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Court of Appeals

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent—Appellee,

—against—

OTIS BOONE,

Defendant—Appellant.

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to New York Court of Appeals Rule of Practice 500.1(f), The NAACP Legal Defense and Educational Fund, Inc. states that it is a nonprofit 501(c)(3) corporation. It is not a publicly held corporation that issues stock, nor does it have any parent companies, subsidiaries or affiliates that have issued shares to the public.

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INTEREST OF AMICUS CURIAE

The NAACP Legal Defense & Educational Fund, Inc. (LDF), is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, organizing and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their full civil and human rights. Since its inception, LDF has sought to eliminate the arbitrary role of race on the administration of the criminal justice system by challenging laws, policies, and practices that have a disproportionate impact on African Americans and other communities of color. For example, LDF has served as counsel of record or *amicus curiae* in such cases as *Davis v. City of New York*, 902 F. Supp. 2d 405 (S.D.N.Y. 2012) (challenging the New York City Police Department's practice of unlawful trespass stops and arrests of NYCHA residents and their visitors); *Brown v. City of Oneonta,* 235 F.3d 769 (2d Cir. 2000) (challenging the role of race in police stops); *Buck v. Davis*, 137 S. Ct. 759 (2017) (challenging the explicit use of race in capital sentencing); *Johnson v. California*, 543 U.S. 499 (2005) (challenging the discriminatory exercise of peremptory challenges); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (same); *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (same); *Georgia v. McCollum*, 505 U.S. 42 (1992) (same); *Batson v. Kentucky*, 476 U.S. 79 (1986) (same); and *McCleskey v. Kemp*, 481 U.S.

279 (1987) (challenging the role of race in the imposition of capital punishment in Georgia).

INTRODUCTION

> Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence[,] it is the least reliable, especially where unsupported by corroborating evidence.[1]

Courts and social scientists universally recognize the inherent weakness of eyewitness identifications in general,[2] and cross-racial identifications in particular.[3] Because of own-race bias—the phenomenon of being better able to remember the faces of people who share one's own race than the faces of people of other races—cross-racial identifications are decidedly less reliable than same-race identifications.[4] But absent clear and specific instructions explaining these

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[1] *Jackson v. Fogg*, 589 F.2d 108, 112 (2d Cir. 1978); *see, e.g., United States v. Wade*, 388 U.S. 218, 228 (1967) ("The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.") (quoting Felix Frankfurter, *The Case of Sacco and Vanzetti*, Atlantic 30, Mar. 1927, https://www.theatlantic.com/magazine/archive/1927/03/the-case-of-sacco-and-vanzetti/306625/).

[2] *See, e.g., United States v. Smith*, 563 F.2d 1361, 1365 (9th Cir. 1977) ("[Mistaken identifications] are the result of '[t]he normal and universal fallibilities of human sense perception and human memory' as well as of the susceptibility of the human mind to suggestive influences.") (quoting Patrick M. Wall, *Eye-Witness Identification in Criminal Cases* 9 (1965)).

[3] *See* Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 Psychol. Pub. Pol'y & L. 230 (2001); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934 (1984).

[4] 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); *see also Brown v. Davis*, 752 F.2d 1142, 1146 (6th Cir. 1985); *United States v. Smith*, 736 F.2d 1103, 1108 (6th Cir. 1984); American Bar Association, *American Bar Association Policy 104D: Cross-Racial*

shortcomings, "juries almost unquestioningly accept eyewitness testimony."[5] Therefore, the unfettered introduction of cross-racial identification evidence at trial not only poses a significant risk of wrongful conviction, it exacerbates the racial bias and disproportionality that is endemic to the criminal justice system.[6]

Given that people of color are severely overrepresented in the criminal justice system,[7] it is no surprise they are heavily overrepresented among exonerees.[8] Yet, the extent of this overrepresentation among exonerees is in no small part attributable to cross-racial identifications: Approximately 70% of post-conviction DNA

Identification, 37 Sw. U. L. Rev. 917, 926 (2008) ("Cross-racial identifications are generally inferior to within race identifications.").

[5] *United States v. Langford*, 802 F.2d 1176, 1182 (9th Cir. 1986); *see also Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) ("[T]here is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'") (quoting Elizabeth F. Loftus, Eyewitness Testimony 19 (Harvard University Press 1979)).

[6] While the overall general population in New York is 58% white, 16% Black, and 18% Hispanic, New York State prisoners are 26% white, 53% Black, and 22% Hispanic. Leah Sakala, Prison Policy Initiative, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity* (May 28, 2014), http://www.prisonpolicy.org/profiles/NY.html. At least 30% of felony assault, rape, and robbery cases involve cross-racial identifications. Heather D. Flowe, Amrita Mehta & Ebbe B. Ebbesen, *The Role of Eyewitness Identification Evidence in Felony Case Dispositions*, 17 Psychol. Pub. Pol'y & L. 140, 150 (2011). *See also* Nazgol Ghandnoosh, The Sentencing Project, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* 20 (2014), http://sentencingproject.org/wp-content/uploads/2015/11/Race-and-Punishment.pdf ("[R]acial disparities in criminal behavior fully explain neither the public's racial perceptions of crime, nor the racial disparities in the prison population.").

