NEW JERSEY JURORS ARE NO LONGER COLOR-BLIND REGARDING EYEWITNESS IDENTIFICATION

Eyewitness testimony in the criminal trial context constitutes a point at which psychological and evidentiary principles converge.[1] An eyewitness account is the result of input, retention, and retrieval processes.[2] The accuracy of an eyewitness identification depends largely upon psychological determinants such as observational powers, memory, viewing conditions, and prompts to recall.[3] Despite

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[1] *See* KATHERINE W. ELLISON & ROBERT BUCKHOUT, PSYCHOLOGY AND CRIMINAL JUSTICE 82 (1981). Eyewitness identification is defined as a "[t]ype of evidence by which one who has seen the event testifies as to the person or persons involved from his own memory of the event." BLACK'S LAW DICTIONARY 408 (6th ed. 1991). An eyewitness account is essentially "based on a theory—constructed by a human being (with help from others)—about what reality was like in the past." ELLISON & BUCKHOUT, *supra*, at 128-29.

Psychological principles applied to the issue of eyewitness identification in the legal context are an outgrowth of ongoing research on human memory and perception. *See id.* at 80. However, an incongruence exists in that even though much has been learned through research, little has been applied in the legal arena. *See id.*

[2] *See* Peter J. Cohen, *How Shall They Be Known?* Daubert v. Merrell Dow Pharmaceuticals *and Eyewitness Identification*, 16 PACE L. REV. 237, 242 (1996). Human memory of any given event is not tantamount to an exact recording, such as a video taping. *See id.* There are three distinct stages that make up the memory process. *See id.* In the first stage, information about an event enters the memory. *See id.* During this acquisition stage, factors specific to the actual event (e.g., lighting and duration) and factors unique to the witness (e.g., stress and fear) may alter the accuracy of the encoding. *See id.* at 242-43. Subsequently, an observer's attempt to remember the event with the passage of time constitutes the retention stage. *See id.* at 242. The retention stage is susceptible to the passage of time and post-event information. *See id.* at 243. Ultimately, the witness attempts to recall the information during the retrieval stage, which the manner of questioning and witness confidence level may affect. *See id.*

The limitations of human mental processes are unalterable, but the courts should address the reality of sources of misidentification accordingly through prevention or detection. *See* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 986 (1984); *see also* United States v. Russell, 532 F.2d 1063, 1066 (6th Cir. 1976). In *Russell*, the Sixth Circuit noted a strong potential for misidentification when a witness observes a stranger in a single instance under stressful conditions. *See id.* at 1066. The court commented that the justice system must take measures to ensure that no further distortions of potentially mistaken perceptions occur. *See id.*

[3] *See* EDWARD ARNOLDS ET AL., EYEWITNESS TESTIMONY STRATEGIES AND TACTICS §

so many variables, eyewitness testimony plays a prominent role in the criminal justice system.[4] Jurors generally tend to attach significant weight to eyewitness testimony;[5] consequently, mistaken identifications can lead to wrongful convictions of innocent people.[6]

1.03, at 5 (1984). A commonly used classroom simulation demonstrates the inconsistencies of eyewitness identification. *See* ELLISON & BUCKHOUT, *supra* note 1, at 82-83. A staged crime occurs during a professor's lecture. *See id.* at 83. Once the assailant exits the room, the student-eyewitnesses complete questionnaires about the incident. *See id.* Results indicate that "eyewitness accounts of events differ drastically from one another, the ranges of physical descriptions are large and discrepant, clothing and physical objects are not agreed on, and the majority of the witnesses are unable to pick out the assailant from a lineup staged at a later time." *Id.*

[4] See Jennifer L. Devenport & Steven D. Penrod, *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL., PUB. POL'Y & L. 338, 338 (1997); 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, 261 (1991) ("[N]otwithstanding its well-recognized unreliability, eyewitness identification testimony is featured frequently and prominently in criminal trials."); see also EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES at ix (Gary L. Wells & Elizabeth F. Loftus eds., 1987). Rape and robbery prosecutions usually rely heavily upon identification evidence. See Joseph D. Grano, A Legal Response to the Inherent Dangers of Eyewitness Identification Testimony, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES, supra, at 315, 315. Eyewitness identification, in some instances, may be the only evidence linking the accused to the criminal act. See id.; see, e.g., United States v. Hodges, 515 F.2d 650, 651, 653 (7th Cir. 1975) (holding that the trial court's refusal to give a jury instruction on mistaken identity was reversible error when the government's case was essentially based on three eyewitnesses' identifications of defendant cashing a stolen check); United States v. Holley, 502 F.2d 273, 277 (4th Cir. 1974) (adopting a model jury instruction on identification for use in cases that involve eyewitness testimony as the sole evidence of identification); Arizona v. Chapple, 660 P.2d 1208, 1212, 1224 (Ariz. 1983) (finding error in the trial court's exclusion of expert testimony when no direct or circumstantial evidence other than the eyewitness identification of two witnesses connected defendant to three murders and drug transportation); State v. Frey, 194 N.J. Super. 326, 329, 476 A.2d 884, 885 (App. Div. 1984) (stating that the sole evidence of a sexual assault/kidnap victim's testimony, coupled with defendant's denial of guilt, merited a jury instruction on identification). In these situations, accuracy of the eyewitness testimony is of utmost importance if justice is to be served. See EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES, supra, at ix.

[5] *See* ARNOLDS ET AL., *supra* note 3, § 1.03, at 5. The United States Supreme Court has also recognized unwarranted juror reliance on eyewitness testimony. *See* Watkins v. Sowders, 449 U.S. 341, 352 (1981) ("[D]espite its inherent unreliability, much eyewitness identification evidence has a powerful impact on juries.").

[6] *See* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES, *supra* note 4, at ix. Erroneous identifications have caused more injustice than perhaps any other factor. *See* NATHAN R. SOBEL, EYE-WITNESS IDENTIFICATION: LEGAL AND PRACTICAL PROBLEMS at vi (1972). Research indicates that wrongful convictions are largely attributed to mistaken identification. *See* Devenport & Penrod, *supra* note 4, at 338.

There are 349 documented wrongful convictions for capital crimes committed in the twentieth century. *See* Cindy J. O'Hagan, Note, *When Seeing Is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741, 741 n.7 (1993) (citing Tim Rutten, *As April 21 Nears, The Executioner's Song Grows Louder*, L.A. TIMES, Mar. 19,

Both legal authorities and researchers in the field of psychology have acknowledged the shortcomings of eyewitness identification evidence.[7] Factors negatively affecting the accuracy of an eyewitness's identification include "speed and movement, stimulus overload, the fact that the perpetrator is a stranger to the witness, diversion of attention, excessive arousal, surprise, and limitations on the opportunity to observe the face."[8] These hindrances are particularly unsettling because an eyewitness's ability to identify positively an alleged perpetrator's face is normally a threshold requirement in

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1992, at E1). Of these 349 innocent persons, 23 were executed. *See id.* Estimates of mistaken convictions for crimes range between 7500 and 150,000 on a yearly basis. *See* Cohen, *supra* note 2, at 254. In a study of more than 500 erroneous convictions, mistaken identifications accounted for 60% of the cases. *See* Devenport & Penrod, *supra* note 4, at 338 (citing C.R. Huff, *Wrongful Conviction: Societal Tolerance of Injustice*, 4 RES. IN SOC. PROBS. & PUB. POL'Y 99-115 (1987)). Another compilation of 65 wrongful convictions included 29 cases that were attributed to mistaken eyewitness identifications. *See* O'Hagan, *supra*, at 741 (citing EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932)).

Despite the demonstrated potential for wrongful convictions, the law historically has been hesitant to accept the findings of psychological research. *See* ARNOLDS ET AL., *supra* note 3, § 1.04, at 6. Much of the initial research literature on eyewitness testimony was in German, and, therefore, American jurists could not easily evaluate the findings. *See id.* Guy Montrose Whipple, beginning in 1909, contributed to resolving this dilemma by translating much of the foreign findings (e.g., works of Stern, Borst, Obsien, Binet, and Gross) into English. *See* Gary L. Wells & Elizabeth F. Loftus, *Eyewitness Research: Then and Now, in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES, *supra* note 4, at 1, 5. Once the research was made accessible and understandable, American jurists were still hesitant to accept and utilize such findings. *See id.* The resulting neglect over the years may be attributed to the fact that courts highly value eyewitness testimony for its evidentiary value and the tendency for research to be restricted to artificial laboratory environments makes it less generalizable to real world situations. *See* ELLISON & BUCKHOUT, *supra* note 1, at 80.

The first formal attempt by the United States Supreme Court to devise constitutional safeguards against the pitfalls of eyewitness identification did not occur until 1967. *See* SOBEL, *supra*, at 1-2. Prior to 1967, criminal courts essentially neglected inaccuracies of eyewitness identification. *See id.* at 2.

[7] *See* Devenport & Penrod, *supra* note 4, at 339. Efforts of researchers in the field of psychology have focused on isolating the sources of misidentification and correction of the problem. *See id.* In the legal community, attempts are made to safeguard against wrongful convictions. *See id.* Examples of specific safeguards include "the presence of counsel at postindictment, live lineups, opportunities for motions to suppress identifications, cross-examination of identifying witnesses, and expert psychological testimony about factors that influence eyewitness memory." *Id.* (citations omitted).

The degree of attorney reliance on psychological research findings regarding eyewitness identification is stifled by "discussions of experimental methods, the use of statistics, and the specialized language." Michael Owen Miller & Thomas A. Mauet, *The Psychology of Jury Persuasion*, 22 AM. J. TRIAL ADVOC. 549, 549 (1999).

[8] ELLISON & BUCKHOUT, *supra* note 1, at 83.

criminal proceedings.[9] Further complications arise when the accused is a member of a different race from that of the observer—a cross-racial identification.[10]

The significant weight that jurors attach to eyewitness testimony, coupled with its vulnerability to inaccuracies, have prompted some courts to safeguard against misidentification.[11] Suppression hearings,[12] cross-examination,[13] and summations[14] represent

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[9] *See id.* at 88. The law is also settled to the extent that one person's identification of an alleged criminal actor is sufficient grounds for a case to go to the jury and that such a rule does not constitute a denial of due process rights. *See Holley*, 502 F.2d at 274.

