

Cross-Racial Misidentification: A Call to Action in Washington State and Beyond

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ABSTRACT

Research indicates eyewitness identifications are incorrect approximately one-third of the time in criminal investigations. For years, this phenomenon has significantly contributed to wrongful convictions all over the country, including in Washington State. But jurors, attorneys, and police remain unaware of the nature and extent of the problem and continue to give undue weight to eyewitness evidence. Experts have estimated that approximately 5,000–10,000 felony convictions in the United States each year are wrongful, and research suggests that approximately 75% of wrongful convictions involve eyewitness misidentification. The phenomenon of eyewitness misidentification is also amplified and most troublesome in the context of cross-racial identification—when a witness identifies someone of another race. Experimental research suggests that an eyewitness trying to identify a stranger is over 50% more likely to make a misidentification when the stranger and eyewitness are of different races. Consistent with this finding, approximately one-third of wrongful convictions uncovered by DNA analysis nationwide have involved whites misidentifying blacks. For these reasons, this Article focuses on cross-racial misidentification, and discusses the nature and extent of the problem and potential tools for addressing it; however, this

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Article's reasoning applies in large part to eyewitness misidentification in general.

The Washington State Supreme Court had two recent opportunities to address the issue of cross-racial misidentification in *State v. Cheatam* and *State v. Allen*. These cases establish that Washington State trial courts have broad discretion to permit expert testimony and jury instruction on cross-racial misidentification when relevant. In light of this precedent, this Article proposes that Washington State trial courts begin exercising their broad discretion regularly to admit such testimony and instruction whenever relevant as an initial step toward preventing wrongful convictions and improving our criminal justice system. Going forward, additional education and reform efforts will be needed to solve this ongoing problem.

I. INTRODUCTION

The story of Michael Marshall presents a prime example of how undue reliance on eyewitness identification can lead to a wrongful conviction.¹ The story begins on November 3, 2007, when a woman and her son were carjacked at gunpoint.² Police were called to the scene, spotted the woman's stolen vehicle less than half a mile away, and gave chase.³ The suspect eventually pulled over the vehicle, ran off on foot, and got away.⁴ But the suspect left behind his shirt, cell phone, and phone case, which the police collected as evidence.⁵

The police then developed a composite sketch of the suspect based on information from the woman's son, who described the suspect as a middle-aged black man.⁶ Ten days later, the police were called to a nearby apartment complex where a black man, Michael Marshall, had been found unconscious lying in a hallway.⁷ The police called to the scene noticed similarity between Marshall and the composite sketch of the carjacker.⁸ The police then called the woman's son to the scene, who posi-

1. See *Georgia Man Freed After 2008 Conviction Is Overturned*, INNOCENCE PROJECT (Dec. 16, 2009, 1:55 PM), http://www.innocenceproject.org/Content/Georgia_Man_Freed_After_2008_Conviction_Is_Overturned.php.

2. GEORGIA INNOCENCE PROJECT, MICHAEL MARSHALL: BACKGROUND ON THE CASE (2009), available at <http://www.ga-innocenceproject.org/images/Marshall/GIP-Marshall-Background-12.15.09.pdf>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

tively identified Marshall as the carjacker.⁹ On this basis, Marshall was charged with armed robbery and aggravated assault.¹⁰ Facing likely conviction and up to twenty-five years in prison, Marshall pleaded guilty to theft and was sentenced to serve four years.¹¹

From prison, Marshall reached out to exoneration advocates, who investigated his case and discovered that the carjacker's shirt, cell phone, and phone case never were subjected to DNA testing or otherwise examined or investigated.¹² Marshall's advocates then obtained an order requiring the evidence undergo DNA testing, and the testing exculpated Marshall and matched the DNA of another man.¹³ After spending more than two years in prison for a crime he did not commit, Michael Marshall was finally exonerated and freed.¹⁴

Michael Marshall's story underscores the need to approach eyewitness evidence with caution, and the need to develop and rely on other types of evidence in criminal prosecutions. Marshall's story is only one of many throughout the United States involving eyewitness misidentification and wrongful conviction.¹⁵ A disproportionate number of these stories involve cross-racial misidentification in particular—a witness misidentifying someone of another race.¹⁶ This is consistent with experimental research demonstrating that the risk of mistaken identification is uniquely high in the context of cross-racial identification, on top of any other factors contributing to eyewitness error.¹⁷ In Michael Marshall's case, the race of the police officers and victim who misidentified Marshall is not publicly available information, but it would not be surprising

9. *Id.*

10. *Id.*

11. *Id.*; Michael Marshall, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3408> (last visited Dec. 20, 2014).

12. GEORGIA INNOCENCE PROJECT, *supra* note 2; NAT'L REGISTRY OF EXONERATIONS, *supra* note 11.

13. NAT'L REGISTRY OF EXONERATIONS, *supra* note 11.

14. INNOCENCE PROJECT, *supra* note 1.

15. See, e.g., Jennifer L. Devenport et al., *Effectiveness of Traditional Safeguards Against Erroneous Conviction Arising from Mistaken Eyewitness Identification*, in EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 51 (Brian L. Cutler ed., 2009) ("For several decades now, scholars and social scientists have studied miscarriages of justice occurring in the American legal system and have drawn the same conclusion: Mistaken eyewitness identifications is the leading cause of wrongful convictions." (citations omitted)).

16. See, e.g., Earl Smith & Angela J. Hattery, *Race, Wrongful Conviction & Exoneration*, 15 J. AFR. AM. STUD. 74, 84 (2011) ("[T]he vast majority of exoneration cases involve a White victim who mis-identifies an African American man.").

17. See, e.g., 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) (meta-analysis of thirty years of psychological studies demonstrating unique difficulty of identifying someone of another race).

to find that these individuals were white, for reasons more fully explained below.

Beyond causing wrongful convictions, cross-racial misidentification also contributes to racial disparity in the criminal justice system.¹⁸ Washington's Task Force on Race and the Criminal Justice System recently documented racial disparities throughout Washington's criminal justice system and advocated for ongoing dialogue to address those disparities.¹⁹ The Task Force identified cross-racial misidentification as an important aspect of the problem.²⁰ This is true for numerous reasons. First, research has indicated that white persons are more susceptible to committing cross-racial misidentification than racial minorities.²¹ Second, members of racial minority groups are more susceptible to cross-racial misidentification because potential witnesses to crimes are more likely to be white.²² Third, once misidentified, racial minorities in Washington also face disparately higher rates of arrest, charging, and conviction, and also receive harsher sentences, even after controlling for legally relevant factors.²³ It should not be surprising, then, that African American men are disproportionately represented among exonerees as compared to the incarcerated population in general.²⁴ Efforts to address cross-racial misidentification thus fall within the broader ongoing efforts in Washington to address racial disparities in the criminal justice system.

Although eyewitness misidentification has received increasing scholarly attention in recent years as more and more wrongful convictions resulting from such misidentification have been discovered and documented,²⁵ too many persons—including police, attorneys, judges,

18. See generally Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623 (2012) [hereinafter Task Force].

19. See *id.*

20. See *id.* at 668.

21. See Meissner & Brigham, *supra* note 17, at 21 (“Results indicated that White participants were more likely to demonstrate [cross-race bias], especially with regard to false alarm responses.”).

22. See, e.g., *Washington State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/53000.html> (last updated Feb. 5, 2015, 1:11 PM) (reporting that black persons comprise only 4% of Washington's population whereas white, non-Hispanic persons comprise 71%).

23. See generally Task Force, *supra* note 18.

24. Smith & Hattery, *supra* note 16, at 79 (finding that African American men represent 70% of exonerees as compared to 40%–50% of incarcerated persons).

25. See, e.g., Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821 (2003); John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207 (2001); Christian Sheehan, *Making the Jurors the “Experts”: The Case for Eyewitness Identification Jury Instructions*, 52 B.C. L. REV. 651 (2011); Bethany Shelton, *Turning a Blind Eye to Jus-*

and jurors—remain unaware of this phenomenon or its scope.²⁶ Thus, much more work remains to be done. With that in mind, this Article seeks to supplement the existing literature in a number of distinct ways. First, to promote needed incremental change and awareness, this Article focuses on cross-racial misidentification as the most pressing eyewitness problem, and focuses on two discrete court tools—expert testimony and jury instruction—that can be utilized immediately to begin addressing the problem. Second, this Article focuses on Washington State, as part of the ongoing efforts to improve Washington’s criminal justice system and in light of two recent Washington State Supreme Court cases—*State v. Cheatam*²⁷ and *State v. Allen*²⁸—which acknowledge the problem of cross-racial misidentification and establish that Washington State trial courts have broad discretion to permit expert testimony and jury instruction to address the problem. Third, this Article presents a grounded approach to misidentification issues, with an emphasis on empirical and scientific research rather than speculative theory. This approach incorporates research on the potential effectiveness of expert testimony and jury instruction to prevent the wrongful convictions that would otherwise result from eyewitness misidentifications.

This Article proceeds in six parts. Part II provides further background on the issue of eyewitness misidentification and, more specifically, cross-racial misidentification. Part III argues that, in appropriate cases, the proper admission of expert testimony and jury instruction on cross-racial misidentification can prevent wrongful convictions and improve the criminal justice system by helping jurors to properly weigh the evidence before them. Part IV explains that under *State v. Cheatam*, Washington trial courts have significant discretion to admit expert testimony on cross-racial misidentification—more discretion, in fact, than many in the legal community might expect. Part V explains that under

tice: Kansas Courts Must Integrate Scientific Research Regarding Eyewitness Testimony into the Courtroom, 56 U. KAN. L. REV. 949 (2008); Derek Simmons, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 MD. L. REV. 1044 (2011); Lauren Tallent, *Through the Lens of Federal Evidence Rule 403: An Examination of Eyewitness Identification Expert Testimony Admissibility in the Federal Circuit Courts*, 68 WASH. & LEE L. REV. 765 (2011).

26. See, e.g., Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 200 (2006); Richard A. Wise et al., *What U.S. Law Enforcement Officers Know and Believe About Eyewitness Factors, Eyewitness Interviews and Identification Procedures*, 25 APPLIED COGNITIVE PSYCHOL. 488, 497 (2011); Richard A. Wise et al., *What U.S. Prosecutors and Defense Attorneys Know and Believe About Eyewitness Testimony*, 23 APPLIED COGNITIVE PSYCHOL. 1266, 1277–78 (2009).

27. *State v. Cheatam*, 81 P.3d 830 (Wash. 2003).

28. *State v. Allen*, 294 P.3d 679 (Wash. 2013).

State v. Allen, Washington trial courts have broad discretion to permit jury instruction on cross-racial misidentification, while the discretion to refuse such an instruction is relatively narrow. Part VI argues that Washington trial courts should exercise their discretion liberally to permit expert testimony and jury instruction on cross-racial misidentification whenever relevant, which should be supplemented with the development of a publicly available pool of qualified experts and the formal adoption of pattern instructions. Part VII advocates for broader education and reform surrounding these issues.

II. THE PROBLEM OF CROSS-RACIAL MISIDENTIFICATION

Many criminal prosecutions are based, at least in part, on eyewitness identification.²⁹ Such identification occurs whenever a witness testifies that he or she saw the defendant committing the alleged crime or engaging in relevant conduct suggestive of guilt. In many prosecutions, eyewitness identification represents the primary or only evidence of guilt.³⁰ Historically, our criminal justice system has placed great value on such evidence.³¹

Today, however, there is overwhelming evidence that eyewitness identification is erroneous approximately one-third of the time³² and is

29. See, e.g., Heather D. Flowe et al., *The Role of Eyewitness Identification Evidence in Felony Case Dispositions*, 17 PSYCHOL. PUB. POL'Y & L. 140, 150 (2011) (finding that among a random sampling of assault, rape, and robbery cases in one of the largest district attorney's offices in the United States, "one out of every three suspects had positive [eyewitness identification] evidence in their case").

30. See *id.* (finding that 11% of prosecuted assault, rape, and robbery cases were based on eyewitness identification alone or eyewitness identification with only limited corroborating evidence). The authors believe that the rate of cases based solely on eyewitness identification is much higher for misdemeanors, due to the lesser resources devoted to investigating those crimes and for other such reasons.

31. See, e.g., *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) ("[T]here is almost nothing more convincing [to a jury] than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" (internal quotations omitted)); *State v. Wheeler*, 737 P.2d 1005, 1006, 1010 (Wash. 1987) (holding that eyewitness identification of suspect who had been found nearby wearing shirt matching witness's original description constituted "overwhelming evidence" of guilt); cf. *Numbers* 35:30 (New Oxford Annotated, 3d ed.) ("If anyone kills another, the murderer shall be put to death on the evidence of witnesses; but no one shall be put to death on the testimony of a single witness.").