[7] *See generally* Arthur H. Garrison, *Disproportionate Incarceration of African Americans: What History and the First Decade of Twenty-First Century Have Brought*, 2011 J. Inst. Just. Int'l Stud. 87 (2011).

[8] National Registry of Exonerations, Newkirk Center for Science and Society, University of California Irvine, *Race and Wrongful Convictions in the United States* (Samuel R. Gross, et al. eds., Mar. 7, 2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

exonerations involve people of color.[9] Of the 70% of all DNA exonerations that involve erroneous identifications, at least 42% were cross-racial identifications.[10]

This unacceptable risk can easily be ameliorated: "Effective use of jury instructions can be a powerful way to help the jury appreciate problems with eyewitness identification."[11] Thus, this Court should ensure that jurors in all cases involving identification testimony receive instructions about the flaws inherent to cross-racial identification, unless both parties agree that such instructions are unnecessary.[12]

ARGUMENT

I. A Cross-Race Identification Jury Instruction is Necessary to Ameliorate the Over-Incarceration of African Americans and Other People of Color.

Notwithstanding the fact that eyewitness identifications—and cross-racial identifications in particular—are notoriously untrustworthy, eyewitness

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[9] Edwin Grimsley, The Innocence Project, *What Wrongful Convictions Teach Us About Racial Inequality* (Sept. 26, 2012), http://www.innocenceproject.org/what-wrongful-convictions-teach-us-about-racial-inequality/.

[10] A review of the first 250 DNA exoneration cases revealed that 76% of exonerees had eyewitnesses misidentify them. Of these, nearly half of the misidentifications were cross-racial. Brandon L. Garrett, *Judges and Wrongful Convictions*, 48 Ct. Review 132, 132, http://aja.ncsc.dni.us/publications/courtrv/cr48-4/CR48-4Garrett.pdf (accessed Nov. 13, 2016); Of 149 known exonerations in 2015, two-thirds were racial minorities, one-half of which were African Americans. National Registry of Exonerations, *Exonerations in 2015* 1 (Feb. 3, 2016), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf.

[11] Jonathan Rapping, *Street Crimes, Stress, and Suggestion: Helping the Jury See What the Witness Did Not*, The Champion, June 2011, at 22, 27, https://ssrn.com/abstract=2082421.

[12] *See, e.g., Commonwealth v. Bastaldo*, 32 N.E.3d 873 (Mass. 2015) (requiring cross-racial identification jury instruction unless parties agree there was no cross-racial identification); *State v. Henderson*, 27 A.3d 872 (N.J. 2011) (requiring cross-racial jury instruction in all cases involving cross-racial identification).

identification testimony has always played a significant role in the American criminal justice system.[13] Yet, because this evidence is fraught with error, it is a significant contributor to the wrongful and disproportionate incarceration of people of color.[14]

A. Own-Race Bias Increases the Risk of a Witness Wrongly Identifying a Suspect of a Different Race.

"One of the strongest witness characteristics associated with identification accuracy is whether the race or ethnicity of the eyewitness and the perpetrator are the same or different."[15] Various studies have shown how own-race bias compromise cross-racial identifications.[16]

> Minor stereotypical features like hair style and texture can lead to quick categorization of a face as same- or other-race. Other-race faces are processed, however, largely based upon stereotypical racial features rather than upon individuating features or holistic processing of the

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[13] *Wade*, 388 U.S. at 228 ("[T]he annals of criminal law are rife with instances of mistaken identification.... 'The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.'") (quoting Frankfurter, *supra* note 1; *State v. Lawson*, 291 P.3d 673, 690 (Or. 2012) ("[E]yewitness evidence can be extremely probative of guilt and, in many cases, may be the only evidence connecting a guilty defendant to a crime."); *Henderson*, 27 A.3d at 878 ("[I]dentification evidence will continue to be admitted in the vast majority of cases.").

[14] *See generally* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945 (2006). *See infra* I.B for a discussion on the impact of cross-racial identification on people of color.

[15] Kathy Pezdek, Matthew O'Brien & Corey Wasson, *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 (2012).

[16] *Janey v. State*, 891 A.2d 355, 368 (Md. Ct. Spec. App. 2006) (Davis, J., concurring) ("[A] substantial body of empirical study suggest[s] that cross racial identification, particular[ly] by whites of [B]lacks, is more difficult than identification of a person within one's own race.").

entire face. Once such categorization occurs, the differentiating features of the other race are ignored.[17]

In 2001, Dr. Christian Meissner, Professor of Cognitive Psychology at Iowa State University and Dr. John C. Brigham, Professor Emeritus of Psychology at Florida State University—leading experts in the field of eyewitness identification[18]—conducted a meta-analysis of 91 studies of own-race bias representing data from nearly 5,000 participants over a period of more than 30 years.[19] This evaluation confirmed the prevalence of own-race bias across multiple studies and highlighted the infirmities of cross-racial identification.[20] Significantly, their findings demonstrate that false alarms—the mistaken identification of an innocent suspect—account for the majority of errors involving other-race faces.[21]

The Meissner/Brigham study found that research participants were 1.56 times more likely to mistakenly identify a person of another race, as compared to a member

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[17] Andrew E. Taslitz, *"Curing" Own Race Bias: What Cognitive Science and the Henderson Case Teach About Improving Jurors' Ability to Identify Race-Tainted Eyewitness Error*, 16 N.Y.U. J. Legis. & Pub. Pol'y 1049, 1072 (2013).

