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# Court of Appeals

**STATE OF NEW YORK**

PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

—against—

OTIS BOONE,

*Defendant-Appellant.*

## BRIEF OF *AMICUS CURIAE* THE INNOCENCE PROJECT, INC. IN SUPPORT OF DEFENDANT-APPELLANT


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## CORPORATE DISCLOSURE STATEMENT

Pursuant to New York Court of Appeals Rule of Practice 500.1(f), The Innocence Project, Inc. states that it is a not-for profit corporation and that it has no parent, subsidiary or affiliate.

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## INTEREST OF AMICUS CURIAE

The Innocence Project, Inc. (the "Innocence Project") is an organization dedicated to providing *pro bono* legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction DNA evidence. To date, the work of the Innocence Project and affiliated organizations has led to the exoneration of 349 individuals who post-conviction DNA testing has shown were wrongly convicted. The Innocence Project has a compelling interest in ensuring that criminal trials reach accurate determinations of guilt and promote justice. Because wrongful convictions destroy lives and allow the actual perpetrators to remain free, the Innocence Project's objectives help to ensure a safer and more just society. Indeed, in 43 percent of the wrongful convictions exposed by post-conviction DNA testing, the work of the Innocence Project and affiliated organizations has also helped to identify the real perpetrators of those crimes.

In addition to its work on individual cases, the Innocence Project seeks to prevent future wrongful convictions by researching the causes of wrongful convictions and pursuing reform initiatives designed to enhance the truth-seeking functions of the criminal justice system. Seventy percent of individuals exonerated by DNA were originally convicted based, at least in part, on the testimony of eyewitnesses who turned out to be mistaken. Of these DNA exonerations

involving eyewitness identification, at least 42 percent involved identification by a witness who was of a different race or ethnicity than the individual who was wrongfully convicted, and nearly one-third of these mistaken eyewitness identification cases involved more than one witness misidentifying the same innocent person.

Mistaken eyewitness identifications are a principal contributing cause of wrongful convictions, and cross-racial misidentifications pose a further, enhanced risk of error. Accordingly, the Innocence Project has a compelling interest in ensuring that courts employ legal remedies, including appropriate jury instructions, to aid the reliability of the fact-finding process and to protect criminal defendants against the risk of misidentification.

## SUMMARY OF ARGUMENT

*Amicus curiae* the Innocence Project respectfully submits this brief in support of appellant Otis Boone. *Amicus* urges this Court to reverse the Appellate Division's holding that the trial court did not err in refusing appellant's requested cross-racial identification instruction and, on that basis, to vacate appellant's conviction.

In support of Boone's appeal, *amicus* recounts for the Court a number of illustrative cases in which defendants were convicted on the basis of cross-racial

identifications – often by more than one witness – and later exonerated in light of DNA evidence. These cases, representing just a small sample of wrongful convictions occurring under such circumstances, demonstrate both the risk of erroneous eyewitness identifications generally, as well as the particular risk of misidentification where the witness and defendant are of different races.

Extensive recent scientific research has established the existence of the "cross-race effect."[1] People are better able to recall the face of a person of the same race than that of someone of another race. *See, e.g.*, Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL., PUB. POL'Y, & L. 3, 15 (2001). Many courts, including this one, have recognized and sought to minimize this particular risk presented by cross-racial identifications. Some have endorsed an instruction to aid jurors in their deliberations by advising them of the existence of the cross-race effect. As this Court is aware, New York's Model Criminal Jury Instructions contain such a charge, although trial courts are not presently required to include it.[2]

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[1] The cross-race effect is also referred to as "own-race bias."

[2] Notably, however, the Commentary to the model charge observes that the American Bar Association and the New York State Justice Task Force recommend

Recently, the Supreme Judicial Court of Massachusetts reviewed the extensive scientific literature on the subject, as well as the pros and cons of requiring trial courts to give a cross-race effect jury instruction upon request. The Court held that an instruction must be given unless the parties agree otherwise. *Commonwealth v. Bastaldo*, 32 N.E.3d 873, 877-83 (Mass. 2015) (requiring a cross-racial identification instruction "unless the parties agree that there was no cross-racial identification"). The Court also considered whether the decision to provide the instruction should first be subject to the trial judge's determination that there was in fact a cross-racial eyewitness identification. The Court held that it should not, because "differences in race based on facial appearance lie in the eye of the beholder," and are best left to the jury as factfinder. *Id*. at 883. As the *Bastaldo* Court recognized, an appropriately tailored instruction, apprising the jury of the problems associated with cross-racial identifications can be implemented easily and without countervailing risks to the integrity of the prosecution. *Amicus*

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that a cross-racial identification charge be provided when such an identification is in issue. *See* C.J.I.2d [N.Y.] Identification – One Witness, n.59, http://www.nycourts.gov/judges/cji/5-SampleCharges/CJI2d.Final_Instructions.pdf.

urges the Court to join the Massachusetts Supreme Judicial Court in requiring a cross-racial identification charge in all cases, upon request.

