COURT OF APPEALS
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- OTIS BOONE, Defendant-Appellant.	Kings County Indictment Number 2190/2011 APL-2016-00015 **NOTICE OF MOTION BY BROOKLYN DEFENDER SERVICES, THE LEGAL AID SOCIETY, THE BRONX DEFENDERS, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CHIEF DEFENDERS ASSOCIATION OF NEW YORK TO FILE BRIEF AND ARGUE AS *AMICI CURIAE***

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PLEASE TAKE NOTICE that, upon the annexed affirmation of Mark J. Stein dated, January 25, 2017 (the "Stein Affirmation"), and attached exhibit thereto, Brooklyn Defender Services, by and through its counsel, will move this Court on February 6, 2017 for an order pursuant to Rule 500.23 granting Brooklyn Defender Services, the Legal Aid Society, the Bronx Defenders, Neighborhood Defender Service of Harlem, the National Association of Criminal Defense

Lawyers, the New York State Association of Criminal Defense Lawyers and the Chief Defenders Association of New York leave to file a brief as amici curiae in support of Defendant-Appellant Otis Boone in the above-captioned action, a copy of which is attached as Exhibit A to the Stein Affirmation, and separately for oral argument in further support of its brief, and for such other further relief as may be just and proper.

Dated: New York, New York
January 25, 2017

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COURT OF APPEALS
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- OTIS BOONE, Defendant-Appellant.	Kings County Indictment Number 2190/2011 APL-2016-00015 **AFFIRMATION OF MARK J. STEIN IN SUPPORT OF THE MOTION BY BROOKLYN DEFENDER SERVICES, THE LEGAL AID SOCIETY, THE BRONX DEFENDERS, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CHIEF DEFENDERS ASSOCIATION OF NEW YORK TO FILE BRIEF AND ARGUE AS *AMICI CURIAE***

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MARK J. STEIN, an attorney duly admitted to practice in the State of New York, hereby affirms under penalty of perjury as follows:

1. I am a Partner of the firm Simpson Thacher & Bartlett LLP, counsel for Brooklyn Defender Services. I respectfully submit this affirmation in support of Brooklyn Defender Services, the Legal Aid Society, the Bronx Defenders,

Neighborhood Defender Service of Harlem, the National Association of Criminal Defense Lawyers, the New York State Association of Criminal Defense Lawyers and the Chief Defenders Association of New York's motion for leave to file a brief as *amici curiae* before this Court on behalf of Defendant-Appellant Otis Boone and to offer oral argument in further support of its brief.

2. Attached hereto as Exhibit A is a true and correct copy of a brief that Brooklyn Defender Services and the Legal Aid Society, the Bronx Defenders, Neighborhood Defender Service of Harlem, the National Association of Criminal Defense Lawyers, the New York State Association of Criminal Defense Lawyers and the Chief Defenders Association of New York seek leave to file as *amici curiae.*

3. Brooklyn Defender Services and the Legal Aid Society, the Bronx Defenders, Neighborhood Defender Service of Harlem, the National Association of Criminal Defense Lawyers, the New York State Association of Criminal Defense Lawyers and the Chief Defenders Association of New York seek such leave to argue that a cross-racial eyewitness identification jury instruction should be mandatory when a defendant and an eyewitness are of different races, and should be given without request from counsel and with no further showing required, and that to act otherwise deprives defendants of a fair trial.

WHEREFORE, I respectfully request that this Court grant Brooklyn Defender Services and the Legal Aid Society, the Bronx Defenders, Neighborhood Defender Service of Harlem, the National Association of Criminal Defense Lawyers, the New York State Association of Criminal Defense Lawyers and the Chief Defenders Association of New York leave to file a brief as *amici curiae* in support of Defendant-Appellant Otis Boone, a copy of which is attached hereto as Exhibit A, and to offer oral argument in further support of the positions stated therein.

Dated: New York, New York
January 25, 2017

BY: 

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EXHIBIT A

APL 2016-00015
Kings County Clerk's Index No. 2190/11
Appellate Division–Second Department Docket No. 2012-07711

Court of Appeals

of the

State of New York

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

OTIS BOONE,

Defendant-Appellant.

BRIEF OF BROOKLYN DEFENDER SERVICES, THE LEGAL AID SOCIETY, THE BRONX DEFENDERS, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CHIEF DEFENDERS ASSOCIATION OF NEW YORK AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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January 25, 2017

COURT OF APPEALS
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- OTIS BOONE, Defendant-Appellant.	Kings County Indictment Number 2190/2011 APL-2016-00015 **DISCLOSURE STATEMENT IN SUPPORT OF THE MOTION BY BROOKLYN DEFENDER SERVICES, THE LEGAL AID SOCIETY, THE BRONX DEFENDERS, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CHIEF DEFENDERS ASSOCIATION OF NEW YORK TO FILE BRIEF AND ARGUE AS *AMICI CURIAE***

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DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. §500.1(f), counsel for amicus curiae certifies as follows:

Brooklyn Defender Services, amicus curiae for the defendant, with Legal Aid Society, Bronx Defenders, Neighborhood Defender Service of Harlem, the

National Association of Criminal Defense Lawyers, the New York State Association of Criminal Defense and the Chief Defenders Association of New York state that they are nonprofit organizations with no parents, subsidiaries or business affiliates.