Psychologists propose that facial recognition places demands upon the human memory process that are distinct from memorizing words, happenings, or sounds. *See* ELLISON & BUCKHOUT, *supra* note 1, at 88. Laboratory tests show more than a 90% success rate for subjects shown pictorial images of a face and later tested for recognition of the same image. *See id.* at 88-89. Such results, however, cannot necessarily be generalized to real life situations in which an eyewitness sees a face "in motion, under a variety of changing lighting conditions and embedded in a rich context of other visual events and objects." *Id.* at 89.

[10] *See* Hadyn D. Ellis, *Practical Aspects of Face Memory*, *in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES, *supra* note 4, at 12, 17 ("It is a commonplace observation that faces drawn from an unfamiliar race are more difficult to remember than own-race faces.").

Criminal cases involving a perpetrator and a witness of different races pose the dilemma of a cross-racial identification. *See generally* United States v. Norwood, 939 F. Supp. 1132 (D.N.J. 1996) (involving Caucasian eyewitnesses and an African-American defendant charged with, among other things, unlawful possession of a handgun, aggravated assault, conspiracy to commit carjacking, and theft); State v. Gaines, 926 P.2d 641 (Kan. 1996) (involving a cross-racial identification of a Native American defendant in a rape, kidnapping, and criminal sodomy case); Commonwealth v. Engram, 686 N.E.2d 1080 (Mass. App. Ct. 1997) (involving Caucasian victims confronted by an African-American stranger wielding a gun); White v. State, 926 P.2d 291 (Nev. 1996) (involving a cross-racial identification of an African-American defendant in a murder and robbery case); Nelson v. State, 914 S.W.2d 670 (Tex. Ct. App. 1996) (involving the identification of an African-American armed robber by a Japanese male); Currie v. Commonwealth, 515 S.E.2d 335 (Va. Ct. App. 1999) (involving a cross-racial identification of an African-American male by a female victim in an assault and battery, a burglary, and an attempted rape case).

[11] *See* Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL., PUB. POL'Y & L. 589, 609 (1997).

[12] A suppression hearing is defined as "[a] pretrial proceeding in criminal cases in which a defendant seeks to prevent the introduction of evidence alleged to have been seized illegally." BLACK'S LAW DICTIONARY 1004 (6th ed. 1991). Courts enforce a defendant's right to counsel during post-indictment lineups and right to due process by suppressing a pretrial identification found to violate such rights. *See* Johnson, *supra* note 2, at 951.

[13] "Cross-examination" is defined as "[t]he examination of a witness upon a trial or hearing, or upon taking a deposition, by the party opposed to the one who produced him, upon his evidence given in chief, to test its truth, to further develop it, or for other purposes." BLACK'S LAW DICTIONARY 262 (6th ed. 1991). Many courts disallow expert testimony on cross-racial recognition impairment, reasoning that

opportunities for defense attorneys to shield against mistaken identifications of their clients.[15] Although less widely accepted by courts, the use of expert testimony about eyewitness identification is another potential safeguard against misidentification.[16] The risks posed by basic eyewitness identification and, particularly, cross-racial identification, may also be addressed through the use of a cautionary jury charge in which the judge instructs the jury how properly to evaluate eyewitness testimony.[17]

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cross-examination is the proper way to approach the credibility of a witness account. *See* Johnson, *supra* note 2, at 953.

[14] "Summation" is defined as "a recapitulation by attorneys and, sometimes, judge of the evidence adduced, in order to draw the attention of the jury to the salient points at issue." BLACK'S LAW DICTIONARY 1001 (6th ed. 1991). Some courts consider jury instructions on cross-racial recognition impairment unnecessary because counsel for the defense can include the issue in a closing argument. *See* Johnson, *supra* note 2, at 955.

[15] *See* Johnson, *supra* note 2, at 951 (discussing manners in which defense attorneys attempt to protect their clients from mistaken identifications).

[16] *See id.*, at 958-59. One commentator has noted that "[f]ederal courts have been very reluctant to admit expert testimony on the unreliability of eyewitness identifications; one circuit has held that such testimony is never admissible." O'Hagan, *supra* note 6, at 757 (citing United States v. Benitez, 741 F.2d 1312, 1315 (11th Cir. 1984)). The trial judge's decision to admit or exclude expert testimony regarding eyewitness identification is generally discretionary. *See id.* (citing United States v. Purham, 725 F.2d 450, 454 (8th Cir. 1984)).

Expert testimony regarding eyewitness reliability may remedy the problem of juror inability to assess eyewitness identification accuracy. *See* Christopher M. Walters, Comment, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402, 1402 (1985). Expert testimony on eyewitness identification attempts "to bolster the jury's own ability to assess the evidence." *Id.* at 1406.

[17] *See* Johnson, *supra* note 2, at 974. Federal and state jurisdictions have adopted cautionary jury instructions. *See id.* at 978-79 (noting that all federal courts of appeals except the Fifth and Eleventh Circuits, which have not yet faced the issue, approve of the cautionary instruction; noting also that state courts, such as those of New York, Kansas, West Virginia, and Massachusetts, have approved of the use of the cautionary instruction). "Charge to the jury" is defined as "[t]he final address by judge to jury before verdict, in which he sums up the case, and instructs jury as to the rules of law which apply to its various issues, and which they must observe." BLACK'S LAW DICTIONARY 159 (6th ed. 1991). "Special charge to the jury" is defined as "[a] charge or instruction given by the court to the jury, upon some particular point or question involved in the case, and usually in response to counsel's request for such instruction." *Id.*

Courts adopted pattern jury instructions because faulty jury instructions were the most common cause for reversal. *See* Bruce Dennis Sales et al., *Improving Comprehension for Jury Instructions*, *in* 1 THE CRIMINAL JUSTICE SYSTEM 23, 24 (Bruce Dennis Sales, ed. 1977). These pattern instructions were intended to provide the judge with a precise and succinct statement of the law that the average juror would understand. *See id.*

A jury instruction serves as an educational tool for informing jurors about the significant issues in, and law applicable to, the case. *See* Gabriel v. Auf Der Heidearagona, Inc., 14 N.J. Super. 558, 564, 82 A.2d 644, 647 (App. Div. 1951). The

In *New Jersey v. Cromedy*,[18] the New Jersey Supreme Court considered whether an African-American defendant was entitled to a cross-racial jury instruction when the only evidence linking the defendant to the crime was an identification provided by a Caucasian eyewitness.[19] The court held that, despite a lack of consensus in the scientific community, the strong potential for inaccurate cross-racial identifications requires a jury charge when eyewitness identification is a central issue and no corroborating evidence exists.[20]

The crime for which McKinley Cromedy stood trial occurred in a New Brunswick, New Jersey apartment on August 28, 1992.[21] D.S., a white, female college student was watching television when an African-American male intruder suddenly appeared in her well-lit apartment.[22] After seizing D.S.'s cash and charge cards, the stranger adjusted the window blinds and led her into the illuminated kitchen.[23] Standing behind D.S., the intruder demanded that she remove her shorts and then sexually assaulted her.[24] After the attack,

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trial judge must pose to the jury "the material and substantial issues of fact disclosed by the pretrial order, drawn into controversy by the conflicting, divergent, and contradictory evidence adduced at the trial and to be submitted to the jury for determination, together with instructions in the law adapted to the consideration of such issues." *Id.* at 565, 82 A.2d at 648.

Some research indicates, however, that jurors given eyewitness identification instructions are no more sensitive to the fallacies of eyewitness identification than are uninstructed jurors, except to the extent that instructed jurors are less influenced by eyewitness testimony when poor visibility conditions exist. *See* Lieberman & Sales, *supra* note 11, at 609 (referencing E. Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCHOL. 252 (1988)).

[18] 158 N.J. 112, 727 A.2d 457 (1999).

[19] *See Cromedy*, 158 N.J. at 115, 727 A.2d at 458-59.

[20] *See id.* at 132, 727 A.2d at 467 ("We embrace the . . . rule requiring a cross-racial identification charge under the circumstances of this case despite some differences of opinion among the researchers."). The State argued that a lack of agreement in the research community as to cross-racial recognition impairment contradicts the need for a special jury charge. *See id.* at 130, 727 A.2d at 466. The court, however, rejected the State's argument and maintained that this case did not turn on the introduction of any scientific evidence or expert testimony to discredit the identification of the accused, but instead entailed mere common experience. *See id.*

[21] *See id.* at 115-16, 727 A.2d at 459.

[22] *See id.*

[23] *See id.* at 116, 727 A.2d at 459. The perpetrator claimed that he needed money to reach New York to evade arrest for murder. *See id.*

[24] *See id.* ("The intruder . . . vaginally penetrated D.S. from behind.").

D.S. turned and faced her rapist before he exited the apartment.[25] Once alone, the victim contacted the local police department.[26]

Law enforcement personnel immediately reported to the scene and obtained the victim's statement before she was taken to the hospital for treatment and rape samples.[27] D.S. provided a detailed description of the clothing worn by the rapist, whom she characterized as an "African-American male in his late 20's to early 30's, full-faced, about five feet five inches tall, with a medium build, mustache, and unkempt hair."[28] D.S., however, did not identify Cromedy as her attacker the following day when she was shown an array of photographs that included the defendant.[29] Eight months later, however, the victim saw the defendant on the street and, believing him to be her attacker, immediately contacted the police.[30] Within fifteen minutes, the police took the defendant into custody and arrested him after D.S. made a positive identification in a "showup" procedure.[31]

The defendant provided the police with blood and saliva samples, none of which linked him to the crime.[32] Consequently, the

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[25] *See Cromedy*, 158 N.J. at 116, 727 A.2d at 459. When D.S. turned to face her attacker, she "was standing approximately two feet away from her assailant." *Id.*

[26] *See id.*

[27] *See id.*

[28] *Id.* D.S. further described her attacker as "wearing a dirty gray button-down short-sleeved shirt, blue warm-up pants with white and red stripes, and a Giants logo on the left leg." *Id.*

[29] *See id.*

[30] *See id.* at 117, 727 A.2d at 459.

[31] *See Cromedy*, 158 N.J. at 117, 727 A.2d at 459. A "showup" is defined as a

> [o]ne-to-one confrontation between suspect and witness to crime. A type of pre-trial identification procedure in which a suspect is confronted by or exposed to the victim of or witness to a crime. It is less formal than a lineup but its purpose is the same. Commonly, it occurs within a short time after the crime or under circumstances which would make a lineup impracticable or impossible.

BLACK'S LAW DICTIONARY 962 (6th ed. 1991). Lineups differ in that "the suspect . . . is exhibited, along with others with similar physical characteristics, before the victim or witness to determine if he can be identified as having committed the offense." *Id.* at 641 (defining "lineup"). Although suggestive methods of identification are more conducive to misidentification, "the admission of evidence of a showup without more does not violate due process." Neil v. Biggers, 409 U.S. 188, 198 (1972).