## PRELIMINARY STATEMENT

As this Court has recognized in its evolving jurisprudence on the subject, eyewitness misidentifications exact a severe and irretrievable human cost. Scores of wrongfully convicted individuals – both those we know of, based on subsequent DNA-based exoneration, and those for whom DNA evidence is unavailable – were robbed of years of freedom for crimes they did not commit. The question posed in this case – whether it was error for the trial court to deny appellant's requested cross-racial identification jury charge – provides the Court with the opportunity to further develop its jurisprudence on cross-racial identification, with the benefit of the scientific consensus regarding the cross-race effect that has emerged over the past few decades.

Eyewitness identifications have contributed to the wrongful convictions of more than 240 individuals who were later exonerated by DNA. In New York alone, fifteen individuals convicted on the basis of at least one, and sometimes more than one eyewitness identification, have been exonerated following post-trial DNA testing. These fifteen wrongfully convicted men served an average of 14 1/2 years in prison for crimes they did not commit. And of these cases, at least five

involved cross-racial identifications. There is every reason to believe these exonerations represent just the tip of the iceberg, and that an unknown number of others may have served, or may currently be serving, long sentences because DNA evidence was not available to demonstrate their innocence.[3]

Accordingly, in addition to reversing appellant's conviction, *amicus* respectfully submits that this Court should establish a rule requiring a cross-race effect jury instruction in all cross-racial eyewitness identification cases, unless the parties agree to forego it. The instruction should follow the example set by the Massachusetts Supreme Judicial Court in *Commonwealth v. Bastaldo*:

> 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.

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[3] A clear majority of the DNA-based exonerations identified by *amicus* (269 of 347 or nearly 78 percent) occurred in cases charging or involving rape, sexual assault or similar crimes. The nature of sexual assault crimes makes it more likely that the guilty party will leave genetic material behind. Crimes like the robberies under review here are less susceptible to DNA exoneration because conclusive DNA evidence is unlikely to be available. The need for protection against potential wrongful conviction is all the more pronounced in such cases. *See* National Registry of Exonerations, Interactive Data Display, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited March 1, 2017) (the Registry, which includes both DNA and non-DNA exonerations, has documented almost 2,000 exonerations since 1989, almost one-third of which involved mistaken eyewitness identifications).

32 N.E.3d at 883; CRIMINAL MODEL JURY INSTRUCTIONS 9.160(3) (Mass. Dist. Ct. 2016) ("Massachusetts Model Jury Instructions").

This straightforward instruction directly addresses and mitigates the risk of wrongful conviction based on cross-racial eyewitness misidentification. The *Bastaldo* Court's decision to require the instruction in all cases (unless the parties elect not to have it) frees the trial court from having to assess competing claims as to whether the instruction is necessary, preserving judicial resources and eliminating any risk that the defendant will be deprived, erroneously, of this important safeguard. 32 N.E.3d at 883. It appropriately entrusts the jury, informed and guided by the instruction, with deciding – as it does with all trial evidence – whether and to what extent to credit the identification of the defendant.

## ARGUMENT

In separate lineups, two white witnesses identified appellant Otis Boone, who is black, as their assailant. Both witnesses provided in-court identifications of Boone at trial. These cross-racial identifications were the entirety of the People's case, unsupported by corroborating physical or other evidence. Defense counsel asked the trial judge to deliver an instruction on cross-racial identifications, as was authorized by New York's Model Criminal Jury Instructions. *See* C.J.I.2d [N.Y.] Identification – One Witness.

The court denied the application, on the ground that the defendant had neither offered expert testimony nor cross-examined the witnesses about the cross-racial nature of their identifications. The trial court did not consider the merits of giving the requested charge – *i.e.*, how it would aid the jury's assessment of the evidence. After deliberating for two days, the jury convicted appellant Boone of both counts of first-degree robbery, based solely on the two victims' identifications.

On appeal, Boone argues that the record supported his request for a cross-racial identification charge and that the trial court's refusal to give the instruction deprived him of his due process right to a fair trial.

## I. DNA EXONERATIONS SHOW THAT ERRONEOUS CROSS-RACIAL EYEWITNESS IDENTIFICATIONS – OFTEN TESTIFIED TO WITH GREAT CONFIDENCE OR EVEN COMPLETE CERTAINTY – HAVE CONTRIBUTED TO WRONGFUL CONVICTIONS AND LENGTHY PERIODS OF WRONGFUL INCARCERATION

*Amicus* has worked on behalf of hundreds of innocent men and women who have been wrongly accused, convicted, and imprisoned. In many cases our criminal justice system failed because the jury (and, before that, police and prosecutors) credited testimony identifying an innocent person as the culprit. As this Court and others have recognized, and as is well-established in the scientific literature, mistaken eyewitnesses often believe, in the utmost good faith and with

great confidence, that they have accurately identified the perpetrator.[4] Cross-examination, relied upon in our system to expose erroneous testimony, often fails to reveal that an eyewitness is mistaken, because the witness is not testifying insincerely.[5] The failure of cross-examination to uncover false confidence or