[18] *See, e.g.*, *Smiley v. State*, 111 A.3d 43, 46 (Md. 2015) (noting John Brigham testified as expert at trial); *Collins v. Cain*, No. CIV.A. 12-715-SDD, 2014 WL 1028639, at *4-5 (M.D. La. Mar. 17, 2014) (same); *Wilson v. Birkett*, No. 08-12602, 2010 WL 3290978, at *2 (E.D. Mich. Aug. 16, 2010) (same); *see, e.g.*, *Henderson*, 27 A.3d at 907 (citing Brigham and Meissner's research on eyewitness identification, Meissner & Brigham, *supra* note 4); *Lawson*, 291 P.3d at 703 (same); *Smith v. State*, 880 A.2d 288, 297 (Md. 2005) (same).

[19] Meissner & Brigham, *supra* note 4.

[20] *Id.* at 26.

[21] *Id.*; Ashlyn E. Slone, John C. Brigham, & Christian A. Meissner, *Social and Cognitive Factors Affecting the Own-Race Bias in Whites*, Basic & Applied Soc. Psych. 22(2), at 80 (2000) ("[P]articipants recognized other-race faces at about the same rate as own-race faces..., but were more likely to say they had previously seen an other-race face when they had not.").

of their own race.[22] Put another way, a cross-racial identification is 56% more likely to be incorrect than a same-race identification. Two factors that frequently occur in real-life crime situations often increase this already significant rate of error: (1) the amount of "study time,"[23] and (2) the time lapse between "study time" and actual identification.

The longer the time between the witness's "studying" of the perpetrator's face and the witness's making of an identification, the less accurate the identification is likely to be.[24] This has tremendous implications in the context of criminal cases, where the time between a crime and an identification procedure can range from days to years.[25] While any identification made after a significant delay should not be relied upon, cross-racial identifications made after a delay pose an even greater risk of misidentification. Accordingly, Meissner and Brigham cautioned against relying on cross-race identifications made after extensive delays.[26]

Even though cross-racial identification is indisputably unreliable, it remains within the trial court's discretion to allow the presentation of such evidence absent explanation or qualification. Thus, juries—who are not informed of the risks of

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[22] Meissner & Brigham, *supra* note 4, at 15.
[23] "Study time" is the amount of time that a witness spends studying the suspect's face prior to making an identification. Meissner & Brigham, *supra* note 4, at 19.
[24] *Id.* at 4.
[25] *Id.* at 24; *see, e.g.*, *State v. Cromedy*, 727 A.2d 457 (N.J. 1999), *abrogated by State v. Henderson*, 27 A.3d 872 (N.J. 2011) (unreliable cross-racial identification occurred eight months after incident).
[26] Meissner & Brigham, *supra* note 4, at 24.

cross-racial identification—persistently rely on identification testimony[27] at the peril of wrongfully convicting a disproportionate number of people of color.[28] Notably, the overrepresentation of people of color in the criminal justice system[29] is not the product of higher levels of criminality among racial minorities,[30] but is, instead, a reflection of systemic racial bias,[31] including the unregulated reliance on cross-racial identifications.

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[27] National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification* 11 (2014), https://www.nap.edu/read/18891/chapter/3#11 ("One estimate based on a 1989 survey of prosecutors suggests that at least 80,000 eyewitnesses make identifications of suspects in criminal investigations each year."); *see, e.g.*, *Henderson*, 27 A.3d at 878 ("[I]dentification evidence will continue to be admitted in the vast majority of cases.").

[28] *See* Wells & Olson, *supra* note 3 at 230 (noting that clinical studies likely underestimate the strength of own-race bias in criminal cases).

[29] While the overall general population in the U.S. today is 62% white, 13% Black, and 17% Hispanic, state prisoners are 35% white, 38% Black, and 21% Hispanic. *See* Ashley Nellis, The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 4 (2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/.

[30] *See* Ghandnoosh, *supra* note 6, at 20–21 ("[R]acial disparities in criminal behavior fully explain neither the public's racial perceptions of crime, nor the racial disparities in the prison population.... Whites comprise the majority of drug users and sellers, but were only 30% of the state prison population with drug convictions in 2011.... [I]f drug law violations were equally enforced, prosecuted, and sentenced, the racial profile of drug offenders in the prison population would match that of the general population. But police policies and practices, prosecutorial discretion, and sentencing laws have created a schism between who participates in the illicit drug market and who is punished for it.").

[31] *See, e.g.*, James Austin, et al., *The Use of Incarceration in the United States: National Policy White Paper, American Society of Criminology, Draft, iii* (November 2000), http://www.ssc.wisc.edu/~oliver/RACIAL/Reports/ascincarcerationdraft.pdf ("[T]here is a growing body of research suggesting that arrest practices in certain jurisdictions are based, in part, on race. There is also evidence that discrimination persists in other key criminal justice decision points ... further aggravat[ing] incarceration rates.").

