

Court of Appeals
of the
State of New York

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

OTIS BOONE,

Defendant-Appellant.

**BRIEF OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT**

ALAN SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, New York 10007
Tel: (212) 230-8800
Fax: (212) 230-8888

DANIEL S. VOLCHOK, *pro hac vice* pending
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
Tel: (202) 663-6000
Fax: (202) 663-6363

March 16, 2017

CORPORATE DISCLOSURE STATEMENT

The American Psychological Association (APA) is a not-for-profit, non-stock corporation incorporated under the laws of the District of Columbia and organized under section 501(c)(3) of the Internal Revenue Code. APA has no parent company, and no publicly held corporation has an ownership interest in APA. APA's purpose is to advance psychology as a science and profession and as a means of promoting health, education, and human welfare.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
STATEMENT	2
ARGUMENT	4
I. Courts Should Instruct Juries On The Established-But-Often-Unrecognized Reality That Eyewitness Identifications, Particularly Cross-Race Identifications, Are Frequently Inaccurate	4
A. Erroneous Eyewitness Testimony—The Causes Of Which Have Been Explained By Social-Science Research—Often Leads To Wrongful Convictions	4
B. Cross-Race Identifications Are More Likely To Be Mistaken Than Same-Race Identifications	15
II. Eyewitness-Identification Research Is Reliable	19
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Arizona v. Youngblood</i> , 488 U.S. 51 (1988).....	17
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	1
<i>Commonwealth v. Bastaldo</i> , 32 N.E.3d 873 (Mass. 2015).....	18
<i>Commonwealth v. Gomes</i> , 22 N.E.3d 897 (Mass. 2015).....	14
<i>Commonwealth v. Walker</i> , 92 A.3d 766 (Pa. 2014).....	1
<i>Daniels v. Commonwealth</i> , 657 S.E.2d 84 (Va. 2008)	5
<i>Graham v. Florida</i> , 560 U.S. 48 (2010).....	1
<i>Hall v. Florida</i> , 134 S. Ct. 1986 (2014).....	1
<i>Panetti v. Quarterman</i> , 551 U.S. 930 (2007).....	1
<i>People v. McCann</i> , 455 N.Y.S.2d 134 (2d Dep’t 1982)	5
<i>People v. Radcliffe</i> , 764 N.Y.S.2d 773 (Sup. Ct. 2003)	18
<i>People v. Thomas</i> , 8 N.E.3d 308 (N.Y. 2014)	1

<i>Perry v. New Hampshire</i> , 132 S. Ct. 716 (2012).....	1
<i>State v. Artis</i> , 101 A.3d 915 (Conn. 2014).....	1
<i>State v. Clopten</i> , 223 P.3d 1103 (Utah 2009).....	12
<i>State v. Guilbert</i> , 49 A.3d 705 (Conn. 2012).....	13
<i>State v. Henderson</i> , 27 A.3d 872 (N.J. 2011)	4, 13, 14, 18
<i>United States v. Stevens</i> , 935 F.2d 1380 (3d Cir. 1991)	18
<i>United States v. Telfaire</i> , 469 F.2d 552 (D.C. Cir. 1972).....	14
<i>United States v. Wade</i> , 388 U.S. 218 (1967).....	5
<i>Watkins v. Sowders</i> , 449 U.S. 341 (1981).....	11

OTHER AUTHORITIES

ABA, <i>American Bar Association Policy 104D: Cross-racial Identification</i> , 37 Sw. U. L. Rev. 917 (2008).....	18
Abshire & Bornstein, <i>Juror Sensitivity to the Cross-Race Effect</i> , 27 Law & Hum. Behav. 5 (2003)	16
APA <i>Certification of Compliance with APA Ethical Principles</i> (available at http://www.apa.org/pubs/authors/ethics02.pdf).....	21
APA Ethical Principles and Code of Conduct Standard 8.10(a).....	20
8.14(a).....	21