[32] *See Cromedy*, 158 N.J. at 117, 727 A.2d at 459. Defendant's fingerprints were not found in the victim's apartment. *See id.* In contrast to the victim, defendant was identified as a "non-secretor" by the New Jersey State Police Chemistry Biology Laboratory. *See id.*, 727 A.2d at 459-60. "Non-secretors," who constitute approximately 20% of the population, do not secrete their blood type in their bodily fluids. *See id.*, 727 A.2d at 459. In addition, both the victim and defendant had type "A" blood. *See id.*, 727 A.2d at 459-60. Because defendant fell into these

only evidence the prosecution presented at the criminal trial was D.S.'s eyewitness identification.[33] At the close of trial, the defendant requested that the jury receive an instruction from the judge on cross-racial identification.[34] The New Jersey Superior Court, Law

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classifications, the semen found on the victim could not be matched conclusively with Cromedy or used to exonerate him as the perpetrator. *See id.*, 727 A.2d at 460.

The public defender representing Cromedy, Anderson D. Harkov, sought DNA testing to no avail as the trial judge disallowed such testing. *See* Ronald Smothers, *DNA Tests Free Man After 6 Years; Had Been Convicted in Rape of Student*, N.Y. TIMES, Dec. 15, 1999, at B6.

[33] *See Cromedy*, 158 N.J. at 132, 727 A.2d at 467.

[34] *See id.* at 118, 727 A.2d at 460. For a cross-racial instruction, defense counsel proposed the following language:

> You 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.

Id. In support of defendant's request for an instruction to the jury on cross-racial identification, he referred to the final report of the New Jersey Supreme Court Task Force on Minority Concerns. *See id.*

Refusing the defendant's request, the trial court alternatively issued the model jury charge on eyewitness identification. *See id.* As of November 26, 1990, the Model Jury Charge on Identification, in pertinent part, states:

> The defendant as part of (his/her) general denial of guilt contends that the State has not presented sufficient reliable evidence to establish beyond a reasonable doubt that (he/she) is the person who committed the alleged offense. Where the identity of the person who committed the crime is in issue the burden of proving that identity is upon the State. The State must prove beyond a reasonable doubt that this defendant is the person who committed the crime. The defendant has neither the burden nor the duty to show that the crime, if committed, was committed by someone else or to prove the identity of that other person. You must determine, therefore, not only whether the State has proved each and every element of the offense charged beyond a reasonable doubt, but also whether the State has proved beyond a reasonable doubt that this defendant is the person who committed it.
>
> In order to meet its burden with respect to the identification of the culprit the State has presented the testimony of the witness _____. You will recall that this witness identified the defendant in court as the person who committed the offense. According to the witness, (his/her) identification of the defendant in court is based upon the observations and perceptions which (he/she) made of the defendant on the scene at the time the offense was being committed. It is your function as jurors to determine what weight, if any, to give to this testimony. You must decide whether it is sufficiently reliable evidence upon which to conclude that this defendant is the person who committed the offense charged.
>
> In going about your task you should consider the testimony of the witness in the light of the customary criteria concerning credibility as I

Division declined the defendant's request, noting that the New Jersey Supreme Court had not yet formally adopted the report of the Task Force on Minority Concerns calling into question the accuracy of cross-racial identifications.[35] The trial court further pointed out that no expert testimony on the subject of cross-racial identification had been presented during the trial.[36] Ultimately, the jury convicted the defendant of aggravated sexual assault, robbery, burglary, and terroristic threats.[37]

The defendant, emphasizing that the entire case hinged upon the victim's cross-racial identification, appealed on the issue of an inadequate jury instruction.[38] The appellate division held that the trial court did not err when it declined to issue a jury charge specific to cross-racial identification.[39] In reaching its conclusion, the majority noted that the law concerning the admissibility of expert testimony on cross-racial identification was not yet settled in New Jersey.[40] Judge Shebell dissented, stating that the trial court's failure

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> have explained them to you. It is particularly appropriate that you consider the capacity or the ability of the witness to make observations or perceptions as you gauge it to be and that you consider the opportunity which the witness had at the time and under all of the attendant circumstances for seeing that which (he/she) says (he/she) saw or that which (he/she) says (he/she) perceived with regard to (his/her) identification of the person who committed the alleged offense.

New Jersey's Model Jury Charge on Identification, Nov. 26, 1990.

[35] *See Cromedy*, 158 N.J. at 118, 727 A.2d at 460. The Task Force originated out of Chief Justice Robert N. Wilentz's directive for an investigation of the treatment given to minorities in the court system with the goal of suggesting remedies that would be within the judiciary's power to institute. *See New Jersey Supreme Court Final Report of the Task Force on Minority Concerns*, 131 N.J. L.J. 1145, 1145 (1992). The Task Force included the Subcommittee on Cross-Racial Eyewitness Identification, which was formed to determine whether race differences among witnesses and criminals are correlated with erroneous identifications. *See id.* at 1154. The subcommittee examined commonly used identification procedures, the relative determinative weight of eyewitness identification in criminal prosecutions, and the reliability of identification when the accused and accuser are of different races. *See id.* The subcommittee concluded that eyewitness identification is not as reliable as commonly perceived and, furthermore, that the legal community remains uneducated about the decreased reliability of cross-racial identifications. *See id.* at 1154-55. One recommendation was for the Supreme Court to develop instructions that caution jurors as to the unreliability of eyewitness testimony and cross-racial identifications, in particular. *See id.* at 1155.

[36] *See Cromedy*, 158 N.J. at 118, 727 A.2d at 460.

[37] *See id.*

[38] *See id.*

[39] *See id.*

[40] *See id.* at 118-19, 727 A.2d at 460 (citing State v. Gunter, 231 N.J. Super. 34, 40-48, 554 A.2d 1356, 1359-64 (App. Div. 1989)). The appellate court was averse to

to direct the jury's attention to the risks associated with cross-racial identification denied the defendant of his right to an impartial trial.[41]

Unsuccessful at the appellate division, the defendant exercised his right to come before the state's highest court.[42] Echoing the concern articulated in Judge Shebell's dissenting opinion at the appellate division, the New Jersey Supreme Court unanimously reversed Cromedy's convictions and remanded the case for a new trial.[43] The court held that a cautionary jury charge on cross-racial

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requiring a cross-racial instruction because, according to *State v. Gunter*, expert testimony on cross-racial identification was not yet approved in New Jersey. *See id.* *Gunter* involved a robbery and aggravated assault at a McDonald's fast food restaurant in Sussex County, New Jersey. *See Gunter*, 231 N.J. Super. at 37, 554 A.2d at 1357. The restaurant manager's eyewitness identification was essentially the only evidence linking defendant to the crime. *See id.* at 38, 554 A.2d at 1358. The trial judge in *Gunter* excluded expert testimony that would have offered opinions as to the unreliability of cross-racial identification, weapon-focus theory, and the effect of stress on memory and perception. *See id.* at 40-41, 554 A.2d at 1359-60. Defendant was convicted and appealed on the issue of admissibility of expert testimony on eyewitness identification. *See id.* at 39, 554 A.2d at 1359. In *Gunter*, the appellate division remanded to the trial court the admissibility issue of expert testimony for a Rule 8 hearing, reasoning that a preliminary hearing should have been held to determine whether expert testimony would assist the jury beyond a common-sense understanding of eyewitness identification. *See id.* at 47-48, 554 A.2d at 1363.

[41] *See Cromedy*, 158 N.J. at 119, 727 A.2d at 460. Judge Shebell stated:

> A jury instruction that contains no direct reference to the hidden fires of prejudice and bias which may be stoked by an incident such as the sexual assault in question and fails to call the jury's attention to the problems of cross-racial identification, so well documented by the [New Jersey Supreme Court Task Force on Minority Concerns], denies minority defendants, such as McKinley Cromedy, their constitutional right to a fair trial.

Id. (brackets in original). Judge Shebell's warning about the drawbacks associated with cross-racial identification was prophetic in that McKinley Cromedy was ultimately proven innocent through DNA testing. *See infra* note 136 and accompanying text.

[42] *See Cromedy*, 158 N.J. at 119, 727 A.2d at 460. The issue of a jury instruction pertaining to cross-racial identification came before the state's highest court as a matter of right pursuant to Rule 2:2-1(a)(2). *See id.* New Jersey Rules of Court 2:2-1(a) provides:

> Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State; (2) in cases where, and with regard to those issues as to which, there is a dissent in the Appellate Division; (3) directly from the trial courts in cases where the death penalty has been imposed and in post-conviction proceedings in such cases; (4) in such cases as are provided by law.

N.J. CT. R. 2:2-1(a). The New Jersey Supreme Court also granted certification on issues restricted to those identification issues not addressed by the appellate decision dissenting opinion. *See Cromedy*, 158 N.J. at 119, 727 A.2d at 460.

[43] *See Cromedy*, 158 N.J. at 133, 727 A.2d at 467-68.

identification is required whenever identification is a central issue in the case and eyewitness testimony by a member of a different race constitutes the sole evidence linking the defendant to the crime.[44] The court also held, however, that cross-racial recognition impairment falls within the ambit of "commonsense" and, thus, expert testimony on the matter is inadmissible pursuant to the New Jersey Rules of Evidence.[45]

A significant potential for misidentification arises when a witness recognizes a stranger following a momentary observation under stressful conditions.[46] This risk has prompted state and federal courts alike to proceed with caution when addressing eyewitness testimony in a variety of contexts.[47]

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[44] *See id.* at 132, 727 A.2d at 467 ("A cross-racial instruction should be given only when, as in the present case, identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability.").

[45] *See id.* at 133, 727 A.2d at 467-68. The court noted that expert testimony would be inadmissible because of the "widely held commonsense view that members of one race have greater difficulty in accurately identifying members of a different race." *Id.* (quoting United States v. Telfaire, 469 F.2d 552, 559 (D.C. Cir. 1972) (Bazelon, C.J., concurring) (internal quotations omitted)).

Rule 702 of the New Jersey Rules of Evidence, which the *Cromedy* court cited, provides that, only "[i]f 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." N.J. R. EVID. 702. The use of the phrase "scientific knowledge" in Rule 702 is intended to allow testimony only on information arrived at through the scientific method, which attempts to ensure reliability. *See* Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1029 (1995).

As set forth in relevant case law, the requirements for admitting expert testimony are:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.