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[4] *E.g.*, *People v. Santiago*, 17 N.Y.3d 661, 672 (2011) (holding that the trial court erred in refusing to allow expert testimony that "eyewitness confidence is a poor predictor of identification accuracy," because that principle is "generally accepted within the relevant scientific community") (citing *People v. Abney*, 13 N.Y.3d 251, 268 (2009)); *State v. Henderson*, 27 A.3d 872, 889 ("We presume that jurors are able to detect liars from truth tellers. But as scholars have cautioned, most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and '[b]ecause the eyewitness is testifying honestly (i.e., sincerely), he or she will not display the demeanor of the dishonest or biased witness.'") (quoting Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identity, and the Limits of Cross–Examination*, 36 STETSON L. REV. 727, 772 (2007)); Tanja Rapus Benton *et al.*, *Handbook of Eyewitness Psychology Vol 2: Memory for People , Has Eyewitness Testimony Research Penetrated the American Legal System?A Synthesis of Case History, Juror Knowledge, and Expert Testimony*, 484 (R.C.L. Lindsay, et al., eds., 2007) (jurors tend to "rely heavily on eyewitness factors that are not good indicators of accuracy").

[5] *E.g.*, *Perry v. New Hampshire*, 565 U.S. 228, 252, 132 S. Ct. 716, 732 (2012) (Sotomayor, J., dissenting) ("At trial, an eyewitness' artificially inflated confidence in an identification's accuracy complicates the jury's task of assessing witness credibility and reliability. It also impairs the defendant's ability to attack the eyewitness' credibility.") (citing *Stovall v. Denno*, 388 U.S. 293, 298 (1967)); *accord Commonwealth v. Crayton*, 21 N.E.3d 157, 169 (Mass. 2014) ("[W]e have previously recognized how difficult it is for a defense attorney to convince a jury that an eyewitness's confident identification might be attributable to the suggestive influence of the circumstances surrounding the identification"); *State v. Lawson*, 291 P.3d 673, 695 (Or. 2012) ("[C]ourts around the country have recognized that traditional methods of informing factfinders of the pitfalls of eyewitness

witness error is particularly acute where a witness has made an in-court identification. In-court identifications are often the last in a series of identification procedures. They follow earlier exposures to the defendant's likeness; they often occur after the witness has received information about the defendant's alleged participation in the crime; and they are, by their very nature, highly suggestive. National Research Council of the National Academies, *Identifying the Culprit: Assessing Eyewitness Identification* 36 n.28 (2014) ("NRC Report") (noting that "courts have shown great tolerance of in-court identifications" although they do not reliably test an eyewitness's memory). Each of these aspects of in-court identifications has been shown to increase witness confidence. *Id.* at 110.

As the narratives below demonstrate, wrongful convictions give rise to a double injustice – the state deprives an innocent person of his liberty while a guilty, and possibly dangerous, person goes free. Although we cannot know exactly how the juries evaluated the cross-racial identifications in these cases, we do know that the identifications were often the only evidence presented by the

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identification [including cross-examination] frequently are not adequate to inform factfinders of the factors affecting the reliability of such identifications").

prosecution, or very nearly so. We also know, based on subsequent DNA testing, that the convictions premised on those identifications were indisputably erroneous. Finally, we know that none of these trials benefited from a specific, cross-racial identification jury instruction – and, as reflected in the recent decision of the Massachusetts Supreme Judicial Court, such an instruction is a targeted and easily implemented safeguard against the risk of wrongful conviction.

**Stephan Cowans**

On a clear day in May 1997, a Boston Police Department officer chased a suspect into the back yard of a home in Jamaica Plain. *Commonwealth v. Cowans*, 756 N.E.2d 622, 625 (Mass. App. Ct. 2001). The officer was white and the suspect was black. The two men struggled until the assailant grabbed the officer's service weapon from its holster and shot him twice. The shooter shot at but missed hitting Benjamin Pitre, a white man, who was looking down at him from an upstairs window. The shooter then fled the scene and ran into a nearby house, where he encountered Bonnie Lacy and her two children, also white. Rob Warden and Michael Aikins, *Stephan Cowans*, The National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3127 (last visited March 1, 2017). Lacy asked the man to put down his gun, which he did. He stated that he was being chased by the police and asked for a drink of

water. After drinking the water, he put the empty glass on the kitchen table, wiped off his gun with his sweatshirt, and ran from the house leaving the mug, gun, and sweatshirt behind.

Weeks after the incident, the police officer identified Stephan Cowans from a photo array and, later, a lineup. Police showed Benjamin Pitre a photo array that included a photograph of Cowans. Pitre did not recognize the shooter in any of the pictures at that time, but Pitre later identified Cowans in a live lineup.

Police showed Ms. Lacy and her children, who had been with the shooter longer than the two shooting victims, a photo array that included Cowans. The Lacys indicated they did not see the man who had been in their house.

At trial, the police officer and Pitre both identified Cowans. These eyewitnesses testified that they had unobstructed views of the suspect for several minutes, and the officer testified that at the time of the incident it was broad daylight and there was "not a cloud in the sky." (Cowans Trial Transcript at 2-75, 3-81 (on file with *amicus*)). Moreover, the officer testified, he had a chance to view the suspect from close up while they were struggling. (*Id*. at 2-94). Defense counsel moved to preclude testimony that the eyewitnesses were confident in their identifications; the court denied the motion and the officer testified he had no

doubt Cowans was the shooter. (Motion in Limine re: Eyewitness Testimony (on file with *amicus*)); (Cowans Trial Transcript at 2-130, 2-144); Warden, *supra*.