Bartlett, <i>Remembering: A Study in Experimental and Social Psychology</i> (1932)	7
Benton et al., <i>Eyewitness Memory Is Still Not Common Sense</i> , 20 Applied Cognitive Psychol. 115 (2006)	9, 10
Bothwell et al., <i>Cross-Race Identification</i> , 15 Personality & Soc. Psychol. Bull. 19 (1989)	15
Brigham & Ready, <i>Own-race Bias in Lineup Construction</i> , 9 Law & Human Behav. 415 (1985)	15
Brigham et al., <i>Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues</i> , 36 Ct. Rev. 12 (1999)	7
California Criminal Jury Instruction 2.9 (2016)	18
Castelli et al., <i>Evaluating Eyewitness Testimony in Adults and Children in The Handbook of the Forensic Psychology</i> (Weiner & Hess eds., 3d ed. 2006)	8
Cutler & Penrod, <i>Juror Sensitivity to Eyewitness Identification Evidence</i> , 14 Law & Hum. Behav. 185 (1990)	12
Cutler & Penrod, <i>Mistaken Identification</i> (1995)	20
Cutler & Penrod, <i>Mistaken Identification: The Eyewitness Psychology, and The Law</i> (1995)	6
Cutler et al., <i>Expert Testimony and Jury Decision Making: An Empirical Analysis</i> , 7 Behav. Sci. & L. 215 (1989)	12
Deffenbacher & Loftus, <i>Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?</i> , 6 Law & Hum. Behav. 15 (1982)	9
Desmaris & Read, <i>After 30 Years, What Do We Know About What Jurors Know? A Meta-Analytic Review of Lay Knowledge Regarding Eyewitness Factors</i> , 35 Law & Hum. Behav. 200 (2011)	17

Devenport et al., <i>Eyewitness Identification Evidence: Evaluating Commonsense Evaluations</i> , 3 Psychol. Pub. Pol’y & L. 338 (1997).....	4
Devenport et al., <i>How Effective Are the Cross-Examination and Expert Testimony Safeguards? Jurors’ Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures</i> , 87 J. Applied Psychol. 1042 (2002)	13
DNA Exonerations in the United States, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/	5
Garrett, <i>Judging Innocence</i> , 108 Colum. L. Rev. 55 (2008)	6
Goodman et al., <i>The Development of Memory for Own- and Other-Race Faces</i> , 98 J. Experimental Child. Psychol. 233 (2007)	15
Hosch et al., <i>Expert Psychology Testimony on Eyewitness Identification: Consensus Among Experts?</i> , in <i>Expert Testimony on the Psychology of Eyewitness Identification</i> (Cutler ed. 2009)	22
Huff, <i>Wrongful Conviction: Societal Tolerance of Injustice</i> , 4 Res. in Soc. Probs. & Pub. Pol’y 99 (1987)	6
Kassin & Barndollar, <i>The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors</i> , 22 J. Applied Soc. Psychol. 1241 (1992)	9
Kassin et al., <i>The “General Acceptance” of Psychological Research on Eyewitness Testimony, A Survey of the Experts</i> , 44 Am. Psychologist 1089 (1989).....	21
Kassin et al., <i>On the “General Acceptance” of Eyewitness Testimony Research, A New Survey of the Experts</i> , 56 Am. Psychologist 405 (2001).....	16, 21
Lampinen et al., <i>The Psychology of Eyewitness Identification</i> (2012).....	10, 11, 12
Leippe, <i>The Case for Expert Testimony About Eyewitness Memory</i> , 1 Psychol. Pub. Pol’y & L. 909 (1995)	11