State v. Kelly, 97 N.J. 178, 208, 478 A.2d 364, 379 (1984).

[46] *See* United States v. Russell, 532 F.2d 1063, 1066 (6th Cir. 1976). The Supreme Court has noted that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." United States v. Wade, 388 U.S. 218, 228 (1967).

[47] *See* Michael H. Hoffheimer, *Criminal Law: Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585, 585 (1989) ("During the 1960s, in the wake of scholarship and Supreme Court opinions that called attention to the serious problem of misidentification in criminal trials, federal circuit courts began to join a growing number of state and foreign common-law jurisdictions that required or encouraged use of identification instructions." (footnotes omitted)).

The "*Wade-Gilbert-Stovall* trilogy"[48]—three cases decided on the same day in 1967—reflects the United States Supreme Court's concern for mistaken eyewitness identifications in criminal cases.[49] In *United States v. Wade*,[50] the Court considered whether in-court identifications of the defendant should be barred from evidence because law enforcement officials had placed the defendant in a pretrial lineup without giving notice to defense counsel.[51] Stressing

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Courts have addressed eyewitness identification in many different contexts, including witness testimony, pretrial lineups, admissibility of expert testimony, pretrial showup procedures, and photographic displays. *See, e.g.*, United States v. Hunter, 692 A.2d 1370, 1372 (D.C. Cir. 1997) (involving a challenge to witness identification of robbers in a showup procedure); Lyons v. Johnson, 99 F.3d 499, 504 (2d Cir. 1996) ("The issue of misidentification is absolutely fundamental to a criminal trial. Although this case seems to be solidly built upon the identification of three eyewitnesses, this court has noted on more than one occasion that eyewitness testimony is often highly inaccurate."); State v. Love, 986 P.2d 358, 361 (Kan. 1999) (involving a defendant's attempt to suppress a pretrial identification because a photographic lineup leading to a murder charge was impermissibly suggestive); State v. Glover, 951 S.W.2d 359, 362 (Mo. Ct. App. 1997) ("If . . . the court finds that the pretrial identification procedures were unduly suggestive, the court must proceed to the second step and determine whether the suggestive procedures have so tainted the identification as to lead to a substantial likelihood that the pretrial identification was not reliable."); State v. Nelson, 950 P.2d 940, 944-45 (Utah Ct. App. 1997) ("We hold that when presented with the issue of the constitutional admissibility of eyewitness identification testimony, a trial court must . . . legally determine whether the eyewitness identification is reliable."); Rodriquez v. Commonwealth, 455 S.E.2d 724, 725 (Va. Ct. App. 1995) (exploring the admissibility of expert testimony regarding eyewitness identification in the context of suggestive eyewitness identification procedures).

Problems with eyewitness identification have been addressed in relation to the right to counsel during generic lineup procedures, in-court identifications, due process, photographic displays, suggestive lineup procedures, and showup procedures. *See Russell*, 532 F.2d at 1067 (providing a brief track record of the Supreme Court's forays into these areas).

[48] *See* United States v. Telfaire, 469 F.2d 552, 555 (D.C. Cir. 1972) (giving the cases this collective name).

[49] *See* Lisa Manshel, *The Child Witness and the Presumption of Authenticity After* State v. Michaels, 26 SETON HALL L. REV. 685, 714 (1996) ("*Wade*, *Gilbert*, and *Stovall* reflect the Court's concern with the problems of eyewitness identification. Usually, the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness' recollection of the stranger can be distorted easily."); *see also* David E. Paseltiner, Note, *Twenty Years of Diminishing Protection: A Proposal to Return to the* Wade *Trilogy's Standards*, 15 HOFSTRA L. REV. 583, 607 (1987) (encouraging a return to the standards set forth by the *Wade* trilogy—fair trials for defendants and sanctions on police misconduct).

[50] 388 U.S. 218 (1967).

[51] *See Wade*, 388 U.S. at 219-20. The facts of this case involved a robbery of a Texas bank, during which a man wearing sections of tape on both sides of his face held a gun on two bank personnel and demanded they fill a pillowcase with cash. *See id.* at 220. The robber escaped in a stolen vehicle driven by an accomplice. *See id.* After an indictment was returned and counsel appointed, an FBI agent placed the

the "innumerable dangers and variable factors"[52] associated with eyewitness identification, the Court held that a post-indictment lineup is a critical stage of a criminal prosecution during which the accused is entitled to legal representation.[53] Accordingly, the Court

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defendant in a lineup procedure without notifying the defendant's attorney. *See id.* The two bank employees selected defendant as the robber out of six or seven men. *See id.* At trial, the bank employees also identified the defendant as the robber. *See id.*

To no avail at the trial level, defense counsel raised Fifth Amendment self-incrimination and Sixth Amendment assistance of counsel challenges. *See id.* at 220. The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V. The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

The *Wade* Court observed:

> [T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth Amendment—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor.

Id. at 226-27 (footnotes omitted). *But see* Stephen A. Saltzburg, *Criminal Procedure in the 1960s: A Reality Check*, 42 DRAKE L. REV. 179, 199-200 (1993) (claiming that the Court identified a key problem, but chose the wrong solution in merely requiring the presence of counsel at a lineup).

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

[53] *See id.* at 236-37. The Court explored the following drawbacks associated with eyewitness identification: (1) the fallibility associated with identifying strangers, (2) the suggestiveness commonly associated with pretrial identification procedures, (3) witnesses' susceptibility to even subtle suggestion, (4) witnesses' documented unwillingness to change their minds once an identification has been made, (5) a victim's outrage interfering with objective identification, and (6) the inability of the accused to effectively undermine the credibility of the identification by proving any

vacated the defendant's conviction and ordered a hearing to explore (1) whether the eyewitnesses' in-court identifications of the defendant were based on valid, independent observations and (2) whether including such evidence prejudiced the defendant.[54]

Gilbert v. California[55] also involved a pretrial lineup conducted in the absence of defense counsel.[56] The Supreme Court addressed not only the trial court's need to determine that in-court identifications are "not tainted by the illegal lineup,"[57] but also ruled on the admissibility of direct testimony regarding an identification at an illegal lineup.[58] The Court applied its ruling in *Wade* by holding that, for the conviction to stand, the State must establish either (1) that the in-court identification has a source other than the illegal lineup or (2) that admitting the evidence does not prejudice the defendant.[59] Going one step further than *Wade*, however, the Court held that direct testimony regarding the identification at an illegal lineup is per se inadmissible.[60] The Court reasoned that a steadfast exclusionary rule against "illegal lineup" testimony would underscore the importance of the lineup stage and provide law enforcement personnel with an added incentive to act in accordance with a criminal defendant's constitutional right to have counsel present at lineup.[61]

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unfairness during a private lineup confrontation. *See id.* at 228-32.

[54] *See id.* at 242.

[55] 388 U.S. 263 (1967).

[56] *See Gilbert*, 388 U.S. at 269. The case involved an armed robbery of a California loan and savings establishment, as well as the murder of a law enforcement officer at the scene. *See id.* at 265. Defendant was initially arrested by the FBI in Philadelphia. *See id.* at 265-66. Without notice to defense counsel, the alleged perpetrator was paraded with 10 to 13 prisoners on a stage in a Los Angeles auditorium before more than 100 people in the audience. *See id.* at 270 & n.2. The men in the lineup were asked questions and directed to utter phrases used by the perpetrator during the robbery. *See id.* at 270 n.2. Defendant was identified by three eyewitnesses to the robbery in question, the manager of the apartment building where evidence was discovered, and eight witnesses of other crimes allegedly committed by him. *See id.* at 269-70. A bifurcated trial ultimately resulted in imposition of the death penalty. *See id.* at 265.

[57] *Id.* at 272.

[58] *See id.* at 272-73.

[59] *See id.* at 272.

[60] *See id.* at 273.

[61] *See id.* at 273 ("Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup."). The Court further reasoned that "the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence." *Id.*

In *Stovall v. Denno*,[62] the Court considered whether the exclusionary rules enunciated in *Wade* and *Gilbert* should be applied retroactively.[63] The Court additionally considered whether, under the totality of the circumstances, the identification procedure was so unnecessarily conducive to misidentification that the accused suffered a violation of due process.[64] In *Stovall*, the defendant had not yet had the opportunity to retain counsel when the police brought him to the stabbing victim's hospital room for identification purposes.[65] At trial, the victim testified about the identification process at the hospital, made an in-court identification, and the defendant was convicted.[66] Following his conviction, the defendant filed for federal habeas corpus, challenging the constitutionality of his forced participation in an unfairly suggestive showup without the benefit of legal representation.[67] Although acknowledging that the exclusionary rules announced in *Wade* and *Gilbert* sought to secure justice and ensure accurate identifications, the Court held that "adherence to sound principles of decision-making" militated against retroactive application of the rules.[68] The Court explained that showing suspects individually for identification purposes is generally discouraged, but the particularly crisis-like circumstances of the case[69] did not permit a formal lineup and, thus, petitioner had not been denied due process of law.[70]

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[62] 388 U.S. 293 (1967).

[63] *See Stovall*, 388 U.S. at 297.

[64] *See id.* at 301-02.

[65] *See id.* at 295. A physician was stabbed to death in his Long Island home. *See id.* His wife, also a doctor, was stabbed 11 times by the attacker. *See id.* At the crime scene, police found a shirt and keys, which were ultimately traced to defendant. *See id.* Without waiting for counsel to be appointed, police brought the accused to the hospital for identification purposes. *See id.* The female victim identified defendant from her hospital bed after the man uttered words for voice recognition. *See id.*

[66] *See id.*

[67] *See id.* at 295-96.

[68] *Id.* at 301; *see also id.* at 297. The Court acknowledged that "[i]nequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue." *Id.* at 301. The Court supported its ruling by reasoning, "we regard that fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." *Id.*

[69] *See Stovall*, 388 U.S. at 302. The emergent circumstances justifying the showup procedure included that the victim was potentially close to death and thus, a showup may have been the defendant's only chance to clear his name. *See id.*

[70] *See id.* at 302. Specifically, the Court explained that the following factors demonstrated the need for a showup at the hospital: (1) the victim was the only one who could positively identify or exculpate the accused, (2) time may have been a factor because her survival was not certain, (3) the victim was unable to travel to the

Five years later, in *Neil v. Biggers*,[71] the United States Supreme Court set forth factors for assessing the reliability of eyewitness identification following a suggestive showup.[72] In *Neil*, the accused was convicted of rape based on the victim's identification during a showup procedure conducted approximately seven months after the attack.[73] The Court acknowledged that an increased chance of misidentification can violate a defendant's due process rights, but ultimately concluded that an unnecessarily suggestive identification procedure alone does not warrant the exclusion of such evidence.[74] The Court evaluated the reliability of the identification under the totality of the circumstances, but focused on the following factors: (1) the witness's opportunity to observe the defendant at the time of the criminal act, (2) the attention of the witness, (3) the precision of the witness's earlier description of the perpetrator, (4) the degree of certainty shown by the witness at the time of identification, and (5) the amount of time between the criminal act and the confrontation.[75] Applying these five factors, the Court held that misidentification of the assailant was not a substantial likelihood and, thus, the case properly went to the jury.[76]

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police station, and (4) the police pursued the only feasible avenue for identification. *See id.*

[71] 409 U.S. 188 (1972).

