demanded money, rifled through her purse, then led her to her kitchen (also described as brightly lit) and vaginally penetrated her from behind. She was not facing him during the incident and, in fact, her eyes were closed. After the attack, she faced him, standing two feet away. He did not conceal his face. He left the apartment. While there is no record of the amount of viewing time, from the court's opinion, it seems that the victim only actually saw her attacker for less than two minutes. Moreover, it is without question that the victim viewed the perpetrator under *highly* stressful circumstances. Her first attempt at an identification occurred five days later. Her retention interval, had she identified Cromedy out of the photographs, would have been very short. However, she did not identify anyone at that time. Instead, she made the identification of Cromedy almost eight months after the crime—a very long retention interval.

Based on these facts and a correct application of the test, the magnitude of the own-race bias would be very high because, as noted, the viewing time was very short and the retention interval very long. The court must then move to the second part of the test to determine whether there are other aspects of the identification that bolster its reliability. If none are found, it would be excluded.

First, the court should determine whether there is any evidence in the record that could corroborate the identification of Cromedy. Because this is a rape case, there are significant opportunities for corroboration through forensic evidence. The police in this case properly

[157] The facts in this discussion, unless otherwise noted, come from *State v. Cromedy*, 727 A.2d 457, 458-60 (N.J. 1999); see also supra notes 128-34 and accompanying text.

dusted for fingerprints and took the victim to the hospital where rape samples were taken. Additionally, the police received Cromedy's consent after his arrest to take saliva and blood samples. However, the prosecution presented no forensic evidence during the trial linking Cromedy to the offenses, and the police did not lift any fingerprints from the apartment that belonged to him. In fact, the genetic markers found in the semen could not be said to have come from the defendant. (If this is starting to sound like an easy case, remember that Cromedy was convicted *twice*.)

There are some reports that a detective corroborated the assertion that Cromedy had a "strange walk," a detail the victim provided.[158] The New Jersey Supreme Court, however, does not report this detail and a Comment on this case states that "[t]he only evidence against Cromedy was the eyewitness testimony."[159] Even if the court considers this fact of the "strange walk"—a fact that would have to be further verified—it would be insufficient for a case where the own-race bias was as great as it was here.

Failing corroboration, the court would then look to the facts of the identification itself. As mentioned above, it is arguable that if the victim had mentioned that Cromedy had a "strange walk," and if he indeed did have a "strange walk," this might be an indication of reliability. However, the victim did not actually see the defendant walk as part of the identification procedure, and therefore, it is unclear whether his walk was "strange" in the way she meant it. More importantly, this vague description alone does not add reliability to the identification.

Looking to other parts of the identification, the police did provide the victim with many slides and photographs in her initial viewing of the defendant. The number of fillers certainly provides a safeguard to the procedure.[160] However, she failed to identify the defendant at this time, and the subsequent identification was the product of a showup. Therefore, no special safeguards were used in this case that could make the identification more reliable.

At this point, the court would have to conclude that the cross-racial identification in this case is inadmissible. However, if the court had admitted the identification after determining that the own-race bias was large, it would have to allow both jury instructions and expert testimony on the issue.

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158 See Cromedy Case Profile, supra note 136.

159 K. Suzanne Heisinger, Case Note, State v. Cromedy, 6 Wash. & Lee Race & Ethnic Ancestry L.J. 155, 156 (2000).

160 See, e.g., Wells & Olson, supra note 74, at 230 (advocating for increased number of fillers for cross-racial identifications specifically).

Recall that in this case, the identification was admitted and expert testimony was denied. If the court had applied the due process test this Note proposes, this eyewitness identification would not have been admitted at trial. It is unlikely that Cromedy would have been wrongfully imprisoned.

B. A Critical Look at the Test

Because of the complexity of this issue and the test this Note presents, there are several potential criticisms that could emerge. These include: (1) A due process standard that is separate for cross-racial, versus same-race, identifications violates the Equal Protection Clause; (2) The test would exclude too much reliable evidence; (3) The test is too malleable; and (4) The test relies too much on scientific evidence that is constantly evolving and changing.

1. First Criticism: The Test Violates the Equal Protection Clause

The Supreme Court's current colorblind approach to the law places under scrutiny any racial classification, whether it be "benign" or "invidious."[161] Therefore, while an equal protection analysis seems intuitively appropriate for a test that determines admissibility standards based on race, such scrutiny does not actually seem to be a bar to the administration of the test presented in this Note. Initially, there are questions of standing: Who would bring an equal protection challenge, and have they suffered an injury in fact?