32. See Brief for Am. Psychological Ass'n as Amici Curiae Supporting Petitioner at 14–17, *Perry v. New Hampshire*, 132 S. Ct. 716 (2012) (No. 10-8974) (explaining that "researchers have conducted a variety of studies of actual witness identifications . . . [that] have consistently found that the rate of inaccurate identifications is roughly 33 percent"); see also, e.g., Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 LAW & HUM. BEHAV. 475, 482 (2001) (study of actual lineups finding that eyewitnesses identified suspects 50% of the time and mistakenly identified lineup "foils"—unrelated individuals inserted into the lineups—24% of the time). The risk of misidentification may increase when similar-looking

far less accurate than most jurors believe it to be.³³ In fact, in many cases a suspect need not bear any resemblance to the real perpetrator for an eyewitness to falsely identify the suspect.³⁴ Further, eyewitness confidence is malleable and provides no guarantee of accuracy.³⁵ A recent report from a committee of the National Academy of Sciences (NAS) reviewed the state of eyewitness science, acknowledged the strong foundation of basic research on the fallibility of memory and visual percep-

clothing is involved. In one recent study, subjects who interacted with one experimenter and were shortly thereafter shown a picture of a similar-looking individual wearing similar (but not identical) clothing falsely identified the person in the photograph as the experimenter 50% of the time. See Jennifer E. Dysart et al., *Show-ups: The Critical Issue of Clothing Bias*, 20 APPLIED COGNITIVE PSYCHOL. 1009, 1017–19 (2006).

33. See ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 9 (1979) (“Jurors have been known to accept eyewitness testimony pointing to guilt even when it is *far* outweighed by evidence of innocence.”); Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115, 125 (2006) (“Jurors were in agreement with the experts on only 13% of the eyewitness issues surveyed.”); Saul M. Kassir & Kimberly A. Barndollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors*, 22 J. APPLIED PSYCHOL. 1241, 1245 (1992) (survey demonstrating lack of juror knowledge on findings of eyewitness science); Michael R. Leippe et al., *Timing of Eyewitness Expert Testimony, Jurors’ Need for Cognition, and Case Strength as Determinants of Trial Verdicts*, 89 J. APPLIED PSYCHOL. 524, 524 (2004) (discussing literature and noting “there is evidence that jurors tend to overbelieve eyewitnesses, have insufficient understanding of the factors that affect memory, and are overly swayed by eyewitness confidence, which is not very diagnostic of accuracy and apt to be inflated by the time the eyewitness reaches the courtroom” (citations omitted)); Daniel J. Simons & Christopher F. Chabris, *What People Believe About How Memory Works: A Representative Survey of the U.S. Population*, 6 PLOS ONE e22757, at 3 (2011) (national survey finding that most respondents believed visual memory works like accurate video-camera recording).

34. See, e.g., Roy S. Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification*, in EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 3–4 (Brian L. Cutler ed., 2009) (noting that an early review of known misidentifications found that in many cases “the wrongfully accused person and the really guilty criminal bore not the slightest resemblance to each other, whereas in [many] other cases, the resemblance, while fair, was still not at all close” (internal quotations omitted)).

35. See, e.g., Kathy Pezdek, *Content, Form, and Ethical Issues Concerning Psychological Testimony on Eyewitness Identification*, in EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION 31–32 (Brian L. Cutler ed., 2009) (“[One study] reported a [.41] accuracy–confidence [correlation] when . . . limited . . . to individuals who chose to make an identification. . . . How can an eyewitness expert help a jury understand what a .41 correlation means? . . . [I]f we assume that eyewitnesses make accurate identifications about 50% of the time, encountering a highly confident mistaken identification would be about as common as encountering a tall female or a short male. . . . It is also important to recognize that witness confidence is malleable.”). Numerous stories have been documented in which the testimony of a very confident but mistaken eyewitness resulted in the conviction and imprisonment of an innocent person. See, e.g., Jennifer Thompson, Op-Ed., *I Was Certain, but I Was Wrong*, N.Y. TIMES (June 18, 2000), <http://www.nytimes.com/2000/06/18/opinion/i-was-certain-but-i-was-wrong.html> (story of victim who “studied every single detail on [her] rapist’s face” but then misidentified an innocent suspect who spent over a decade in prison until DNA evidence proved his innocence).

tion, and recognized the need for reforms in this area.³⁶ The NAS report identifies the need for much additional research to understand the complex interaction of factors that may influence the accuracy of any given eyewitness identification, finds that some prior research on particular variables (such as the presence of a weapon or the procedures used for subsequent identification) has lacked sufficient rigor and transparency, and calls for better research designs and collaboration among scientists and law enforcement personnel.³⁷ In the meantime, the report recognizes that the problem of eyewitness misidentification is well established, ongoing, and demands action.³⁸

The scope and significance of the problem is substantial. Eyewitness misidentification has been found to be the most common cause of wrongful convictions,³⁹ playing a role in approximately 75% of the numerous convictions overturned by post-conviction DNA testing nationwide.⁴⁰ Although measuring wrongful conviction rates is notoriously difficult, one recent qualitative analysis estimated that the wrongful conviction rate for felonies in the United States is somewhere between 0.5%–1%.⁴¹ This would represent approximately 5,000–10,000 wrongful felony convictions each year,⁴² with a substantial portion likely involving eyewitness misidentification,⁴³ and few ever resulting in exoneration.⁴⁴ Oth-

36. See COMM. ON SCIENTIFIC APPROACHES TO UNDERSTANDING AND MAXIMIZING THE VALIDITY AND RELIABILITY OF EYEWITNESS IDENTIFICATION IN LAW ENFORCEMENT AND THE COURTS ET AL., NAT'L ACADEMY OF SCIENCES, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION xiii, 2, 31–48 (2014) [hereinafter NAS REPORT].

37. See *id.* at xiii, 2–3, 49–72.

38. See *id.* at 71–81.

39. See, e.g., Devenport et al., *supra* note 15, at 51 (“For several decades now, scholars and social scientists have studied miscarriages of justice occurring in the American legal system and have drawn the same conclusion: Mistaken eyewitness identifications is the leading cause of wrongful convictions.” (citations omitted)).

40. See *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Nov. 18, 2014); see also *State v. Riofta*, 209 P.3d 467, 474 (Wash. 2009) (“Riofta and amicus correctly argue that mistaken eyewitness identification is a leading cause of wrongful conviction.”); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 48 (2011) (reporting that 190 of the first 250 DNA-based exonerations in the United States involved eyewitness misidentification).

41. Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 230 (2012).

42. See *id.* at 225–26.

43. See, e.g., Flowe et al., *supra* note 29, at 150 (sampling of felony cases finding that “one out of every three suspects had [an eyewitness identification] in their case,” which increased the likelihood of prosecution); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542 (2005) (“The most common cause of wrongful convictions is eyewitness misidentification. This is not news.”).

er experts have suggested that up to 6% of incarcerated persons in the United States are innocent, which would translate to approximately 140,000 wrongfully imprisoned inmates at present.⁴⁵

The costs of wrongful convictions are numerous and devastating. Innocent persons who are wrongly convicted are deprived of their liberty; burdened with substantial personal debt; suffer emotional, psychological, and physical harm; face stigmatization, lack of support, and difficulty finding employment upon release; and must overcome substantial legal and administrative hurdles to obtain any sort of financial compensation.⁴⁶ In the meantime, the actual perpetrators who escape conviction often proceed to commit additional crimes and harm more victims.⁴⁷ Wrongful convictions also seriously undermine public confidence in the administration of justice⁴⁸ and inflict hundreds of millions of dollars in financial costs on the public.⁴⁹

Eyewitness misidentification represents a serious problem within the criminal justice system that should be addressed, but it is important not to overstate the unreliability of eyewitness identification as an entire category of evidence. Not all such identifications are mistaken—according to estimates, approximately two-thirds are correct.⁵⁰ Further, the reliability of such evidence may depend on the circumstances. For example, research and exonerations implicating mistaken identification tend to involve identifications of *strangers* (e.g., a victim identifying an unknown attacker in a lineup, or a third party identifying an unknown perpetrator from a photo array), and may be less relevant to cases in

44. See Gross et al., *supra* note 43, at 523–24 (study finding 340 identifiable exonerations in the United States between 1989 and 2003).

45. See Smith & Hattery, *supra* note 16, at 76; cf. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 761–62 (2007) (reviewing data on capital rape-murders and resulting exonerations and concluding that the rate of wrongful convictions for such cases is probably somewhere between 3.3% and 5%).

46. See Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J.L. REFORM 123, 129–31, 136 (2010) (discussing harms).

47. See James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1632 & n.16 (2013) (discussing research); see also John Conroy & Rob Warden, *The High Costs of Wrongful Convictions*, BETTER GOV'T ASS'N (June 18, 2011), http://www.bettergov.org/investigations/wrongful_convictions_1.aspx (study of wrongful convictions in Illinois from 1989 to 2010 finding that “while 85 people were wrongfully incarcerated, the actual perpetrators were on a collective crime spree that included 14 murders, 11 sexual assaults, 10 kidnappings and at least 62 other felonies”).

48. See Acker, *supra* note 47, at 1705 & nn.782–83.

49. See Conroy & Warden, *supra* note 47 (study of wrongful convictions in Illinois from 1989 to 2010 concluding that the known wrongful convictions during that time “cost taxpayers \$214 million”).

50. See *supra* note 32.

which an eyewitness recognizes and identifies someone familiar.⁵¹ Notwithstanding such distinctions, the evidence is clear that eyewitness identifications are mistaken in a substantial portion of actual criminal cases,⁵² and that such misidentifications result in wrongful convictions.⁵³

Although the shortcomings of eyewitness identification have been confirmed, jurors continue to overestimate this evidence's accuracy.⁵⁴ In a recent national survey, most respondents agreed with the notion that human memory "works like a video camera, accurately recording the events we see . . . so that we can review and inspect them later."⁵⁵ Yet "decades of research" has demonstrated that memory is often incomplete and inaccurate; depends on the subject's "goals and expectations"; is retrieved in "a constructive process influenced by knowledge, beliefs, expectations, and schemas"; and can easily be mistaken.⁵⁶ Despite this, many jurors find eyewitness testimony so persuasive that it colors their view of all other evidence in the case.⁵⁷ This may be due in part to the fact that mistaken eyewitnesses generally believe they are telling the truth; as a result, their testimony will seem sincere and often will be impervious to cross-examination.⁵⁸

Even more troublesome than eyewitness misidentification in general is *cross-racial* eyewitness misidentification. That is because eyewitnesses who are identifying someone of a race other than their own tend

51. See *State v. Riofta*, 206 P.3d 467, 474 (Wash. 2009) ("[M]istaken eyewitness identification is a leading cause of wrongful conviction. However, this is not a case where the defendant was unknown to the victim. Riofta and the victim lived in the same neighborhood and had known each other for years." (citation omitted)); *State v. Guloy*, 705 P.2d 1182, 1193 (Wash. 1985) ("Dr. Loftus' [proposed expert] testimony would not have affected the reliability of Domingo's statement because her testimony [on eyewitness misidentification] only concerns the identification of strangers."); cf. *State v. Welchel*, 801 P.2d 948, 949–50 (Wash. 1990) (eyewitness was girlfriend of defendant and participated in crime); *State v. Pam*, 635 P.2d 766, 769 (Wash. 1981) (eyewitness recognized defendant "because they had been incarcerated in the King County jail at the same time").

52. See *supra* note 32.

53. See sources cited *supra* notes 39–40.

54. See *supra* note 33; see also Michael R. Leippe & Donna Eisenstadt, *The Influence of Eyewitness Expert Testimony on Jurors' Beliefs and Judgments*, in *EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION* 170–72 (Brian L. Cutler ed., 2009).

55. Simons & Chabris, *supra* note 33, at 3.

56. *Id.* at 5.

57. See *Watkins v. Sowders*, 449 U.S. 341, 352 & nn. 4–5 (1981) (noting that "statistical and psychological evidence . . . persuasively supports [the] conclusion that eyewitness identification evidence is overwhelmingly influential" and that jurors tend to accept identifications "by well intended uninterested persons . . . as absolute proof" (internal marks omitted)); Timothy P. O'Toole & Giovanna Shay, *Manson v. Brathwaite Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 134–35 (2006) (citing studies).

58. See, e.g., Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 952–955 (1984); O'Toole & Shay, *supra* note 57, at 135.

to be especially unreliable.⁵⁹ One well-known meta-analysis covering over thirty years of eyewitness studies concluded that eyewitnesses are 56% more likely to falsely identify an individual if the individual is of another race.⁶⁰ As recognized in the NAS report, this and other research has established the cross-race effect as a “generally accepted” phenomenon.⁶¹ In addition, cross-racial identification is relied upon in a substantial number of prosecutions. For example, a recent study of assault, rape, and robbery cases from one of the largest District Attorney’s Offices in the United States found that cross-racial identifications were involved in at least 30% of such cases.⁶² In Washington alone, at least nine appellate decisions since 2010 have involved prosecutions based at least in part on a cross-racial identification.⁶³ Consistent with the research findings and prevalence of this type of evidence, approximately one-third of wrongful convictions uncovered by DNA analysis have involved whites misidentifying blacks,⁶⁴ representing a substantial portion of wrongful convictions in general and of cases involving eyewitness misidentification in particular.⁶⁵

As with eyewitness misidentification in general, research shows that most jurors are either misinformed about, or unaware of, the distinct inaccuracy of cross-racial identification in particular.⁶⁶ Researchers have found “large discrepancies” between juror and expert knowledge regard-

59. See *State v. Cheatam*, 81 P.3d 830, 840 (Wash. 2003) (“[T]here are numerous studies showing that contrary to many jurors’ beliefs upon questioning, it is more difficult for people of one race to identify people of a different race.”); Saul M. Kassin et al., *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts*, 56 AM. PSYCHOLOGIST 405, 407–08, 410 (2001); Meissner & Brigham, *supra* note 17; Kathy Pezdek et al., *Cross-Race (but Not Same-Race) Face Identification Is Impaired by Presenting Faces in a Group Rather Than Individually*, 36 LAW & HUM. BEHAV. 488, 488–89 (2012) (reviewing literature on cross-race effect).