STATEMENT OF THE STATUS OF RELATED LITIGATION

On December 22, 2016, the Honorable Jenny Rivera, granted appellant Otis Boone leave to appeal from an order of the Appellate Division, Second Department, dated June 24, 2015, modifying a judgment of July 25, 2012, convicting him in the Supreme Court, Kings County (Del Giudice, J.S.C.), after a jury trial, of two counts of robbery in the first degree (P.L. 160.15(3)), and sentencing him to consecutive prison terms of ten years and fifteen years, with consecutive terms of post relief supervision of three years and five years. The Appellate Division modified the sentence to consecutive prison terms of five and ten years with post-release supervision, but otherwise affirmed the conviction. Appellant is represented by Appellate Advocates in Manhattan, by Lynn W.L. Fahey and Leila Hull, Esqs. The People of the State of New York are represented by Eric Gonzalez, Acting District Attorney of Kings County.

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INTEREST OF AMICI

Brooklyn Defender Services ("BDS") is a public defender organization that annually represents approximately 40,000 people that cannot afford an attorney in Brooklyn—one of the most racially diverse jurisdictions in New York State. BDS attorneys have provided clients with high quality defense representation in thousands of criminal cases, many of which were tried before a jury. It is based on our first-hand experience trying a substantial number of cases in a particularly racially-diverse New York jurisdiction that BDS seeks leave to proffer its perspective as *amicus curiae* in support of Defendant-Appellant Boone, to urge this Court to adopt a rule requiring a cross-racial identification instruction in every identification case tried to a jury, except on stipulation, in order to afford constitutional due process and prevent avoidable wrongful convictions.

The **Legal Aid Society**, the nation's oldest and largest not-for-profit legal services organization, is an indispensable component of the legal, social and economic fabric of New York City—passionately advocating for low-income individuals and families across a variety of criminal, civil and juvenile rights matters, while also fighting for legal reform. The Society has performed this role in City, State and federal courts since 1876. The Society takes on more cases for more clients than any other legal services organization in the United States, and it brings a depth and breadth of perspective that is unmatched in the legal profession.

The Society's dedication to Trial by Jury is exemplified by our advocacy in *Baldwin v. New York,* 399 U.S. 66 (1970), which defined and expanded the right to a jury trial in criminal cases. The Sixth Amendment Right identified in Baldwin is conjoined with a requirement of judicial instruction necessary to apply evidentiary standards. *Sullivan v. Louisiana,* 508 U.S. 275 (1993). Thus, whenever a jury is called upon to decide a contested question of eyewitness reliability, a matter that has been the subject of exhaustive scientific research, the jury must receive the Court's guidance on all scientifically established factors affecting the reliability of eyewitness identification.

The **Bronx Defenders** is a community-based public defender that provides fully integrated criminal defense, civil legal services, and social services to indigent people charged with crimes in the Bronx. The Bronx Defenders serves 31,000 Bronx residents each year. As defenders on the front lines of the criminal justice system representing clients, we see firsthand how the lack of robust jury charges on eyewitness identification leads to a fundamental lack of fairness for those accused of crimes and an increase in the risk of wrongful convictions. Judges routinely deny our request for experts on cross-racial identification unless the defendant/witness pairing is African-American/white. Their denial is often based on a lack of understanding that the high error rate of cross-racial identifications is not race-dependent but, rather, an in-group/out-group effect that applies to all

cross-racial pairing. Absent expert testimony, the standard Criminal Jury Instrument (CJI) charge does not permit a judge to comment on the reliability of cross-racial identifications, leaving jurors without the benefit of well-established social science demonstrating the reduced reliability of such identifications. Our attempts to craft our own jury charges have been rejected, as have efforts to have judges read the *Henderson* jury charge established in New Jersey. *See* discussion on page 13, *infra*. Voir dire and cross examination are not adequate to address the disconnect between jurors' deep-seated but mistaken beliefs and tested as well as proven social science. A mandatory jury charge on cross-racial identification would bring the law into step with social science, educating jurors about a real phenomenon with which they are almost universally unfamiliar and thus guarding against wrongful convictions.

The **Neighborhood Defender Service of Harlem** ("NDS") is a community-based public defender office that has served the residents of Northern Manhattan for more than 25 years. Through our innovative team-based model of representation, we have served tens of thousands of clients in criminal defense cases. NDS attorneys have conducted many hundreds of criminal trials on behalf of our clients, and we have seen firsthand the evidentiary power of a witness' in-Court identification. To understand the weight that they should give cross-racial identification evidence, jurors must understand the reduced reliability of cross-

racial identifications. Relying upon the defense's ability to proffer an expert witness or cross-examine a prosecution witness about an unconscious racial bias is insufficient to ensure a fair trial. Only by mandating a cross-racial identification jury instruction in every case where a cross-racial identification is at issue can the Court ensure that jurors will weigh this evidence appropriately, thus helping to avoid wrongful convictions.

The **National Association of Criminal Defense Lawyers** ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in this case because of the experience of our membership in

trying cross-racial identification cases, our knowledge of the prevalence of wrongful convictions caused by mistaken identification testimony, and the practical difficulty in educating juries about such dangers other than through clear judicial instructions.