Lindsay et al., <i>Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?</i> , 66 J. Applied Psychol. 79 (1981).....	12
Loftus, <i>Eyewitness Testimony</i> (1979)	11
Loftus et al., <i>Eyewitness Testimony</i> §2-2 (4th ed. 2007)	6, 8
Malpass & Kravitz, <i>Recognition for Faces of Own and Other Race</i> , 13 J. of Personality and Soc. Psychol. 330 (1969)	15
Malpass et al., <i>The Need for Expert Psychological Testimony on Eyewitness Identification</i> , in <i>Expert Testimony on the Psychology of Eyewitness Identification</i> (Cutler ed. 2009).....	14, 20, 21
Meissner & Brigham, <i>Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review</i> , 7 Psychol. Pub. Pol’y & L. 3 (2001)	15, 17
Meyer, <i>Regulating the Production of Knowledge: Research Risk-Benefit Analysis and the Heterogeneity Problem</i> , 65 Admin. L. Rev. 237 (2013)	21
National Research Council, <i>Identifying the Culprit: Assessing Eyewitness Identification</i> (2014)	13, 16, 17
New Jersey Criminal Model Jury Charges (2016).....	18
New York Criminal Pattern Jury Instructions, C.J.I.2d [N.Y.] Identification – One Witness (2011)	3, 18
North Carolina Criminal Practice Forms § 27:9 (2016)	19
Noon & Hollin, <i>Lay Knowledge of Eyewitness Behaviour: A British Survey</i> , 1 Applied Cognitive Psychol. 143 (1987)	9
Pezdek et al., <i>Children’s Face Recognition Memory: More Evidence for the Cross-Race Effect</i> , 88 J. Applied Psychol. 760 (2003).....	17
Platz & Hosch, <i>Cross-Racial/Ethnic Eyewitness Identification: A Field Study</i> , 18 J of Applied Soc. Psychol. 972 (1988).....	16

Rahaim & Brodsky, <i>Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy</i> , 7 Law & Psychol. Rev. 1 (1982)	12, 18
Rutledge, <i>They All Look Alike: The Inaccuracy of Cross-Racial Identifications</i> , 28 Am. J. Crim. L. 207 (2001)	18
Schmechel et al., <i>Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence</i> , 46 Jurimetrics 177 (2006)	9, 22
Seltzer et al., <i>Juror Ability To Recognize the Limitations of Eyewitness Identification</i> , 3 Forensic Reports 121 (1990).....	9
Seng & Carroll, <i>Eyewitness Testimony</i> § 9:7 (2d ed. 2016)	14
Sigler & Couch, <i>Eyewitness Testimony and the Jury Verdict</i> , 4 N. Am. J. Psychol. 143 (2002)	10
Smalarz & Wells, <i>Contamination of Eyewitness Self-Reports and the Mistaken-Identification Problem</i> , 24 Current Directions in Psychol. Sci. (2015).....	11
Smith & Cutler, <i>Introduction: Identification Procedures and Conviction of the Innocent</i> , in <i>Reform of Eyewitness Identification Procedures</i> 3:21 (Cutler ed. 2013)	6
Sporer, <i>Recognizing Faces of Other Ethnic Groups: An Integration of Theories</i> , 7 Psychol. Pub. Pol'y & L. 36 (2001)	15
Sporer et al., <i>Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies</i> , 118 Psychol. Bull. 315 (1995).....	11
Wells, <i>Eyewitness Identification: Systemic Reforms</i> , 2006 Wis. L. Rev. 615	7
Wells & Olson, <i>The Other-Race Effect in Eyewitness Identification: What Do We Do About It?</i> , 7 Psychol. Pub. Pol'y & L. 230 (2001).....	15
Wells et al., <i>Eyewitness Evidence: Improving Its Probative Value</i> , 7 Psychol. Sci. in Pub. Int. 45 (2006).....	20

Wu et al., <i>Through the Eyes of the Own-Race Bias: Eye-Tracking and Pupillogometry During Face Recognition</i> , 7 Soc. Neuroscience 202 (2012).....	16, 17
Young et al., <i>Perception and Motivation in Face Recognition: A Critical Review of Theories of the Cross Race Effect</i> , 16 Personality and Soc. Psychol. Rev. 116 (2012)	16

INTEREST OF AMICUS CURIAE

The American Psychological Association is the leading association of psychologists in the United States. A non-profit scientific and professional organization, APA has approximately 155,000 members and affiliates, including the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. Among APA's major purposes are to increase and disseminate knowledge regarding human behavior, to advance psychology as a science and profession, and to foster the application of psychological learning to important human concerns, thereby promoting health, education, and welfare.

