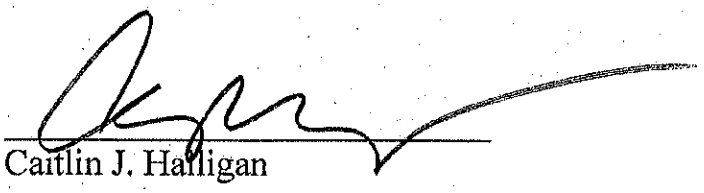
COURT OF APPEALS OF THE
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, *Respondent*, v. OTIS BOONE, *Defendant-Appellant*.	APL – 2016 – 00015 **NOTICE OF MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

PLEASE TAKE NOTICE that pursuant to Rule 500.23 of this Court, and on the supporting affirmation of Caitlin J. Halligan, along with one copy of the proposed brief of *Amici Curiae* Former Judges and Prosecutors, the proposed *amici* will move this Court at the Courthouse, 20 Eagle Street, Albany, New York, at 10:00 A.M. on Monday, March 27, 2017, for an order granting the proposed *amici* leave to file the attached brief in the above-captioned matter.

Dated: New York, New York
March 17, 2017



Caitlin J. Halligan

Caitlin J. Halligan
Kathryn M. Cherry
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000
challigan@gibsondunn.com

Attorney for Proposed Amici Curiae

Paul Shechtman
BRACEWELL LLP
1251 Avenue of the Americas, 49th Fl.
New York, New York 10020-1100
Tel.: (212) 508-6107
Fax: (800) 404-3970

To: Lynn W.L. Fahey
Leila Hull
Appellate Advocates
111 John Street, 9th Floor
New York, New York 10038
(212) 693-0085
Attorneys for Defendant-Appellant

Leonard Joblove
Seth M. Leiberman
District Attorney Kings County
Renaissance Plaza
350 Jay Street, 19th Floor
Brooklyn, New York 11201-2908
(718) 250-2516
Attorneys for Respondent

Timothy P. Murphy
David C. Schopp
Legal Aid Bureau of Buffalo, Inc.
290 Main Street, Suite 350
Buffalo, New York 14202
(716) 853-9555
Attorneys for Amicus Curiae Legal Aid Bureau of Buffalo, Inc.

Mark J. Stein
Uzezi Abugo
Veronica R. Jordan-Davis
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017-3903
(212) 455-2310
Attorneys for Amicus Curiae Brooklyn Defender Services

Joel B. Rudin
National Association of Criminal Defense Lawyers
600 Fifth Avenue, 10th Floor
New York, New York 10020
(212) 752-7600
Attorney for Amicus Curiae National Association of Criminal Defense Lawyers

COURT OF APPEALS OF THE
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

OTIS BOONE,

Defendant-Appellant.

APL – 2016 – 00015

AFFIRMATION OF CAITLIN J. HALLIGAN IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

CAITLIN J. HALLIGAN, under penalty of perjury, affirms as follows:

1. I am an attorney duly admitted to practice law before the courts of the State of New York and a partner in the law firm of Gibson, Dunn & Crutcher LLP. I am counsel for proposed *amici* in this matter.

2. I respectfully submit this affirmation in support of proposed *amici*'s motion for leave to file an *amicus* brief in support of Petitioner Otis Boone's position in this matter.

3. This appeal concerns Mr. Otis Boone, who was convicted of two counts of robbery in the first degree and sentenced to 25 years imprisonment. The only evidence linking Mr. Boone to the crime was two cross-racial eyewitness identifications from the victims. The trial court denied Mr. Boone's request for a jury instruction on the unreliability of cross-racial

identifications because he presented no evidence on the issue at trial and did not raise it on cross-examination. The Appellate Division affirmed his conviction. Associate Judge Jenny Rivera granted Mr. Boone leave to appeal to this Court on December 22, 2015. In its March 31, 2016 Notice to the Bar, this Court invited *amicus curiae* participation from those qualified and interested.

