

3.3 Cross-Racial Impairment

A. Empirical Evidence of Cross-Racial Impairment

A cross-racial identification occurs when an eyewitness is asked to identify a person of another race. The effect of race on the accuracy of eyewitness identification was considered as early as 1914. *See* Gustave A. Feingold, *The Influence of Environment on Identification of Persons and Things*, 5 J. CRIM. L. & CRIMINOLOGY 39, 50 (1914) (“other things being equal, individuals of a given race are distinguishable from each other in proportion to our familiarity, to our contact with the race as a whole”). Researchers have since identified the phenomenon as own-race bias, cross-race effect, or other-race effect. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL’Y & L. 3, 4 (2001). Several studies have evaluated the difficulty of cross-racial identification and concluded that eyewitnesses are less likely to misidentify a person of their own race than a person of another race. Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821, 1822–23 (2003) (concluding that “[w]hile all eyewitness identifications are prone to error, cross-racial eyewitness identifications are more often wrong than same-race identifications”); *see also* Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POL’Y & L. 230, 230 (2001). Some courts, in reliance on such studies, have recognized that cross-racial identifications raise particular concerns about reliability. *See, e.g., State v. Henderson*, 27 A.3d 872 (N.J. 2011) (referencing a Report of the Special Master prepared for the case regarding eyewitness identification science and law, *available at* www.eyeID.org); *Gonzales v. Thaler*, 643 F.3d 425, 432 (5th Cir. 2011); *United States v. Jernigan*, 492 F.3d 1050, 1054 (9th Cir. 2007).

B. Impact of Cross-Racial Impairment

The cross-racial effect may be stronger when White witnesses attempt to identify Black subjects. Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 938–39 (1984); MISTAKEN IDENTIFICATION at 104 (reviewing a set of studies and concluding that “the cross-racial effect appears to be stronger for whites than for blacks”). *But see* EYEWITNESS TESTIMONY at § 4-13 (noting that in studies concerning cross-racial impairment, “the cross-race effects were comparable for black witnesses and white witnesses”). Among White eyewitnesses, cross-racial impairment leads more often to false positives (the erroneous identification of a person as the perpetrator) than to false negatives (the erroneous failure to identify the perpetrator). James M. Doyle et al., *Discounting the Error Costs: Cross-Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 PSYCHOL. PUB. POL’Y & L. 253, 254 (2001). Studies have suggested that such false positives have risen over time. *Id.* (citing Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL’Y & L. 3 (2001)).

Among wrongful convictions uncovered by DNA analysis, 36% occurred in cases where White witnesses mistakenly identified innocent Black defendants. James M. Doyle et al., *Discounting the Error Costs: Cross-Racial False Alarms in the Culture of Contemporary Criminal Justice*, 7 PSYCHOL. PUB. POL'Y & L. 253, 253 (2001); *see also* Innocence Project, [Facts on Post-Conviction DNA Exonerations](#), INNOCENCEPROJECT.ORG (last visited Sept. 25, 2014) (at least 40% of cases in which the defendant was exonerated as a result of DNA evidence involved cross-racial eyewitness identifications). The impact of cross-racial impairment may be magnified by the relative representation of people of color in the criminal justice system compared to their representation on juries. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201 (2001).

Case study: *State v. Terence Garner*. Below are the reflections of attorney Mark Montgomery on the role of race in the wrongful conviction of Terence Garner. More information about the case can be found at [PBS Frontline: An Ordinary Crime](#), PBS.ORG (last visited Sept. 25, 2014).

In *State v. Terence Garner*, cross-racial eyewitness identifications played a role in Garner's wrongful conviction for robbery, kidnapping, and attempted murder. The case involved two young Black men with similar names: Terence Garner, who in 1997 was 16 years old and living with his mother in Goldsboro; and Terrance DeLoach, a 24-year-old man from New Jersey who spent five years in prison in New York for robbery before moving to Goldsboro where his cousin, Richard Keith Riddick, lived.