APA has filed more than 155 amicus briefs in state and federal courts nationwide. *See, e.g., People v. Thomas*, 8 N.E.3d 308 (N.Y. 2014); *Graham v. Florida*, 560 U.S. 48 (2010). These briefs have been cited frequently by courts, including the U.S. Supreme Court. *See, e.g., Hall v. Florida*, 134 S. Ct. 1986, 1994-1995, 2000-2001 (2014); *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). Several of APA's amicus briefs addressed eyewitness-identification issues. *See, e.g., Perry v. New Hampshire*, 132 S. Ct. 716 (2012); *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014); *State v. Artis*, 101 A.3d 915 (Conn. 2014).

APA has a rigorous approval process for amicus briefs, the touchstone of which is an assessment of whether the case is one in which there is sufficient

scientific research, data, and literature on a question before a court that APA can usefully contribute to the court's understanding and resolution of that question. APA regards this as one of those cases. The issue here is whether, when the prosecution introduces eyewitness-identification evidence and the witness is a different race from the subject, the court must give an instruction informing jurors that, as a matter of scientific consensus, cross-race witness identifications are less reliable than same-race identifications.

The limitations of eyewitness identification in general, and the relative unreliability of cross-race identification in particular, have been the subject of significant psychological research. APA submits this brief to recount that research and to explain why the failure to give a jury instruction on cross-race identification creates a substantial risk of a wrongful conviction. The integrity of the criminal-justice system is undermined if jurors are left to determine whether to rely on eyewitness identifications without understanding the scientifically established factors that affect the accuracy of such identifications.

STATEMENT

In 2011, appellant Otis Boone, an African-American man, was arrested and charged with committing two muggings in Brooklyn, each of which lasted roughly one minute. The only evidence at trial that tied Mr. Boone to either crime was the

eyewitness-identification testimony provided by the victims, both of whom were white.

Given that the victims were a different race from Mr. Boone, his counsel asked the trial judge to instruct the jury on cross-racial eyewitness identification. New York's Criminal Pattern Jury Instructions include the following such instruction:

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

C.J.I.2d [N.Y.] Identification—One Witness, n.1 (rev. January 2011). The trial judge declined to include this or any other instruction on cross-race identification.

Without the benefit of such an instruction, the jury convicted Mr. Boone of both muggings. He was sentenced to 25 years in prison, but the Appellate Division (while otherwise affirming) reduced the sentence to 15 years. This Court then

granted leave to appeal on the question of whether the trial judge erred in refusing to provide the jury with an instruction on cross-race identification.¹

ARGUMENT

I. COURTS SHOULD INSTRUCT JURIES ON THE ESTABLISHED-BUT-OFTEN-UNRECOGNIZED REALITY THAT EYEWITNESS IDENTIFICATIONS, PARTICULARLY CROSS-RACE IDENTIFICATIONS, ARE FREQUENTLY INACCURATE

A. Erroneous Eyewitness Testimony—The Causes Of Which Have Been Explained By Social-Science Research—Often Leads To Wrongful Convictions

1. Eyewitness testimony is a significant element of the criminal-justice system’s truth-seeking process, because accurate eyewitness identifications can provide critical evidence of guilt or innocence. Yet “both archival studies and psychological research suggest that eyewitnesses are frequently mistaken in their identification.” Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 Psychol. Pub. Pol’y & L. 338 (1997). As a result, “eyewitness [m]isidentification is widely recognized as the single greatest cause of wrongful convictions in this country.” *State v. Henderson*, 27 A.3d 872, 885 (N.J. 2011) (internal quotation marks omitted). Misidentification “present[s] what is conceivably the greatest single threat to the achievement of our ideal that no innocent [person] shall be punished.” *Id.*

¹ The parties dispute whether Mr. Boone preserved this question for appeal. The APA does not take a position on that dispute.