4. The proposed *amici* are former judges and prosecutors who have an abiding interest in improving the criminal justice system. The proposed *amici* include:

    a. Daniel R. Alonso

    b. Carmen Beauchamp Ciparick

    c. Steven M. Cohen

    d. Eric Corngold

    e. Edward C. Cosgrove

    f. Mylan L. Denerstein

    g. Hector Gonzalez

    h. Barry Kamins

    i. Howard A. Levine

j. Harlan A. Levy

k. Bernard J. Malone, Jr.

l. James M. McGuire

m. Benjamin E. Rosenberg

n. Albert M. Rosenblatt

o. James A. Yates

5. *Amici* seek to file their proposed *amicus* brief to provide a different perspective from that of the parties in this case, based on their experiences in serving the criminal justice system as judges and prosecutors. That experience has informed their view of how to balance the need to introduce important prosecution evidence in criminal trials with the imperative to prevent wrongful convictions. Although they have diverse views on many issues, *amici* agree that it is appropriate for courts to instruct juries on the existence of the cross-race effect—the tendency of individuals to be better at identifying individuals of their own race than of other races—whenever the defendant requests such an instruction.

6. Attached to this Affirmation as Exhibit A is a true and correct copy of the proposed *amicus curiae* brief in support of the Petitioner.

7. For the reasons set forth above, I respectfully request that the Court grant proposed *amici*'s motion for leave to file the attached brief.

I affirm that the foregoing is true and correct.

Dated: New York, New York
March 17, 2017

Respectfully submitted,

By: _____
Caitlin J. Halligan

GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000
challigan@gibsondunn.com

Attorney for Proposed Amici Curiae

Exhibit A

CTQ-2016-00015

Court of Appeals

of the

State of New York

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

OTIS BOONE,

Defendant-Appellant,

BRIEF OF FORMER JUDGES AND PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF OTIS BOONE

PAUL SHECHTMAN
BRACEWELL LLP
1251 Avenue of the Americas
49th Floor
New York, New York 10020-1100
Tel.: (212) 508-6107
Fax: (800) 404-3970

CAITLIN J. HALLIGAN
KATHRYN M. CHERRY
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166-0193
Tel.: (212) 351-4000
Fax: (212) 351-4035

Counsel for Amici Curiae

Dated: March 17, 2017

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Statutes

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QUESTION PRESENTED

Whether a trial court should be required to give an instruction on the cross-race effect in a case involving cross-racial identification testimony.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae are former judges and prosecutors who have an abiding interest in improving the criminal justice system. *See* Addendum (listing *amici*). We share a deep commitment to what this Court has identified as the "ultimate objective" of that system: "that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). Moreover, we believe that New York is best served when those who have worked in our courts "come together, look at our strengths and our weaknesses, and develop . . . even more effective way[s] to . . . achiev[e] justice." *From the District Attorney: Task Force to Examine Wrongful Convictions*, Bronxville Times (June 3, 2009).

In recent years, the highest courts in Massachusetts and New Jersey have required trial judges, in cases involving cross-racial identifications, to advise jurors about the "cross-race effect"—that people are generally less accurate at identifying members of other races than they are identifying members of their own race.[1] *Amici*

[1] *See State v. Henderson*, 27 A.3d 872, 926 (N.J. 2011) ("the additional research on own-race bias . . . and the more complete record about eyewitness identification . . . justify giving the charge whenever cross-racial identification is in issue at trial"); *Commonwealth v. Bastaldo*, 32 N.E.3d

have come together because we believe that New York should follow the same course. Trial judges, we believe, have an obligation to educate jurors about the need to scrutinize cross-racial identifications carefully.

Amici differ on some issues, but on the need for a cross-race effect instruction at the defendant's request, we speak with one voice.