The only forensic evidence presented at trial was a latent fingerprint on the mug, which, the Commonwealth's expert testified, was a match for Cowans' left thumb. *Stephan Cowans*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/stephan-cowans/ (last visited March 1, 2017). A jury convicted Cowans and the judge sentenced him to thirty to forty-five years in prison. *Id*.; Warden, *supra*. As defense counsel observed during his summation, "[i]dentity…[was] the key to this entire case." (Cowans Trial Transcript at 5-15).

Six years after Cowans' conviction, testing revealed that DNA recovered from the mug, sweatshirt, and hat all came from the same source – and that Cowans was not that source. Warden, *supra*. The Commonwealth then reexamined the fingerprint and determined that it actually was not a match for Cowans' thumb. *Id*. Cowans was released from prison, but he never recovered from his ordeal. After his release, he suffered from mental illness and drug addiction. *Id*.[6] Cowans sued the City of Boston, which settled the case.

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[6] Such struggles, including Post-Traumatic Stress Disorder, anxiety and depression, are common among exonerees. Heather Weigland, *Rebuilding A Life:*

Tragically, Cowans was murdered in his home during an attempted robbery in October 2007. *Id*.

**Walter D. Smith**

Walter Smith is an African-American motivational speaker and body builder, but from 1986 to 1996 he was serving a sentence of 78 to 190 years for a series of rapes he did not commit. *Walter D. Smith*, http://www.innocenceproject.org/cases/walter-d-smith/ (last visited March 1, 2017). Police put Smith in a lineup from which three rape victims, all of whom were white and had been raped by a black man or men, identified him as their attacker. *State v. Smith*, No. 87AP-85, 1988 WL 79080, at *1 (Ohio Ct. App. 1988); Geoff Dutton, *DNA: Halfway to Justice*, THE COLUMBUS DISPATCH (May 4, 2008), http://www.dispatch.com/content/stories/local/2008/05/04/DNA_main.ART_ART_05-04-08_A1_BTA3NGF.html. All three women said they immediately recognized Smith. *Smith*, 1988 WL 79080 at *1. One woman told police "that she was ninety-nine percent sure" that she had identified her attacker; another testified

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*The Wrongfully Convicted and Exonerated*, 18 PUB. INT. L. J. 427, 428-429 (2009).

that she was positive Smith was the person who raped her. *Id*. Smith was convicted in two cases and acquitted in the third. *Id*. at *3.

Smith continually asserted his innocence, while at the same time coping admirably with his time in prison, completing a drug treatment program and earning an Associate's degree in business. *Walter D. Smith*, *supra*. Beginning the year after his conviction, Smith made repeated requests for DNA testing, offering to pay for it himself. Dutton, *supra*. In 1996, DNA tests were performed on the rape kits from the two cases in which Smith had been convicted. These tests showed that both women were raped by the same man and conclusively eliminated Smith as a possible perpetrator. Dutton, *supra*. By that time, Smith had lost ten years of his life in prison. His conviction and incarceration "devastated [Smith's] family" who "distanced themselves from [him]" while he was in prison. *Id*.[7]

**Luis Diaz**

In the late 1970s the so-called Bird Road Rapist committed a string of twenty-five sexual assaults in a Miami neighborhood. John-Thor Dahlburg, *In Florida Rape Case, 'There Is No Time Limit to Justice,'* L.A. TIMES (Aug. 05,

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[7] For many years after the trial, the victim of the rape of which Smith had been acquitted continued to believe he was the man who had attacked her – reflecting dramatically the power of eyewitness confidence. She began to doubt her original accusation only after DNA evidence exonerated Smith in the attacks against the other two women. Dutton, *supra*.

2005), http://articles.latimes.com/2005/aug/05/nation/na-dna5. Multiple victims described the rapist as a Latin male who spoke English with an accent. *Luis Diaz*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/luis-diaz/ (last visited March 1, 2017). Ultimately, eight victims, seven of whom were white, identified Luis Diaz, who is Latino, as the attacker. *Id*. Diaz spent twenty-six years in prison before DNA evidence exonerated him. *Id*.

Police first arrested Diaz when one of the Bird Road Rapist's victims saw him in a parking lot, believed she recognized him, and gave police his license plate number. Abby Goodnough and Terry Aguayo, *DNA Tests Come to Prisoner's Defense*, N.Y. TIMES (Aug. 3, 2005), http://www.nytimes.com/2005/08/03/us/dna-tests-come-to-prisoners-defense.html. The police soon released Diaz, who had no prior record, because they did not have enough evidence to charge him.

As media pressure mounted, police showed a victim an array containing photographs of nine men, including Diaz. The victim told the officers that she did not recognize any of the nine men in the array and asked to see more pictures. When the victim did not see her attacker in any of the arrays, the officers asked her to return to the first sheet. Only then did the victim point to Diaz, who she believed more closely resembled her attacker than the other eight men in the array. Diaz was then arrested a second time. *Id*.