Although these are very important insights, they are not new. More than thirty years ago, for example, the Appellate Division stated that “[m]istaken identification probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.” *People v. McCann*, 455 N.Y.S.2d 134, 135 (2d Dep’t 1982) (internal quotation marks omitted); accord, e.g., *Daniels v. Commonwealth*, 657 S.E.2d 84, 86 (Va. 2008) (“Courts have long recognized dangers inherent in eyewitness identification testimony.”). And fifteen years before that, the U.S. Supreme Court made much the same point, noting that “identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.” *United States v. Wade*, 388 U.S. 218, 228 (1967).

Recent times have brought significant new data to support the conclusion that erroneous eyewitness identifications lead to wrongful convictions and thus the imprisonment of innocent people. According to an Innocence Project study, for example, over 70 percent of DNA exonerations involve convictions based on eyewitness misidentification. *DNA Exonerations in the United States*, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited March 16, 2017). Another study similarly found that, of the first 200 cases

of post-conviction DNA exonerations, nearly 80 percent included at least one eyewitness who mistakenly identified the innocent defendant as the perpetrator. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 76 tbl. 2 (2008). Overall, it appears that inaccurate eyewitness identifications account for more than half of erroneous convictions in the United States. *See, e.g.*, Huff, *Wrongful Conviction: Societal Tolerance of Injustice*, 4 Res. in Soc. Probs. & Pub. Pol’y 99, 101-103 (1987) (stating that a study implicated mistaken eyewitness identifications as the cause of more than 60 percent of the 500 wrongful convictions studied); Cutler & Penrod, *Mistaken Identification: The Eyewitness Psychology, and The Law* 3-36 (1995); Smith & Cutler, *Introduction: Identification Procedures and Conviction of the Innocent*, in *Reform of Eyewitness Identification Procedures* 3:21 (Cutler ed. 2013).

2. Decades of social-science research have provided an explanation for the root cause of many if not most mistaken identifications, namely that human memory is highly malleable. In particular, cognitive psychologists have “established that when we experience an important event, we do not simply record it in our memory as a videotape recorder would.” Loftus et al., *Eyewitness Testimony* § 2-2, at 12 (4th ed. 2007). This finding traces its origin to the 1930s work of Frederic Charles Bartlett. Through a series of experiments, Bartlett debunked the notion that “[r]emembering is ... the reexcitation of innumerable

fixed, lifeless and fragmentary traces.” Bartlett, *Remembering: A Study in Experimental and Social Psychology* 213 (1932). Instead, the process of remembering “is an imaginative reconstruction, or construction It is thus hardly ever really exact, even in the most rudimentary cases of rote recapitulation[.]” *Id.*

Inaccuracies in memory are common because the process of remembering necessitates the active processing of sensory inputs through the individual’s preexisting cognitive patterns—patterns that are not infallible. As one commentary explained, “what is perceived and stored in memory is often incomplete or distorted as a result of the individual’s state of mind or the nature of the event observed.” Brigham et al., *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues*, 36 Ct. Rev. 12, 13 (1999). In short, research has shown that memory should not be regarded as comparable to a videotape. *See, e.g., Wells, Eyewitness Identification: Systemic Reforms*, 2006 Wis. L. Rev. 615, 622-623.

Bartlett’s “reconstructive” model not only accounts for why memory is fallible, but also addresses when and how inaccuracies are introduced into the memory process. Psychologists analyzing the nature of memory have partitioned the memory cycle into three discrete steps: (1) the acquisition or encoding stage, when a witness perceives an event and information is thereby entered into the

memory system; (2) the retention or storage stage, the period between acquisition and the witness's attempt to recall the information; and (3) the retrieval stage, when the witness attempts to recall the stored information. *See, e.g.,* Loftus et al., *supra*, at 13.