INTRODUCTION AND SUMMARY OF ARGUMENT

Otis Boone, an African American, was charged with stealing two iPhones from two Caucasian men and brandishing a weapon at them. The prosecution's case consisted solely of the cross-racial identifications of the two victims. There was no corroborating evidence linking Mr. Boone to the crime. Although the identifications were the totality of the evidence against Mr. Boone, the trial court refused to grant his request for a cross-race effect instruction, and Mr. Boone was convicted and sentenced to 25 years in prison. The Second Department affirmed the verdict but reduced the sentence to 15 years. *People v. Boone*, 129 A.D.3d 1099 (2d Dep't 2015).

873, 883 (Mass. 2015) ("direct[ing] that a cross-racial instruction be given unless all parties agree there was no cross-racial identification"). Hawaii and Utah also require a cautionary instruction on eyewitness testimony, which identifies the cross-racial nature of the identification as one of the factors that should be considered. *See State v. Cabagbag*, 277 P.3d 1027, 1038 (Haw. 2012); *State v. Clopten*, 223 P.3d 1103, 1110 (Utah 2009). Other courts have declined to require such an instruction. *See State v. Allen*, 294 P.3d 679, 687 (Wash. 2013) (en banc) (collecting cases).

Mr. Boone is not alone in being convicted on the basis of eyewitness testimony. Each year, more than 75,000 suspects are identified in the United States through eyewitness identifications. Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 50 (2011). Eyewitness identifications can be both the most persuasive and the least reliable form of evidence in a case. *See Watkins v. Sowders*, 449 U.S. 341, 356-57 (1981) (Brennan, J., dissenting) (eyewitness identification testimony "has an unduly powerful effect on jurors" (citing E. Loftus, Eyewitness Testimony 9 (1979)). Cross-racial identifications are uniquely vulnerable to error. *See* 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, 21 (2001). Thus, the question for our justice system is how to mitigate the potential inaccuracy of cross-racial identifications while still allowing prosecutors to use reliable identifications to secure just results.

As discussed below, a cross-race effect instruction—the instruction that the trial court declined to give in this case—can help strike the proper balance. Such an instruction is supported by a far more impressive scientific pedigree than other instructions routinely given to jurors and is no more complex than those instructions. As the New Jersey Supreme Court has concluded, requiring a trial court to give a cross-race effect instruction fulfills the judiciary's "obligation to guarantee that constitutional requirements are met, and to ensure the integrity of criminal trials."

Henderson, 27 A.3d at 914. For that reason, *amici* urge this Court to mandate such an instruction for New York.

I. Overwhelming Scientific Evidence Shows the Need for a Cross-Race Effect Instruction

The overwhelming consensus among scientists is that the cross-race effect exists and may, unbeknownst to jurors, distort even the most earnest witness's ability to give an accurate identification.

A. The Science Supporting the Existence of the Cross-Race Effect Is Well Established

The cross-race effect has been noted for more than a century. In 1914, a leading commentator described the cross-race effect as "well known" and the result of "incomplete perception of distinctive qualities." Gustave A. Feingold, *The Influence of Environment on Identification of Persons and Things*, 5 J. of the Am. Inst. of Crim. L. & Criminology 39, 50 (1914). In 1927, then Professor Felix Frankfurter observed that "[a]ll the identifying witnesses [in the Sacco and Vanzetti case] were speaking from casual observation of men they had never seen before, men of foreign race, under circumstances of unusual confusion." Felix Frankfurter, *The Case of Sacco and Vanzetti*, The Atlantic, March 1927, at 415. Those factors, Frankfurter argued, had contributed to what he (and many others) believed were wrongful convictions.

Modern science has confirmed those historical observations. As the New Jersey Supreme Court has observed, "[i]n the thirty-four years since the United States Supreme Court announced a test for the admission of eyewitness identification evidence . . . a vast body of scientific research about human memory has emerged." *Henderson*, 27 A.3d at 877. That research illustrates that "memory is malleable, and that an array of variables can affect and dilute memory and lead to misidentifications," including "variables . . . over which the legal system has no control," such as the cross-racial nature of an identification. *Id.* at 878. The existence of the cross-race effect is now "generally accepted" and demonstrated "in both visual discrimination and memory tasks, in laboratory and field studies, and across a range of races, ethnicities, and ages." Nat'l Res. Council of the Nat'l Academies, *Identifying the Culprit: Assessing Eyewitness Identification* 96 (2014); *see also Young v. State*, 374 P.3d 395, 424 (Alaska 2016) (science has "convincingly demonstrate[d] that . . . eyewitness identification is therefore likely to be less reliable if [the] witness and perpetrator are of different races").