The **New York State Association of Criminal Defense Lawyers** ("NYSACDL"), an affiliate of the National Association of Criminal Defense Lawyers, is a non-profit membership organization of some 800 criminal defense attorneys practicing in New York. The state's largest private criminal bar group, it assists members in better serving their clients' interests and helps enhance their professional standing. NYSACDL is dedicated to protecting and preserving individual rights and liberties for all. It appears in this case to promote accurate, informed fact-finding – particularly by juries – and thereby minimize the risk of false convictions in criminal prosecutions.

The **Chief Defenders Association of New York** ("CDANY") is a vibrant organization that represents the interests of the various chiefs of indigent defense providers throughout New York State, and the clients unable to afford counsel that they represent. CDANY advocates for fundamental fairness and positive change in the State criminal justice system by educating legislators, courts, and the general public on topics relevant to our representation of New York's indigent accused. Our collective experiences as the managing attorneys for many thousands

of defense counsel that try cases before diverse juries in New York's criminal courts give us unique and particular insight into the practical effect the trial court's ruling in this case would have on a defendant's ability to obtain a fair trial in New York State, if it were adopted by this Court. In our capacity as New York's chief defenders, we thus seek leave to proffer our informed perspective to the Court as *amicus curiae* in this case.

QUESTION PRESENTED

Whether a cross-racial eyewitness identification jury instruction should be given, with no further showing required, when a defendant and an eyewitness are of different races, because to act otherwise deprives defendants of a fair trial.

PRELIMINARY STATEMENT

An eyewitness identification is often the most persuasive evidence that the prosecution will present and that a jury will hear in a criminal case. Cross-racial identifications—when a person of one race tries to accurately identify a person of a different race—are less reliable than identifications generally, and are even more likely to be wrong. Cross-racial identifications are a common cause of erroneous convictions, as detailed ably by other *amici*.

We submit that when a cross-racial identification is presented as evidence in a criminal trial, it is critically important that the jury be provided with an instruction that specifically addresses the scientific fact that such identifications are more vulnerable to error than other identifications. Without such an instruction, avoidable wrongful convictions will result.

There are no viable alternatives to such a jury instruction that would provide a defendant with a fair trial in a case involving a cross-racial identification. Requiring instead that the defense call an expert witness on the subject, or cross-examine a victim or witness on possible racial biases about which the witness is not even conscious, is an insufficient safeguard against false convictions. Such alternatives, as we discuss below, are impracticable and risk alienating jurors. A mandatory jury instruction, such as those adopted in a number of other jurisdictions, offers the best hope for making sure that jurors give adequate

consideration to the effect of own-race bias when evaluating, in each case, the reliability of cross-racial identification evidence.

ARGUMENT

Many wrongful convictions based on erroneous cross-racial identifications can easily and efficiently be avoided by requiring a simple and direct jury instruction on the issue. Such an instruction would reflect the scientific fact that a cross-racial identification, if jurors perceive that one exists, is less reliable than other identifications for reasons that have nothing to do with the bad faith of the witness or the witness' personal background. Such an instruction should be provided to the triers of fact in such cases without any further showing from defense counsel.

POINT I

THERE IS SUBSTANTIAL SCHOLARLY AUTHORITY ESTABLISHING THAT CROSS-RACIAL IDENTIFICATIONS ARE LESS RELIABLE AND MORE PRONE TO INACCURACY THAN OTHER IDENTIFICATIONS.

Erroneous cross-racial identifications are one of the leading causes of false convictions. *See Race and Misidentification*, The Innocence Project (December 27, 2010) http://www.innocenceproject.org/race-and-misidentification/; *see also* Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. Rev. 1821, 1823 (2003). The Innocence Project, an organization dedicated to the exoneration of wrongfully-

convicted criminal defendants through DNA testing found that of the 200 wrongful convictions it succeeded in overturning, 150 involved eyewitness misidentifications. Significantly, of those 150 overturned cases, *approximately 50 percent involved cross-racial misidentifications by an eyewitness*. Bryan Scott Ryan, *Alleviating Own-Race Bias in Cross-Racial Identifications*, 8 Wash. U. Jurisprudence Rev. 115, 128 (2015). Eyewitness misidentifications are thus demonstrably more likely to occur in cases involving a cross-race identification, which are quite common. *See* Taki V. Flevaris and Ellie F. Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 Seattle U. L. Rev. 861, 870-71 (2015) ("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.").

There is broad agreement in the scientific community, that individuals of one race are more likely to be less accurate at identifying people of a different race, a phenomenon known as own-race bias. The fact of own-race bias exists across cultural and racial groups. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 Psychol. Pub. Pol'y & L. 3 at *4 (2001). A witness identifying a suspect of *any* different race is more likely to misidentify that suspect than if that suspect was the same race as the

witness. Dana Walsh, *The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness*, 54 B.C. L. Rev. 1415, 1442 (2013).