B. People of Color are More Likely to be Wrongly Convicted with Cross-Racial Identification.

Although racial animus does not drive the phenomenon of own-race bias,[32] implicit biases—attitudes and stereotypes that unconsciously affect actions and decisions[33]—toward people of color exacerbate own-race bias in several critical ways. Multiple studies have found that own-race bias is "reliably stronger" for white people than people of color,[34] and that white people demonstrate greater impairment in their ability to recognize and identify Black faces than Black people's ability to recognize and identify white faces.[35]

The unreliability of own-race bias is compounded by the impact of eyewitnesses' implicit racial biases on their ability to accurately remember a crime and their perception of the perpetrator.[36] For example, studies consistently show that

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[32] Slone, Brigham, & Meissner, *supra* note 21, at 82 (finding "racial attitudes were not predictive of facial recognition accuracy").

[33] *See* Greenwald *supra* note 14.

[34] Meissner & Brigham, *supra* note 4, at 3, 18, 21; Siegfried Ludwig Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 Psychol. Pub. Pol'y & L. 36, 48 (2001); Johnson, *supra* note 3, at 937.

[35] At least four studies found that Black eyewitnesses do not have difficulty identifying individuals of another race. *Smith v. State*, 880 A.2d at 295 (Md. 2005). One such study found that while Black participants recognized Black and white faces "almost equally well," whites "demonstrated poorer recognition of [B]lack faces and better recognition of white faces." John F. Cross, Jane Cross & J. Daly, *Sex, Race, Age and Beauty as Factors in Recognition of Faces*, 10 Perception & Psychophysics Vol. 10 (6), 393, 394 (1971), http://paperity.org/p/21228875/sex-race-age-and-beauty-as-factors-in-recognition-of-faces (follow "This is a preview of a remote PDF:") (noting that Black and white participants both "made more false identifications of black faces than of white faces").

[36] Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 N.Y.U. Rev. L. & Soc. Change 131, 147–48 (2006).

white witnesses automatically and unconsciously expect criminals to be Black, and white people who observe an interracial crime in which the aggressor is white tend to recall, inaccurately, that the aggressor was Black.[37]

> This unconscious, automatic process has an extraordinarily powerful grip on the human mind, especially with a white observer, who may have little regret about the risk of error because of a working assumption about minority, especially [B]lack, guilt. All this can happen despite the white observer's conscious rejection of racial stereotyping.[38]

Finally, police officers' own biases[39] exacerbate the disproportionate effect of own-race bias on people of color. Police are more likely to make an arrest for an incident involving a white complainant than a Black complainant.[40] And when the alleged victim is white, there is a greater tendency to arrest a person of color.[41] Thus,

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[37] Johnson, *supra* note 2, at 950; *see also* The Sentencing Project, *Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System*, 4 (Aug. 2013), http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf ("Extensive research has shown that . . . the vast majority of Americans of all races implicitly associate [B]lack Americans with adjectives such as 'dangerous,' 'aggressive,' 'violent,' and 'criminal.'"); Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, Law & Contemp. Probs., Autumn 2008, at 93; Andrew E. Taslitz, *Wrongly Accused: Is Race A Factor in Convicting the Innocent?*, 4 Ohio St. J. Crim. L. 121, 126 (2006) ("There is ample data showing that whites generally believe that African-Americans are more violent than whites."); Ghandnoosh, *supra* note 6, at 22 ("By over-representing whites as victims of crimes perpetrated by people of color, crime news delivers a double blow to white audiences' potential for empathetic understanding of racial minorities.").

[38] Taslitz, *supra* note 37, at 125.

[39] *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 578 (S.D.N.Y. 2013) (noting that police officers' "unconscious racial biases" contribute to the racial disparity in stop-and-frisk practices); *Davis v. City of New York*, 902 F. Supp. 2d 405, 429 (S.D.N.Y. 2012) (noting that the arrested plaintiffs' stops and/or arrests were motivated by individual officers' racial animus).

[40] Sinha, *supra* note 36, at 151 ("[P]olice may view complainants of color as 'less deserving of legal protection,' or may simply be less sympathetic towards people of color.").

[41] *Id.*

police bias heightens the risk that a Black defendant—as opposed to a white defendant—will be subject to a cross-racial misidentification.

In a system that heavily relies on eyewitness identification to secure criminal convictions,[42] and where people of color are hyper-criminalized and more likely than whites to be identified as the perpetrator of a crime by a person of a different race, the risk of wrongful convictions looms large. Sexual assault exonerations illuminate the critical impact of cross-racial identifications on wrongful convictions. Most victims of sexual assault are the same race as their assailants; sexual assault cases of white women by Black men constitute only 5% of all such cases.[43] "A majority of rape prisoners in 2002 were white, 58%; only 29% were [B]lack. . .. But for rape exonerations the proportions are reversed: almost two thirds of the defendants are black, 64%; only 28% are white. . .."[44] Sexual assaults allegedly committed by Black defendants against white complainants totaled 53% of all exonerations in sexual assault cases with mistaken identifications.[45] Indeed, some of the most egregious

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[42] *See* National Academy of Sciences, *supra* note 27.