Although these findings "are widely accepted by scientists, they are largely unfamiliar to the average person" and indeed "counterintuitive." *State v. Guilbert*, 49 A.3d 706, 723 (Conn. 2012); *see id.* at 724 ("[m]ost people . . . tend to think that cross-racial identifications are no less likely to be accurate than same race identifications"); *People v. Abney*, 13 N.Y.3d 251, 268 (2009) (describing the cross-

race effect as counterintuitive); *Henderson*, 27 A.3d at 910 (citing a survey in which "only 38% to 47% [of jurors] agreed with the effects of . . . cross-race bias").[2] As a result, jurors tend to give too much weight to cross-racial identifications.

Given the gap between the reliability of cross-racial identifications and the undue weight jurors may accord those identifications, it is not surprising that many wrongful convictions "involve a White victim who mis-identifies an African American man." Earl Smith & Angela J. Hattery, *Race, Wrongful Conviction & Exoneration*, 15 J. Afr. Am. Stud. 74, 84 (2011). Indeed, one study reports that "[a]t least 49% of the exonerees identified by eyewitnesses had a cross-racial identification (93 of 190 cases)." Garrett, *supra*, at 73. Several individuals whose cases involved a cross-racial identification have been exonerated through DNA testing. *Id.* at 73-74. But "[a]s powerful as DNA testing is, it is limited to a small set of mostly rape convictions, mostly from the 1980s, in which the evidence happened to be preserved." *Id.* at 264. In other cases involving cross-racial identifications, often no mechanism exists to test the validity of the identification, and surely some innocent individuals languish in our jails as a result.

When a mistaken identification results in the conviction of an innocent person, the consequences are grave. As North Carolina Governor Mike Easley has put it, a

[2] As the New Jersey Supreme Court has asked: "[I]f even only a small number of jurors do not appreciate an important, relevant concept, why not help them understand it better with an appropriate jury charge?" *Henderson*, 27 A.3d at 910.

wrongful conviction is "law enforcement's greatest nightmare." Press Release, State of North Carolina Office of the Governor: Governor Easley Signs Innocence Inquiry Commission Bill (Aug. 3, 2006). Not only is the life of an innocent person upended, but the victim is deprived of justice and the true culprit remains free. *Commonwealth v. Walker*, 92 A.3d 766, 779 (Pa. 2014). Each wrongful conviction deals a blow to society's faith in the justice system.

B. The Appropriate Remedy Is a Cross-Race Effect Instruction

We recognize, of course, that many cross-racial identifications are reliable and that the prosecution has a compelling interest in introducing such evidence. For that reason, courts, legislatures, and stakeholders must identify institutional safeguards that mitigate the potential cross-race effect when prosecutors present cross-racial identifications to jurors. As discussed below, a mandatory jury instruction is by far the most cost-effective safeguard that can be implemented on a system-wide basis.

As every trial lawyer knows, cross-examination is often an inadequate means to identify flaws in an eyewitness's recollection of events. In most cases, an eyewitness has no apparent motive to lie and believes in the accuracy of his recollection. *See Henderson*, 27 A.3d at 888 ("[m]ost misidentifications . . . are not the result of malice"). No amount of cross-examination is likely to unmask the flaws that might exist in the formation of that recollection. *See* Brian L. Cutler, *Eyewitness Testimony: Challenging Your Opponent's Witness* 97 (2002) ("Cross-examining a

neutral, credible, and confident eyewitness is a challenge . . . [t]he likelihood that a committed eyewitness will recant his position (or fall apart on the stand) is so minimal that it is hardly worth considering."). In fact, "most eyewitnesses think they are telling the truth even when their testimony is inaccurate," and "will not display the demeanor of the dishonest or biased witness." *Henderson*, 27 A.3d at 889. But that a witness is confident does not mean his testimony is accurate. *Abney*, 13 N.Y.3d at 268.