In order to raise the claim that the proposed test's racial classifications violate the Equal Protection Clause, a private plaintiff must have a concrete injury, one that is not abstract or conjectural.[162] In other words, the plaintiff must have suffered a palpable harm and the harm must be traceable to the state action.[163] If an eyewitness were to bring an equal protection claim, she would fail the first inquiry of experiencing a palpable harm, as an eyewitness possesses no legal entitlement to have her story presented in the courtroom. Judges have broad discretion to exclude unreliable evidence, including eyewitness accounts, and this exclusion does not affect the legal rights of eyewitnesses.[164] Additionally, eyewitnesses cannot raise the general

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161 See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 225-28 (1995).

162 Allen v. Wright, 468 U.S. 737, 751 (1984).

163 Id.

164 The author could find no case to date that has given eyewitnesses a legal right to present their account to a jury.

claim that the judiciary is violating the Constitution or is not following the law unless such claim is attached to a cognizable injury.[165]

While eyewitnesses might not have standing to challenge the test on these grounds, an official of the state or federal government could raise an equal protection claim. However, the official party would have to raise an injury to its own interests, as it cannot act merely to vindicate the concerns of its citizenry.[166] A state official might claim, for example, that the proposed test harms the State's interest in enforcing its laws. While this argument might properly articulate an injury to the State,[167] the official would still fail to prove causation. Since the proposed test only excludes the most unreliable evidence, the test cannot be said to hinder enforcement; rather, if adopted, its aim and likely effect would be to enhance the State's ability to convict the *actual* perpetrator rather than simply to find a person to convict.

Finally, even if the private or official parties were able to meet the standing requirements to raise the equal protection issue, the proposed test would likely pass strict scrutiny. To do so, the test must be narrowly tailored to serve a compelling state interest.[168] In this case, the state has a compelling interest in preventing wrongful convictions. Furthermore, because of the effect of race as demonstrated by the studies of own-race bias in eyewitness identifications,[169] the proposed test is narrowly tailored to exclude only the most unreliable evidence and secure more accurate verdicts. Therefore, it is unlikely that the test presented in this Note would be found to violate the Equal Protection Clause.[170]

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165 Cf. United States v. Richardson, 418 U.S. 166 (1974) (holding that plaintiffs lacked standing to challenge statute prohibiting disclosure of expenditures by Central Intelligence Agency). Citizens have been held to have standing for a more general grievance in very limited instances. See, e.g., Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990) (holding that standing to sue under federal environmental statute could be found for harm to individual's use and enjoyment of environment); Flast v. Cohen, 392 U.S. 83 (1968) (allowing taxpayer suit alleging violation of Establishment Clause through federal spending).

166 Laurence H. Tribe, 1 American Constitutional Law 452 (3d ed. 2000) ("[W]hen a state is merely suing . . . on behalf of its citizens rather than seeking to prevent or redress an independent injury to itself, standing is ordinarily denied.").

167 See John C. Reitz, 50 Am. J. Comp. L. 437, 451 (Supp. 2002) (pointing out that State is always entitled to sue to protect its sovereign interests, including enforcement of its own laws).

168 See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[Racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

169 See supra Part II.A.

170 Indeed, if this test were in violation of the Equal Protection Clause, it seems that cross-racial jury instructions would be as well. Cross-racial jury instructions, however, are gaining acceptance in the courts and have not faced objections on equal protection grounds. There is no case that has even discussed the equal protection implications of a cross-racial jury charge. Even when a cross-racial jury charge was requested and a sepa-

2. *Second Criticism: The Test Excludes Reliable Evidence*

The test proposed here attempts to balance the need for more safeguards with the realities of criminal proceedings. It aims only to exclude the most unreliable evidence, not cross-racial identifications across the board. It enables exclusion of only the unreliable identifications by providing many different options for the prosecution to illustrate the reliability of an identification despite the significance of the own-race bias. Such a test is necessary to sufficiently protect defendants' due process rights because the *Manson* test fails to do so by allowing too much unreliable evidence to be admitted. There is no way to prove conclusively that the proposed test will not exclude some reliable evidence, because there is no way to know if evidence is truly reliable; we only learn of identifications that are *un*reliable when DNA or other evidence leads to exonerations.