Prejudice towards a particular race does not make one more likely or less likely to correctly identify an individual of that race. *See* Meissner, *supra*, at *7. Further, an individual's self-rated degree of exposure to people of different races—the same self-reporting method an attorney would be constrained to in order to determine a witness's exposure to other races on cross-examination—seems to do little to mitigate the difficulties of cross-racial identifications. Meissner, *supra*, at *17 ("Overall, [inter-racial] contact appears to play a small, yet reliable, mediating role in the [own-race bias], accounting for approximately 2% of the variability across participants. This seemingly weak relationship between self-rated contact and [own-race bias] may be due to limitations in the range of variability present in such measures. Future studies may wish to further explore alternative methods of assessing interracial contact."). In other words, neither racial animus nor underexposure to individuals of different races animates own-race bias. It is simply an inherent flaw in human recognition that is likely to exist without regard to a particular witness's own life experience.

Own-race bias is biologically based, involuntary, and generally outside of the awareness of the witness. The phenomenon has been extensively studied; its

existence is not debatable. Neither is the impact of false identifications on criminal cases. A prophylactic instruction alerting the jury to a known reason that such an identification may be less reliable than a juror might otherwise assume, should therefore issue in every identification case.

POINT II

FAILURE TO INSTRUCT THE JURY ON THE ISSUE OF CROSS-RACIAL IDENTIFICATION RISKS ERRONEOUS CONVICTIONS DUE TO JURORS' LACK OF AWARENESS OF THE ISSUE AND POTENTIALLY DEPRIVES DEFENDANTS OF THEIR RIGHT TO A FAIR TRIAL.

Without a cross-racial jury instruction in each case where a cross-racial identification was made—a fact the average juror can be trusted to discern—jurors who are unaware of the likelihood of erroneous cross-racial identifications may wrongfully convict defendants on the perceived strength of an unreliable identification. In light of the wealth of information courts now have regarding own-race bias and its potential to lead to false convictions, courts have an obligation to make jurors aware of this danger so that each juror can fairly evaluate the reliability of identification evidence before him or her.

In some cases, a cross-racial misidentification is the critical evidence at trial that implicates the defendant. In such a case, depriving a defendant of a cross-racial jury instruction creates an especially high, and unacceptable, risk of a false conviction. Accordingly, the ABA has recommended giving "a cross-racial

identification jury instruction when the identification is the critical evidence controlling whether there will be a conviction or not." American Bar Association, *American Bar Association Policy 104d: Cross-Racial Identification*, 37 Sw. U. L. Rev. 917, 919 (2008).

States like New Jersey and Massachusetts have adopted this view and mandate just such an instruction in identification cases for similar reasons. In *State v. Henderson*, the New Jersey high court established that trial judges were required to give a mandatory jury instruction reflecting the fact that cross-racial identification is less accurate than own-race identification. It stated that "the additional research on own-race bias … justify giving the charge whenever cross-racial identification is in issue at trial." 27 A.3d 872, 926 (N.J. 2011) (holding modified by *State v. Chen*, 27 A.3d 930, 942-943 (N.J. 2011) (*Chen* largely upheld *Henderson* and created a higher threshold of suggestiveness for a preliminary hearing on whether there was a misidentification where there was no police action).

The *Henderson* court articulated several justifications for mandating an identification instruction, with specific information regarding own-race bias, in New Jersey that should persuade this Court to do the same. First, it found that the previous eyewitness instruction "[did] not offer an adequate measure for reliability." 27 A.3d at 878. "It also overstate[d] the jury's inherent ability to

evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate." *Id*. Second, the old identification instructions, like New York's, were outdated and "[juries] must be informed by sound evidence on memory and eyewitness identification, which is generally accepted by the relevant scientific community. Only then can courts fulfill their obligation both to defendants and the public." *Id*. at 928. Finally, to "promote fair trials and ensure the integrity of the judicial process," *id.*, the court then adopted specific cross-racial identification information in the now-mandatory jury instruction. *Id.* at 926 ("We add a substantive point about the current charge for cross-racial identification. In 1999, the Court in *Cromedy* directed that the charge be given 'only when ... identification is a critical issue in the case, and an eyewitness's cross-racial identification is not corroborated by other evidence giving it independent reliability.' Since then, the additional research on own-race bias discussed [*infra*], and the more complete record about eyewitness identification in general, justify giving the charge whenever cross-racial identification is in issue at trial.") (citations omitted). The same considerations counsel in favor of including cross-racial identification information in New York's presently-inadequate identification instructions.

Massachusetts explained its reasoning for recently instituting a mandatory instruction in *Commonwealth v. Bastaldo*, 32 N.E.3d 873, 880-81 (Mass. 2015). In *Bastaldo*, the defendant appealed his convictions of mayhem and resisting arrest,

arguing that he deserved a new trial—in part because the trial judge refused to give a cross-racial or cross-ethnic identification instruction. *Id.* at 876. Mr. Bastaldo was a dark-skinned Latino and two of the three eyewitnesses for the prosecution were Caucasian. *Id*. The *Bastaldo* court ruled that while the judge was within the law to refuse to give a cross-racial identification instruction, moving forward, "a cross-racial instruction should always be included when giving the model eyewitness identification instruction, unless the parties agree that there was no cross-racial identification." *Id.* at 877. The final instruction stated: "If the witness and the person identified appear to be of different races, you should consider that people may have greater difficulty in accurately identifying someone of a different race than someone of their own race." *Id*. at 883.