Cross-examination directed at the cross-race effect is even more difficult and even less likely to succeed. Race is "one of the most sensitive issues in American society and discourse." Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. Rev. 727, 775 (2007). And the cross-race effect is driven by implicit bias, not outright prejudice. *See* Meissner & Brigham, *supra*, at 7. Thus, a question aimed at establishing that a witness may have difficulty identifying members of another race may offend the witness and the jury, without any benefit to the examiner. Epstein, *supra*, at 775.

While expert testimony regarding the cross-race effect may seem an appealing solution, it is not a system fix. Expert testimony is costly, and, while the cost may be justifiable in a homicide case, it may not be in a robbery case, let alone a petit larceny. All but the wealthiest defendants think twice before expending resources

for expert testimony on this and every other issue. Even if resources were limitless, the number of qualified and available experts is constrained. They are few and far between. *See* Appellant's Br. 42-43; Br. of Amici Curiae Brooklyn Defender Services *et al.* 20-22. Moreover, courts are hesitant to turn every case with a cross-racial identification into a battle of the experts. *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, 1067-68 (2011) ("A recent analysis of eyewitness identification cases found that courts uphold the exclusion of such testimony far more than they overrule the exclusion of it.").

As the Massachusetts Supreme Court has observed, "[i]f the research regarding eyewitness identification could be communicated to the jury only through expert testimony, very few juries would hear it, because expert testimony is not often proffered in cases where eyewitness identification is at issue, and because the admission of expert testimony is left to the sound discretion of the trial judge." *Commonwealth v. Gomes*, 22 N.E.3d 897, 909 (Mass. 2015). In New York, trial judges need not admit expert testimony on the cross-race effect if "sufficient evidence corroborates an eyewitness's identification of the defendant." *People v. Santiago*, 17 N.Y.3d 661, 669 (2011); *see also People v. Young*, 7 N.Y.3d 40, 46 (2006) (upholding exclusion of testimony on cross-race effect where there was corroborating evidence). As a result, a defendant may be precluded from introducing

expert testimony even when the corroborating evidence is disputed and even when a cross-racial identification is crucial to the prosecution's case.

A mandated jury instruction would ensure that juries are apprised of the cross-race effect in every case involving a cross-racial identification.[3] Model jury instructions provide a standard method by which courts instruct jurors about how to evaluate evidence. New York's experience in adopting a mandatory instruction on police officer testimony is instructive. Like eyewitness identification evidence, police officer testimony can be powerful evidence for the prosecution. Jurors, however, may give that testimony undue weight simply because of the officer's status and authority. *See* Jennifer L. Groscup & Steven D. Penrod, *Battle of the Standard for Experts in Criminal Cases: Police vs. Psychologists*, 33 Seton Hall L. Rev. 1141, 1147-48 (2003) ("Survey studies of jurors indicate that police officers . . . are perceived as highly likeable, understandable, believable, and confident, more so than other types of experts."). For that reason, New York has adopted a model instruction cautioning jurors to "evaluate a police officer's testimony in the same way [they] would evaluate the testimony of any other witness." C.J.I.2d [N.Y.] – Credibility. The failure to give that instruction is error. *See People v. Pegeise*, 195 A.D.2d 337, 337 (1st Dep't 1993).

[3] In referring to cross-racial identifications, we mean to exclude "confirmatory identifications," in which the "witness is so familiar with the defendant that there is little or no risk of a misidentification." *People v. Rodriguez*, 79 N.Y.2d 445, 449-50 (1992).