Police placed Diaz in a live lineup and brought in fourteen of the Bird Road Rapist's victims. *Luiz Diaz, supra*. Six of the fourteen identified him as their attacker, four victims identified "fillers," and the other four made no identification. *Id*. The state proceeded with prosecutions in eight cases, and ultimately eight victims identified Diaz at a joint trial. *See* Diaz Trial Transcript at 1187 (on file with *amicus*). In summation, the prosecutor argued that each of the multiple identifications reinforced the reliability of the others, giving jurors a reason to be confident that Diaz was indeed the perpetrator of each of the crimes. Diaz Trial Transcript at 1169-70, 1175.

Yet Diaz did not match the victims' initial descriptions. He was shorter and lighter complexioned than the victims had described; he spoke only Spanish, while the assailant spoke vulgarity-laced English; he smelled of grease and onions due to his job as a fry cook, but no victim recalled such a smell; and, although several victims described their assailant as having a mustache, Diaz was clean shaven. Goodnough, *supra*; *see generally* Diaz Trial Transcript. Notwithstanding these inconsistent physical descriptions, each of the eight victims testified she was confident in the accuracy of her identification. *Id*. at 1160-61, 1187. On the basis of these eyewitness accounts, and despite the absence of physical evidence, Diaz was convicted of seven of the attacks. *Luiz Diaz, supra*. At sentencing, the trial

judge stated that he had never been more convinced of a man's guilt, and that the state had proved Diaz guilty not only beyond a reasonable doubt, but "beyond a shadow of a doubt." Diaz Sentencing Transcript at 27.

The case against Diaz began to unravel in 1993 when two victims recanted their identifications. Tamara Lush, *After 26 Years, a Free Man*, TAMPA BAY TIMES (Aug. 4, 2005), http://www.sptimes.com/2005/08/04/State/After_26_years__a_fre.shtml. The prosecution agreed to ask the court to vacate only those two convictions, but no others. *Id.* In 2003, DNA samples from two other victims were tested and Diaz was excluded as the attacker in those cases as well. *Id*. The state, in response to this further evidence of innocence, declined to retry the cases not previously dismissed. The court then dismissed all of them. *Id*. Diaz had spent twenty-six years in prison for a string of rapes he did not commit. *Id*.

**Ronald Cotton**

Mistaken eyewitness identification is possible even when the witness makes every conceivable effort to be accurate. When, in 1984, a man broke into her apartment and raped her with a knife to her throat, Jennifer Thompson focused her attention on collecting information about her attacker that would make it possible to identify him later. "I studied every single detail on the rapist's face. I looked at

his hairline; I looked for scars, for tattoos." Jennifer Thompson, *I Was Certain, But I Was Wrong*, N.Y. TIMES (Jun. 18, 2000), http://www.nytimes.com/2000/06/18/opinion/i-was-certain-but-i-was-wrong.html. She was determined to "make sure that he was put in prison and he was going to rot." *Id*.

The attacker was black; Thompson is white. Thompson worked with the police to generate a composite sketch based on the details she worked so hard to recall. The investigators provided a series of pictures of potential matches. When she identified a picture of Ronald Cotton in a photo array, Thompson felt confident he was her attacker. She felt even more certain when she picked him out of a live lineup. Thompson's certainty was further reinforced when investigators reacted positively to her identifications. Neil Vidmar, James E. Coleman, & Theresa A. Newman, *Rethinking Reliance on Eyewitness Confidence*, 94 Judicator 1, 16 (2010), http://www.lajudicialcollege.org/wp-content/uploads/2013/02/Lying-eyes.pdf. Based on Thompson's confident testimony at trial, a jury convicted Cotton and a judge sentenced him to life in prison. Thompson, *supra*.

The North Carolina Supreme Court overturned Cotton's conviction, holding that the trial court had improperly excluded defense evidence of a possible alternative perpetrator. *State v. Cotton*, 351 S.E.2d 277, 278, 280 (1987). Cotton's trial counsel proffered evidence that, in addition to the attack on Thompson, there

were two nearly identical attacks in the same neighborhood, on the same night. *Id.* at 278. Yet Cotton was not allowed to present testimony from one of those victims, who had identified a different man from a lineup that included Cotton. *Id*. The Court remanded for a new trial. *Id*. at 280. Before she testified in the second trial, Thompson learned that Bobby Poole was in the same prison as Cotton and was bragging that he was the attacker. *Thompson*, supra. When Poole was brought before her at Cotton's second trial, Thompson testified that she had never seen him before. Cotton was convicted again and sentenced to consecutive life sentences. *Id*.

In 1995, evidence collected after Thompson's attack was tested against blood samples from Thompson, Cotton, and Poole. The DNA testing confirmed that Poole, not Cotton, had raped Thompson. *Id*. The governor of North Carolina pardoned Cotton two months later. *Ronald Cotton*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/ronald-cotton/ (last visited March 1, 2017).

Cotton had spent ten and a half years in prison. After his release, Cotton worked for the company that had provided the DNA testing. He and Thompson are close friends and together advocate for eyewitness identification reform. *Id*.