60. See Meissner & Brigham, *supra* note 17, at 15.

61. NAS REPORT, *supra* note 36, at 66–67.

62. Flowe et al., *supra* note 29, at 144–146, 149.

63. See *In re Gentry*, 316 P.3d 1020, 1033 n.13 (Wash. 2014); *State v. Allen*, 294 P.3d 679 (Wash. 2013); *State v. Jaime*, 233 P.3d 554, 560 (Wash. 2010) (Sanders, J., concurring); *State v. Fields*, No. 70036-7-I, 2014 WL 3741925, at *2 (Wash. Ct. App. July 28, 2014); *State v. Pulega*, No. 69439-1-I, 2014 WL 448586, at *7 n.2 (Wash. Ct. App. Feb. 3, 2014); *State v. Ross*, No. 66849-8-I, 2012 WL 3065304, at *4 (Wash. Ct. App. July 30, 2012); *State v. Ljubich*, No. 66095-1, 2012 WL 1382440, at *7 (Wash. Ct. App. Apr. 23, 2012); *State v. Seals*, No. 63883-1-I, 2011 WL 1226896, at *2 (Wash. Ct. App. Apr. 4, 2011); *State v. Hassan*, No. 63556-5-I, 2010 WL 4409691, at *7 (Wash. Ct. App. Nov. 8, 2010).

64. James M. Doyle, *Discounting the Error Costs*, 7 PSYCHOL. PUB. POL’Y & L. 253, 253 (2001); see also Smith & Hattery, *supra* note 16, at 84 (“[T]he vast majority of exoneration cases involve a White victim who mis-identifies an African American man.”).

65. See GARRETT, *supra* note 40, at 48 (reporting that approximately 75% of DNA-based exonerations in the United States involved eyewitness misidentification).

66. See, e.g., Benton et al., *supra* note 33, at 119–20; Kassin & Barndollar, *supra* note 33, at 1245; Schmechel et al., *supra* note 26, at 200.

ing the reliability of cross-racial identification.⁶⁷ In one recent survey of potential jurors, for example, researchers found that “almost two-thirds of jurors surveyed” were “ill-informed about the inaccuracy of cross-racial identification,” and some jurors believed that cross-racial identification is *more* accurate rather than less accurate.⁶⁸

Historically, courts regularly overlooked the problem of eyewitness misidentification and resisted any efforts to prevent undue reliance on eyewitness testimony at trial, especially attempts to present expert testimony on the subject.⁶⁹ In the 1970s and 1980s, Washington State trial courts regularly excluded expert testimony on eyewitness misidentification, and those decisions were regularly upheld on appeal.⁷⁰ These courts gave various reasons for exclusion, including assertions that eyewitness science was unfounded, speculative, or conflicting;⁷¹ that the general findings of eyewitness science would not be relevant to a specific identification in a particular case;⁷² that the reliability of an eyewitness identification was a matter of common knowledge and should be left to the jury,⁷³ and that cross-examination rather than expert testimony could be

67. Benton et al., *supra* note 33, at 119–20 (finding “large discrepancies” between juror and expert knowledge regarding the reliability of cross-racial identification).

68. Schmechel et al., *supra* note 26, at 200 (reporting that 48% of survey respondents “thought cross-race and same-race identifications are of equal reliability” whereas 11% “either did not know or thought a cross-racial identification would be more reliable”).

69. See, e.g., Jules Epstein, *Expert Testimony: Legal Standards for Admissibility*, in *EXPERT TESTIMONY ON THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION* 69 (Brian L. Cutler ed., 2009) (“Historically . . . courts were adverse to expert testimony regarding eyewitness[es].”); Malpass et al., *supra* note 34, at 3–4 (noting that researcher in the 1930s who discovered that misidentifications were causing wrongful convictions “made a series of recommendations, which had little detectable impact on the legal system”).

70. See, e.g., *State v. Johnson*, 743 P.2d 290, 294 (Wash. 1987); *State v. Mak*, 718 P.2d 407, 422 (Wash. 1986), *overruled on other grounds by State v. Hill*, 870 P.2d 313, 315 (Wash. 1994); *State v. Barry*, 611 P.2d 1262, 1267 (Wash. Ct. App. 1980); *State v. Brown*, 564 P.2d 342, 346–47 (Wash. Ct. App. 1977); *but see State v. Cook* 639 P.2d 863, 869 (Wash. Ct. App. 1982) (trial court allowed expert to testify on findings of eyewitness science in general but still did not allow expert to “answer hypothetical questions and address specific problems”).

71. See *Brown*, 564 P.2d at 346 (“[A] professor of psychology . . . was called by the defendant as an expert witness to testify concerning her studies, conclusions and opinions as to eyewitness testimony generally, and as to the eyewitness identifications in this case particularly. . . . The trial court . . . ruled that the offered opinions were highly speculative and founded on assumptions contrary to any evidence in the case.”); *Johnson*, 743 P.2d at 293–94 (“[T]he court excluded [some eyewitness expert] testimony . . . because, in the court’s view, that testimony . . . was based on studies which had reached contradictory conclusions.”).

72. See *Barry*, 611 P.2d at 1267 (“We are in agreement with the ruling of the trial court that the proposed testimony of [the eyewitness expert] would have been collateral to the specific issue of Mr. Culpepper’s ability accurately to observe and recall what he saw The proffered testimony bore no specific relation to Mr. Culpepper but concerned eyewitnesses in general.”).

73. See *Mak*, 718 P.2d at 422 (“The trial court did not err by declining to admit the testimony on eyewitness identification. . . . [T]he trial court appropriately observed that the ‘subject of the

used to call into question the reliability of any given identification.⁷⁴ For these asserted reasons, Washington courts generally reserved expert testimony on eyewitness misidentification to “a very narrow range of cases,”⁷⁵ namely those that would “‘cry out’ for an explanation” due to inconsistent physical evidence or otherwise.⁷⁶ The problem, of course, was that these courts did not understand eyewitness science (which remained in its infancy) and were unaware of the nature and prevalence of eyewitness misidentifications and the need for corrective measures.

More recently, however, courts have begun to recognize the need to address eyewitness misidentification, including cross-racial misidentification, within our criminal justice system. The New Jersey Supreme Court’s recent decision in *State v. Henderson*⁷⁷ and the Oregon Supreme Court’s recent decision in *State v. Lawson*⁷⁸ are two prime examples. In each case, the court acknowledged that memory is malleable and that an array of variables, including cross-race bias, can affect and dilute memory and lead to misidentifications.⁷⁹ These two courts adopted various trial procedures intended to address the overarching problem of eyewitness misidentification, including heightened requirements for the admission of eyewitness identifications and enhanced jury instructions.⁸⁰ Washington courts also have now recognized that eyewitness misidentifications, and especially cross-racial misidentifications, are an ongoing

testimony is within the general knowledge and experience of a lay jury’”); *Johnson*, 743 P.2d at 294 (“The court excluded the . . . proposed testimony [on eyewitness misidentification], . . . finding that it would not be helpful to the trier of fact because it was within the ‘common experience’ of the jurors. . . . [E]xcluding expert testimony on eyewitness identification for the reason that it would not be helpful to the trier of fact is a proper exercise of the trial court’s discretion in the great majority of cases.” (internal quotations omitted)); *Barry*, 611 P.2d at 1267 (“The proffered testimony . . . posed the risk of interfering with the jury’s role as factfinder”).

74. See *Mak*, 718 P.2d at 422 (“[T]he trial court appropriately observed that . . . cross examination of the eyewitness would reveal any inconsistencies.”); *Barry*, 611 P.2d at 1267 (“Although the possibility of misidentification always exists in a given case, exposure of that risk is a specific function of cross-examination and argument by defense counsel.”).

75. *State v. Moon*, 726 P.2d 1263, 1266 (Wash. Ct. App. 1986), *abrogated by* *State v. Cheatam*, 81 P.3d 830, 842 (Wash. 2003).

76. *Johnson*, 743 P.2d at 294 (citing *Moon*, 726 P.2d at 1267). After the *Moon* decision, numerous appellate decisions in Washington addressed the admission of eyewitness expert testimony with the understanding that such testimony is required only in a very narrow class of cases, based on a three-part test the *Moon* court identified. See, e.g., *id.* Because the Washington State Supreme Court in *Cheatam* expressly disapproved of *Moon*’s overly restrictive approach, these decisions are no longer good law. See *Cheatam*, 81 P.3d at 842.

77. *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

78. *State v. Lawson*, 291 P.3d 673 (Or. 2012).

79. See *Henderson*, 27 A.3d at 917; *Lawson*, 291 P.3d at 687–88.

80. See *Henderson*, 27 A.3d at 878; *Lawson*, 291 P.3d at 690–97.

problem within our criminal justice system.⁸¹ It remains an open question, however, how best to address the problem.

III. THE USE OF EXPERT TESTIMONY AND JURY INSTRUCTION TO PREVENT WRONGFUL CONVICTIONS

The “central purpose of any system of criminal justice is to convict the guilty and free the innocent.”⁸² A wrongful conviction is directly contrary to this purpose, both because the truly guilty party often escapes conviction as a result, and because great harm is wrongly imposed on an innocent person. Our criminal justice system is thus founded on a strong presumption of innocence and includes numerous additional procedural safeguards to promote accuracy and prevent wrongful convictions.⁸³

As discussed above, cross-racial misidentification increases the number of wrongful convictions, the number of guilty persons who escape conviction, and the extent of racial disparity in our criminal justice system. Thus, cross-racial misidentification poses an ongoing threat to the integrity of the criminal justice system and demands action.⁸⁴ At the outset, there are numerous potential ways to try addressing this problem. But in considering remedies, one must also keep in mind the potential tradeoff between overall rates of wrongful convictions and correct convictions for crimes committed. Entirely prohibiting criminal prosecutions would guarantee zero wrongful convictions, for example, but at the same time would result in zero correct convictions—an unacceptable tradeoff.

In general, it is a “fundamental value determination of our society” that “it is far worse to convict an innocent man than to let a guilty man go free.”⁸⁵ This means that preventing a wrongful conviction is more im-

81. See, e.g., *State v. Allen*, 294 P.3d 679, 682 (Wash. 2013) (C. Johnson, J., lead opinion) (“Concerns and discussions over the reliability of eyewitness identifications, and more specifically cross-racial eyewitness identifications, have arisen in cases for some time.”); *id.* at 691 (Chambers, J., concurring) (acknowledging “the demonstrated weakness of eye witness testimony in general and cross-racial witness identification in particular”); *Cheatam*, 81 P.3d at 840 (acknowledging that “courts were once extremely reluctant to admit [expert] testimony [on eyewitness misidentification]” but that a “shift in thinking” has taken place as a result of “numerous studies” and research); *State v. Allen*, 255 P.3d 784, 787 (Wash. Ct. App. 2011) (“Mistaken eyewitness identification is a leading cause of wrongful conviction. . . . Studies have shown that a cross-racial identification . . . is an especially problematic identification.”), *aff’d on other grounds*, 294 P.3d 679 (Wash. 2013).

82. *Herrera v. Collins*, 506 U.S. 390, 398 (1993); see also *Herring v. New York*, 422 U.S. 853, 862 (1975) (noting that the “ultimate objective” of our criminal justice system is “that the guilty be convicted and the innocent go free”).

83. See *Herrera*, 506 U.S. at 398–99.

84. See *supra* Part II.

85. *Schlup v. Delo*, 513 U.S. 298, 325 (1995) (quoting *In re Winship*, 397 U.S. 358, 372 (1970)) (internal quotations omitted). This value determination is often reflected in statements made concerning the appropriate ratio between guilty persons who escape conviction and innocent persons

portant than securing a correct conviction, all else being equal. At the same time, securing correct convictions remains an important goal to be pursued. The preference for preventing wrongful convictions thus has limits. And for that reason, an extreme remedy such as a blanket prohibition against using eyewitness identifications as evidence would be unacceptable; it would exclude even the most reliable of identifications (such as the identification of a spouse in a typical domestic violence incident), even for the limited purpose of corroboration. Proper solutions to the problem of cross-racial misidentification will balance the need to prevent wrongful convictions with the need to convict guilty parties. And the best solutions will reduce or eliminate wrongful convictions resulting from misidentification without compromising the effectiveness of the system in accurately identifying and convicting the guilty.