This three-stage analysis is “central to the concept of human memory,” and “[p]sychologists who conduct research in this area try to identify and study the important factors that play a role in each of the three stages.” Loftus et al., *supra*, at 13. Those research psychologists have identified many factors that may adversely affect an eyewitness's memory at each stage. At the acquisition stage, memory is subject to both event-specific variables (such as duration of the event) and witness-specific variables (such as age). *Id.* At the retention stage, additional factors such as the passage of time or post-event information may degrade or contaminate the witness's memory. *Id.* Finally, at the retrieval stage, the witness's memory may be negatively affected by the method of questioning. *Id.*

Put simply, the principle that memory is malleable is generally accepted. *See, e.g.,* Castelli et al., *Evaluating Eyewitness Testimony in Adults and Children* in *The Handbook of Forensic Psychology* 243, 244 (Weiner & Hess eds., 3d ed. 2006). Indeed, it is the foundation of the contemporary scientific understanding of human memory.

3. This understanding and general acceptance, however, are not shared by most lay jurors. Over the last three decades, studies have assessed jurors' understanding of the factors that adversely influence an eyewitness's accuracy. See Benton et al., *Eyewitness Memory Is Still Not Common Sense*, 20 *Applied Cognitive Psychol.* 115 (2006); Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 *Jurimetrics* 177, 191-205 (2006).² These studies have consistently concluded that jurors lack a complete understanding of the factors affecting eyewitness identifications.

In a 1992 study, for example, researchers asked potential jurors whether they agreed with each of 21 propositions about eyewitness reliability, propositions that had also been posed to psychologists. See Kassin & Barndollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors*, 22 *J. Applied Soc. Psychol.* 1241, 1243-1244 (1992). On most of the topics (13 of 21), jurors differed in statistically significant ways from the experts. See *id.* at 1246. Jurors, in other words, held beliefs inconsistent with what the experts know about the fallibility of eyewitness identifications.

² See also Seltzer et al., *Juror Ability To Recognize the Limitations of Eyewitness Identifications*, 3 *Forensic Reports* 121, 124-133 (1990); Noon & Hollin, *Lay Knowledge of Eyewitness Behaviour: A British Survey*, 1 *Applied Cognitive Psychol.* 143, 143, 145-149 (1987); Deffenbacher & Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 6 *Law & Hum. Behav.* 15, 24-26 (1982).

Jurors' misconceptions about eyewitness accuracy have remained largely impervious to correction over time, even in the face of multiple high-profile exonerations over the last decade. *See generally* Lampinen et al., *The Psychology of Eyewitness Identification* 243-244 (2012). In a 2006 study, researchers found statistically significant discrepancies between jurors' and experts' responses regarding 26 out of 30 statements about eyewitness accuracy. *See* Benton et al., *supra*, at 119. If anything, jurors performed more poorly in the 2006 study than in the 1992 study, where potential jurors had agreed with the experts on 33 percent of the issues tested, as opposed to merely 13 percent in 2006. *See id.* at 119, 126.

Lay persons' lack of understanding about the limits of human memory (and hence the reliability of eyewitness testimony) helps explain why jurors tend to overvalue the accuracy and reliability of such testimony, further increasing the risk of wrongful convictions. *See* Sigler & Couch, *Eyewitness Testimony and the Jury Verdict*, 4 N. Am. J. Psychol. 143, 146 (2002) (finding that adding a single, vague eyewitness account to controlled-experiment mock trials increased the conviction rate from 49 percent to 68 percent). Jurors are particularly likely to give too much weight to an eyewitness's expressed confidence about the accuracy of their perception and recall. As former U.S. Supreme Court Justice William Brennan noted, "there 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!'"

Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (quoting Loftus, *Eyewitness Testimony* (1979)). Yet research generally shows that except under ideal testing conditions, eyewitness accuracy is at best modestly correlated with eyewitness confidence. See Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 Psychol. Bull. 315 (1995); Smalarz & Wells, *Contamination of Eyewitness Self-Reports and the Mistaken-Identification Problem*, 24 Current Directions in Psychol. Sci. (2015). Conditions that compromise encoding render confidence a less reliable predictor of accuracy. See Sporer et al., *supra*. Similarly, suggestive identification procedures and post-identification feedback inflate confidence and attenuate the relation between confidence and accuracy. See Smalarz & Wells, *supra*.