[43] Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989-2012, Report by the National Registry of Exonerations* (June 2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

[44] Samuel R. Gross et. al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 547 (2005).

[45] Gross & Shaffer, *supra* note 43. Of the 80% of mistaken eyewitness identifications in sexual assault exonerations, more than two-thirds involved Black defendants. *Id.*

and highly publicized cases of erroneous identification involve an innocent Black suspect who was mistakenly identified by a white sexual assault victim.[46]

Cross-racial misidentifications increase wrongful convictions of people of color, contribute to the severe racial imbalance in our system of justice, and shatter the lives of innocent Americans. The exceptional racial disparity in sexual assault exonerations highlights the critical flaws of cross-racial identification and the urgent need for systemic reform by way of educating jurors about the fallibility of cross-racial identifications.[47]

II. A Cross-Race Identification Jury Instruction Should Be Required in All Identification Cases Unless the Parties Agree to Forego It.

"Far from being a relic of the past, fears about wrongful convictions based on inaccurate eyewitness testimony remain a pressing concern warranting action by the legal system."[48] Nevertheless, while own-race bias is universally accepted by social scientists and experts on identification, jurors generally remain unaware of its potent

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[46] *See, e.g.*, National Academy of Sciences, *supra* note 27 (discussing the misidentification of a Black man who was identified by a white sexual assault victim and sentenced to life in prison plus fifty-four years before DNA tests exonerated him); *Cromedy*, 727 A.2d at 457 (case hinged on a single-witness cross-racial identification by a white sexual assault victim of a Black assailant); National Registry of Exonerations, James Calvin Tillman, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3690 (accessed Nov. 24, 2016) (discussing DNA exoneration of a Black man after he was misidentified by a white rape victim and spent sixteen years in prison); *see also* Brief for the Innocence Project, Inc. as Amicus Curiae Supporting Appellant, People v. Boone, APL—2016-00015.

[47] *See Cromedy*, 727 A.2d at 467 ("[T]he empirical data encapsulate much of the ordinary human experience and provide an appropriate frame of reference for requiring a cross-racial identification jury instruction.").

[48] *See* Derek Simmonsen, *Teach Your Jurors Well: Using Jury Instructions to Educate Jurors About Factors Affecting the Accuracy of Eyewitness Testimony*, 70 Md. L. Rev. 1044, 1076 (2011).

effect on cross-racial identifications.[49] Thus, in recognition of this heightened potential for wrongful convictions, various state courts have instituted mandatory jury instructions for cross-racial identifications.[50] These courts have found that jurors must be educated on the fallibility of cross-racial identifications in order to fairly and accurately analyze evidence at trial.[51] Although the current New York State pattern jury instructions include a discretionary cross-racial identification instruction in one-witness identification cases,[52] it is insufficient to address the significant risk of error posed by identification testimony. Instead, New York courts should be required to give a cross-racial identification jury instruction in all cases in which identification is at issue unless both parties agree otherwise.

A. Jurors Are Unfamiliar with Own-Race Bias and the Fallibility of Cross-Racial Identification.

Despite its fundamental unreliability, eyewitness evidence powerfully impacts juries.[53] "Juries seem most receptive to, and not inclined to discredit,

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[49] *See infra* II.A.

[50] *See infra* II.C.

[51] *See State v. Long*, 721 P.2d 483, 492 (Utah 1986) ("Given the great weight jurors are likely to give eyewitness testimony, and the deep and generally unperceived flaws in it, to convict a defendant on such evidence without advising the jury of the factors that should be considered in evaluating it could well deny the defendant due process of law."), *holding modified by State v. Clopten*, 223 P.3d 1103, 1113 (Utah 2009).

[52] Identification—One Witness, http://www.nycourts.gov/judges/cji/1-General/CJI2d.Identification-One_Witness.pdf n.7 (accessed Dec. 5, 2016) ("Both the American Bar Association and the New York State Justice Task Force have recommended that, if in issue, there should be a charge on cross-racial identification.").

[53] *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting).

testimony of a witness who states that he saw the defendant commit the crime."[54] While overreliance on identification evidence is problematic generally, the heightened risk of wrongful conviction in cross-racial identifications poses an even greater obstacle for truth-seeking jurors and necessitates redress by the courts.

Jurors are generally unfamiliar with own-race bias and the unreliability of cross-race identification.[55] In one survey, nearly two-thirds of jurors demonstrated significant misunderstanding about the risk of error in cross-racial identification when asked to compare the reliability of a same-race identification with that of a cross-race identification.[56] Nearly half the respondents believed cross-race and same-race identifications are equally reliable, while many others either did not know the answer or believed cross-racial identifications were more reliable.[57] Another survey of approximately 1,000 potential jurors in the District of Columbia revealed that more than half of potential jurors erroneously believed that cross-racial identifications are at least as reliable, if not more so, than same-race identifications.[58]

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[54] *Id.*

[55] *See, e.g.*, Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 Jurimetrics J. 177, 200 (2006); Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Fair of Glasses for the Jury*, 32 Am. Crim. L. Rev. 1013, 1035 (1995) (finding half the participants in a study of 500 people did not know cross-racial identifications are less reliable than same-race identifications).