Two potential remedies that have been suggested for addressing cross-racial misidentification are the use of expert testimony and jury instructions at trial.⁸⁶ As will be discussed in Part VI, there are numerous additional remedies that should be considered, including general education of jurors, judges, attorneys, and police; changes to relevant evidentiary standards; and improved investigatory standards.⁸⁷ Notwithstanding these additional remedies, which are not mutually exclusive, there are numerous reasons to focus on the use of expert testimony and jury instructions in particular. First, expert testimony and jury instructions on cross-racial misidentification are already authorized under Washington law,⁸⁸ have already been used in criminal trials in Washington,⁸⁹ and can be employed immediately on a widespread basis. Second, there are existing efforts at developing these two remedies in Washington, including

who are wrongly convicted, sometimes referred to as the “Blackstone Ratio.” *E.g.*, Steven E. Clark, *Blackstone and the Balance of Eyewitness Identification Evidence*, 74 ALB. L. REV. 1105, 1105 (2010) (“[T]he law holds that it is better that ten guilty persons escape than that one innocent suffer.” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 358)); *see also Schlup*, 513 U.S. at 325 (“The maxim of the law is . . . that it is better that ninety-nine . . . offenders should escape, than that one innocent man should be condemned.” (quoting THOMAS STARKIE, EVIDENCE 756 (1824))).

86. *See, e.g.*, *Allen*, 294 P.3d at 691 (Chambers, J., concurring) (“Given the demonstrated weakness of eye witness testimony in general and cross-racial eye witness identification in particular, in my view, expert testimony and instruction to the jury on the weakness of cross-racial identifications should be the standard in our courtrooms whenever it would be helpful.”).

87. *See infra* Part VII.

88. *See infra* Parts IV, V.

89. *E.g.*, *State v. Ljubich*, No. 66095-1, 2012 WL 1382440, at *7 (Wash. Ct. App. Apr. 23, 2012) (noting that at trial “[a] defense expert testified on the topic of ‘cross-racial identification’”); *State v. Bell*, 788 P.2d 1109, 1112 (Wash. Ct. App. 1990) (“Dr. Croyle was allowed to testify regarding . . . cross racial identification.”); *State v. Cook*, 639 P.2d 863, 869 (Wash. Ct. App. 1982) (“During trial, the court allowed . . . an expert on eyewitness identification[] to testify generally as to the factors affecting the reliability of such identifications.”).

research aimed at the development of a model jury instruction.⁹⁰ Third, there is a great deal of research on the use and effectiveness of these two remedies.⁹¹ Fourth, the widespread use of these two remedies could help increase general awareness of the problem, providing needed support for broader efforts and additional remedies.

To evaluate the merit of promoting expert testimony and jury instruction on cross-racial misidentification, one must first consider the potential effects these tools may have on the trial process and on verdicts. Notwithstanding good intentions and theory, if these tools have no actual effect on outcomes, then using them will do little to solve the underlying problems associated with cross-racial misidentification. And if these tools somehow have substantial negative effects on the proper functioning of the trial process, their use might then be undesirable notwithstanding some lesser positive effects.

In general, researchers have found “mixed effects” from expert testimony and jury instruction on eyewitness misidentification, depending on the particular study and the particular form of testimony or instruction tested.⁹² Researchers have grouped these observed effects into three main categories: sensitivity, skepticism, and no-effect/confusion.⁹³ First, in some studies mock jurors have demonstrated increased *sensitivity* to the particular factors found to render eyewitness identifications more or less reliable, such as the lighting at the scene, duration of witness exposure, the presence of a weapon, or whether the identification is cross-racial.⁹⁴ These jurors proved capable of distinguishing between more and less

90. See *infra* Part VI.

91. See *infra* notes 92–97 and accompanying text.

92. Kristy A. Martire & Richard I. Kemp, *The Impact of Eyewitness Expert Evidence and Judicial Instruction on Juror Ability to Evaluate Eyewitness Testimony*, 33 LAW & HUM. BEHAV. 225, 225–26 (2009) [hereinafter *The Impact of Eyewitness Expert Evidence*]; see also, e.g., Kathy Pezdek et al., *Does Trial Presentation Medium Matter in Jury Simulation Research? Evaluating the Effectiveness of Eyewitness Expert Testimony*, 24 APPLIED COGNITIVE PSYCHOL. 673, 674 (2010) (noting that “the findings are mixed”).

93. See, e.g., Brian L. Cutler et al., *The Eyewitness, the Expert Psychologist, and the Jury*, 13 LAW & HUM. BEHAV. 311, 312–14 (1989); Jennifer L. Devenport & Brian L. Cutler, *Impact of Defense-Only and Opposing Eyewitness Experts on Juror Judgments*, 28 LAW & HUM. BEHAV. 569, 570 (2004) [hereinafter *Impact of Defense-Only and Eyewitness Expert Evidence*]; Kristy A. Martire & Richard I. Kemp, *Can Experts Help Jurors to Evaluate Eyewitness Evidence? A Review of Eyewitness Expert Effects*, 16 LEGAL & CRIMINOLOGICAL PSYCHOL. 24, 25 (2011) [hereinafter *Can Experts Help Jurors*]; Martire & Kemp, *The Impact of Eyewitness Expert Evidence*, *supra* note 92, at 225.

94. See Cutler et al., *supra* note 93, at 329 (stating that use of expert testimony increases sensitivity of jurors); Devenport & Cutler, *Impact of Defense-Only and Opposing Eyewitness Experts*, *supra* note 93, at 570 (discussing studies); Martire & Kemp, *Can Experts Help Jurors*, *supra* note 93, at 29–33 (same); Martire & Kemp, *The Impact of Eyewitness Expert Evidence*, *supra* note 92, at 225–26 (same).

reliable eyewitness evidence based on the presence of such relevant factors.⁹⁵ Second, in many other studies mock jurors have demonstrated general *skepticism*—an overall reduction in the weight given to eyewitness evidence regardless of the particular factors involved.⁹⁶ And third, in a small number of studies mock jurors have demonstrated *no effect* resulting from expert testimony or jury instruction, because the testimony or instruction was too confusing or for some other reason.⁹⁷

Notwithstanding the mixed effects discussed above, the research results to date support the use of expert testimony and jury instruction to help solve the cross-racial misidentification problem, for numerous reasons. First, the research shows that jurors can be effectively sensitized to cross-racial bias and other such factors, and that sensitized jurors will give more appropriate weight to relevant identification evidence.⁹⁸ This is consistent with the general legal presumption that jurors are reasonably intelligent and will understand the evidence and implement the trial judge's reasonable instructions.⁹⁹ It is also consistent with the conclusions of the recent NAS report, which recommends the use of expert testimony and "clear and concise" jury instructions to educate jurors on these issues.¹⁰⁰

Second, to the extent juror skepticism results, jurors will be motivated to rely on other forms of evidence that are more reliable, and will be less likely to give undue weight to eyewitness evidence.¹⁰¹ In light of

95. See Cutler et al., *supra* note 93, at 327; Martire & Kemp, *Can Experts Help Jurors*, *supra* note 93, at 29–31; Martire & Kemp, *The Impact of Eyewitness Expert Evidence*, *supra* note 92, at 225–26.

96. See Leippe et al., *supra* note 33, at 527 (discussing studies); Martire & Kemp, *Can Experts Help Jurors*, *supra* note 93, at 29–33 (same); Martire & Kemp, *The Impact of Eyewitness Expert Evidence*, *supra* note 92, at 226 (same).

97. See Devenport & Cutler, *Impact of Defense-Only and Opposing Eyewitness Experts*, *supra* note 93, at 574–75 (finding no effect on mock jurors from expert testimony); Martire & Kemp, *Can Experts Help Jurors*, *supra* note 93, at 29–33 (discussing studies); Martire & Kemp, *The Impact of Eyewitness Expert Evidence*, *supra* note 92, at 226 (same).

98. See sources cited *supra* notes 94–95.

99. See *State v. Montgomery*, 183 P.3d 267, 281 (Wash. 2008) (J.M. Johnson, J., concurring) ("Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case." (quoting *People v. Carey*, 158 P.3 743, 758 (Cal. 2007) (internal quotations omitted)); *State v. Whetstone*, 191 P.2d 818, 840 (Wash. 1948) ("We must and do assume, in support of our jury system, that jurors are men and women of reasonable intelligence; [and] that it is their desire to return verdicts supported by evidence and according to the court's instructions . . ."); see also *City of Seattle v. Gellein*, 768 P.2d 470, 471 (Wash. 1989) (concluding that the effect of a jury instruction "[was] to be judged by the understanding of a reasonable juror"); *State v. Dana*, 439 P.2d 403, 405 (Wash. 1968) ("If instructions are such as are readily understood and not misleading to the ordinary mind, they are sufficient.").

100. NAS REPORT, *supra* note 36, at 112.

101. See sources cited *supra* note 96.

the presumption of innocence and the relative importance of avoiding wrongful convictions, juror skepticism is at least preferable to the status quo (acute over-acceptance of eyewitness testimony¹⁰²), even if skeptical jurors are not able to discern which particular factors increase or decrease reliability, and even if eyewitness evidence is the primary or only evidence of guilt. The effect of juror skepticism should not be overstated—it simply represents a relative reduction in weight given to eyewitness identification, not a refusal to fairly consider all evidence in a given case.¹⁰³ Prosecutors will remain able to explain any reasons why a specific identification should be considered reliable based on the particulars of each case.¹⁰⁴ Moreover, expert testimony and jury instruction will be allowed only when relevant,¹⁰⁵ meaning that some amount of skepticism probably will be appropriate regardless of which particular factors are at play in the case.

Third, although expert testimony and jury instruction might sometimes have no effect on jurors, this result is relatively rare in experiments and is thus relatively unlikely in practice.¹⁰⁶ In any case, a lack of any effect does not worsen outcomes, other than a potential increase in administrative costs.

Fourth, to the extent that expert testimony and jury instruction on cross-racial misidentification become common practice, additional efforts can be put toward research and refinement.¹⁰⁷ Practitioners and

102. See sources cited *supra* notes 33, 54, 57–58.

103. See, e.g., Martire & Kemp, *Can Experts Help Jurors*, *supra* note 93, at 29 (noting that skepticism can be reflected in greater “scrutiny” of eyewitness testimony, lesser “perceptions of its weight,” or even lesser “certainty associated with guilty verdicts”).

104. Prosecutors will be able to cross-examine any expert, proffer experts of their own, and draw all reasonable inferences from expert testimony and other evidence in the case. See, e.g., *State v. Hoffman*, 804 P.2d 577, 600 (Wash. 1991) (noting that a prosecutor “has a wide latitude in drawing and expressing reasonable inferences from the evidence”); *State v. Barrow*, 809 P.2d 209, 212 (Wash. Ct. App. 1991) (approving of prosecutor’s argument “simply made . . . based on common sense”).

105. See, e.g., *State v. Guloy*, 705 P.2d 1182, 1193 (Wash. 1985) (eyewitness expert properly excluded because case did not involve the cross-racial identification of a stranger, about which the expert would have testified); see also *infra* Parts IV, V.

106. See, e.g., Martire & Kemp, *The Impact of Eyewitness Expert Evidence*, *supra* note 92, at 225–26 (review of literature reflecting relatively limited number of studies showing no effect/confusion).

107. See, e.g., Kassir & Barndollar, *supra* note 33, at 1247 (noting that although some research on particular instructions may “suggest that the . . . instructions are not . . . effective . . . and need to be written in more accessible language,” that is not reason “to conclude that [jury] instruction is not a [generally useful] medium for educating the jury”); see also Edith Greene, *Judge’s Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. APPLIED SOC. PSYCHOL. 252, 261–62 (1988) (noting that jury instructions on eyewitness identification should adhere to established principles of psycholinguistics).

judges can incorporate research findings into the particular testimony and instructions being used, and any pattern instructions can be improved over time.¹⁰⁸

Fifth, common use of expert testimony and jury instruction on cross-racial misidentification in criminal cases should increase general awareness of this issue in the long term, among the general public and throughout the criminal justice system, which theoretically could increase the future effectiveness of such testimony and instruction.

Sixth, if expert testimony and jury instruction on cross-racial misidentification are used effectively to prevent convictions that would otherwise result, police and prosecutors presumably will be more motivated to focus on other forms of evidence and to ensure abundant indicia of reliability and corroborating evidence for any cross-racial identification upon which they intend to rely in court.¹⁰⁹ Indeed, the mere recognition by trial courts that this category of evidence is problematic could encourage police and prosecutors to approach cross-racial identifications with greater caution. Had the police and prosecutors been more cautious in Michael Marshall's case, for example, they might have tested the physical evidence collected at the scene of the crime rather than simply trusting the eyewitness identification that was made. Although forensic testing may be inappropriate or unnecessary in some cases due to prohibitive cost, cumulative evidence, or for other such reasons, eyewitness testimony generally should demand some corroborating evidence. Police who approach eyewitness evidence with appropriate caution are motivated not only to test additional evidence, but also to collect such evidence in the first place, conducting more thorough investigations even after an identi-

108. See Greene, *supra* note 107, at 261–70 (finding, in a study of actual Washington jurors, that jurors were less likely to convict in a case involving eyewitness identification when given a clearly worded cautionary instruction); Gabriella Ramirez et al., *Judges' Cautionary Instructions on Eyewitness Testimony*, 14 AM. J. FORENSIC PSYCHOL. 31, 55 (1996) (finding that subjects who received a clearly worded instruction on cross-racial bias were more likely to be aware of this phenomenon than those who received a less clear instruction or no instruction); see also Martire & Kemp, *The Impact of Eyewitness Expert Evidence*, *supra* note 92, at 226 (noting that studies on one particular well-known jury instruction on eyewitness misidentification have found no effect from that particular instruction).