4. Alternatives to jury instructions—such as cross-examination and expert testimony—are important but by themselves insufficient to address the problems of faulty eyewitness identifications and jurors’ overconfidence in such identifications. Empirical data on cross-examination, for example, indicate that it is not an effective way to counter unreliable eyewitness testimony. See Lampinen et al., *supra*, at 249 (citing Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 Psychol. Pub. Pol’y & L. 909 (1995)). This is in part because jurors tend to both overvalue eyewitness confidence and undervalue

factors that are known from the scientific research to affect identification accuracy. *See* Cutler & Penrod, *Juror Sensitivity to Eyewitness Identification Evidence*, 14 Law & Hum. Behav. 185, 185 (1990); Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. Applied Psychol. 79, 83 (1981). And cross-examination is often ineffective with an honest but mistaken witness, particularly one who is very confident. *See, e.g.*, Lampinen, *supra*, at 250 (“[T]he goal of cross-examination is to attack the credibility of the witness[, which] leads to a focus on factors ... such as witness demeanor and trivial inconsistencies.”). As another state high court put it, “[c]ross-examination will often expose a lie or half-truth, but may be far less effective when witnesses, although mistaken, believe that what they say is true.” *State v. Clopten*, 223 P.3d 1103, 1110 (Utah 2009); *see also* Rahaim & Brodsky, *Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 Law & Psychol. Rev. 1 (1982).

Expert testimony is likewise insufficient, though for a different reason. Expert testimony can help juries better understand eyewitness identifications (and its limits), and thus does reduce the prejudice of inaccurate identifications. Indeed, studies support the view that expert testimony can make jurors more sensitive to the factors that influence eyewitness accuracy. *See* Lampinen, *supra*, at 250; Cutler et al., *Expert Testimony and Jury Decision Making: An Empirical Analysis*,

7 Behav. Sci. & L. 215 (1989); Devenport et al., *How Effective Are the Cross-Examination and Expert Testimony Safeguards? Jurors' Perceptions of the Suggestiveness and Fairness of Biased Lineup Procedures*, 87 J. Applied Psychol. 1042 (2002). APA has thus urged courts to allow such testimony. But the admission of expert testimony typically lies within the discretion of the trial court. And even when a judge permits such testimony, other practical considerations—most significantly, the cost of retaining an expert and the time needed to present such testimony to the jury—may prevent a defendant from introducing it. See, e.g., *Identifying the Culprit: Assessing Eyewitness Identification* at 40 (2014). Jury instructions, by contrast, are “concise” and “cost-free.” *Henderson*, 27 A.3d at 925, *quoted in State v. Guilbert*, 49 A.3d 705, 727 n.27 (Conn. 2012). Thus, despite generally being desirable, expert testimony cannot be the only safeguard against the dangers of unreliable identifications.

In sum, given the limitations of other tools of the adversary process aimed at sensitizing jurors to the complexities and limitations of eyewitness evidence, the truth-seeking function of the criminal trial is best served by adopting an approach that allows vigorous cross-examination and admissible expert testimony alongside—but not in lieu of—thorough jury instructions.

5. Although our legal system has historically underappreciated the limitations of human perception and memory, and hence underappreciated the