[56] Schmechel, *supra* note 55, at 200.

[57] *Id.*

[58] Timothy P. O'Toole et al., *District of Columbia Public Defender Survey: What Do Jurors Understand About Eyewitness Reliability? Survey Says . . .*, The Champion, Apr. 2005 at 28, 31.

As detailed above, cross-racial identifications are unquestionably far less reliable than same-race identifications;[59] yet, jurors remain unaware of this consensus. This disparity between accepted social science research and juror perception demonstrates the significant risk that jurors cannot, and do not, give appropriate weight to cross-racial identification testimony.[60]

B. Whether An Identification is Cross-Racial Depends on the Percipient Witness.

Whether an identification is designated as cross-racial should hinge not on the actual race of the individual being identified, but on the race that the witness making the identification perceives the perpetrator to be.[61] In some instances, the occurrence of a cross-racial identification may be clear; however, the complexity of cross-racial identification surfaces when the race of an identifying witness and/or defendant is not universally apparent.

Consider, for instance, a case involving a white (Caucasian) eyewitness and a white Latino or light-skinned Black defendant. A juror may categorize the witness

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[59] Meissner & Brigham, *supra* note 4, at 15. *See supra* I.A for a discussion on erroneous cross-racial identification.

[60] *See Long*, 721 P.2d at 490 ("Although research has convincingly demonstrated the weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems. . .. Moreover, the common knowledge that people do possess often runs contrary to documented research findings.").

[61] *See Bastaldo*, 32 N.E.3d at 882–83 ("In facial recognition studies, the person making the identification is generally asked to self-identify his or her race, and that self-identification is accepted as the person's race for purposes of the study; the race of the person who is identified is generally determined based on the physical appearance of the person's face, including but not limited to skin color.").

and defendant as belonging to two separate races, whereas a judge or prosecutor may perceive the witness and defendant as belonging to the same race. Given that different individuals viewing the same person may perceive that person's race differently, judges should not decide whether a particular eyewitness identification is cross-racial.[62] Instead, as the Massachusetts Supreme Court held in *Commonwealth v. Bastaldo*, a cross-racial jury instruction should be presumptively given in all cases involving an eyewitness identification, unless the parties reach a contrary agreement.[63] This rule allows factfinders to determine—based on their own perceptions and beliefs—whether a cross-racial identification has occurred, and if so, how to evaluate it.[64]

C. A Cross-Racial Identification Jury Instruction is Necessary to Reduce the Risk of Wrongful Convictions.

As explained above, decades of social science research on own-race bias, taken together with recent DNA exonerations, establishes the significant contribution of mistaken identification—and, in particular, cross-racial misidentification—to wrongful convictions.[65] Left unexplained, eyewitness testimony can impede the integrity of the adversarial process.[66] Courts should,

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[62] *Id.* at 883.
[63] *Id.*
[64] *Id.*
[65] Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 Harv. J. Racial & Ethnic Just. 165, 193 (2011).
[66] Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 729 (2007).

therefore, intervene and provide a compulsory cross-racial identification jury instruction to mitigate the risk of wrongful convictions resulting from cross-racial identifications.

Without information about the potential inaccuracy of cross-racial identifications, the determination of an individual's guilt or innocence rests in the hands of under-informed jurors who lack the tools necessary to effectively evaluate cross-racial eyewitness testimony.[67] A cross-racial identification jury instruction, however, would effectively "introduce[e] caution into juror deliberations [ ] and [ ] significantly inform juror evaluation of eyewitness testimony."[68]

Moreover, a cross-racial jury instruction should be given regardless of whether an expert testifies on the subject.[69] Many judges are reluctant to grant expert identification testimony because it is time-consuming at trial.[70] And even if a court is inclined to allow expert identification testimony, it is often cost-prohibitive.[71] Jury instructions, in contrast, "provide a low-cost, effective means of communicating this information to jurors."[72]

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[67] *See Henderson*, 27 A.3d at 928 ("[J]uries must receive thorough instructions tailored to the facts of the case to be able to evaluate the identification evidence they hear.").
[68] Epstein, *supra* note 66, at 783; Simmonsen, *supra* note 48, at 1072; *see, e.g.*, *Henderson*, 27 A.3d at 928 ("[W]e believe that it is essential to educate jurors about factors that can lead to misidentifications, which in and of itself will promote deterrence.").
[69] *See, e.g.*, *Bastaldo*, 32 N.E.3d 873.
[70] Simmonsen, *supra* note 48, at 1078.
[71] *Id.*
[72] *Id.* at 1076.