The court explained the new instruction was based in the widespread scientific acceptance that own-race bias exists when people attempt to make identifications saying:

> The existence of the "cross-race effect" (CRE)—that people are generally less accurate at identifying members of other races than they are at identifying members of their own race—has reached a near consensus in the relevant scientific community and has been recognized by courts and scholars alike.

Id. at 880-81.

The court did away with the difficulty of determining whether the defendant and witness are different races on a case-by-case basis by mandating the instruction unless all parties deemed it unnecessary. *Bastaldo*, 32 N.E.3d at 883.

So, too, should this Court keep trial judges out of the weeds of guessing the race and ethnicity of litigants and require that trial courts issue the instruction in every identification case unless the parties agree otherwise. Like the *Bastaldo* Court reasoned, we submit that a cross-race identification is sufficiently placed "at issue" in every identification case in which a juror could conclude, as a matter of fact, that the identifier is of a different race than the person purportedly identified—a fact assessment well within the ken of the average juror. Whether a cross-racial identification has occurred can and should be left to the jury, accordingly, and a proper instruction on the diminished reliability of cross-racial identifications should issue from the court to avoid erroneous judgments and afford due process, particularly in a case that turns on identification testimony.[1]

A cross-racial instruction is necessary in order to alert jurors to the existence and extent of own-race bias, so that it may be given proper weight in deliberations.

[1] Several other high courts across the country have also recognized that cross-racial identifications are less reliable, even if stopping short of mandating a cross-racial identification instruction, as in New Jersey. *See, e.g. State v. Cabagbag*, 277 P.3d 1027, 1035-36 (Haw. 2012); *State v. Guilbert*, 49 A.3d 705, 724 (Conn. 2012); *State v. Lawson*, 291 P.3d 673, 703-04 (Or. 2012); *State v. Copeland*, 226 S.W.3d 287, 299-300 (Tenn. 2007). *See also State v. Ramirez*, 817 P.2d 774, 780-81 (Utah 1991).

Such an instruction can effectively sensitize each juror to subconscious own-race bias. Without such an instruction, many jurors will not understand the influence of own-race bias on an identification placed before them, or underestimate its probable impact on the identification's accuracy. *See* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934, 982 (1984). For example, when asked to compare the reliability of an own-race identification to the reliability of a cross-racial identification by an eyewitness, 48% of jurors mistakenly thought cross-racial and same race identifications were equally reliable, and almost two-thirds of surveyed jurors said they were "ill-informed about the inaccuracy of cross-racial identification." Richard S. Schmechel, Timothy P. O'Toole, Catharine Easterly, Elizabeth F. Loftus, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177, 200 (2006).

A brief instruction from the judge can prompt appropriate discussions among the jurors concerning the reliability of a cross-racial identification. Otherwise, as the ABA has observed, such crucial conversations on the effect of race in a case may not organically happen. On the other hand, "[j]urors are more apt to comfortably discuss racial differences with such a [cross-racial identification] instruction" from the judge. American Bar Association, 37 Sw. U. L. Rev. at 933; *see also* Johnson, *supra*, at 982.

Judges regularly instruct juries on how to evaluate various types of fact evidence before them that the average person is not expected to know how to properly weigh. The average juror can surely be trusted to discern, as a matter of fact, whether two people are of different races. The average juror almost certainly does not; however, intuitively know how to evaluate this fact; it does not know the science of own-race bias and its known effects on identification accuracy among people of different races, if that's what that juror indeed concludes, and it is not obvious how to properly evaluate this fact without proper instruction from the court.

POINT III

A DEFENDANT'S RIGHT TO CALL AN EXPERT ON THE ISSUE OF A CROSS-RACIAL IDENTIFICATION DOES NOT CURE THE PREJUDICE RESULTING FROM THE ABSENCE OF A JURY INSTRUCTION.

A rule requiring a criminal defendant to educate the jury about the dangers of cross-racial identifications through expert testimony alone would create foreseeable hazards to a fair trial. An accused defendant has the absolute right to put on the defense of his or her choice. This includes calling experts as witnesses when necessary or strategic; but it also includes holding the People to *their* proof and offering no witnesses at all. It is the People's burden to prove their case beyond a reasonable doubt, and the defense cannot be required to call certain witnesses—or any witness at all—in order for a jury to receive information about

the scientific unreliability of an identification the prosecution has placed before them. Indeed, in many cases, the best strategy for the defendant is to allow the People to attempt their burden of proof beyond a reasonable doubt and to put on no affirmative defense case. Requiring the defense to call an identification expert risks shifting the prosecution's burden and calling attention to the absence of defense fact witnesses—including the defendant himself.

Additionally, there is a paucity of available identification experts; defendants cannot always afford to retain the ones that are available; and trial judges often exercise their discretion not to permit expert testimony about identification evidence at all. Putting on a defense expert should not be a prerequisite to obtaining due process and a fair trial. And expert testimony proffered by an accused defendant is no substitute for the court instructing the jury on objective, accepted scientific facts regarding the hazards of a cross-racial identification placed before them.

The defendant's right to call an expert, should he or she choose to do so, should not be converted into a court mandate—even assuming such experts could be engaged to testify in every cross-racial identification case. But the simple reality is that calling an expert witness on the issue of cross-racial identification is not even a viable option for every defendant. First, the availability and cost of such experts can be prohibitive for some indigent and working-class defendants and the

defense counsel who serve them. Second, New York courts have been inconsistent in their decisions to admit such testimony into evidence, leaving even this an unreliable avenue for a defendant to educate the jury on cross-racial identifications.

a. The cost and availability of experts competent to testify on the issue of cross-racial identifications can be prohibitive for some defendants.