**Timothy Cole**

Timothy Cole was a 25-year-old student when he was arrested as a suspect in Michelle Mallin's rape. Cary Clack, *Exoneration Came Far Too Late for Cole*, SAN ANTONIO EXPRESS-NEWS, Jan. 14, 2010, at 1F. He was 38 when he died in prison, half way through his 25 year sentence. *Id*. Another decade passed before Cole was posthumously exonerated and, eventually, pardoned by the governor of Texas. Elliot Blackburn, *Governor Makes Cole Pardon Official*, LUBBOCK AVALANCHE-JOURNAL, Mar. 2, 2010.

Mallin, who is white, was a student at Texas Tech when she was raped. Steven McGonigle, *Rape Victim Shocked ID Wasn't Right*, DALLAS MORNING NEWS, October 12, 2008, at 29A. Cole was one of a small number of black students at the school. Beth Schwartzapfel, *No Country for Innocent Men*, MOTHER JONES, Jan. 1, 2012. Police showed Mallin a six-picture photo array – five mugshots and one polaroid of Cole. *Id*. Mallin picked the polaroid and told the officer that she was "positive" it showed her attacker. *Id*.

At trial, the state proceeded on the basis of Mallin's identification testimony, without any corroborating evidence (there was inconclusive forensic evidence from hair and blood samples). *Timothy Cole*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/timothy-cole/ (last visited March 1, 2017).

Cole presented both an alibi – his brother and his brother's friends testified he was home studying at the time of the crime – and evidence that he suffered from asthma and therefore could not have been chain smoking, as was the attacker. *Id.* Despite this defense evidence, the jury convicted Cole based on Mallin's cross-racial identification.

Jerry Wayne Johnson was convicted of two rapes that occurred in the same area, and around the same time period, as Mallin's rape. Shwartzapfel, *supra*. A Texas Tech Detective suspected correctly that Johnson was Mallin's rapist, but investigators failed to pursue Johnson as a suspect. Fred B. McKinley, *The Cole Truth*, The Texas Observer, Nov. 17, 2010, https://www.texasobserver.org/the-cole-truth/. In 1995, after the ten-year statute of limitations on the Mallin rape had expired, Johnson began writing letters to prosecutors and judges confessing to the crime resulting in Cole's conviction. Jim Vertuno, *Judge Moves to Clear Man of Rape Conviction*, ASSOCIATED PRESS, Feb. 7, 2009. Unfortunately, Cole died of asthma complications in prison in 1999. *Id.* It was not until 2008 that a DNA test showed that Johnson had in fact been Mallin's attacker. *Id.* In 2009, after Johnson repeated his confession in court, Cole was formally exonerated. *Id.*

Mallin was shocked when she heard that Cole had been exonerated. McGonigle, *supra*. Until then she had been 100 percent sure of her identification.

*Id*. After learning of Cole's innocence, Mallin began studying the science of memory and gained perspective on her own story. She now questions whether the racial difference between Cole and her played a role in her misidentification. *Id*.

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All of these exonerees were convicted based on identification testimony from at least one witness of another race. Their experiences offer many lessons, including that mistaken cross-racial identifications can lead to wrongful convictions – even in the absence of other evidence of guilt and in the face of substantial defense evidence of innocence. For example, Luis Diaz did not match the initial description victims had given of the Bird Road Rapist and he was not identified by several witnesses. Ronald Cotton was convicted despite evidence that a third party had been linked to two nearly identical attacks occurring the same night. And Timothy Cole presented *both* alibi evidence that he was not at the scene of the crime *and* evidence rebutting a key component of the witness description, that he could not have been chain smoking since he suffered from asthma.

It is, of course, impossible to know for sure whether a cross-racial identification charge would have caused jurors to doubt the accuracy of the identification or the correctness of the prosecution's case. But these wrongful –

and tragic – outcomes call out for every appropriate procedural safeguard to protect against their repetition.

## II. AS THE MASSACHUSETTS SUPREME COURT HAS RECOGNIZED, REQUIRING TRIAL COURTS TO INSTRUCT THE JURY ON THE RISK OF MISTAKEN CROSS-RACIAL EYEWITNESS IDENTIFICATIONS PROVIDES AN IMPORTANT, AND EASILY IMPLEMENTED, SAFEGUARD AGAINST WRONGFUL CONVICTIONS

Numerous courts, after considering the scientific consensus regarding the cross-race effect, have recognized the grave risk of misidentification presented by cross-racial identifications.[8] The Supreme Court of New Jersey, for example, reviewed hundreds of published studies on human memory and eyewitness identification and concluded that that the cross-race effect is linked to eyewitness misidentifications. *Henderson*, 27 A.3d at 878, 884, 907.