Cross-examination of an eyewitness, without a proper jury instruction, is not an adequate solution for the problems posed by cross-racial identification. While cross-examination can effectively unearth falsehoods, it is not an effective way to refute mistaken eyewitness testimony because witnesses are unaware of the factors that subconsciously affect the reliability of their identification.[73] The frequency of wrongful convictions in eyewitness identification further demonstrates that cross-examining eyewitnesses is not an adequate vehicle for securing reliable verdicts.[74]

Additionally, jury instructions provide benefits beyond educating jurors about the risk of erroneous cross-racial misidentification. In a criminal justice system riddled with racial bias, "instructing jurors that cross-racial identifications may pose special issues not present in same-race identifications can help juries develop a

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[73] *See, e.g.*, *United States v. Downing*, 753 F.2d 1224, 1231 n.6 (3d Cir. 1985) ("To the extent that a mistaken witness may retain great confidence in an inaccurate identification, cross-examination can hardly be seen as an effective way to reveal the weaknesses in a witness' recollection of an event."); *Langford*, 802 F.2d at 1183 (Ferguson, J., dissenting) ("[C]ross-examination cannot uncover the reasons for misidentification because the witness honestly does not believe he or she has misidentified the defendant....[E]ven with such cross-examination, juries are unduly influenced by eyewitness testimony."); Tracy L. Denholtz & Emily A. McDonough, *State v. Guilbert: Should Jurors in Connecticut Be Educated About Eyewitness Reliability Through Expert Testimony or Jury Instructions?*, 32 Quinnipiac L. Rev. 865, 885–86 (2015) ("[A]ttempting to cross-examine an eyewitness on the factors relating to the reliability of his identification may actually make the witness appear more credible to the jury.").

[74] Epstein, *supra* note 66, at 729. For further discussion about the ineffectiveness of cross-examination as a tool to introduce information regarding own-race identification bias, *see* Brief of Brooklyn Defender Services, et al. as *Amici Curiae* Supporting Appellants (BDS Br.). *Amicus* BDS discuss how cross-examination can be more harmful than helpful to a defendant when dealing with a witness who may be impaired by own-race bias. Cross-examination requires asking a witness if they were affected by something outside their awareness and, therefore, creates the danger of being perceived by the witness and the jury as implying that the witness is racially biased. BDS Br. Point IV.

framework for thinking about and discussing these issues during deliberations."[75] Absent jury instructions, jurors are unlikely to initiate discussions about race in their deliberations.[76] Based, in part, on the social stigma of being perceived as racist, many jurors may feel uncomfortable discussing the shortcomings of cross-racial identification, much less own-race bias.[77] Jury instructions cautioning the hazards of cross-racial identification, therefore, provide the additional benefit of priming jurors to talk about race in their deliberations.[78]

Acknowledging the robust social science research on own-race bias, state courts have begun implementing specific cross-racial identification jury instructions, regardless of whether the defense presents expert testimony, to mitigate the risk of wrongful convictions at trial. For example, in 2011, the New Jersey Supreme Court in *State v. Henderson* held that trial courts must instruct jurors about the impairments of cross-racial identification in every case involving that type of testimony.[79]

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[75] West, *supra* note 65, at 194.

[76] Laura Connelly, *Cross-Racial Identifications: Solutions to the "They All Look Alike" Effect*, 21 Mich. J. Race & L. 125, 128 (2015).

[77] June E. Chance & Alvin G. Goldstein, *The Other Race Effect and Eyewitness Identification*, Psychol. Issues in Eyewitness Identification 153, 172 (Siegfried L. Sporer ed. 1996).

[78] West, *supra* note 65, at 193.

[79] *Henderson*, 27 A.3d at 872 (N.J. 2011); *Cromedy*, 727 A.2d at 467 (N.J. 1999) (holding cross-racial instruction should be given only when identification is a critical issue and identification is not corroborated by other evidence). The current New Jersey pattern jury instruction for cross-racial identification is: "Research has shown that people may have greater difficulty in accurately identifying members of a different race. You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness's identification." *Identification: In-Court and Out-of-Court Identifications* 5, http://www.judiciary.state.nj.us/criminal/charges/idinout.pdf (accessed Nov. 25, 2016).

Utah's highest court "abandoned [its] discretionary approach to [giving] cautionary jury instructions," and, instead, directed state trial courts to give a specific identification instruction "whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense."[80] The instruction must include the various factors that affect identification accuracy, including "whether the race of the actor was the same as the observer's."[81] California courts require an eyewitness identification jury instruction "when requested in a case in which identification is a crucial issue and there is no substantial corroborative evidence."[82] Part of this instruction includes consideration of the impact of a cross-racial identification.[83]

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[80] *Long*, 721 P.2d at 492.

[81] *Id.* at 493. The Utah pattern jury instruction on cross-race identification is: "You should also consider whether the witness is of a different race than the person identified. Identification by a person of a different race may be less reliable than identification by a person of the same race." *Model Utah Jury Instructions – Criminal* 45–46, http://www.utcourts.gov/committees/criminaljury/Model%20Utah%20Jury%20Instructions.pdf (accessed Nov. 25, 2016); *see also State v. Brink*, 173 P.3d 183, 185 n.1 (Utah Ct. App. 2007) (discussing with approval an instruction providing, in part, that "a witness identification of a person of a different race may be less reliable").