Criticism of this test for excluding reliable evidence operates under the assumption that safeguards should address the weight given to identification evidence rather than excluding such evidence wholesale. There are two responses to such a criticism. First, this test simply amends what the Supreme Court has already done for same-race identifications. In other words, rules for excluding eyewitness evidence already exist, and this test merely ferrets out unreliable cross-racial identifications from reliable ones. The second argument is an empirical one: Eyewitness testimony is *too compelling*. Even when eyewitness evidence is obviously flawed, juries believe it and use it as the primary basis to convict.[171] Therefore, evidentiary safeguards alone are inadequate.

3. *Third Criticism: The Test Is Too Malleable*

The third criticism of the test is that it is too malleable because it does not make an exhaustive list of factors (arguably what the Court did in *Manson*) and therefore leaves too much discretion to the trial courts. The only response to this criticism can be that the test is *intentionally* flexible. The Supreme Court's list of factors, in addition to being misleading, gives the impression that these factors are the only potential considerations when assessing reliability of identifications. In reality, identifications must be considered on a case-by-case basis,

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rate equal protection claim was raised, the courts have not used the Equal Protection Clause to analyze the charge. See, e.g., State v. Harvey, 731 A.2d 1121 (N.J. 1999).

[171] See, e.g., State v. Cromedy, 727 A.2d 457, 461 (N.J. 1999) (citing study finding that "jurors tend to place great weight on eyewitness identifications, often ignoring other exculpatory evidence").

and factors that may be material in some cases will be irrelevant in others.

More importantly, continued research will find factors that can help assess the reliability of cross-racial identifications. For this reason, it does not make sense for this Note to attempt to hold the court to scientific standards circa 2003. The purpose of this Note is, after all, to keep judicial practices in line with the extensive scientific research on this issue, not to hold them to a standard that could soon become outdated.[172]

4. *Fourth Criticism: New Science Will Render the Test Obsolete*

The argument in favor of a flexible test is equally applicable to counter critics who argue that scientific research will cause the proposed test to become obsolete. The test is flexible enough to adopt changes presented by the scientific community. A particularly skeptical critic could argue that, if the science is evolving at all, it is premature to adopt a test. This would be true if it were not for the consensus in the scientific community about the existence and robustness of the own-race bias.[173] Moreover, the increasing numbers of wrongful convictions speak to the importance of developing remedies now.[174] Of course, those remedies must be cognizant of the changing nature of science, but if this test is adopted it certainly would not be the first time that the judiciary employs a test that relies on a changing field.[175]

CONCLUSION

McKinley Cromedy was fortunate enough to be convicted of a crime with DNA evidence that could subsequently exonerate him. Indeed, the vast majority of evidence that exists for wrongful convictions comes from DNA exonerations. However, many more identifi-

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[172] Benjamin E. Rosenberg discusses the importance of flexibility with respect to the evolving science on eyewitness identifications. See Rosenberg, supra note 93, at 280-81; see also Jake Sussman, Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System, 27 N.Y.U. Rev. L. & Soc. Change 507 (2002) (arguing that new social science evidence on heightened reliability of sequential lineups should drive changes in police investigatory procedures and judicial review of admissibility of identification evidence).

[173] See supra Part II.A.

[174] The Innocence Project's homepage, at http://www.innocenceproject.org, reports 138 exonerations as of Sept. 29, 2003.

[175] In fact, the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals* to make more lenient the test for admitting novel scientific evidence indicates the judiciary's acceptance of the changing nature of science. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) (holding that "general acceptance" in scientific community is unnecessary for admissibility of scientific evidence).

cations that lead to incarceration can never be tested with DNA analysis.

The due process test developed by the Supreme Court is inadequate to prevent these wrongful convictions in cases of cross-racial identifications. Indeed, the test was not even developed with cross-racial identifications in mind. Scientific evidence of the own-race bias indicates that these cross-racial identifications must be addressed separately.

This Note advances a test that safeguards the due process rights of a defendant on trial as a result of a cross-racial identification. The wholesale adoption of the test is not the aim of this Note, however. Rather, this Note is an attempt to provoke the judiciary to recognize the existence of the own-race bias, the necessity of confronting the racialized nature of memory, and the administrability of additional safeguards. Due process requires at least this much.