There are a small number of expert witnesses spread across the United States that are qualified to testify on the subject of cross-racial identification, specifically. This has been recognized by the American Bar Association Criminal Justice Section's Committee on Rules of Criminal Procedure, Evidence, and Police Practices, which has vocally opposed exclusive reliance on expert witnesses due to the relatively small number of persons qualified to properly testify on the subject, and the cost of their services. American Bar Association, *ABA Criminal Justice Section Report to House of Delegates 104D,* 3-4 (2008), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104d.authcheckdam.pdf (hereinafter "ABA Report 104D"). The ABA Committee noted that there were only a handful of qualified experts located in Los Angeles and that no experts were available in many rural areas of California. *Id*. at 3. There is no evidence or reason to assume that substantially more such experts are available in New York City or New York State.

Even if a qualified expert were available to testify at trial, the clear reality is that the many defendants who are the subject of cross-racial identifications may not have the resources to incur the expert's fees. "The average cost of non-medical expert testimony is $248 per hour, without including other expenses such as witness preparation, travel costs, etc." Ryan, *supra*, at 137. This average is consistent with the cost of an expert qualified and available to testify in New York on the issue of cross-racial identification.

If New York were to require expert testimony as a condition precedent to giving a cross-racial identification jury instruction, New York would have to ensure that such competent experts are available to testify on the subject, and make public funds available to hire them for the majority of criminal defendants who are indigent. *See Ake v. Oklahoma*, 470 U.S. 68, 76 (1985) (citing a multitude of circumstances in which the Court has mandated public funds or other procedural rights for indigent defendants in criminal cases "to assure that the defendant has a fair opportunity to present his defense.").

There is presently no guarantee that indigent New York defendants will receive the funds necessary to engage the expert witness demanded by the court below: while the Criminal Justice Act of 1964 provides for expert assistance to indigent defendants in federal prosecutions by statute, there is no comparable guarantee to state defendants. *See* Paul C. Giannelli, *Ake v. Oklahoma: The Right*

to Expert Assistance in A Post-Daubert, Post-DNA World, 89 Cornell L. Rev. 1305, 1332 & 1338-39 (2004).

In New York, there has been a systemic failure to provide funds necessary for hiring expert witnesses for indigent defendants. Thus, in 2007, the New York Civil Liberties Union brought a class action lawsuit against the State of New York, based in part on the state's systemic failure to provide funding for experts and other services necessary for constitutionally-adequate public defense services state-wide. *See* Amended Class Action Complaint, *Hurrell-Harring v. New York*, No. 8866-07 07 at ¶¶ 6,11 (N.Y.Sup. 2007). Although national and state standards unequivocally recommend appointing experts whenever necessary to the defense, in 2006, New York State spent only $5.65 per case on expert services. *Id*. at ¶¶ 349-350.

Many private criminal defense attorneys represent low-income defendants who barely have sufficient funds to retain them and cannot afford to hire experts. Courts rarely approve allocation of public funds to hire experts for such privately-represented defendants. *Requiring* expert testimony as a prerequisite for a cross-racial jury instruction rather than *allowing* it in the proper case when relevant to the defense theory, thus would predictably preclude the defense from placing the likelihood of a cross-racial misidentification before the jury at all in most cases.

b. Even when a defendant can engage an available expert witness, significant evidentiary barriers and uncertainty in lower courts often prevent jurors from hearing the relevant testimony.

A rule requiring exclusive reliance on expert testimony to inform the jury of issues inherent to cross-racial identification would be impracticable given evidentiary barriers to admitting the testimony and the uncertainty about how lower courts would exercise their discretion to allow such testimony. Inconsistencies in the admissibility of expert witnesses across the country led the ABA Committee on Rules of Criminal Procedure, Evidence, and Police Practices to oppose exclusive reliance on expert witnesses. ABA Report 104D, *supra*, at 3-4. A similar problem exists in New York.

In *People v. LeGrand*, this Court held that "there are cases in which it would be an abuse of a court's discretion to exclude expert testimony on the reliability of eyewitness identifications." 8 N.Y.3d 449, 456 (2007). But which cases those are remains unclear, and lower courts routinely decline to admit expert testimony on the topic. *See, e.g., People v. Nazario*, 20 Misc.3d 1143(A) at *6 (Sup. Ct. Queens Cnty. 2008) (holding "it would not be an appropriate exercise of the Court's discretion to admit into evidence at the trial of this matter expert testimony on identification reliability."). Given that this Court has left the question of whether to admit expert testimony under the specific facts of a case to the discretion of the

trial court, reliance on such testimony is no substitute for a rule requiring a judicial instruction in every case in which a cross-race identification may have occurred.

c. Even if the testimony of an available and qualified expert witness is admitted, the trial court would still need to issue an appropriate jury instruction.