[72] *See Neil*, 409 U.S. at 199-200.

[73] *See id.* at 189, 194-95. The victim's testimony detailed an attack in her kitchen by a youth wielding a butcher knife. *See id.* at 193. The intruder initially wrestled the victim to the floor, but when the victim's daughter began screaming, the perpetrator forced the victim at knifepoint to walk outside along train tracks into a wooded setting. *See id.* at 193-94. At this location, the assailant committed rape under what the victim described as brightly moonlit conditions. *See id.* at 194. After the attack, the perpetrator fled the scene, and the victim returned home to contact the police. *See id.* The victim relayed a general description of the assailant to the police and viewed suspects (i.e., lineups, showups, and pictures) for the next seven months. *See id.* at 194-95. Finally, a showup was conducted during which the victim maintained having "no doubt" about the positive identification of the attacker. *See id.* at 195.

[74] *See id.* at 198-99. The Court specifically stated that "the admission of evidence of a showup without more does not violate due process . . . . While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent, we do not think that the evidence must therefore be excluded." *Id.*

[75] *See id.* at 199-200. The *Neil* Court found that the victim: (1) spent a substantial amount of time observing her attacker under lighted conditions, (2) was by no means a casual observer, (3) provided a thorough description of the assailant, (4) did not contradict herself with any other identifications, and (5) acted quite certain as to her identification. *See id.* at 200-01.

[76] *See id.* at 201. Applying the elements five years later, the United States Supreme Court alluded to the possible unreliability of cross-racial identification in *Manson v. Brathwaite*, 432 U.S. 98 (1977). *See Manson*, 432 U.S. at 115. Reflecting

A further safeguard against the inaccuracy of eyewitness identification is the model jury instruction formulated in the 1972 decision of *United States v. Telfaire*.[77] In that case, the United States Court of Appeals for the District of Columbia considered whether a jury may deliberate the guilt of an accused based solely upon the uncorroborated testimony of one witness.[78] Although the case hinged on the issue of eyewitness identification with the accused denying any part in the robbery, the trial court did not issue a specific charge on identification.[79] The court of appeals held that (1) because of the particular circumstances of the case[80] and the jury charge actually given,[81] the jurors' attention was sufficiently focused on the issue of identification and (2) the defense was not prejudiced by the absence of a charge specific to identification.[82] In view of *Wade* and its progeny, however, the court crafted a model instruction[83] that could

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upon a same-race identification of a Connecticut drug dealer by an African-American undercover narcotics officer, the Court noted that the officer, as a member of the same race, is "unlikely to perceive only general features of 'hundreds of Hartford black males.'" *Manson*, 432 U.S. at 115 (quoting Brathwaite v. Manson, 527 F.2d 363, 371 (2d Cir. 1975)).

[77] 469 F.2d 552 (D.C. Cir. 1972).

[78] *See Telfaire*, 469 F.2d at 554-55. The "one witness rule" allows a case to qualify for jury deliberation on uncorroborated testimony of a solitary witness. *See id.* at 554. The victim in *Telfaire* recounted a scenario occurring in a hotel during which he was robbed of ten dollars. *See id.* at 554 n.4. More than one-half hour later, the victim was accompanied by two officers back to the hotel, where he identified the accused as the robber. *See id.*

[79] *See id.* at 555-56. The court noted that the importance of a special jury instruction on finding the evidence supporting identification beyond a reasonable doubt was articulated first in *McKenzie v. United States*, 126 F.2d 533, 536 (D.C. Cir. 1942). *See Telfaire*, 469 F.2d at 555.

[80] *See Telfaire*, 469 F.2d at 556-57. The victim had a sufficient opportunity to view the perpetrator and automatically identified the defendant upon seeing him in the hotel lobby. *See id.* at 555 n.4.

[81] *See id.* at 556. The jury instructions covered aspects of reasonable doubt, elements of the offense, and alibi. *See id.*

[82] *See id.* at 556 & n.13.

[83] *See id.* at 555 n.11, 558-59. In pertinent part, the model jury instruction provides:

> One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The Government has the burden of providing identity, beyond a reasonable doubt. . . . However, you, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. . . .
>
> Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the offense and to make a reliable identification later.
>
> In appraising the identification testimony of a witness, you should

be used in cases warranting a specific charge on eyewitness identification.[84] The court explained that the instruction was not mandatory, but strongly encouraged the use of the instruction in future criminal trials.[85]

Much like the federal courts, the New Jersey judiciary has taken notice of the misidentification risk posed by eyewitness testimony.[86] In *State v. Green*,[87] for example, the New Jersey Supreme Court

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consider the following:

> (1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?
>
> . . . .
>
> (2) Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection?. . . .
>
> . . . .
>
> [(3) You may take into account any occasions in which the witness failed to make an identification of defendant, or made an identification that was inconsistent with his identification at trial.]
>
> (4) Finally, you must consider the credibility of each identification witness in the same way as any other witness . . . .

Id. at 558-59 (brackets in original).

At least one commentator, however, has suggested that the *Telfaire* instruction may not appropriately sensitize jurors to eyewitness evidence. *See* Robert J. Hallisey, *Experts on Eyewitness Testimony in Court—A Short Historical Perspective*, 39 HOW. L.J. 237, 265 (1995) (discussing results of an experiment indicating that a judge's *Telfaire* instructions failed to sensitize jurors to eyewitness evidence or to create any skepticism with which jurors viewed the evidence).

[84] *See Telfaire*, 469 F.2d. at 557.

[85] *See id.* The *Telfaire* court stated that "[the model jury instruction] is not being set forth in terms of compulsion, but a failure to use this model, with appropriate adaptations, would constitute a risk in future cases that should not be ignored unless there is strong reason in the particular case." *Id.*

[86] *See* State v. Green, 86 N.J. 281, 292, 430 A.2d 914, 919 (1981). An accused has a right to rely on the assumption that basic principles upon which the accusation against him is based will be covered in the jury charge. *See* State v. Butler, 27 N.J. 560, 596, 143 A.2d 530, 550 (1958). The right to a proper jury charge is absolute. *See id.*

Charging the jury in a proper manner is crucial to a fair trial. *See* Gabriel v. Auf Der Heidearagona, Inc., 14 N.J. Super. 558, 563-65, 82 A.2d 644, 647-48 (App. Div. 1951). A jury charge instructs the jurors as to the issues of law involved in the decision-making process. *See Green*, 86 N.J. at 288, 430 A.2d at 917. Jury instructions may be classified into three categories: (1) essential and fundamental issues, (2) substantially material matters, and (3) other relevant and material topics. *See id.* at 289, 430 A.2d at 918. The court should instruct the jury as to essential or substantially material elements. *See id.* at 290, 430 A.2d at 918. Failure to grant proper requests will be deemed prejudicial error. *See id.* at 291, 430 A.2d at 919.

[87] 86 N.J. 281, 430 A.2d 914 (1981). The underlying facts of the case involved a woman approached by a strange man asking for a match at about 12:30 a.m. in Newark, New Jersey. *See id.* at 285, 430 A.2d at 915-16. The man asked her what her astrological sign was and stated that he was born under the sign of Leo. *See id.*, 430

reversed a rape and robbery conviction because of the trial court's failure to issue a jury charge specific to eyewitness identification.[88] The court emphasized that the potential for mistaken identification was magnified because the victim's eyewitness testimony was the crux of the case.[89] The court concluded that, when identification of the defendant is a critical issue, a specific instruction is required to focus juror attention on the proper manner by which eyewitness testimony should be evaluated.[90]

Nearly a decade later, in *State v. Gunter*, the New Jersey Superior Court, Appellate Division, considered whether a defendant is further entitled to present expert testimony on eyewitness identification.[91] In *Gunter*, a robbery and aggravated assault case, an expert witness for the defendant was prepared to state that cross-racial identifications are less reliable than same-race identifications.[92] Applying New

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A.2d at 916. Subsequently, he forced her toward a school yard by holding a razor to her neck. *See id.* at 285-86, 430 A.2d at 916. He then took money from her and raped her in an alley. *See id.* at 286, 430 A.2d at 916. Several months later, she identified the defendant after seeing him in a bar. *See id.* Defendant did not match the original description that the victim gave police, but he admitted being a "Leo," using a box cutter at his job, and living in the neighborhood where the crime occurred. *See id.* at 286-87, 430 A.2d at 916.

[88] *See id.* at 292, 294, 430 A.2d at 919, 921.

[89] *See id.* at 291, 430 A.2d at 919 ("The absence of any eyewitness other than [the victim] directly connecting defendant to the crime, the discrepancies in the description, and defendant's denial combined to make identification a fundamental and essential trial issue. The potential danger of mistaken eyewitness identification is particularly significant here.").

[90] *See id.* at 292, 430 A.2d at 919. The New Jersey Supreme Court listed two alternatives that would satisfy the requirement of a jury charge: (1) the trial court could have clarified that the burden of proof to establish that the defendant raped the victim rested with the State, or (2) the trial court could have issued the Model Jury Charge on identification. *See id.* at 293, 430 A.2d at 920.

[91] *See* State v. Gunter, 231 N.J. Super. 34, 554 A.2d 1356 (App. Div. 1989).

[92] *See id.* at 36, 40-41, 554 A.2d at 1357, 1359-60. This case involved a robbery of a McDonald's restaurant by two masked individuals. *See id.* at 37, 554 A.2d at 1357. While the night manager was locking up the restaurant, one of the intruders forced three employees into a freezer. *See id.*, 554 A.2d at 1357-58. The other intruder forced the manager, at gunpoint, to fill a bag with money. *See id.*, 554 A.2d at 1358. The manager was able to see the face of one robber who had adjusted his mask. *See id.* When the robber realized that the manager was looking at his face, he hit him across the face with a pistol. *See id.* After the bag was filled, the robber forced the manager into the freezer with the other employees. *See id.* The manager's subsequent identification of the defendant, two stocking masks, and a weapon were the only pieces of evidence linking the accused to the crime. *See id.* at 38-39, 554 A.2d at 1358.