109. *Cf.* Perry v. New Hampshire, 132 S. Ct. 716, 726 (2012) (noting that a “primary aim” of excluding unreliable identification evidence “is to deter law enforcement” from relying on such evidence “in the first place”); State v. Martin, 684 P.2d 651, 656 (1984) (noting that a cautionary instruction on testimony involving hypnosis, among other safeguards, would “substantially reduce the likelihood of the use of hypnosis to develop evidence” because “the police officer or prosecutor considering hypnotizing a potential witness [would have to] proceed with caution”); *cf.* Flowe et al., *supra* note 29, at 150 (finding, in a study of actual felony cases, that when a stranger provided “eyewitness identification evidence [and there was some] limited corroborating evidence,” prosecutors still exercised discretion and decided not to press charges 17% of the time).

fication has been made. To the extent faulty cross-racial identifications are discredited before any charges are filed, there will no longer be any need for expert testimony or jury instruction on the subject.

In sum, the regular use of expert testimony and jury instruction on cross-racial misidentification could prevent wrongful convictions and improve our criminal justice system. As the next two Parts demonstrate, trial courts in Washington already have wide discretion to permit the use of these tools in criminal trials.

IV. DISCRETION OF WASHINGTON STATE TRIAL COURTS TO ADMIT EXPERT TESTIMONY ON CROSS-RACIAL MISIDENTIFICATION

Expert testimony regarding cross-racial misidentification usually consists of an expert's opinion as to the relative and overall inaccuracy of cross-racial eyewitness identification.¹¹⁰ Typically, such testimony will be based on scientific expertise and will indicate how research on cross-racial misidentification can (and should) inform the jury's evaluation of the eyewitness identification at issue in the case. In *State v. Cheatam*, the Washington State Supreme Court held that the admission of such testimony is a discretionary decision for the trial court, reviewed under "the rules for admissibility of relevant evidence in general and admissibility of expert testimony under ER 702 in particular."¹¹¹

Although the court in *Cheatam* did not discuss the precise bounds of a trial court's discretion to admit expert testimony on cross-racial misidentification,¹¹² a careful review of Washington's general admissibility standards for expert testimony demonstrates that Washington State trial courts enjoy especially wide discretion to admit such testimony—more than many in the legal community might expect.¹¹³ As is explained below, a trial court has discretion to admit such testimony whenever the issue of cross-racial misidentification is relevant and the proffered expert is sufficiently knowledgeable and experienced to opine. In some cases, it may even be an abuse of discretion to exclude a proffered expert's testimony.¹¹⁴

110. See Pezdek, *supra* note 35, at 41–42.

111. *State v. Cheatam*, 81 P.3d 830, 842 (Wash. 2003); see WASH. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.").

112. See *Cheatam*, 81 P.3d at 842.

113. See discussion *infra* Part IV.A–C.

114. *Cf., e.g., State v. Clopten*, 223 P.3d 1103, 1115–17 (Utah 2009) (trial court abused its discretion by excluding eyewitness expert testimony from murder trial in which cross-racial identification and other key factors affecting reliability were relevant); *McKibbin v. City of Seattle*, No.

A. General Admissibility of Scientific Expert Testimony

Under Washington law, in order to determine the admissibility of scientific expert testimony, a trial court must conduct a threshold inquiry into reliability and relevance.¹¹⁵ Washington courts generally oversee the use of evidence in trials in order to “secure fairness in administration,” to eliminate “unjustifiable expense and delay,” and so that “the truth may be ascertained and proceedings justly determined.”¹¹⁶ Accordingly, Washington courts regulate the admission of expert testimony in particular to exclude any such testimony that might mislead the jury to the prejudice of an opposing party, or that would not be helpful to the jury, thus wasting time and resources and needlessly distracting from the merits of the case.¹¹⁷ Yet it is the role of the jury, not the court, to assess the weight and credibility of admissible testimony.¹¹⁸ Thus, the court’s threshold inquiry into admissibility is limited.

With these principles in mind, the Washington State Supreme Court has enumerated three basic requirements for the admissibility of scientific expert testimony.¹¹⁹ First, the testimony must address matters beyond common knowledge that are relevant to the case at hand, or in other words, the testimony must be helpful to the trier of fact.¹²⁰ Helpfulness to the trier of fact is construed broadly.¹²¹ Second, the expert’s opinion must be based upon principles or theories generally accepted in the relevant scientific community.¹²² This is sometimes referred to as the “*Frye* test,”¹²³ named after the seminal case *Frye v. United States*.¹²⁴ Third, the individual providing the testimony must qualify as an expert.¹²⁵

65177-3-I, 2011 WL 2120084, at *3–4 (Wash. Ct. App. May 31, 2011) (reversing trial court’s decision to exclude expert testimony from proffered expert who had specifically studied topic at issue).

115. See *Reese v. Stroh*, 907 P.2d 282, 285–86 (Wash. 1995); see also *Cheatam*, 81 P.3d at 830, 840; *State v. Ward*, 777 P.2d 1066, 1067 (Wash. Ct. App. 1989).

116. WASH. R. EVID. 102.

117. See *State v. Copeland*, 922 P.2d 1304, 1313 (Wash. 1996) (court seeks to avoid “complex, expensive, and time-consuming courtroom dramas” and thus “insulates the adversary system” from unreliable expert testimony (internal quotations omitted)); *Gerberg v. Crosby*, 329 P.2d 184, 188 (Wash. 1958) (“[T]he important question is whether [expert testimony] will mislead the trier of fact to the prejudice of the objecting party.”).

118. *Larson v. Ga. Pac. Corp.*, 524 P.2d 251, 254 (Wash. Ct. App. 1974) (“[O]nce the expert testimony is admitted into evidence, its weight and credibility is like all other evidence to be considered by the jury.”).

119. See *Cheatam*, 81 P.3d at 840.

120. *Id.*

121. *Philippides v. Bernard*, 88 P.3d 939, 947 (Wash. 2004).

122. *Cheatam*, 81 P.3d at 840.

123. See, e.g., *Anderson v. Akzo Nobel Coatings, Inc.*, 260 P.3d 857, 859, 860–868 (Wash. 2011).

124. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

125. *Cheatam*, 81 P.3d at 840.

The first two prongs of the test for admitting scientific testimony pose little obstacle to the admissibility of expert testimony on cross-racial misidentification in relevant cases. First, testimony on eyewitness misidentification and cross-racial bias, when sufficiently relevant, will be helpful to the jury.¹²⁶ Although evidence over the past thirty years demonstrates that cross-racial identification is distinctly less reliable and more prone to error, studies show that most jurors remain ill-informed about these issues.¹²⁷ Thus, scientific testimony on the subject will help most jurors decide what weight to give to eyewitness evidence. Second, cross-racial bias is generally accepted in the scientific community: in a 2001 survey of sixty-four eminent experts on eyewitness research, 90% agreed that the cross-race effect is reliable enough to be presented in court.¹²⁸ And since that time, the phenomenon has only gained in evidentiary support and acceptance.¹²⁹ In any case, the cross-race effect has been demonstrated and investigated using generally accepted scientific methods,¹³⁰ which alone is sufficient to satisfy the *Frye* test.¹³¹ Therefore, expert testimony on cross-racial eyewitness bias, when sufficiently relevant, should be admissible in Washington State trial courts as long as the third prong of the test for admissibility—that the testifying individual must qualify as an expert—is met.

B. Qualifying as an Expert Witness

The qualification of an expert witness is a discretionary matter that is subject to discrete legal standards. Initially, determining whether a tes-

126. See sources cited *supra* notes 33, 54, 57–58, 94–95.

127. See sources cited *supra* notes 33, 54, 57–58, 94–95.

128. Kassin et al., *supra* note 59, at 412.

129. See, e.g., John Paul Wilson et al., *The Cross-Race Effect and Eyewitness Identification: How to Improve Recognition and Reduce Decision Errors in Eyewitness Situations*, 7 SOC. ISSUES & POL'Y REV. 83, 84, 104, 108 (2013) (“Psychologists have documented the [Cross-Race Effect (CRE)] for nearly half a century, and in the past decade psychologists have substantially increased our understanding of its antecedents and potential ways to ameliorate this troubling bias. . . . The evidence for the CRE is reliable, robust, and overwhelming. . . . We know more than we have ever known about the CRE, and we are increasingly confident that the existing body of work must be used to inform eyewitness identification policy.” (citation omitted)); NAS REPORT, *supra* note 36, at 66–67.

130. See, e.g., sources cited *supra* note 129; Malpass et al., *supra* note 34, at 10, 15–17 (“Experimental psychology and the applied field of eyewitness identification and memory are widely recognized as fields of scientific study, embodying the techniques, methodologies, and standards that define science in relation to other forms of knowledge. . . . As with other scientific communities, there is general agreement about the scientific findings of the eyewitness community. . . . Important examples . . . include topics such as the cross-race effect” (citation omitted)).

131. See *Anderson v. Akzo Nobel Coatings, Inc.*, 260 P.3d 857, 859, 860–63, 863–68 (Wash. 2011) (“The *Frye* test is only implicated where the opinion offered is based upon novel science.”).

tifying individual properly qualifies as an expert falls within the trial court's discretion.¹³² Review under an abuse of discretion standard is especially appropriate when a determination is "fact intensive and involves numerous factors to be weighed on a case-by-case basis," and is one for which "no rule of general applicability" could be effectively constructed.¹³³ In the case of expert qualification, there is no cut-and-dry formula; rather, many different experiences, educational or otherwise, of varying duration, may contribute to an expert's capacity to understand and present information that is outside common knowledge and that will be helpful to the jury. Thus, the trial court's determination of an expert's qualification will require a case-by-case, fact-intensive, totality-of-the-circumstances analysis.

A review of Washington case law reveals that, in order for a proposed witness to be deemed qualified as an expert in Washington, the witness must possess both *legitimacy* and *proficiency* in the relevant area of expertise.¹³⁴ First, the witness must possess some requisite amount of skill, experience, training, or education to *legitimize* her relevant knowledge and understanding.¹³⁵ Second, the witness must demonstrate *proficiency* in the particular subject matter at issue and be able to articulate a reasonable basis for her specific testimony.¹³⁶ Testimony from a proposed expert possessing both legitimacy and proficiency is admissible; evaluating the credibility and weight of that testimony is for the factfinder.¹³⁷

Washington courts have broad discretion in evaluating the legitimacy of a proposed expert, but legitimacy is not a stringent requirement. Washington Rule of Evidence 702 clearly states that one can qualify as an expert based on skill, experience, training, *or* education.¹³⁸ Accordingly, a witness need not possess traditional, formal academic credentials in order to qualify as an expert on a given subject.¹³⁹ A witness must simply possess skill, experience, training, or education sufficient to legitimize

132. *Harris v. Robert C. Groth, M.D., Inc.*, P.S., 663 P.2d 113, 119 (Wash. 1983).

133. *State v. Sisouanh*, 290 P.3d 942, 949 (Wash. 2012) (internal quotations omitted).

134. See sources cited *infra* notes 139–147.

135. See sources cited *infra* notes 139–142.

136. See sources cited *infra* notes 143–147.

137. See cases cited *supra* note 118; *infra* note 142.

138. See WASH. R. EVID. 702.

139. See, e.g., *State v. McPherson*, 46 P.3d 284, 293 (Wash. Ct. App. 2002) (no abuse of discretion in permitting police detective without chemistry degree to testify on manufacture of methamphetamine where detective had investigated many meth labs, passed training courses, and attended conferences on the subject of meth labs); *Goodman v. Boeing Co.*, 877 P.2d 703, 715 (Wash. Ct. App. 1994) (noting the "general trend in the law of evidence" is "away from reliance on formal titles or degrees"); *Harris v. Robert C. Groth, M.D., P.S.*, 663 P.2d 113, 119 (Wash. 1983) (same).

her purported scientific, technical, or otherwise specialized expertise. In some cases, training or education in a related or underlying field may suffice.¹⁴⁰ Although the legitimacy requirement is not stringent, it is highly discretionary because each determination depends upon the particular qualifications of the proposed expert and the specific subject matter of testimony. Under the abuse of discretion standard, if a supposed expert's underlying qualifications are "fairly debatable," the trial court's conclusion as to the expert's legitimacy will not be reversed on appeal.¹⁴¹ On the other hand, if a proposed expert's basic legitimacy is beyond reproach, any arguable deficiencies in the expert's underlying qualifications must go to weight rather than admissibility.¹⁴²

Comparatively, the proficiency requirement is more straightforward and more easily met: the witness must simply have a specific and reasonable basis for his particular testimony.¹⁴³ It would be an abuse of discretion, for example, to admit the testimony of a supposed expert who admits to having no familiarity with the specific topic on which he purports to testify, notwithstanding legitimate underlying qualifications in the general subject area.¹⁴⁴ Mere reference to a "review of the literature,"

140. See *Swanson v. Hood*, 170 P. 135, 139 (Wash. 1918) (osteopathic physician who had never practiced allopathy but had theoretical knowledge of allopathy from "the study of books" was sufficiently qualified to opine as an expert on the subject); *Goodman*, 877 P.2d at 715–16 (registered nurse with many years of experience and nursing degree properly allowed to testify on whether victim's medical condition would have deteriorated in twelve years so as to require a personal companion); *State v. Brooks*, 557 P.2d 362, 366 (Wash. Ct. App. 1976) (no abuse of discretion where court permitted witness whose primary field of expertise was serology and tool-marking comparisons to testify as a ballistics expert); cf. *McKibbin v. City of Seattle*, No. 65177-3-I, 2011 WL 2120084, at *3–4 (Wash. Ct. App. 2011) (reversing trial court's decision to exclude expert testimony from witness with bachelor's degree in physics who had specifically studied topic at issue).