Following expert testimony, a trial court judge will often provide instruction to the jury on how to handle and weigh such evidence. *See* ABA Report 104D, *supra*, at 4. This instruction then becomes the jury instruction on cross-racial identification that the judge may have been avoiding by requiring expert testimony in the first place, eliminating any possible efficiency rationale for using expert testimony to introduce the topic. *Id*.

Issuing a standard jury instruction in every identification case would provide certain advantages as "they are focused and concise, authoritative (in that juries hear them from the trial judge, not a witness called by one side), and cost-free; they avoid possible confusion to jurors created by dueling experts; and they eliminate the risk of an expert invading the jury's role or opining on an eyewitness'[s] credibility." *Comm. v. Gomes*, 22 N.E.3d 897, 917 (Mass. 2015) *holding modified by Comm. v. Bastaldo,* 32 N.E.3d 873 at 883 (*quoting State v. Henderson*, 27 A.3d at 925).

Finally, exclusive reliance on expert witness testimony to raise the issue of inaccuracies in cross-racial identifications would be especially inappropriate given

its overwhelming scientific and legal acceptance as a known phenomenon, as explained ably by other *amici*. Given this wide recognition, any requirement to present the jury with expert testimony on the topic is an extra and unnecessary step and may suggest to the jury that the phenomenon's existence is open to conjecture. It is not: own-race identification bias is well-established. The effect it had or did not have on an individual case can be theoretically debated by experts, but its existence cannot be. An automatic instruction is therefore appropriate, whether or not the defense elects to present expert testimony.

POINT IV

CROSS-EXAMINATION IS AN INEFFECTIVE WAY TO INTRODUCE PERTINENT INFORMATION ON OWN-RACE IDENTIFICATION BIAS, AND A RULE REQUIRING IT TO RECEIVE AN INSTRUCTION WOULD ALMOST CERTAINLY ALIENATE JURORS IN THE PROCESS.

The trial court's suggestion that cross-examination is an alternative manner of placing a cross-racial identification sufficiently "at issue" to merit the requested instruction takes as its premise that an effective cross-examination would reveal own-race bias. But this is not so. There is no line of questioning that would allow even the most skilled counsel to elicit from a witness a correct assessment of whether he or she is more likely to make errors when trying to identify people of another race, even if that is the case, because the phenomenon is unconscious and not reflective of any racial animus or necessarily dependent on a lack of interracial

contact of the witness. In other words, a witness could answer completely truthfully (and thus, believably) that he believes that he can identify members of different races just as accurately as members of his own race because, for example, he comes from a racially diverse neighborhood. That belief, however earnest, simply does not make his identification less prone to inaccuracies. Own-race bias is subconscious, and no line of questioning on cross-examination could uncover it for the jury's consideration in a given case.

In addition to being ineffective, a rule that would place the onus on defense counsel to cross-examine a victim or witness on own-race bias would run the risk of prejudicing the defendant. Even if conducted with the utmost delicacy and skill, a cross-examination suggesting that race probably played a part in a misidentification runs the very serious risk of alienating jurors by painting a victim or eyewitness to a crime as a racist or as prejudiced and seemingly making the prosecution a "race issue."

In our experience, it is difficult and often harmful to the defense to raise the issue of racial bias during cross-examination, even if it is at play. For the most part, witnesses are just as new to the legal system as are jurors are, and jurors therefore tend to identify with witnesses more than they do with attorneys. Counsel's raising the issue of cross-racial identification, then, could be perceived by lay jurors as "race baiting" or an accusation of racism when levied against an

eyewitness or the victim of a crime. Questioning a rape victim about whether he or she "can't tell black people apart," for example, or a asking a teen held at gunpoint whether he or she has any black friends is likely to upset jurors and prejudice them against the defense. Defense attorneys have seen the ramifications of such questioning: absent judicial imprimatur, juries are likely to perceive such questions as irrelevant, and dismiss the entire line of questioning as rude and accusatory. This remains so even when the only reason counsel is pursuing such racially-charged questions is to comply with a court's mandate to pursue these sensitive questions in order to receive the appropriate instruction.

Further, even if the jury's response to these types of questions was something other than predictable prejudice toward the defense, little knowledge would be gained through such a line of questioning. The questions a defense attorney might ask on cross-examination only scratch the surface of *conscious* racial bias, while cross-racial identification issues are tied to *unconscious* racial bias. As mentioned earlier, science tells us that prejudice toward different racial groups does not cause one to be better or worse at identifying individuals from those racial groups. *See* Meissner, *supra*, at 7. And questioning regarding a witness's exposure to and interaction with members of the defendant's race will generally be unhelpful to the jury in determining whether the witness's identification was accurate. *See* Meissner, *supra*, at 17.

Requiring cross-examination to unearth an own-race identification bias that a witness does not even know he or she has as New York's condition precedent to receiving an appropriate jury instruction is simply untenable. A rule that forces defense counsel to question possibly traumatized witnesses and crime victims on race in order to ensure that the cross-racial eyewitness identification instruction is given would invite juror prejudice and dictate a trial strategy that would damage, rather than assist, a defendant's ability to obtain a fair trial.

POINT V

NEW YORK SHOULD IMPLEMENT A MANDATORY CROSS-RACIAL JURY INSTRUCTION THAT REFLECTS WIDELY-ACCEPTED SCIENCE.