The defendant was prepared to introduce an expert, who was prepared to testify that white people are less apt to distinguish accurately among black people than vice-versa. *See id.* at 41, 554 A.2d at 1360. The expert was also prepared to explain the "weapon focus" theory, which involves the limitations of a victim's perceptions when

Jersey's evidentiary rules, the appellate division held that the exclusion of the expert testimony was erroneous in the absence of an admissibility hearing.[93] The court further noted that the New Jersey Rules of Evidence require the trial judge to consider the nature and reliability of the expert testimony, as well as the witness's expertise.[94]

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an attacker has a deadly weapon. *See id.* Furthermore, the expert was prepared to explain the "forgetting curve" (i.e., recollection of an event does not diminish at a steady rate) and the degree to which memory factors are commonly understood or misunderstood. *See id.*

The court noted that, although several state and federal courts had previously addressed the issue of expert testimony on eyewitness identification, New Jersey had not yet considered the issue in a published court opinion. *See id.* at 36, 554 A.2d at 1357.

[93] *See id.* Rule 8 of the New Jersey Rules of Evidence provides, in pertinent part:

> (1) When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. . . .
> (2) Where evidence is otherwise admissible if relevant and its relevance is subject to a condition, the judge shall admit it if there is sufficient evidence to support a finding of the condition. In such cases the judge shall instruct the jury to consider the issue of the fulfillment of the condition and to disregard the evidence if they find that the condition was not fulfilled. . . .
> (3) Where by virtue of any rule of law a judge is required in a criminal action to make a preliminary determination as to the admissibility of a statement by the defendant, the judge shall hear and determine the question of its admissibility out of the presence of the jury. In such a hearing the rules of evidence shall apply and the burden of proof as to admissibility of the statement is on the prosecution. . . .

N.J. R. EVID. 8.

[94] *See Gunter*, 231 N.J. Super. at 41-42, 554 A.2d at 1360 (citing State v. Kelly, 97 N.J. 178, 208, 478 A.2d 364, 379 (1984)). The three factors included: (1) whether the testimony addresses aspects beyond the common understanding of jurors, (2) whether the area of testimony is sufficiently advanced such that the information is reliable, and (3) whether the purported expert has sufficient expertise to lend a reliable account. *See id.* These three factors are taken from Rule 56(2), which provides:

> A witness qualified pursuant to Rule 19 as an expert by knowledge, skill, experience, training or education may testify in the form of opinion or otherwise as to matters requiring scientific, technical or other specialized knowledge if such testimony will assist the trier of fact to understand the evidence or determine a fact in issue. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

N.J. R. EVID. 56(2).

Recently, in *State v. Cromedy*,[95] the New Jersey Supreme Court considered a particular type of eyewitness testimony—cross-racial identification.[96] The court ruled that a jury instruction on cross-racial identification is mandatory in certain instances, despite a lack of consensus in the scientific community as to the reliability of the theory of cross-racial recognition impairment.[97]

Justice Coleman, writing for a unanimous court, began by acknowledging that the issue of cross-racial identification impairment was one of first impression in New Jersey.[98] The justice stated that the determinative question is whether a cross-racial jury charge should be issued even though expert testimony on the matter of identification was not presented at trial.[99] Considering the propriety of a special jury instruction, the court reflected upon empirical research examining the psychological determinants of cross-racial identification reliability.[100] The court explained that some

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[95] 158 N.J. 112, 727 A.2d 457 (1999).

[96] *See id.* at 115, 727 A.2d at 458. Defendant argued that cross-racial impairment is a scientific reality and, furthermore, that the court should take judicial notice of such fallibility and approve the findings of the New Jersey Supreme Court Task Force on Minority Concerns, recommending a jury instruction. *See id.* at 119, 727 A.2d at 460-61. Defendant relied on the Task Force's report, common knowledge, and judicial notice to bolster his argument and further maintained that expert testimony would not assist the jury in its determination. *See id.* at 119-20, 727 A.2d at 461. Alternatively, the State argued that there is no definitive determination in the scientific community as to cross-racial impairment and that the court therefore should decline to issue a jury charge. *See id.*

[97] *See id.* at 130, 727 A.2d at 466 ("We reject the State's contention that we should not require a cross-racial identification charge before it has been demonstrated that there is substantial agreement in the relevant scientific community that cross-racial recognition impairment is significant enough to support the need for such a charge."). The court then defined the appropriate circumstances for a cross-racial instruction. *See id.* at 132, 727 A.2d at 467 ("A cross-racial instruction should be given only when . . . identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability.").

[98] *See id.* at 120, 727 A.2d at 461. The justice described cross-racial identification as occurring "when an eyewitness is asked to identify a person of another race." *Id.*

[99] *See id.* ("In this context, we must decide whether a cross-racial jury instruction should be required where scientific evidence demonstrating the need for a specific instruction has not been presented.").

[100] *See id.* at 120-23, 727 A.2d at 461-62. The court took notice of the increasing frequency with which findings of cross-racial recognition can be found in the professional literature. *See id.* at 120, 727 A.2d at 461. One study found that jurors place significant weight on eyewitness identification, even to the extent that they may blatantly disregard exculpatory evidence. *See id.* at 120-21, 727 A.2d at 461 (citing R.C.L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79, 79-89 (1981)). Other studies have shown that eyewitnesses are better at identifying members of their own race than members

eyewitnesses are affected by "own-race" bias—a decreased ability to accurately identify members of another race.[101] The court then highlighted the consistency with which studies have found "that the 'own-race effect' is 'strongest when white witnesses attempt to recognize black subjects.'"[102] The court also noted, however, that significant disagreement remains within the scientific community over (1) the actual impact of the "own-race" bias upon eyewitness reliability, (2) the degree to which members of different races are affected by cross-racial impairment, and (3) the extent to which empirical findings can be applied to real-life situations.[103]

The court maintained that agreement among researchers in a particular area is not a *sine qua non* of judicial reliance upon research in that same area.[104] In support of this proposition, the court submitted that the United States Supreme Court in *Brown v. Board of Education*[105] did not consider the uniformity of social scientists' opinions to be a prerequisite for buttressing legal conclusions with research findings.[106] Justice Coleman reasoned that sociological observations can aid a court in choosing a rule of law, as exemplified by the *Brown* Court's reliance upon social science studies finding that racial segregation had a harmful effect upon students.[107]

Justice Coleman then embarked upon a review of federal precedent that revealed a trend of increasing attention to eyewitness

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of other races. *See id.* at 121, 727 A.2d at 461 (citing ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979); Gary L. Wells & Elizabeth F. Loftus, *supra* note 6, at 1-11).

[101] *See Cromedy*, 158 N.J. at 121, 727 A.2d at 461.

[102] *Id.*, 727 A.2d at 461-62 (quoting People v. McDonald, 690 P.2d 709, 720 (Cal. 1984)).

[103] *See id.* at 121-23, 727 A.2d at 461-62. The court stated that "[a]lthough researchers generally agree that some eyewitnesses exhibit an own-race bias, they disagree about the degree to which own-race bias affects identification." *Id.* at 121, 727 A.2d at 462.

[104] *See id.* at 123, 727 A.2d at 462-63.

[105] 347 U.S. 483 (1954).

[106] *See Cromedy*, 158 N.J. at 123, 727 A.2d at 462-63. The court stated:

> The debate among researchers did not prevent the Supreme Court of the United States, in the famous school desegregation case of *Brown v. Board of Education of Topeka*, from using behavioral and social sciences to support legal conclusions without requiring that the methodology employed by those scientists have general acceptance in the scientific community.

Id., 727 A.2d at 462 (citations omitted).

[107] *See Cromedy*, 158 N.J. at 123, 727 A.2d at 462-63 ("Thus, *Brown v. Board of Education* is the prototypical example of an appellate court using modern social and behavioral sciences as legislative evidence to support its choice of a rule of law.").

identification pitfalls.[108] The court noted passages from various courts of appeals decisions during the past several decades that demonstrated judicial encouragement of jury charges that focus attention on the suspect nature of eyewitness identifications.[109] Justice Coleman also took notice of the United States Supreme Court's warnings about the unreliability of eyewitness identifications and the likelihood of race as a complicating factor.[110]

Having considered the federal approach to eyewitness identification, the justice focused on cross-racial jury charges in state courts.[111] The court observed that judicial treatment of cross-racial jury instructions has ranged from discretionary use to complete prohibition.[112] Justice Coleman reported that the majority of courts that allow cross-racial instructions leave the decision to provide such charges to the trial judge's discretion.[113] The justice stated that, in

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[108] *See id.* at 124-25, 727 A.2d at 463-64. The justice explored federal treatment of eyewitness identification overall, as well as cross-racial identification, in particular. *See id.* (discussing Manson v. Brathwaite, 432 U.S. 98 (1977); United States v. Wade, 388 U.S. 218 (1967); Jackson v. Fogg, 589 F.2d 108 (2d Cir. 1978); United States v. Smith, 563 F.2d 1361 (9th Cir. 1977) (Hufstedler, J., concurring); United States v. Russell, 532 F.2d 1063 (6th Cir. 1976); United States v. Brown, 461 F.2d 134 (D.C. Cir. 1972); United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972) (Bazelon, C.J., concurring)).

[109] *See id.* (quoting Jackson v. Fogg, 589 F.2d 108, 112 (2d Cir. 1978) ("[C]enturies of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence.")); United States v. Smith, 563 F.2d 1361, 1365 (9th Cir. 1977) (Hufstedler, J., concurring) (commenting on the reliability of eyewitness identification as being "at best, highly dubious, given the extensive empirical evidence that eyewitness identifications are not reliable."); United States v. Russell, 532 F.2d 1063, 1066-67 (6th Cir. 1976)). In *Russell*, Judge McCree stated:

> There is a great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation, and this risk is increased when the observation was made at a time of stress or excitement. . . .
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> . . . .
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> This problem is important because of all the evidence that may be presented to a jury, a witness' in-court statement that "he is the one" is probably the most dramatic and persuasive.

Russell, 532 F.2d at 1066-67.

[110] *See Cromedy*, 158 N.J. at 125, 727 A.2d at 464 (quoting United States v. Wade, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.")).