New York's police officer testimony instruction reflects a common sense understanding of juror psychology. No one would suggest that the instruction is unfair to the prosecution or that it hampers the truth-seeking process. It is given in our courtrooms every day. A comparable instruction is even more appropriate here in light of the well-established scientific research substantiating the cross-race effect.

Six years ago, in promulgating its "Recommendations for Improving Eyewitness Identifications," the New York State Justice Task Force included a model jury instruction on the cross-race effect. Chaired by now Chief Judge Janet DiFiore and Judge Theodore T. Jones, the Task Force included "prosecutors, defense attorneys, judges, police chiefs, legal scholars, legislative representatives, executive branch officials, forensic experts and victims' advocates." New York State Justice Task Force, "Recommendations for Improving Eyewitness Identifications" 1 (February 2011). The Task Force agreed that "mistaken eyewitness identification is the leading contributor to wrongful convictions." *Id.* It based its recommendations on an examination of "reports, best practice guidelines and legislation from states and local jurisdictions"; "recommendations from the Department of Justice's National Institute for Justice, various bar associations, the Innocence Project, and other entities"; "academic studies and literature on factors affecting the accuracy of eyewitness identifications"; "a state-wide survey on existing identification

practices"; and "cases involving wrongful convictions in New York." *Id.* In short, the sources that the Task Force considered were as wide-ranging as its membership.

Although some of its recommendations were adopted "over considerable dissent," the Task Force reached consensus on a proposal for a cross-race effect instruction. *Id.* at 2. It recommended this instruction:

> If you think it 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. at 5. The Task Force wisely concluded that the instruction should be given "regardless of whether an expert testifies." *Id.* The Task Force, we submit, got it right. Requiring a cross-race effect instruction would standardize criminal practice across the State and promote justice in our courts.

II. The Cross-Race Effect Is an Appropriate Subject for a Jury Instruction

Although the cross-race effect may seem obvious to some, *see* People's Br. 42, or too complex to others, *id.* at 70, neither perspective should prevent this Court from requiring a cross-race effect instruction. As the New Jersey Supreme Court has recognized, "[e]ven with matters that may be considered intuitive, courts provide focused jury instructions; . . . [for] it is the court's obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial." *Henderson*, 27 A.3d at 924.

Here, as with other instructions routinely given by trial courts, there is an undeniable benefit in ensuring that the jury evaluates evidence critically.

A. A Cross-Race Effect Instruction Is Better Grounded Than Other Standard Jury Instructions

We recognize, of course, that not every cross-racial identification is suspect. But that is not a reason to fail to educate the jury about the cross-race effect. As the American Bar Association has noted, "[o]ther standard jury instructions are not subject to [such a] requirement." ABA, *American Bar Ass'n Policy 104D: Cross-Racial Identification*, 37 Sw. U. L. Rev. 917, 920 (2008). Thus, for example, courts did not require evidence that accomplice testimony is always suspect before mandating an instruction that such testimony should be treated with "caution." *Cool v. United States*, 409 U.S. 100, 103 (1972). Rather, that instruction grew out of a "common sense recognition" that caution was required lest jurors credit such testimony too readily.[4] *Id.* Put differently, courts recognized that an accomplice has a powerful motive to lie and that a cautionary instruction would alert jurors to the need to scrutinize such testimony carefully.

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[4] The accomplice testimony instruction was a staple in courts as early as 1909. *See Crawford v. United States*, 212 U.S. 183, 204 (1909) ("the evidence of [an accomplice] ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses"). The New York legislature put its imprimatur on the instruction in 1970, *see* C.P.L. § 60.22 (2017), but New York judges were instructing juries on accomplice testimony long before then. *See People v. Dixon*, 231 N.Y. 111, 116 (1921) ("At common law, while a jury might convict on the evidence of the accomplice alone, it became the general practice of judges to advise juries not to convict of [a] felony unless such evidence was corroborated by other evidence.").