The model jury instructions of New York, the New York State Justice Task Force, and the ABA *all* reference the known inaccuracies of cross-racial identifications. As this proposition is clearly accepted by these non-partisan criminal justice stakeholders, as well as in scientific and legal communities, New York should make the cross-racial identification instruction mandatory.

New York courts have been working towards an ideal instruction, and cross-racial identification instructions already exist; however, some of those instructions, discussed below, do not accurately reflect the widely-accepted science on cross-racial identifications. We submit that New York should implement a mandatory instruction that accurately reflects the scientific consensus on cross-racial

identification and charges jurors to consider such science, instead of relying on individual experience. Any inaccurate language referencing the scientifically-disputed impact of a witness's contacts with members of other races should be struck from a New York instruction, accordingly. Further, like many other fact-driven components of identification instructions (e.g. lighting conditions), New York should make the instruction truly mandatory by charging jurors to consider the risks of cross-racial identifications should the juror conclude one occurred, instead of suggesting that the juror *may* consider the instruction regarding cross-racial identification only if the juror thinks it is appropriate according to his or her own judgment.

The New York State judiciary has already recognized the need for reform of the rules surrounding cross-racial identification. Indeed, the New York State Justice Task Force, created in May 2009 by the Honorable former Chief Judge of this Court, recommended in 2011 that "[a cross-racial eyewitness identification] instruction should be given in cases in which cross-racial identification is an issue, regardless of whether an expert testifies on the topic of cross-racial identification." New York State Justice Task Force, *Recommendations for Improving Eyewitness Identifications*, 5 (2011), http://www.nyjusticetaskforce.com/2011_02_01_Report_ID_Reform.pdf. The Task Force's proposed model instruction provided as follows:

> If you think it is appropriate to do so, you may consider whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that some people may have greater difficulty in accurately identifying members of a different race than in identifying members of their own race.

Id.

New York's current model jury instructions already provide a cross-racial identification instruction alongside other familiar eyewitness identification factors. This model instruction is a good start, to be sure, as it integrates the Task Force's recommended language:

> You may consider whether there is a difference in race between the defendant and the witness who identified the defendant, and if so, whether that difference affected the accuracy of the witness's identification. *Ordinary human experience* indicates that some people have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race. *With respect to this issue, you may consider the nature and extent of the witness's contacts with members of the defendant's race and whether such contacts, or lack thereof, affected the accuracy of the witness's identification.* You may also consider the various factors I have detailed which relate to the circumstances surrounding the identification (and you may consider whether there is other evidence which supports the accuracy of the identification).

CJI2d [NY] Final Instructions, http://www.nycourts.gov/judges/cji/5-SampleCharges/CJI2d.Final_Instructions.pdf (emphasis on scientifically inaccurate language added). This instruction speaks to the absolute necessity for a cross-racial jury instruction of some kind, even if the language falls short by erroneously asking the jury to rely on "ordinary human experience" instead of the accepted

scientific evidence concerning own-race bias. This superfluous language regarding cross-racial identifications could easily be excised by this Court as inconsistent with accepted science, and the model instruction otherwise adopted.

The ABA Criminal Justice Section's Committee on Rules of Criminal Procedure, Evidence, and Police Practices has also published guidance on cross-racial eyewitness identification problems and recommends the following model jury instruction:

> In this case, the identifying witness is of a different race than the defendant. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race than the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race. You may also consider whether there are other factors present in this case which overcome any such difficulty of identification. *[For example, you may conclude that the witness had sufficient contacts with members of the defendant's race that [he] [she] would not have greater difficulty in making a reliable identification.]*

American Bar Association, 37 Sw. U. L. Rev., *supra*, at 921 (emphasis on scientifically inaccurate language supplied).

In addition to New York's current model jury instruction and support for a mandatory instruction from the New York Task Force and the ABA, this Court's jurisprudence has consistently highlighted the importance of properly charging the jury to consider the unreliability of eyewitness identifications by providing

expanded instructions, in the interest of justice. *See, e.g., People v. Perez*, 77 N.Y.2d 928, 929 (1991).

It is critical that a proper instruction now be implemented in the interest of justice. The instruction should accurately reflect the established science regarding cross-racial identification instead of focusing on individual experience and should emphasize that the jury *must* consider the content of the instruction given, rather than merely suggesting that jurors *may* consider a factor known to affect the accuracy of a witness' identification.

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A mandatory cross-racial identification jury instruction would increase efficiency and reliability in the justice system. Adopting an instruction like that promulgated by the ABA, and partially captured in the current CJI instructions, would accurately convey necessary, objective information regarding cross-racial identification at no cost or risk of prejudice.

Without an instruction, those New York defendants who cannot or do not call one of the nation's few experts—and whose lawyers rightly elect to not imply the victim is a racist to the jury by asking questions whose answers reveal nothing about an unconscious phenomenon, but will almost certainly anger and prejudice the jury against the defense—will be erroneously convicted on the strength of unreliable identifications.

New York can do better. "At stake is the very integrity of the criminal justice system and the courts' ability to conduct fair trials." *Henderson*, 27 A.3d at 879.

CONCLUSION

New York needs a mandatory cross-racial identification instruction, and for the foregoing reasons, we urge the Court to adopt one in this case.

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CERTIFICATE OF COMPLIANCE

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