[111] *See id.* at 126-28, 727 A.2d at 464-65. The justice cited to case law of California, Massachusetts, Utah, Kansas, New York, Illinois, and Rhode Island while considering the utility of cross-racial identification instructions. *See id.*

[112] *See id.*

[113] *See id.* at 126, 727 A.2d at 464 (citing several cases that illustrate the

these "discretionary" jurisdictions, a trial court's failure to issue a cross-racial cautionary charge is considered prejudicial error only when (1) eyewitness identification is a central issue, (2) no other corroborating evidence exists, and (3) factors arise that cast doubt upon the reliability of the identification.[114]

Conversely, the justice noted that some courts refuse to issue cross-racial jury instructions under any circumstances.[115] The justice explained that some of these courts have reasoned both that cross-racial instructions require expert testimony and that cross-examination, coupled with summation, sufficiently safeguards against the risk of misidentification.[116] The justice also remarked that other courts refusing to give cross-racial jury instructions have concluded that empirical findings on the topic are questionable.[117]

Having reviewed the law in other jurisdictions, Justice Coleman turned to New Jersey jurisprudence.[118] The justice emphasized that New Jersey law already requires a trial court to give a jury instruction specific to eyewitness identification when it is a crucial issue in the

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discretionary approach, including *Commonwealth v. Hyatt*, 647 N.E.2d 1168 (Mass. 1995), *People v. Wright*, 755 P.2d 1049 (Cal. 1988), *State v. Long*, 721 P.2d 483 (Utah 1986), *People v. Palmer*, 203 Cal. Rptr. 474 (Cal. Ct. App. 1984), and *People v. West*, 189 Cal. Rptr. 36 (Cal. Ct. App. 1983)).

The justice then turned to case law of other jurisdictions holding that cross-racial identification is an *inappropriate* subject for a jury charge and relying, instead, on expert guidance, cross-examination, and summation to safeguard against misidentifications. *See id.* at 127, 727 A.2d at 465 (citing State v. Willis, 731 P.2d 287 (Kan. 1987); People v. McDaniel, 630 N.Y.S.2d 112 (N.Y. App. Div. 1995)). The court further mentioned alternate jurisdictional views denying cross-racial instructions on grounds such as questionable empirical findings and "instructions as improper commentary on 'the nature and quality' of the evidence." *Id.* (quoting State v. Hadrick, 523 A.2d 441, 444 (R.I. 1987)).

[114] *See id.* The court also noted that refusal to give the cross-racial instruction, in these same jurisdictions, is deemed proper in situations in which the victim was able to view the perpetrator under adequate observational conditions, additional corroborating evidence exists, and racial components apparently do not affect the identification. *See id.* at 127 (citing *Hyatt*, 647 N.E.2d at 1171).

[115] *See id.* at 127, 727 A.2d at 465 ("A number of courts have concluded that cross-racial identification simply is not an appropriate topic for jury instruction.") (citing State v. Willis, 731 P.2d 287 (Kan. 1987); Commonwealth v. Hyatt, 647 N.E.2d 1168 (Mass. 1995); People v. McDaniel, 630 N.Y.S.2d 112 (N.Y. App. Div. 1995)).

[116] *See Cromedy*, 158 N.J. at 127, 727 A.2d at 465 ("Those courts have determined that the cross-racial instruction requires expert guidance, and that cross-examination and summation are adequate safeguards to highlight unreliable identifications.").

[117] *See id.* (citing United States v. Telfaire, 469 F.2d 552, 561-62 (D.C. Cir. 1972) (Leventhal, J., concurring); People v. Bias, 475 N.E.2d 253, 257 (Ill. App. Ct. 1985)).

[118] *See id.* at 128, 727 A.2d at 465 (citing State v. Green, 86 N.J. 281, 292, 430 A.2d 914, 919 (1981); State v. Melvin, 65 N.J. 1, 18, 319 A.2d 450, 459 (1974); State v. Middleton, 299 N.J. Super. 22, 32, 690 A.2d 623, 628 (App. Div. 1997); State v. Frey, 194 N.J. Super. 326, 329-30, 476 A.2d 884, 885 (App. Div. 1984)).

case.[119] Justice Coleman reviewed *State v. Green*,[120] in which the court held that a proper eyewitness identification instruction should direct the jury to consider "the capacity or the ability of the witness to make observations or perceptions . . . at the time and under all of the attendant circumstances for seeing that which he says he saw or that which he says he perceived with regard to his identification."[121] The justice underscored the applicability of the *Green* decision to the case at bar by remarking that Cromedy had sought a jury charge focusing on the cross-racial identification as one of the "attendant circumstances" of the witness's observation.[122]

Justice Coleman next reviewed the findings of the New Jersey Supreme Court Task Force on Minority Concerns.[123] The court summarized the Task Force's final report as recommending that the New Jersey Supreme Court assume a proactive stance on the issue of cross-racial identification by developing a special jury charge.[124] The court further noted that the Task Force's five-year effort culminated in a final version of a cross-racial jury instruction that was submitted to the Model Criminal Jury Charge Committee for consideration.[125]

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[119] *See id.* ("[T]he trial court is obligated to give the jury a discrete and specific instruction that provides appropriate guidelines to focus the jury's attention on how to analyze and consider the trustworthiness of eyewitness identification.").

[120] 86 N.J. 281, 430 A.2d 914 (1981).

[121] *Id.* at 293-94, 430 A.2d at 920.

[122] *See Cromedy*, 158 N.J. at 128, 727 A.2d at 465.

[123] *See id.* at 128-30, 727 A.2d at 465-66. The Task Force consisted of "an appellate judge, trial judges, lawyers representing both the prosecution and defense, social scientists, and ordinary citizens." *Id.* at 128-29, 727 A.2d at 465.

[124] *See id.* at 129, 727 A.2d at 465-66 ("Ultimately, in 1992 the Task Force submitted its final report to the Court in which it recommended, among other things, that the Court develop a special jury charge regarding the unreliability of cross-racial identifications."). The court subsequently forwarded the Task Force's recommendation to the Criminal Practice Committee. *See id.* at 129, 727 A.2d at 466. A subcommittee drafted a proposed charge that read as follows:

> You 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 defendant, who is a member of another race, we say that 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' [sic] original perception and/or the accuracy of the subsequent identification(s).

Id. (correction in original).

[125] *See id.* at 129-30, 727 A.2d at 466. The final proposed "cross-racial factor" read: "The fact that the witness is not of the same race as the perpetrator and/or defendant and whether that fact might have had an impact on the witness' [sic] ability to make an accurate identification." *Id.* at 130, 727 A.2d at 466 (correction in original). The Model Criminal Jury Charge Committee reserved decision on the proposal pending the outcome of the *Cromedy* case. *See id.*

Turning to the facts of the case before it, the *Cromedy* court flatly rejected the State's argument that cross-racial identifications should not be required until the research community reaches a consensus on the significance of cross-racial impairment.[126] Justice Coleman responded that the jury instruction at issue related merely to experience within the purview of a common juror and, thus, did not require any scientific knowledge.[127] The justice further stated that, in the requested jury instruction, the defendant had characterized the racial component of the identification as a factor bearing on eyewitness reliability in much the same way as visibility conditions.[128]

Crowning its thorough consideration of federal and state case law, empirical research, New Jersey jurisprudence, and the Task Force's findings, the court handed down a carefully circumscribed holding.[129] The court held that a cross-racial identification requires a special jury charge when (1) identification is a central issue and (2) there is no corroborating evidence of the identification.[130] In the case at bar, Justice Coleman specifically noted that eyewitness identification was a central issue, the identification was not supported by any other independent evidence, and the identification occurred almost eight months after the attack.[131] Based upon these facts, the New Jersey Supreme Court concluded that the trial court committed reversible error when it refused to issue Cromedy's requested instruction for the jury to weigh the potential cross-racial impact against the accuracy of the identification.[132] Furthermore, the court

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[126] *See id.*

[127] *See id.* ("[Defendant] relied . . . on ordinary human experience and the legislative-type findings of the Task Force because the basis for his request [for a jury instruction] did not involve a matter that was beyond the ken of the average juror.").

[128] *See Cromedy*, 158 N.J. at 130-31, 727 A.2d at 466 ("Defendant requested a cross-racial identification jury instruction that would treat the racial character of the eyewitness identification as one of the factors bearing on its reliability in much the same way as lighting and proximity to the perpetrator at the time of the offense.").

[129] *See id.* at 131, 727 A.2d at 467 ("[W]e hold that a cross-racial identification, as a subset of eyewitness identification, requires a special jury instruction in an appropriate case.").

[130] *See id.* at 132, 727 A.2d at 467. The court was careful to limit the use of a cross-racial jury instruction. *See id.* ("The simple fact pattern of a white victim of a violent crime at the hands of a black assailant would not automatically give rise to the need for a cross-racial identification charge. More is required.").

[131] *See id.*

[132] *See id.* at 132-33, 727 A.2d at 467, stating:

> We conclude, therefore, that it was reversible error not to have given an instruction that informed the jury about the possible significance of the cross-racial identification factor, a factor the jury can observe in many cases with its own eyes, in determining the critical issue—the accuracy of the identification.

held that expert testimony was inadmissible due to the "commonsense" nature of the notion that individuals have greater difficulty identifying members of another race than a member of their own race.[133] Accordingly, the court reversed the appellate division's judgment and remanded the case for a new trial.[134]

The eyewitness identification of a perpetrator who faces serious criminal sanctions merits careful scrutiny. In *Cromedy*, the defendant's conviction turned solely on a victim's eight-month-old recollection of a stranger.[135] The court's concern about the unreliability associated with cross-racial recognition was on target—McKinley Cromedy ultimately was exonerated by a DNA test after spending more than six years in prison.[136] Even absent the unique circumstances of Cromedy's case, requiring a cross-racial jury instruction seems prudent in light of scientific research, the recommendations of the Task Force on Minority Concerns, and case law in other jurisdictions.[137] The *Cromedy* decision may also signal an

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Id.

[133] *See id.* at 133, 727 A.2d at 467-68.

[134] *See Cromedy*, 158 N.J. at 133, 727 A.2d at 468.

[135] *See id.* at 117, 727 A.2d at 459.

[136] *See* Smothers, *supra* note 32, at B6. Cromedy faced a 50-year sentence for the rape conviction. *See id.* After serving approximately six years of the sentence, DNA test results from the New Jersey State Police crime laboratory exonerated Cromedy as the perpetrator. *See id.* Such testing is currently accepted to be as reliable as fingerprinting. *See id.*

[137] *See Cromedy*, 158 N.J. at 131, 727 A.2d at 467. By its very nature, however, a cross-racial jury instruction is ironic in view of the working premise that the United States Constitution is color-blind. *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.").