On April 25, 1997, Riddick and his acquaintance, Kendrick Henderson, robbed the Quality Finance Company in Princeton, North Carolina, along with a third man. In the course of the robbery, the third man shot one of the company employees, Alice Wise, assaulted her boss, Charles Woodard, and robbed a customer, Bertha Miller. When police officers questioned Henderson, whose fingerprints were found at the scene, he said that he committed the robbery with Riddick and Riddick's cousin from New York, "Terrance," and provided the address of Terrance DeLoach. When officers were unable to locate DeLoach, they arrested Terence Garner at a different address. Henderson told them they had the wrong "Terrance."

Alice Wise, who lost an eye in the shooting, first identified Terence Garner as the shooter under suggestive circumstances: Terence Garner was in a jail uniform and shackled to co-defendant Henderson. At trial, the two White victims, Ms. Wise and Mr. Woodard, identified Terence Garner as the shooter. In contrast, the lone Black victim, Ms. Miller, testified that she knew Terence Garner from the community and did not see him at the robbery. Co-defendant Henderson testified that Terence Garner was not involved; he always maintained that the police had picked up the wrong "Terrance." Several of Garner's friends and relatives testified that Garner was with them at the time of the robbery. Co-defendant Riddick testified that Terence Garner was the third robber and received a reduced sentence. Riddick perjured himself at trial by denying that he had a cousin named "Terrance," and later recanted his testimony identifying Terence Garner as the shooter.

Terence Garner was found guilty on the basis of eyewitness identifications from Alice Wise and Charles Woodard and the later recanted testimony of Keith Riddick. He was sentenced to over 25 years in prison. Subsequently, police located Terrance DeLoach, who confessed to being the third robber and shooter, but later recanted his confession. Terence Garner served nearly four years in prison. After his case received national attention in a PBS Frontline documentary, prosecutor Tom

Lock consented to a Motion for Appropriate Relief granting Terence Garner a new trial. He then took a voluntary dismissal and said publicly that he no longer thought Terence Garner was guilty.

C. Causes of Cross-Racial Impairment

Several researchers have sought explanations for cross-racial impairment. June E. Chance & Alvin G. Goldstein, *The Other-Race Effect and Eyewitness Identification*, in PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 153, 155–56 (1996). Studies have concluded that cross-racial impairment does not stem from conscious racial prejudice; witnesses who do not harbor conscious racial prejudice are as likely to make an erroneous cross-racial identification as those who harbor racial prejudice. Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 943–44 (1984).

Some evidence suggests that the extent, frequency, and quality of a witness's contact with members of the subject's race may play a role in the witness's ability to make accurate cross-racial identifications. June E. Chance & Alvin G. Goldstein, *The Other-Race Effect and Eyewitness Identification*, in PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 153, 158–68 (1996). However, the evidence also suggests that exposure to members of the other racial group, alone, does not necessarily improve the accuracy of identifications. *Id.* at 170–72.

Practice note: Some research indicates that frequent, quality contact with members of another race may improve cross-racial recognition. *See, e.g., id.* at 158–68. For example, a White witness who has Black family members, lives in a predominantly Black neighborhood, works with a large number of Black colleagues, or has numerous Black friends, may be more adept at making an eyewitness identification of a Black suspect than a White witness who has fewer cross-racial interactions. However, other studies indicate that contact with members of the defendant's race does not necessarily mitigate cross-racial impairment because implicit racial biases may be held even by those who encounter counterexamples to negative racial stereotypes in their daily lives. *See id.* at 170–72. Counsel therefore may raise the issue of cross-racial impairment in an appropriate case even if the eyewitness has had substantial interaction with members of the defendant's race. In such a case, counsel may want to employ an expert witness who can testify about the reliability of cross-racial identifications compared to same-race identifications. June E. Chance & Alvin G. Goldstein, *The Other-Race Effect and Eyewitness Identification*, in PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 153, 170–72 (1996).