Notably, other instructions given regularly in our courts are bereft of much scientific support. A *falsus in uno* instruction, for example, was given in New York as early as 1880, far ahead of any scientific studies on its validity or efficacy. *See People v. Moett*, 58 How. Pr. 467, 469 (N.Y. Sup. Ct. 1880) (remarking that "as a corrupt motive governed [the witness] while giving the testimony to be considered, such motive must, when its presence is demonstrated, be deemed to apply to all that he then declares"). Similarly, the venerable missing witness instruction has its roots in experience, not science. *See People v. Hovey*, 92 N.Y. 554, 560 (1883) ("A jury would have the right to infer that the evidence of an eye-witness to a transaction would not be favorable to a party who voluntarily excluded such witness from testifying in the case.").

The point is straightforward: "[w]here . . . there are grounds for questioning the reliability of certain types of evidence that the jury might misconstrue as particularly reliable," it is appropriate to provide "specific instruction to the jury." *Commonwealth v. DiGiambattista*, 813 N.E.2d 516, 533 (Mass. 2004). Such grounds exist here. Any debate among researchers on the finer points of the issue should not prevent this Court from mandating the cross-race effect instruction. Far from it being too early to adopt such an instruction, it is late in the day.

B. The Cross-Race Effect Is Not Too Complex for a Jury Instruction

Nor is the science of the cross-race effect too complex to explain in a jury instruction. The cross-race effect is not so obscure that jurors cannot understand it, once their attention is drawn to it. The "racial component" of an eyewitness identification is "a factor bearing on eyewitness reliability in much the same way as visibility conditions." Joy N. Lindo, *New Jersey Jurors Are No Longer Color-Blind Regarding Eyewitness Identification*, 30 Seton Hall L. Rev. 1224, 1249 (2000). That simple reality can be easily conveyed to jurors to assist them in their task.

What may give one pause in addressing this topic is our sensitivity to issues involving race. As a society, we do not discuss racial issues easily. "[S]ome jurors may deny the existence of the [cross-race] effect in the misguided belief that it is merely a racist myth . . . while others may believe in the reality of this effect but be reluctant to discuss it in deliberations for fear of being seen as bigots." *People v. McDonald*, 690 P.2d 709, 721 (Cal. 1984) (en banc), *overruled on other grounds by People v. Mendoza*, 4 P.3d 265 (Cal. 2000). That, however, makes an instruction all the more essential. *Id.* Unless the judge instructs the jury that the race of the eyewitness and the defendant should be considered, a jury may avoid discussing the issue, even though discussion is needed. *See* ABA, *supra*, at 924 (noting that "jurors are unlikely to discuss racial factors freely without some authorization to do so").

III. This Court Should Require a Cross-Race Effect Instruction Whenever the Defendant Requests It

The Justice Task Force and drafters of the C.J.I. pattern instruction indicate that the cross-race effect instruction should be given "in cases in which cross-racial identification is an issue" or "is at issue." New York State Justice Task Force, *supra*, at 5; C.J.I.2d [N.Y.] – Identification-One Witness, at n.7. As explained below, the Second Department interpreted the words "at issue" to render the instruction discretionary. This Court should make clear that the instruction is required whenever a defendant requests it.

In this case, the Second Department held that the cross-race effect instruction was not warranted because "the defendant never *placed the issue in evidence* during trial." *Boone*, 129 A.D.3d at 1099 (emphasis added). That understanding of "plac[ing] the issue in evidence" appears to require a defendant to cross-examine or present expert testimony on the cross-race effect. Accepting the Second Department's understanding of "at issue" would place an unreasonable burden on defendants. As explained above, cross-examining a juror on her ability to recognize people of a different race can prove damaging to a defendant's case. *See supra* pp. 7-8. The cross-examination may be more likely to alienate the jury than to discredit the witness.