Similarly, there is an irony when considering a cross-racial identification jury charge in light of constitutional restrictions on juror selection; the same jury that is instructed to consider cross-racial bias in identifications cannot itself be the product of racial bias. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986). In *Batson*, the United States Supreme Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id. But see* Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1022-23 (1988) (discussing the practical obstacles that a defendant must face to gain relief from discriminatory application of preemptory challenges and noting that allowing defendants to challenge discriminatory use of preemptory challenges will not eviscerate discriminatory juror selection).

Another interesting racial component of a trial involves the composition of the jury; for example, the *Cromedy* jury included 11 Caucasians and a single African-American. *See* Smothers, *supra* note 32, at B6. Research findings suggest that white jury members are more apt to convict African-American defendants than Caucasian defendants, under similar circumstances. *See* Miller & Mauet, *supra* note 7, at 552.

end to the hesitancy that historically has been a hallmark of the legal system's treatment of behavioral and social science research.[138] Furthermore, the *Cromedy* holding properly takes into account that (1) jurors have a tendency to attribute significant weight to eyewitness testimony irrespective of other salient factors[139] and (2) a jury instruction is a more economical route than is expert testimony.[140]

The apparent simplicity of the *Cromedy* decision, however, veils weighty concerns. In certain instances, a jury instruction on cross-racial identification may prove to be ineffective, superfluous, or even unjust.

The stated goal of the New Jersey Supreme Court—to safeguard against grievous miscarriages of justice due to mistaken identifications—does not seem to comport with the final product, which merely requires a jury instruction. In light of the various options available to the court in *Cromedy*, a cautionary jury charge may not be the optimal way to prevent mistaken identifications resulting in wrongful convictions.[141] The degree to which jurors absorb and comprehend judges' instructions is unclear due to both procedural factors and psychological variables specific to jury members.[142] Research findings on the shortcomings of jury charges

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These findings also point to the possibility that classifications based on races other than Caucasian/African-American pairings may have similar discriminatory impact. *See id.* at 552-53.

[138] *See* ARNOLDS ET AL., *supra* note 3, § 1.04, at 6.

[139] *See Cromedy*, 158 N.J. at 120-21, 727 A.2d at 461 ("[J]urors tend to place great weight on eyewitness identifications, often ignoring other exculpatory evidence."); *see also* Devenport & Penrod, *supra* note 4, at 348-49 (citing research findings that indicate that jurors overestimate eyewitness accuracy, are unable to distinguish between accurate and inaccurate testimony, and mistakenly rely on witness confidence).

[140] *See* Johnson, *supra* note 2, at 974 ("[T]he need for experts on the own-race effect in many jurisdictions would be frequent and would therefore impose a greater financial burden on the state than results from most kinds of expert testimony." (footnote omitted)).

[141] *See Cromedy*, 158 N.J. at 127, 727 A.2d at 465 (noting that other courts have concluded that a cross-racial identification is not properly dealt with in the context of a jury instruction).

[142] *See* Sales et al., *supra* note 17, at 28, 30. Regarding procedural factors, the general practice of charging the jury at the conclusion of the case has received significant criticism. *See id.* at 28. It has been suggested that charging jurors at the beginning of the case would allow them to evaluate the evidence more properly in terms of the applicable law. *See id.* In addition, that jurors are not allowed to take the instructions with them when deliberating has also been criticized as placing too much reliance on jurors' memories of crucial points. *See id.* at 29.

Regarding individual psychological variables, "[t]he extent to which a jury will follow instructions will be determined by their willingness to do so and by the extent

must not be minimized so as to yield the comfortable judicial conclusion, or legal fiction, that an instruction will sufficiently focus juror attention on the unreliability of cross-racial identifications. If the New Jersey Supreme Court is truly concerned with mistaken identifications, choosing a potentially ineffective remedy seems counter-productive.

At a minimum, the *Cromedy* court could have accounted for the possibility of an ineffective jury instruction by permitting expert testimony in appropriate circumstances. Instead, the court chose to institute a per se exclusionary rule on expert testimony concerning cross-racial recognition impairment.[143] The court specifically disallowed expert testimony because of "the 'widely held commonsense view that members of one race have greater difficulty in accurately identifying members of a different race'"[144]—thus concluding that expert testimony on the topic would not assist the jury in any meaningful way.[145] The court's acknowledgement of the widespread debate among researchers on cross-racial recognition

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to which they have perceived, remembered, and comprehended the instructions." *Id.* at 30; *see also* ARNOLDS ET AL., *supra* note 3, § 4.01, at 148 ("In eyewitness cases, . . . the most important variable is the psychological make-up of the trier of fact."). It is interesting to conceptualize jurors, themselves, as eyewitnesses to courtroom events and, thus, as subject to all the drawbacks of reliability that affect eyewitnesses. *See* ARNOLDS ET AL., *supra* note 3, § 4.01, at 148-49.

[143] *See Cromedy*, 158 N.J. at 133, 727 A.2d at 467-68 (quoting United States v. Telfaire, 469 F.2d 552, 559 (D.C. Cir. 1972) (Bazelon, C.J., concurring)).

[144] *Id.*

[145] *See id.* Although the court professes to rely upon the Task Force report, it selectively incorporates some findings and ignores the Task Force findings that indicate that cross-racial recognition impairment is not a matter of common knowledge; judicial responses to a questionnaire revealed that only 47% of the judges are aware of problems associated with cross-racial identifications. *See New Jersey Supreme Court Final Report of the Task Force on Minority Concerns*, *supra* note 35, at 1145. The eighth finding of the report extrapolates: "While the Task Force does not know with any certainty how familiar New Jersey's attorneys or prospective jurors may be with the limitations of cross-racial eyewitness testimony, it is strongly suspected that their respective knowledge bases are limited." *Id.* If more than half of the judges questioned were unfamiliar with aspects of cross-racial identification, it seems incredulous that the court would attribute such knowledge upon prospective jurors and categorize cross-racial impairment as common sense. The existence of misperceptions demonstrates a need for expert guidance, but the court failed to act in accordance with such a proposition.

Reliance on juror common sense to assess witness credibility may be inaccurate, and psychological data may assist in instances in which there is little or no corroborating evidence of witness testimony. *See* Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 225 (1990).

impairment seems to contradict, rather than support, the existence of a "widely held commonsense view."[146]

Alternatively, a cross-racial identification jury instruction may be simply superfluous.[147] Viewed as a subset of eyewitness identification, cross-racial recognition impairment may not warrant special mention to the jury. Pattern jury instructions on eyewitness testimony in general, coupled with cross-examination of eyewitnesses, arguably is sufficient to alert jurors to the fallibility of eyewitness identification.

Assuming, for the sake of argument, that an instruction will focus juror attention on the unreliability of cross-racial identifications, the potential exists for jury deliberation to be unduly influenced. Instructing the jury on cross-racial identification in addition to eyewitness identification results in a "double hit" on an eyewitness account. In theory, an accurate eyewitness account should withstand the added scrutiny of a specific instruction on cross-racial identification. In reality, however, the jury might equate this second, more specific reference to the inaccuracies of cross-racial identifications with an almost "automatic" finding of reasonable doubt[148] and disregard the individual circumstances of the case.

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[146] *Cromedy*, 158 N.J. at 133, 727 A.2d at 467-68 (quoting *Telfaire*, 469 F.2d at 559 (Bazelon, C.J., concurring)).

[147] *See* Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 34 (1997) ("Perhaps the most important thing to say about judicial instructions to juries is that, as practiced in the great majority of American courts, they may be little more than a superfluous ritual.").

[148] Reasonable doubt—the proof standard utilized in criminal cases—is often not defined for the jury. *See* Lieberman & Sales, *supra* note 11, at 597. Jurors' understanding that the prosecution must prove its case beyond a reasonable doubt is distinct from an understanding of what, exactly, "reasonable doubt" means. *See id.* Following this line of logic, there seems to be nothing to prevent a juror from equating reasonable doubt with the fallacies inherent in eyewitness identification.

In addition, another potential problem of the *Cromedy* decision lies in the degree of consistency with which trial courts will apply the rule of law in other factual contexts. The court limited the use of a cross-racial identification only to cases in which identification is a central issue and no other corroborating evidence exists. *See Cromedy*, 158 N.J. at 132, 727 A.2d at 467. In an attempt to limit the use of a cross-racial instruction to appropriate circumstances, the court ignores the possibility that cross-racial recognition impairment may differ among races. Four studies, in fact, indicate that African-Americans do not experience cross-racial recognition impairment at all. *See id.* at 122, 727 A.2d at 462 (citing Johnson, *supra* note 2, at 939). With its ruling, the court essentially has chosen sides in a battle of competing research ideologies, ruling in accordance with findings suggesting that cross-racial recognition impairment exists among all races and rejecting the possibility that races are affected differently. If, in fact, African-American witnesses do not experience cross-racial recognition impairment, no need exists for a cross-racial jury instruction in a scenario similar in all respects to the *Cromedy* case, except to the extent that it involves an African-American victim and a Caucasian perpetrator. The *Cromedy*

Justice will not be served if jurors disregard an accurate eyewitness identification on the basis of generalities associated with cross-racial identification.

Overall, the *Cromedy* court was undeniably well-intentioned in its effort to ensure justice through the use of a cautionary jury instruction on cross-racial identification. Although a jury charge may not be a perfect solution, the court would have been hard-pressed to arrive at a result that avoided drawbacks. Through reliance on behavioral studies, the court's holding is dependent, in part, on a developing area of research. In addition, the *Cromedy* court's blanket prohibition on expert testimony concerning cross-racial identification appears to discount the possibility of developments in an area that the court itself characterized as unsettled.[149] Thus, the court ultimately may need to revisit its decision if the scientific community comes to understand cross-racial recognition with more particularity. In the interim, however, New Jersey jurors are no longer permitted to embark upon a "color-blind" evaluation with respect to an uncorroborated, cross-racial eyewitness identification.[150]

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court's decision, however, seems to indicate that such a case would merit a cross-racial jury instruction.

[149] *See id.* at 120-21, 727 A.2d at 461-62.

[150] *See id.* at 133, 727 A.2d at 467 ("For the sake of clarity, we repeat that the purpose of a cross-racial instruction is to alert the jury through a cautionary instruction that it should pay close attention to a possible influence of race.").