141. *McPherson*, 46 P.3d at 292.

142. See *Nordstrom v. White Metal Rolling & Stamping Corp.*, 453 P.2d 619, 625 (Wash. 1969) ("[T]he fact that a witness may not be informed as to the latest developments will affect the weight . . . but it does not render the evidence altogether irrelevant or incompetent."); *Keegan v. Grant Cnty. Pub. Util. Dist. No. 2*, 661 P.2d 146, 151–52 (Wash. Ct. App. 1983) (excluding expert with ten years of appraisal experience from testifying to the value of residential home held abuse of discretion, notwithstanding fact that witness was not licensed in Washington and was primarily experienced in appraising nonresidential properties); see also *Palmer v. Massey-Ferguson, Inc.*, 476 P.2d 713, 715 (Wash. Ct. App. 1970) ("Any supposed deficiencies in . . . qualifications would go to the weight rather than the admissibility of the evidence, [once] the basic requisite qualifications are shown.").

143. See, e.g., *Boeing Co. v. Sierracin Corp.*, 738 P.2d 665, 676 (Wash. 1987) (noting that it would be "too easy to merely announce the simplicity of reverse engineering without a solid basis").

144. See *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 882 P.2d 703, 730–32 (Wash. 1994) (trial court abused its discretion in admitting testimony of insurance underwriter on materiality of certain representations where underwriter could not state a generally accepted standard of practice and admitted to having no knowledge of the practices of the particular syndicates at issue); *Boeing Co.*, 738 P.2d at 674–75 (engineer's testimony on whether design could be reverse-

moreover, is insufficient to establish a purported expert's proficiency with a specific topic.¹⁴⁵ Instead, the expert witness must be able to articulate reasonable and specific support for his particular testimony.¹⁴⁶ And again, the trial court's ruling will be upheld as long as the expert's qualification to opine is "fairly debatable."¹⁴⁷

The requirements of legitimacy and proficiency are lenient for many reasons. First, the role of the court in determining admissibility is to admit or exclude evidence based on whether the proffered testimony is sufficiently relevant to assist the jury and is not misleading—a minimal threshold inquiry.¹⁴⁸ The jury, on the other hand, finds facts; it is the jury's role to determine the relative weight of evidence that is admitted and presented.¹⁴⁹ Jurors are free to assign less weight to testimony from experts with less impressive or specialized credentials, and opposing counsel is also free to emphasize to the jury a given expert's failings and shortcomings.

Second, an expert who possesses sufficient education or training in one subject area frequently will possess the necessary knowledge or skillset to become an expert in a more specific or related subject area.¹⁵⁰ In other words, experts are not required to remain strictly within their particular areas of formal training and may be given latitude to learn and explore subspecialties or related fields.

Third, it may be difficult to obtain the services of a renowned or traditional expert in a given field, and at the same time, someone who is a legitimate and proficient source of knowledge on the subject still can be helpful to the jury. Obtaining an expert will be especially difficult when a party is economically disadvantaged or the subject matter is high-

engineered was properly excluded where engineer admitted to having almost no experience with "reverse engineering of the type needed" and offered no basis for his testimony on that subject).

145. *State v. Madison*, 770 P.2d 662, 668 (Wash. Ct. App. 1989).

146. *See, e.g., Boeing Co.*, 738 P.2d 665, 674–75 (engineer's testimony on whether design could be reverse-engineered was properly excluded where engineer offered no basis for his testimony on that subject).

147. *State v. McPherson*, 46 P.3d 284, 292 (Wash. Ct. App. 2002).

148. *See cases cited supra* notes 118, 142.

149. *See cases cited supra* notes 118, 142.

150. *See Swanson v. Hood*, 170 P. 135, 139 (Wash. 1918) (osteopathic physician became expert on allopathic medicine); *McPherson*, 46 P.3d at 292–93 (police officer became expert on methamphetamine production); *State v. Brooks*, 557 P.2d 362, 366 (Wash. Ct. App. 1976) (serologist and tool-marking expert became expert on ballistics); *cf. Lappe v. Am. Honda Motor Co., Inc.*, 857 F. Supp. 222, 226–27 (N.D.N.Y. 1994) ("[W]here an expert has the education or background to permit him to analyze a given set of circumstances, he can through reading, calculations, and reasoning from known scientific principles make himself very much an expert in the particular product even though he has not had actual experience [in it]." (quotations omitted)), *aff'd sub nom. Lappe v. Honda Motor Co. Ltd. of Japan*, 101 F.3d 682 (2d Cir. 1996).

ly specialized, as with cross-racial misidentification.¹⁵¹ In cases involving cross-racial identification, many defendants are indigent and lack sufficient funds to afford the few premier specialists who devote their careers to studying the phenomenon of cross-racial bias.¹⁵² These defendants still may and should be allowed to present expert testimony on cross-racial bias to the jury, so long as their proffered experts are legitimate and proficient.

C. *Qualifying as an Expert on Cross-Racial Misidentification*

As explained above, Washington courts will permit expert testimony on cross-racial misidentification so long as the proffered expert is legitimate and proficient. A witness may be considered sufficiently legitimate to present expert testimony on cross-racial misidentification if the witness possesses the educational background necessary to understand the relevant scientific literature.¹⁵³ A degree in various fields of psychology, sociology, or statistics might suffice for that purpose,¹⁵⁴ especially if combined with training or additional education on the particular topic of eyewitness identification or cross-racial bias.¹⁵⁵ A witness will be sufficiently proficient to present on cross-racial bias if the witness has reviewed and understands the relevant scientific research and publications

151. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), available at <http://bjis.ojp.usdoj.gov/content/pub/pdf/dccc.pdf> ("At the end of their case approximately . . . 82% of felony defendants in large State courts were represented by public defenders or assigned counsel."); See Douglas Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 375 (1995) ("In the mid-1980s, specialists on eyewitness identification cost approximately \$500 per day for courtroom testimony and \$100 per hour for consultation"); KING CNTY. OFFICE OF THE PUB. DEFENDER, EXPERT SERVICES POLICIES AND PROCEDURES 2, 4 (2008), available at http://www.kingcounty.gov/courts/OPD/Partners/~media/courts/OPD/documents/Expert_Services_FINAL_revised_6_20_11.ashx (award of funds for expert is discretionary, and generally must not exceed \$500 for an eyewitness expert); see also, e.g., *State v. Hernandez*, 773 P.2d 857, 869–71 (Wash. Ct. App. 1989) (affirming trial court's refusal to appoint eyewitness expert for defendant), *rev'd on other grounds by State v. Batista*, 808 P.2d 1141 (Wash. 1991).

152. See sources cited *supra* note 151; see also *State v. Griffin*, No. 37732–9–I, 1998 WL 372734, at *3 (Wash. Ct. App. July 6, 1998) (denial of motion for expert witness); *State v. O'Dell*, 854 P.2d 1096, 1098 (Wash. Ct. App. 1993) (trial court refused defendant's "motion for expert witness funds" to allow well-known professor to testify on eyewitness misidentification).

153. *Cf., e.g., Swanson*, 170 P. at 139 (osteopathic physician became expert on allopathic medicine).

154. *Cf. McKibbin v. City of Seattle*, No. 65177–3–I, 2011 WL 2120084, at *3–4 (Wash. Ct. App. May 31, 2011) (witness with bachelor's degree in physics qualified because he had specifically studied topic at issue).

155. *Cf. McPherson*, 46 P.3d at 284, 288, 293 (police detective without chemistry degree qualified as expert on manufacture of methamphetamine where detective had investigated several meth labs, passed training courses, and attended conferences on the subject of meth labs).

in the field and can explain how that literature supports her particular conclusions.¹⁵⁶

A proposed expert witness need not be disqualified from testifying simply because she is not highly specialized in cross-racial bias, did not perform her own research in the field, or is not informed as to the most recent studies on cross-racial bias.¹⁵⁷ At the same time, that a proffered expert arguably has sufficient legitimacy and proficiency to be deemed qualified does not mean that the witness will “always or even usually be allowed to testify.”¹⁵⁸ Instead, trial courts “retain broad discretion” in deciding whether to admit such testimony, unless the expert’s qualification (or lack thereof) is beyond debate.¹⁵⁹

V. DISCRETION OF WASHINGTON STATE TRIAL COURTS TO PERMIT JURY INSTRUCTIONS ON CROSS-RACIAL MISIDENTIFICATION

Jury instruction on cross-racial misidentification usually consists of a brief explanation of the fallibility of eyewitness identifications, with a special emphasis on cross-racial identifications, and with a caution to the jury to consider such evidence with great care. In general, a trial court’s discretion to fashion appropriate jury instructions in any given case is very broad.¹⁶⁰ In *State v. Allen*, the Washington State Supreme Court addressed the discretion trial courts are afforded to permit or refuse to give instructions on cross-racial misidentification.¹⁶¹

The court in *Allen* upheld a particular trial court’s refusal to instruct on cross-racial misidentification.¹⁶² Seven of nine justices contributed to the judgment in one lead opinion and two concurring opinions, and all

156. *Cf. id.*; *Swanson*, 170 P. at 138 (expert was qualified in part because “he had studied certain works”); *Boeing Co. v. Sierracin Corp.*, 738 P.2d 665, 676 (Wash. 1987) (noting that it would be “too easy to merely announce the simplicity of reverse engineering without a solid basis”).

157. *See McPherson*, 46 P.3d at 292–93; *Swanson*, 170 P. at 139; *Nordstrom v. White Metal Rolling & Stamping Corp.*, 453 P.2d 619, 623–24 (Wash. 1969).

158. *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 663 P.2d 113, 119 (Wash. 1983).

159. *Id.*

160. *See State v. Dana*, 439 P.2d 403, 405 (Wash. 1968) (“While each party is entitled to have his theory of the case set forth in the court’s instructions, it is axiomatic that the trial court has considerable discretion in how the instructions will be worded. It is also axiomatic that the instructions must be read as a whole.” (citation omitted)); *see also State v. Hathaway*, 251 P.3d 253, 261 (Wash. Ct. App. 2011) (“Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and, when read as a whole, they properly inform the jury of the applicable law.”); *State v. Portrey*, 10 P.3d 481, 484 (Wash. Ct. App. 2000) (“A trial court has considerable discretion in the wording of a jury instruction so long as the instruction correctly states the law and allows each party to argue its theory of the case.”).

161. *See generally State v. Allen*, 294 P.3d 679 (Wash. 2013).

162. *See id.* at 687 (affirming trial court’s refusal to give instruction on cross-racial misidentification).

seven unanimously agreed that the giving or refusal of a jury instruction on cross-racial misidentification is subject to review for abuse of discretion¹⁶³ and that such an instruction is not an unconstitutional judicial comment on the evidence.¹⁶⁴ Notwithstanding potential disagreements among these justices as to tangential issues, *Allen* thus confirms that under Washington law, trial courts are afforded wide discretion to issue jury instructions on cross-racial misidentification when relevant.¹⁶⁵ The same seven justices concluded that the trial court in *Allen* had not abused its discretion in refusing to give a cross-racial misidentification instruction in that case, in large part because the identification at issue was an identification of apparel and sunglasses rather than facial features, and thus did not necessarily implicate cross-racial bias.¹⁶⁶

Although the court in *Allen* did not resolve the precise limits of a trial court's ability to refuse an instruction on cross-racial misidentification, there is good reason to believe that in many instances, such refusal

163. See *id.* at 686 (refusing to apply a "rigid prohibition against the giving of a cautionary cross-racial identification instruction" because "such a prohibition would be inconsistent with the abuse of discretion standard"); *id.* at 690 (Madsen, C.J., concurring) ("I agree . . . that the trial court did not abuse its discretion in this case . . . [but] a trial judge [could] abuse his or her discretion [by refusing] to provide a cross-racial identification instruction."); *id.* at 691 (Chambers, J., concurring) ("I also agree . . . we cannot say the trial judge abused her discretion . . .").

164. See *id.* at 686 n.7 (rejecting the argument that "a cross-racial identification instruction . . . is prohibited as an unconstitutional comment on the evidence"); *id.* at 690 (Madsen, C.J., concurring) ("[A] trial judge [could] abuse his or her discretion [by refusing] to provide a cross-racial identification instruction."); *id.* at 691 (Chambers, J., concurring) ("I also stress that we have long rejected the contention that such instructions function as unconstitutional comments on the evidence.").

165. Notwithstanding the fact that *Allen* was decided based on a lead opinion of four justices, a concurring opinion of one justice, and an additional concurring opinion of two justices, whatever rationales were agreed upon by at least five justices contributing to the final judgment constitute the holdings of the case and are binding on lower courts. See *W.R. Grace & Co.-Conn. v. Dep't of Revenue*, 973 P.2d 1011, 1017-18 (Wash. 1999) (noting that to the extent a majority of justices "in the lead and concurring opinions" agree upon a rationale, that rationale "is controlling" in future cases); see also *In re Pers. Restraint of Francis*, 242 P.3d 866, 873 n.7 (Wash. 2010) ("When there is no majority opinion, the holding is the narrowest ground upon which a majority agreed. In *Shale*, the lead opinion and concurrence agreed only in the result: double jeopardy was not violated in *Shale's* case."); *All-Pure Chem. Co. v. White*, 896 P.2d 697, 700 (Wash. 1995) (rationale agreed upon in plurality and concurring opinions was holding of prior case). As discussed above, all of the justices contributing to the final judgment in *Allen* reasoned that the abuse of discretion standard applies to a trial court's decision whether to permit jury instruction on cross-racial misidentification, and in general, a trial court's discretion to fashion appropriate jury instructions in any given case is extremely wide.