[82] *People v. Wright*, 755 P.2d 1049 (Cal. 1988); *see also People v. Palmer*, 203 Cal. Rptr. 474, 478 (Cal. Ct. App. 1984) (quoting *People v. Hall,* 167 Cal. Rptr. 844, 853 (Cal. 1980)) ("[I]t is error to refuse to give an instruction requested by a defendant which 'directs attention to evidence from . . . which a reasonable doubt of guilt could be engendered.' This applies with equal force to a refusal to give a requested instruction which deals with identification in the context of reasonable doubt.") (internal quotation omitted).

[83] 2016 California jury instruction on identification: "in evaluating identification testimony, [the jury must] consider whether the witness and the defendant [are] of different races." Judicial Council of California Criminal Jury Instructions 85–86 (2016), http://www.courts.ca.gov/partners/documents/calcrim_2016_edition.pdf.

In 2015, the Supreme Court of Massachusetts, in *Commonwealth v. Bastaldo*, ordered the most robust cross-racial jury instruction to date, requiring that such an instruction be read in all instances of eyewitness testimony, unless the parties agree no instruction is needed.[84] Given the myriad issues associated with cross-racial identification, *Bastaldo* should serve as the standard bearer for cross-racial identification juror instructions. As the Court in *Bastaldo* stated:

> 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. We remain convinced that jurors who are asked to evaluate the accuracy of an identification should be informed of the CRE.[85]

While New York State does not yet have a mandatory cross-racial identification jury instruction, this Court has emphasized the need for such an instruction. In 2009, then-Chief Judge Lippman of the New York Court of Appeals convened the New York State Justice Task Force, which found that "mistaken eyewitness identification is the leading contributor to wrongful convictions."[86] The

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[84] *Bastaldo*, 32 N.E.3d at 883 ("[T]he following instruction should be included when giving the model eyewitness identification instruction, unless all parties agree to its omission: '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.'").

[85] *Id.* at 880–81.

[86] New York State Justice Task Force, *Recommendations for Improving Eyewitness Identifications* 1 (2011), http://www.nyjusticetaskforce.com/2011_02_01_Report_ID_Reform.pdf. In New York State, 34% of exonerations to date resulted from mistaken identification. More than one-tenth of all exonerations since 1989 stem from New York State cases; New York represents the state with the second highest number of exonerations in the United States. The National Registry of

Task Force endorsed the existing New York pattern jury instructions regarding identification, which include a cross-racial identification instruction in cases of one-witness identification.[87] Notably, the Task Force further recommended revising the pattern jury instructions to include an instruction on cross-racial identification whenever cross-racial identification is in issue, "regardless of whether an expert testifies on the topic of cross-racial identification."[88]

Jury instructions are an essential tool for educating jurors about cross-racial identifications and minimizing the risk of wrongful conviction.[89] While trial courts have discretion to instruct juries on cross-racial identification, they have consistently refrained from giving the instruction and will continue to do so unless a pattern jury

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Exonerations, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=New%20York&FilterField2=Contributing_x0020_Factors_x0020&FilterValue2=Mistaken%20Witness%20ID; Samuel R. Gross & Michael Shaffer, *supra* note 43.

[87] New York State Justice Task Force, *supra* note 86.

[88] *Id.*

[89] *See* Simmonsen, *supra* note 48, at 1079–80 ("Jury instructions are the best method for educating jurors about eyewitness identification issues for a variety of reasons. Judges are already familiar with instructions and comfortable using them. Instructions can easily be incorporated into a trial and are compatible with already existing instructions. They cost little to implement and are efficient. Instructions also avoid the adversarial nature of dueling experts and allow for a continuing debate within the legal community. Trial judges retain discretion to modify them as needed for the facts of any particular case. Finally, they offer a uniform and neutral means of educating jurors.").

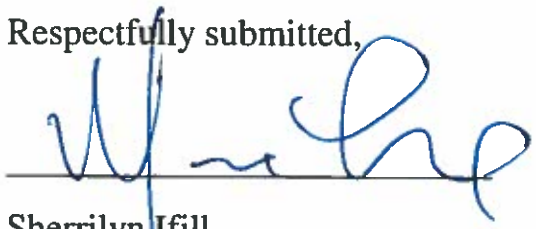
instruction on cross-racial identification is required.[90] A mandatory instruction is, therefore, necessary to protect against the ills of cross-racial identification.

CONCLUSION

Cross-racial identifications have a heightened risk of erroneous identification resulting in wrongful convictions that disproportionately affect people of color. Accordingly, New York courts should be directed to presumptively give a cross-racial identification jury instruction in all cases where identification is at issue unless the parties reach a contrary agreement.

Dated: New York, NY
March 22, 2017

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

WITH COURT RULE 500.13(c)(1)

Pursuant to New York Court of Appeals Rule of Practice 500.13(c)(1), I hereby certify that:

1. This brief complies with the typeface and style requirements of Rule 500.13(c)(1), because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016, double spaced in Times New Roman 14-point font.

2. This brief complies with the type-volume limitations of Rule 500.13(c)(1), because this brief contains 6,718 words, inclusive of point headings and footnotes and exclusive of the brief cover, disclosure statement, table of contents, table of authorities, signature block, and certificate of compliance.

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