Based on this well-established scientific consensus, many states, including New York, permit trial judges, in the exercise of their discretion, to instruct juries

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[8] *See, e.g.*, *State v. Smith*, 128 A.3d 1077, 1085 (N.J. 2016) ("For many years, this Court has recognized that witnesses may have a more difficult time when they identify a person of a different race"); *State v. Cabagbag*, 277 P.3d 1027, 1035-1036 (Hi. 2012); *State v. Lawson*, 291 P.3d 673, 703 (Or. 2012) (Appendix); *State v. Guilbert*, 49 A.3d 705, 732 (Conn. 2012); *State v. Copeland*, 226 S.W.3d 287, 302 (Tenn. 2007) (abuse of discretion to exclude testimony of an eyewitness identification expert concerning cross-racial identifications); *Commonwealth v. Zimmerman*, 804 N.E.2d 336, 343-344 (Mass. 2004) (Cordy, J., concurring).

on the cross-race effect.[9] In New York, trial courts are permitted to exercise discretion "to provide an expanded identification charge, and [to determine] the content of such charge." *People v. Washington*, 56 A.D.3d 258, 259 (1st Dep't 2008). As noted, however, the Commentary to the New York Model Criminal Jury Instructions recommends that the charge be given whenever such an identification is in issue. C.J.I.2d [N.Y.] Identification – One Witness, n.59. This Court has not had occasion to assess whether the recommendation of the Commentary should be made the law.

Yet this discretionary approach is problematic. It fails to guide trial courts in assessing competing claims as to whether the instruction is appropriate, and it risks depriving defendants of an important safeguard against erroneous convictions.

With these concerns in mind, the Massachusetts Supreme Judicial Court recently held that a cross-race effect instruction must be given unless all parties

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[9] *See State v. Wiggins*, 813 A.2d 1056, 1058–59 (Conn. App. Ct. 2003) (stating that trial courts may conclude that an instruction on cross-racial identification is appropriate); *Janey v. State*, 891 A.2d 355, 356 (Md. Ct. Spec. App. 2006) (holding that decision to give a cross-racial identification instruction rests within the discretion of the trial judge); *State v. Fields*, 182 Wash. App. 1035 (Wash. Ct. App. 2014) (concluding that trial court retains discretion to give a cross-racial identification instruction); *see also State v. Zlahn*, 332 P.3d 247, 254 (Mont. 2014) (reviewing trial court's refusal to provide cross-racial identification instruction for abuse of discretion).

agree to forego it. *Commonwealth v. Bastaldo*, 32 N.E.3d at 883.[10] The instruction states:

> 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*.

Importantly, the *Bastaldo* Court concluded that the decision whether to give the instruction should not be subject to the trial judge's discretion:

> Because differences in race based on facial appearance lie in the eye of the beholder, we shall not ask judges to determine whether a reasonable juror would perceive the identification to be cross-racial. This obviates any need for the judge to decide whether the identification was actually cross-racial, or whether jurors might perceive it to be. If the jury receive such an instruction but do not think the identification was cross-racial, they may simply treat the instruction as irrelevant to their deliberations.

*Id*. Courts may omit a cross-racial identification instruction "only if all parties agree that there was no cross-racial identification." Massachusetts MODEL JURY INSTRUCTIONS 9.160(3).

*Bastaldo* builds upon the foundational work of the New Jersey Supreme

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[10] *Bastaldo* followed the decision in *Commonwealth v. Gomes*, 22 N.E.3d 897 (Mass. 2015), in which the Court reviewed the scientific consensus on the cross-race effect and proposed revising the Commonwealth's model jury instructions to include a cross-racial identification charge. 22 N.E.3d at 900, 919-927.

Court. In *State v. Henderson*, that Court concluded that the robust body of research on the cross-race effect justified giving a cross-racial identification charge "whenever cross-racial identification is in issue at trial." 27 A.3d at 925-26 (observing that a cross-racial jury instruction has many benefits, including being "concise, authoritative . . . and cost-free"); *accord Gomes*, 22 N.E.3d at 917 (quoting *Henderson*, 27 A.3d at 925). The *Henderson* Court did not, however, provide guidance to judges regarding when a cross-racial identification is "in issue," with potential for anomalous results. *See, e.g.*, *State v. Henderson*, No. A-4561-11T1, 2014 WL 4212453, at *4 (N.J. Super. Ct. App. Div. Aug. 27, 2014) (holding that a cross-racial identification charge was not required where the defendant was unable to identify the race of the victim).[11]

*Henderson* itself represented an evolution in the New Jersey Supreme Court's view of the role and importance of the cross-racial identification instruction in ensuring accurate trial outcomes. In *State v. Cromedy*, 727 A.2d 457, 467 (N.J. 1999), the Court reversed the defendant's conviction, holding that the trial court's refusal to give a cross-racial identification instruction "could have affected the jurors' ability to evaluate the reliability of the identification." After

[11] This case and the New Jersey Supreme Court case are unrelated and happen to have been prosecutions of defendants with the same surname.

Cromedy's conviction was vacated and his case remanded for a new trial, the New Jersey State Police tested DNA from the rape kit and excluded Cromedy as a possible assailant. Kathy Barrett Carter, *No Apology Offered as Rape Charge is Dropped*, THE STAR-LEDGER, December 21, 1999, at 47. Cromedy was released after spending more than six years in prison. *Id*. In *Henderson*, the Court cut back on the trial court's discretion, concluding that the instruction must be given in all cases in which a cross-racial identification is at issue.