Nor should this Court give trial judges the discretion to forego a cross-race effect instruction simply because there is corroboration for the witness's

identification. In some cases, the corroborating evidence may have flaws that reduce its force and may require its own cautionary instruction. *See* David Crump, *Eyewitness Corroboration Requirements as Protections Against Wrongful Conviction: The Hidden Questions*, 7 Ohio St. J. Crim. L. 361, 366-67 (2009). The decision in *People v. Sage*, 23 N.Y.3d 16, 23 (2014), underscores the point. There, this Court ruled that the trial judge had erred in not giving an instruction on accomplice testimony. *Id.* at 29. Despite the presence of corroborating evidence, the error was found to be prejudicial, because a properly instructed jury might have rejected the accomplice's testimony and concluded that the remaining evidence did not establish guilt. *Id.* Given the great faith that jurors place on eyewitness identifications, a cross-race effect instruction should be mandatory, even if some corroborating evidence exists. Simply stated, a cross-racial identification is "at issue" whenever cross-racial identification testimony is given.

One final point bears emphasis: New York is home to a diverse, multiracial population. It follows that courts should not be asked to wade into sensitive determinations of race before deciding that a cross-race effect instruction is warranted. As the Massachusetts Supreme Court has trenchantly observed, "differences in race based on facial appearance lie in the eye of the beholder." *Bastaldo*, 32 N.E.3d at 883. Reported cases have already demonstrated that leaving it to the trial judge to determine if the defendant and the witness are of different races

is a recipe for confusion. *See, e.g.*, *People v. Radcliffe*, 191 Misc.2d 545, 550-51 (N.Y. Sup. Ct. 2002) (holding that cross-racial identification testimony was not required when there was a Hispanic complainant and an African American defendant). Mandating the instruction at the defendant's request avoids the need for the trial court to determine whether the identification is, in fact, cross-racial.[5] It is therefore with defense counsel, not the judge, that decision-making should reside.[6]

[5] In New York, other jury instructions are required at the defendant's request. *See* C.P.L. § 300.10(2) (2017) (requiring a judge instruct a jury to give the "no inference" charge upon the request of a defendant who does not testify on his own behalf); *cf. People v. Ingrassia*, 118 A.D.2d 587, 587 (2d Dep't 1986) ("It is well settled that the defense of justification should be charged to the jury if there exists any reasonable view of the evidence which supports the defense and a court must do so, under those circumstances, where defense counsel requests such a charge."); Fed. R. Evid. 105 (mandating an instruction that evidence has been admitted for a limited purpose "on timely request").

[6] A defendant should request a cross-race effect instruction as soon as practicable so that the prosecutor has an opportunity to offer evidence on the issue. *Cf. People v. Gonzalez*, 68 N.Y.2d 424, 428 (1986) (party must request missing witness instruction "as soon as practicable").

CONCLUSION

For these reasons, this Court should hold that a jury instruction on the cross-race effect is required upon the defendant's request.

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Respectfully submitted,

By: _____

Caitlin J. Halligan
Kathryn M. Cherry
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166-0193
Tel.: (212) 351-4000
Fax: (212) 351-4035
CHalligan@gibsondunn.com

Counsel for Amici Curiae Former Judges and Prosecutors

ADDENDUM

Amici include the following former judges and prosecutors:

Daniel R. Alonso

Carmen Beauchamp Ciparick

Steven M. Cohen

Eric Corngold

Edward C. Cosgrove

Mylan L. Denerstein

Hector Gonzalez

Barry Kamins

Howard A. Levine

Harlan A. Levy

Bernard J. Malone, Jr.

James M. McGuire

Benjamin E. Rosenberg

Albert M. Rosenblatt

James A. Yates

CERTIFICATE OF COMPLIANCE

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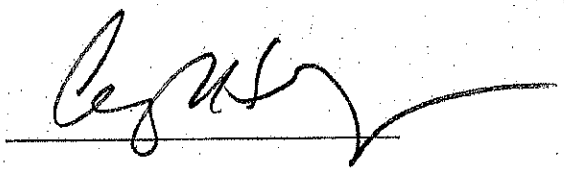

Caitlin J. Halligan