166. See *Allen*, 294 P.3d at 686 ("Providing a cautionary cross-racial identification instruction would not have added to the safeguards operating in *Allen's* case, a case involving an eyewitness identification based on general physique, apparel, and sunglasses, and not on facial features."); *id.* at 690 (Madsen, C.J., concurring) ("[T]he trial court did not abuse its discretion in this case because there was no indication that [the] identification of Bryan Allen was based upon facial features or other specific physical characteristics beyond the mere fact that Allen is African American.").

will be an abuse of discretion and a potential ground for reversal on appeal. In general, a “defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case.”¹⁶⁷ Moreover, cautionary jury instructions are sometimes required when dubious categories of evidence are admitted at trial against a criminal defendant.¹⁶⁸ The Washington State Supreme Court also retains inherent authority and broad discretion over all court rules and procedures, including jury instructions.¹⁶⁹ In *Allen*, a majority of justices, in the concurring and dissenting opinions, suggested that a trial court’s refusal to provide an instruction on cross-racial misidentification would be an abuse of discretion in certain circumstances, such as when “a victim makes a cross-racial identification based on a suspect’s facial features, hair, or other physical characteristic implicating race,”¹⁷⁰ or at least when “eyewitness identification is a central issue in a case, there is little evidence corroborating the identification, and the defendant specifically requests the instruction.”¹⁷¹ The lead opinion also noted that in some cases, “the use of expert evidence may be limited due to cost,”¹⁷² and it stands to reason that an instruction could be required in those circumstances as well. The various opinions in *Allen* thus provide persuasive authority indicating that refusal to give a cross-racial misidentification instruction may constitute an abuse of discretion in many cases.¹⁷³

In sum, Washington trial courts have broad discretion to give jury instructions on cross-racial misidentification whenever relevant, and a trial court’s refusal to give such an instruction may even be an abuse of discretion in many cases. Although the precise limits of a trial court’s discretion to refuse such an instruction remain unsettled, refusal likely

167. *State v. Staley*, 872 P.2d 502, 507 (Wash. 1994).

168. *See, e.g., State v. Harris*, 685 P.2d 584, 588 (Wash. 1984) (requiring cautionary instruction if accomplice testimony is to be admitted without sufficient corroboration), *overruled on other grounds by State v. Brown*, 782 P.2d 1013, 1032 (Wash. 1989); *State v. Renfro*, 639 P.2d 737, 739–40 (Wash. 1982) (requiring cautionary instruction if stipulated polygraph evidence is to be admitted).

169. *See, e.g., WASH. REV. CODE* § 2.04.190 (1987); *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 267 P. 770, 771–73 (Wash. 1928).

170. *Allen*, 294 P.3d at 690–91 (Madsen, C.J., concurring).

171. *Id.* at 691 (Chambers, J., concurring); *see also id.* at 692 (Wiggins, J., dissenting).

172. *Id.* at 686 n.6.

173. *See Spain v. Emp’t Sec. Dep’t*, 185 P.3d 1188, 1192 n.8 (Wash. 2008) (noting that “[a] holding of a plurality of the court may be persuasive”); *In re Pers. Restraint of Isadore*, 88 P.3d 390, 393 (Wash. 2004) (following rationale of “[t]he three concurring justices and the two dissenting justices” in prior case); *Southcenter Joint Venture v. Nat’l Democratic Policy Comm.*, 780 P.2d 1282, 1289–91 (Wash. 1989) (adopting rationale agreed upon by five justices in concurrence and dissent of prior case); *State v. Nikolich*, 241 P. 664, 666 (Wash. 1925) (noting that “a deliberate expression of the court,” even if dicta, should not be “disregarded”).

will be held an abuse of discretion if a cross-racial identification is central to the case and lacks substantial corroboration.

VI. TRIAL COURTS SHOULD ALLOW EXPERT TESTIMONY AND JURY INSTRUCTIONS ON CROSS-RACIAL MISIDENTIFICATION WHENEVER RELEVANT

Trial courts in Washington should exercise their wide discretion regularly to allow expert testimony and jury instructions on cross-racial misidentification whenever relevant. The proper admission and use of these interventions in such cases will result in a number of benefits to the criminal justice system.

First, as explained above, the regular use of these tools to educate jurors in criminal trials will likely prevent wrongful convictions, mitigate racial disparity, and improve police and prosecutorial practices within the criminal justice system.¹⁷⁴ Notably, the use of expert testimony in combination with jury instructions may be more effective than either tool used separately.¹⁷⁵

Second, regularly permitting expert testimony and jury instructions on cross-racial misidentification will avoid needless reversals on appeal. As explained above, a proffered expert with legitimacy and proficiency must be allowed to testify, and these standards are lenient, albeit discretionary.¹⁷⁶ Further, a trial court's discretion to *refuse* a jury instruction on cross-racial misidentification is likely very limited, whereas the discretion to *give* such an instruction remains quite broad.¹⁷⁷ The safer course, then, is to give such an instruction whenever relevant.

Third, in many cases a defendant may be unable to afford a leading specialist to testify as an expert witness, and in such cases, liberal application of the standards governing expert qualification and the use of jury instructions will be especially appropriate.¹⁷⁸ Jury instruction in particular is a low-cost and effective tool in such circumstances.

To obtain the benefits described above and to address the problem of cross-racial misidentification effectively and appropriately, Washington State trial courts should allow expert testimony and jury instructions on cross-racial bias whenever a cross-racial identification is relied upon

174. See *supra* Part III.

175. See, e.g., Leippe et al., *supra* note 33, at 534 (finding that mock expert testimony "served to significantly lower perceptions of guilt and believability of the eyewitness" only in combination with jury instructions).

176. See *supra* Part IV.

177. See *supra* Part V.

178. See *supra* notes 151–152 and accompanying text.

as evidence and the cross-race effect is relevant to the accuracy of the identification. That remains true regardless of whether the identification is central to the proponent's case, because whatever the relevance of the identification, the jury is likely to give it undue weight without expert testimony or instruction.¹⁷⁹ If the identification is not necessary or relevant to the proponent's case, then it need not be relied upon; but if it is relied upon, then corrective measures should be used to ensure fairness and accuracy. And if a trial court determines that expert testimony in a given case would be overly time-consuming relative to the importance of the eyewitness identification to the case as a whole, then either the identification should be excluded as too unreliable or prejudicial or jury instructions should be used.

As Washington State trial courts and criminal justice practitioners begin to implement these trial tools on a regular basis, additional efforts also should be undertaken to increase effectiveness. First, an ongoing list of qualified experts should be developed and made available to practitioners. Second, pattern jury instructions should be developed and formally adopted. As discussed below, such efforts would provide useful support for judges and practitioners and would increase the effectiveness of expert testimony and jury instruction to prevent wrongful convictions.

A. Developing an Expert Pool

Providing practitioners with a running list of identified and available experts on cross-racial misidentification would promote the regular and effective use of both expert testimony and jury instruction on the subject. Optimally, a neutral party would compile and make publicly available a list of potential experts on eyewitness misidentification and cross-racial bias in Washington State. The list would not be limited to only the most renowned specialists—it would include any substantially qualified experts who can properly opine on cross-racial misidentification. The list also would include costs of retention and geographic availability to the extent such information could be collected. Developing an expert pool in this manner would promote the accessibility and use of such experts. It also would allow practitioners to determine when expert testimony cannot be obtained and, in those circumstances, would support the use of jury instructions as an alternative. The Fred T. Korematsu Center for Law and Equality at Seattle University School of Law (the Korematsu Center) is actively promoting reforms in this area and intends to compile and maintain such a list and to make it publicly available on

179. See *supra* text accompanying notes 54–58.

the organization's website. This novel approach to facilitating expert testimony should prove to be useful for attorneys, trial judges, and the criminal justice system as a whole.

B. Developing Pattern Jury Instructions

As Washington State trial courts begin to instruct juries on cross-racial misidentification on a regular basis, a pattern instruction on the subject also should be developed and adopted. In Washington State, the Washington Pattern Instructions Committee regularly drafts and reviews pattern instructions, which are made available to and relied upon by trial judges throughout the state.¹⁸⁰ These pattern instructions are “merely persuasive authority” and are “not the law,”¹⁸¹ but nevertheless serve as “an immense aid to the bench and bar in selecting appropriate jury instructions” and in general “are to be used in preference to individually drafted instructions.”¹⁸² Thus, a pattern instruction on cross-racial misidentification would be very useful and should be adopted.

Other courts have undertaken similar efforts, but without sufficient basis in empirical and scientific research. Perhaps the most well-known set of instructions on eyewitness misidentification was drafted in 1972, in *United States v. Telfaire*.¹⁸³ From that time, the so-called “*Telfaire* instructions” have served as the basis for model instructions adopted in various courts throughout the United States.¹⁸⁴ Unfortunately, the

180. See, e.g., WASH. PATTERN INSTRUCTIONS COMM., PATTERN JURY INSTRUCTIONS (2014), available at <https://www.courts.wa.gov/index.cfm?fa=home.contentDisplay&location=PatternJuryInstructions>.

181. *State v. Hayward*, 217 P.3d 354, 361–62 (Wash. Ct. App. 2009).

182. *Bradley v. Maurer*, 560 P.2d 719, 724 (Wash. Ct. App. 1977).

183. *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

184. See, e.g., Sheehan, *supra* note 25, at 654. The *Telfaire* instructions are lengthy and were provided as an appendix to the court's decision in that case. *Telfaire*, 469 F.2d at 558–59. The instructions begin with a discussion of burdens of proof, followed by a statement that “[i]dentification testimony is an expression of belief or impression by the witness [and 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.” *Id.* at 558. The instructions then direct that “[i]n appraising the identification testimony of a witness, you should consider the following,” which is followed by a number of questions with explanatory discussions, such as:

Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? . . . If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care.

Id. In a concurring opinion, Chief Judge Bazelon emphasized the problem of cross-racial misidentification in particular and provided a suggested instruction on that issue:

In this case the identifying witness is of a different race than the defendant. In the experience of many it is more difficult to identify members of a different race than members of one's own. If this is also your own experience, you may consider it in evaluating the wit-

Telfaire instructions predate much of the relevant research on jury instruction and eyewitness misidentification; they were drafted with little to no empirical basis and have demonstrated little to no effect in research experiments.¹⁸⁵ In other words, the *Telfaire* instructions are poorly constructed and should be abandoned or refined. More recently, the New Jersey Supreme Court ordered its Model Criminal Jury Charge Committee to draft proposed revisions to New Jersey's pattern instructions on eyewitness misidentification.¹⁸⁶ Unfortunately, it appears from the Committee's report that its recommendations are based largely on theoretical discussion among committee members rather than empirical research.¹⁸⁷ And as to cross-racial misidentification in particular, the Committee's report provides little discussion and identifies no empirical basis for its proposed pattern instruction.¹⁸⁸ As the research on the *Telfaire* instructions has demonstrated, jury instructions that are designed in theory to educate jurors and improve decisionmaking often prove to be ineffectual in practice, notwithstanding the best of intentions.

Washington courts can and should do better. Pattern jury instructions on cross-racial misidentification should incorporate empirical and scientific research in an attempt to induce juror sensitivity.¹⁸⁹ In general, studies indicate that for jury instructions to be understandable and effective, they must adhere to established principles of psycholinguistics, such as the use of logical structuring and the avoidance of uncommon words, passive constructions, or compound sentences.¹⁹⁰ Research also demonstrates that sufficient specificity of information is critical to inducing meaningful understanding.¹⁹¹ Numerous experiments also have sought to identify and develop effective instructions on eyewitness misidentification, with a limited number of studies addressing cross-racial misidenti-

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

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

185. See Devenport et al., *supra* note 15, at 62–64; Martire & Kemp, *The Impact of Eyewitness Expert Evidence*, *supra* note 92, at 226.

186. See N.J. SUPREME COURT COMM. ON MODEL CRIMINAL JURY CHARGES, REPORT OF THE SUPREME COURT COMMITTEE ON MODEL CRIMINAL JURY CHARGES ON THE REVISIONS TO THE IDENTIFICATION MODEL CHARGES 1 (2012), available at <http://www.judiciary.state.nj.us/criminal/ModelCrimJuryChargeCommHENDERSONREPORT.pdf>.

187. See generally *id.*

188. See *id.* at 32–33.

189. See *supra* text accompanying notes 92–97, 107–108.

190. Greene, *supra* note 107, at 261–62.

191. *Id.* at 262.

cation in particular.¹⁹² The lessons from all of this research, and all future research, should be incorporated into any pattern instruction.