In sum, the approach taken by the Massachusetts Supreme Judicial Court improves upon both the discretionary approach and on New Jersey's requirement that the instruction be given when the trial judge determines that there is a cross-racial identification at issue. It unburdens the trial court of a difficult decision appropriately entrusted to the jury (without risking the integrity of the prosecution), and it provides greater protection for defendants against often problematic and potentially mistaken cross-racial identification testimony.

## III. THIS COURT SHOULD ADOPT THE RULE ESTABLISHED IN MASSACHUSETTS AND REQUIRE JUDGES TO INSTRUCT JURORS ON THE CROSS-RACE EFFECT UNLESS THE PARTIES AGREE OTHERWISE

This case well illustrates the need for a jury instruction on cross-racial identifications. The People presented no physical evidence of Boone's guilt, and his conviction was based entirely on two cross-racial eyewitness identifications.

The jury may have drawn comfort from the introduction of two identifications. The prosecution was able to use each identification to reinforce the other and assuage jurors' potential concerns about inconsistencies between the witnesses' descriptions and about the witnesses' ability to accurately recall their attacker's face in light of the stressful circumstances of the attack and the brevity of their contact with the attacker. Yet as the narratives above (as well as numerous other cases) show, and as the scientific research confirms, one, two, or even as many as eight victims can all misidentify a defendant. Although the fact of multiple identifications can be used, as it was here, as a basis for arguing to the jury that it could confidently conclude each was correct, the premise has been shown to be baseless: It is quite common for multiple eyewitnesses to misidentify the same person. Indeed, multiple misidentifications occurred in nearly one-third of DNA exoneration cases resulting from the work of the Innocence Project and affiliated organizations.

Moreover, there is good reason to doubt the accuracy of the two identifications of Boone. Both interactions between perpetrator and victim were brief and occurred under stressful circumstances. The presence of a knife in both

cases would have distracted the witnesses from focusing on the assailant's face.[12] The second incident occurred at night, after the witness had been drinking, the witness never directly faced his assailant, and he was under extreme stress from being stabbed during the incident. Additionally, one witness's description of his attacker's weight changed significantly between his police interview and trial.[13] Under these already tenuous circumstances, the fact that the witnesses were of a different race than the defendant – a factor now well established to present its own risks of misidentification – exacerbated the potential for erroneous identifications. In the absence of an instruction notifying the jury of the potential for

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[12] "Weapon focus" is another well-established phenomenon adversely affecting eyewitnesses' perception. When a weapon is used during a crime the witness's attention is drawn away from the perpetrator, impairing his ability to make an accurate identification, particularly if, as was the case here, the crime is of short duration. *Henderson*, 27 A.3d at 872, 904–05.

[13] An officer testified that the victim he interviewed described the assailant as weighing 160 pounds. (Appellant's Appendix A151, A153). The victim, in contrast, testified at trial that the attacker "looked like 190 pounds." (*Id*. at A88, 106). In a study of the first 250 DNA-based exonerations, 62 percent of cases involving eyewitness misidentification had a substantial mismatch between the witnesses' description and the actual appearance of the innocent defendant. *See* Brandon L. Garrett, *Convicting The Innocent: Where Criminal Prosecutions Go Wrong* 68-69 (Harvard University Press, 2011). This is consistent with research establishing a correlation between the presence of incorrect descriptors and inaccurate identifications. *See* Christian A. Meissner et al., *A Theoretical Review and Meta-Analysis of the Description-Identification Relationship in Memory for Faces*, 20 Eur. J. Cognitive Psychol. 414, 431, 435 (2008).

misidentification, it is difficult to have confidence in the outcome. [14]

In sum, this case provides the Court with an opportunity to ensure that in every criminal prosecution involving cross-racial eyewitness identification testimony, that testimony will be subject to the jury's informed consideration, that is, with the knowledge of the risks it poses. Accordingly, *amicus* urges the Court to require trial courts to instruct juries as they are now being instructed in Massachusetts:

> 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.

*Bastaldo*, 23 N.E.3d at 883; Massachusetts MODEL JURY INSTRUCTIONS 9.160(3).[15]

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[14] Unlike the exoneration cases recounted above, the person who committed the robberies at issue did not leave behind hair, sweat, semen, or saliva. Thus, if Boone's conviction stands, DNA evidence cannot be tested to prove his innocence.

[15] There is a lack of scientific consensus as to whether a witness's history of contact with members of a defendant's race affects the accuracy of the witness's identification. NRC Report at 96 (observing that the causes of the cross-race effect are not fully understood). This proposed jury charge, therefore, omits language instructing the jury to consider the extent and nature of the witness's contact with members of the defendant's race.

## CONCLUSION

For the reasons stated, *amicus curiae* the Innocence Project respectfully submits that this Court should establish a rule requiring a cross-racial eyewitness identification jury instruction in all cases, unless the parties agree that the witness and the defendant are of the same race.

Respectfully submitted,

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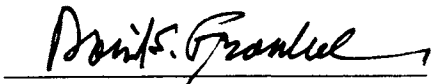
By: 
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## CERTIFICATE OF COMPLIANCE

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