Based on the research to date, the following may be a useful starting point for an effective instruction on cross-racial misidentification:

The testimony given by an eyewitness is an expression of his or her beliefs and those beliefs may or may not be accurate. In general, researchers have found that eyewitness identifications in criminal investigations are incorrect approximately one-third of the time. You should take into account that the confidence displayed by an eyewitness does not necessarily indicate that the testimony is accurate. It is possible for eyewitnesses to be confident and still be wrong. Or, eyewitnesses may be unsure but still be correct in their identification. You should also take into account that people tend to have unique difficulty identifying persons of another race, although this is not always the case. In experiments, eyewitnesses trying to identify a stranger of a *different* race tend to make a misidentification over 1.5 times more often than eyewitnesses identifying a stranger of the *same* race. If, after examining the testimony and all the evidence, you have reasonable doubt that a correct identification was made, you must find the defendant not guilty.¹⁹³

Pending further research developments, this sample instruction can serve either as a starting point for a pattern instruction, or as a model for trial judges until a pattern instruction is adopted. Once adopted, any pattern instructions on cross-racial misidentification should be revised and updated on an ongoing and regular basis, as further research is conducted and more experience with such instructions is gained.

VII. NEED FOR CONTINUING EDUCATION AND REFORMS ADDRESSING CROSS-RACIAL MISIDENTIFICATION

The problem of cross-racial misidentification is not insurmountable. Over time, through education, advocacy, and reform, the wrongful convictions resulting from cross-racial misidentifications can be prevented. This Article has focused on one useful starting point—the use of expert testimony and jury instructions at trial—but the issue remains worthy of broader efforts and numerous additional corrective measures.

Initially, it is important to promote awareness of the problem. This will help garner support for reforms and will also increase awareness

192. See, e.g., *id.*; Ramirez et al., *supra* note 108.

193. Cf. Ramirez et al., *supra* note 108, at 55, 60–62 (finding that a similar instruction was effective at inducing juror understanding of cross-racial misidentification and unreliability of eyewitness confidence).

among potential jurors. To this end, readers should freely and actively discuss the cross-racial misidentification problem with others, and should share this Article and other useful materials on the subject. Efforts at increasing awareness should also target and include prosecutors, defenders, police, and judges, whose involvement in reform efforts will be critical.

As awareness of cross-racial misidentification increases, potential solutions to the problem should be developed and implemented on an ongoing basis. This should include continued research, analysis, debate, and education on the scope of the problem and the merits of proposed remedies. There are numerous potential remedies that warrant further research and discussion. As one example, special rules governing the admissibility of eyewitness evidence could be adopted to reflect current science and to ensure that particularly unreliable identifications are excluded before ever reaching the jury.¹⁹⁴ As another example, police departments and prosecutors could adopt new policies and procedures intended to ensure the highest degree of reliability or corroboration possible for any identifications relied upon, or to promote the use of other forms of evidence. As yet another example, education on eyewitness misidentification could be included as part of an initial, general training of potential jurors while they are waiting to be called into particular cases.

As solutions are implemented, police, prosecutors, defenders, and judges should be provided with continuing education on eyewitness science, applicable laws and procedures, and best practices.¹⁹⁵ It is important for police and prosecutors to know how best to collect and handle eyewitness evidence, for prosecutors and defenders to know when admissibility should be challenged and when to seek experts or request jury

194. *Cf.* *State v. Ahlfinger*, 749 P.2d 190, 192–93 (Wash. Ct. App. 1988) (noting special rule requiring written stipulation by both parties for admission of polygraph evidence and explaining that rule could be reconsidered in the future based on new evidence or scientific developments).

195. *See* Wise et al., *What U.S. Law Enforcement Officers Know*, *supra* note 26, at 497 (“The present survey of a wide array of law officers with diverse positions, ranks and experience from several different regions of the U.S. showed that they have limited knowledge of eyewitness factors and how memory works. . . . Encouragingly, [most] officers believed that officers should receive more training in eyewitness testimony.”); Wise et al., *What U.S. Prosecutors and Defense Attorneys Know*, *supra* note 26, at 1277–78 (“[T]he majority of both prosecutors and defense attorneys who participated in the survey believed that attorneys would benefit from additional training on eyewitness testimony, and also appeared to believe that eyewitness knowledge is not just common sense. . . . The prosecutors had limited knowledge of eyewitness factors, appeared to overestimate the reliability of eyewitness testimony, and also significantly underestimated eyewitness error’s role in wrongful convictions. . . . The defense attorneys appeared to be moderately knowledgeable about eyewitness testimony. . . . [but] some of their apparent knowledge may reflect skepticism rather than knowledge.”).

instructions, and for trial judges to know the contours of their discretion and the considerations that should guide the exercise of that discretion.

Numerous organizations are currently pushing for reforms in this area. The Korematsu Center, in addition to serving generally as an ongoing source of information and advocacy, is taking discrete steps intended to support the proper use of expert testimony and jury instruction on cross-racial misidentification in Washington. First, as described above, the Korematsu Center is compiling a list of potential experts to facilitate the regular use of expert testimony on cross-racial misidentification at criminal trials. Second, the Korematsu Center intends to distribute materials to trial judges throughout Washington to promote awareness of the cross-racial misidentification issue and to inform judges of the scope of their discretion and the considerations relevant to the exercise of that discretion. A “bench card” on the cross-racial misidentification issue is attached to this Article as an appendix. This succinct document summarizes the relevant background information and legal standards presented in this Article and should prove to be useful for Washington’s trial judges. The Korematsu Center’s efforts will add to other ongoing efforts in Washington to address the problem of eyewitness misidentification, including efforts of prosecutors, defenders, and the broader efforts of Innocence Project Northwest, a leading organization on preventing and addressing wrongful convictions in Washington.¹⁹⁶

In sum, the problem of cross-racial misidentification calls for action.¹⁹⁷ The use of expert testimony and jury instruction provides a useful starting point, but further efforts should be devoted to increasing awareness of the problem, providing ongoing education to criminal justice practitioners, and developing and implementing reforms. Each person’s efforts aimed at addressing this problem, including raising awareness of the problem among the general population, will help to prevent wrongful convictions and lessen the number of persons unjustly deprived of liber-

196. See *Innocence Project Northwest*, U. WASH. SCH. L., <http://www.law.washington.edu/Clinics/IPNW> (last visited Nov. 27, 2014); see also *Washington Gov. Inslee Signs Wrongful Conviction Compensation Law*, INNOCENCE PROJECT (May 10, 2013, 3:30 PM), http://www.innocenceproject.org/Content/Washington_Gov_Inslee_Signs_Wrongful_Conviction_Compensation_Law.php (noting recent passage of law in Washington spearheaded by Innocence Project Northwest that will make it easier for exonerated individuals to obtain compensation from the state for wrongful imprisonment).

197. See Malpass et al., *supra* note 34, at 5 (“The point not to miss is this: failures in the development of diagnostic procedures for obtaining eyewitness identification evidence, failures in the administration of eyewitness identification procedures, and failures in the evaluation of eyewitness testimony by police, attorneys, jurors, judges, the public and the American Criminal Justice System, considered as a fact-finding entity, have been documented repeatedly over the last 75 years, with remarkably little effect (in the U.S.) on the routine operation of these systems of justice.”).

ty. With our collective effort, over time, the problem of cross-racial misidentification can become a thing of the past.

BENCH CARD: EXPERT TESTIMONY AND JURY INSTRUCTION ON CROSS-RACIAL MISIDENTIFICATION

In *State v. Cheatam*¹ and *State v. Allen*,² the Washington State Supreme Court held that state trial courts have discretion to allow **expert testimony** and **jury instruction** on **cross-racial misidentification** in relevant cases. This Bench Card explains the bounds of such discretion, which can be exercised to reduce wrongful convictions and racial disparity within the criminal justice system.

Why have these tools been authorized?

Expert testimony and jury instruction on cross-racial eyewitness misidentification have been authorized because of the need to educate jurors on this subject, which falls outside of common knowledge.³

There are many relevant factors at play:

- approximately **one-third** of eyewitness identifications in criminal investigations are mistaken;
- cross-racial identifications are over **1.5 times** more likely than same-race identifications to be mistaken;
- about **75%** of documented wrongful convictions have involved mistaken eyewitness identifications;
- most jurors are unaware of these and other relevant findings;
- honest but mistaken eyewitnesses often are impervious to cross-examination;
- racial minorities are more susceptible to misidentification and face worse outcomes once misidentified.⁴

Research shows that the use of expert testimony and jury instruction can help to educate jurors and prevent them from giving undue weight to cross-racial identifications.⁵

What are the bounds of a trial court's discretion to allow or deny these tools?

Expert testimony: Expert testimony on cross-racial misidentification is admissible if it is (1) helpful to the jury, (2) based on generally accepted principles,

1. 150 Wn.2d 626, 81 P.3d 830 (2003).

2. 176 Wn.2d 611, 294 P.3d 679 (2013).

3. See *Cheatam*, 150 Wn.2d at 645–46; *Allen*, 176 Wn.2d at 616–17, 624 & n.7 (C. Johnson, J., lead opinion); *id.* at 632–33 (Madsen, C.J., concurring); *id.* at 634–35 (Chambers, J., concurring).

4. See Taki V. Flevaris & Ellie F. Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 SEATTLE U. L. REV. 861, at Part II (2015).

5. See *id.* at Part III.

and (3) from a person who is qualified as an expert.⁶ The first two elements will be met whenever cross-racial misidentification is relevant because this phenomenon is not a matter of common knowledge, but has gained wide acceptance in the scientific community.⁷

The third element, qualification, will depend on the circumstances. Qualification is a threshold inquiry, distinct from the weight to be given to an expert's testimony, which is for the jury to decide. A proffered expert need not have the foremost degrees, wide recognition, or scholarly publications. As long as the proffered expert has a legitimate basis for specialized knowledge on the subject, and reasonable proficiency with the particular issues to be discussed, that person qualifies as an expert. If a person's qualification to opine is "fairly debatable," then the trial court has discretion to admit or deny the testimony.⁸

Jury instruction: A trial court has wide discretion to craft jury instructions that are appropriate for each case.⁹ A trial court also has discretion to instruct on cross-racial misidentification in particular.¹⁰ Thus, a trial court can instruct on cross-racial misidentification whenever it is relevant.

In some cases, refusal to instruct will constitute an abuse of discretion. The Washington State Supreme Court has not yet decided the precise limits on a trial court's ability to refuse, but many of the Justices have suggested that an instruction may be **required** in the following circumstances:

- when "a victim makes a cross-racial identification based on a suspect's facial features, hair, or other physical characteristic implicating race";¹¹
- when "eyewitness identification is a central issue in a case, there is little evidence corroborating the identification, and the defendant specifically requests the instruction";¹²
- when "the use of expert evidence [is] limited due to cost."¹³

When should these tools be allowed?

Trial courts should allow expert testimony and jury instruction on cross-racial misidentification **whenever relevant**. Regular use of these tools will reduce wrongful convictions and avoid needless reversals on appeal. If a particular

6. *Cheatam*, 150 Wn.2d at 645.

7. *See, e.g., Cheatam*, 150 Wn.2d at 646; Flevaris & Chapman, *supra* note 4, at Part IV.A.

8. *E.g., State v. McPherson*, 111 Wn. App. 747, 761, 46 P.3d 284 (2002); *see* Flevaris & Chapman, *supra* note 4, at Part IV.B-C (citing cases).

9. *See, e.g., State v. Hathaway*, 161 Wn. App. 634, 647, 251 P.3d 253 (2011).

10. *See Allen*, 176 Wn.2d at 624 (C. Johnson, J., lead opinion); *id.* at 632 (Madsen, C.J., concurring); *id.* at 634 (Chambers, J., concurring).

11. *Allen*, 176 Wn.2d at 632 (Madsen, C.J., concurring).

12. *Id.* at 635 (Chambers, J., concurring); *see also id.* at 637 (Wiggins, J., dissenting).

13. *Id.* at 624 n.6 (C. Johnson, J., lead opinion).

eyewitness identification does not warrant expert testimony or jury instruction in a given case, the identification should be excluded as too unreliable or prejudicial.

How should the jury be instructed?

Based on research to date, the following instruction is likely to be effective:¹⁴

The testimony given by an eyewitness is an expression of his or her beliefs and those beliefs may or may not be accurate. In general, researchers have found that eyewitness identifications in criminal investigations are incorrect approximately one-third of the time. You should take into account that the confidence displayed by an eyewitness does not necessarily indicate that the testimony is accurate. It is possible for eyewitnesses to be confident and still be wrong. Or, eyewitnesses may be unsure but still be correct in their identification. You should also take into account that people tend to have unique difficulty identifying persons of another race, although this is not always the case. In experiments, eyewitnesses trying to identify a stranger of a *different* race tend to make a misidentification over 1.5 times more often than eyewitnesses identifying a stranger of the *same* race. If, after examining the testimony and all the evidence, you have reasonable doubt that a correct identification was made, you must find the defendant not guilty.

What about same-race identifications?

Although cross-race identifications are more prone to error, same-race identifications also are often mistaken and result in wrongful convictions. Thus, many of the same considerations and principles should also apply to eyewitness identification in general.

For a fuller discussion of these issues, including detailed legal analysis and citation to relevant authorities, see Taki V. Flevaris & Ellie F. Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 SEATTLE U. L. REV. 861 (2015).

14. See Flevaris & Chapman, *supra* note 4, at Part VI.B.