magnitude of the risk that an eyewitness could misidentify a criminal defendant, a few courts have long encouraged or required jury instructions about the limitations of eyewitness identifications. *See, e.g., United States v. Telfaire*, 469 F.2d 552, 558 (D.C. Cir. 1972). And the recent statistics discussed above regarding wrongful convictions based on eyewitness misidentifications have made it more common for courts to do so, even in cases not presenting the issue of cross-race identifications. *See, e.g., Henderson*, 27 A.3d at 893, *Commonwealth v. Gomes*, 22 N.E.3d 897, 910-911 (Mass. 2015). In fact, roughly half of states now encourage or require trial courts to give some version of a jury instruction regarding the accuracy of the eyewitness’s identification when accuracy is in dispute and central to the case. *See Seng & Carroll, Eyewitness Testimony* § 9:7 (2d ed. 2016). This trend reflects courts’ increasing recognition of the point explained above: “there is general agreement about the scientific findings of the eyewitness community” with respect to the high risk of inaccuracy in eyewitness identifications. *Henderson*, 27 A.D.3d at 912 (quoting Malpass et al., *The Need for Expert Psychological Testimony on Eyewitness Identification*, in *Expert Testimony on the Psychology of Eyewitness Identification* 3, 14 (Cutler ed. 2009)). As explained in the next section, that risk is particularly high—and hence the need for an appropriate instruction particularly great—in cases involving cross-race identifications.

B. Cross-Race Identifications Are More Likely To Be Mistaken Than Same-Race Identifications

1. The risk of eyewitness misidentification is significantly increased when the witness and the subject are of different races, as people are demonstrably worse at recognizing faces of a race other than their own. This effect—known as “own-race bias,” “cross-race bias,” or the “other-race effect”—has long been documented, and its existence is now a matter of consensus among psychologists and neuroscientists.

The study generally considered to be the first to show cross-race bias was published in 1969. *See* Malpass & Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. of Personality and Soc. Psychol. 330 (1969). Since then, dozens of other studies have confirmed the effect’s existence. For example, a 2001 “meta-analysis” that synthesized 39 research articles and studies involving nearly 5,000 participant witnesses concluded that cross-race identifications are 56 percent more likely to be erroneous than same-race identifications. *See* Meissner & 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).³ More recent studies have

³ *See also, e.g.,* Bothwell et al., *Cross-Race Identification*, 15 Personality & Soc. Psychol. Bull. 19 (1989) (meta-analysis); Wells & Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 Psychol. Pub. Pol’y & L. 230 (2001); Sporer, *Recognizing Faces of Other Ethnic Groups: An Integration of Theories*, 7 Psychol. Pub. Pol’y & L. 36 (2001); Brigham & Ready, *Own-race Bias in Lineup Construction*, 9 Law & Human Behav. 415 (1985); Goodman et al., *The*

further confirmed the cross-race effect. Indeed, “the effect is robust, having been replicated [with] a variety of experimental techniques.” Wu et al., *Through the Eyes of the Own-Race Bias: Eye-Tracking and Pupillometry During Face Recognition*, 7 Soc. Neuroscience 202 (2012). Or as another study put it, the own-race effect is “[o]ne of the best documented examples of face recognition errors,” shown to exist “across a number of ... populations.” Young et al., *Perception and Motivation in Face Recognition: A Critical Review of Theories of the Cross Race Effect*, 16 Personality and Soc. Psychol. Rev. 116 (2012); accord *Identifying the Culprit, supra*, at 96.

Not surprisingly in light of this research, a survey of psychologists who are published in the field showed overwhelming agreement regarding the existence of the cross-race effect. *See generally* See Kassin et al., *On the “General Acceptance” of Eyewitness Testimony Research, A New Survey of the Experts*, 56 Am. Psychologist 405, 410, 413 tbl. 5 (2001). Yet as with other aspects of eyewitness unreliability, many prospective jurors (according to survey research) appear not to know about the effect, and one study found that mock jurors failed to account for it when evaluating eyewitness identifications. *See* Abshire & Bornstein, *Juror Sensitivity to the Cross-Race Effect*, 27 Law & Hum. Behav. 5

Development of Memory for Own- and Other- Race Faces, 98 J. Experimental Child Psychol. 233 (2007); Platz & Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. of Applied Soc. Psychol. 972 (1988).

(2003); Desmaris & Read, *After 30 Years, What Do We Know About What Jurors Know? A Meta-Analytic Review of Lay Knowledge Regarding Eyewitness Factors*, 35 Law & Hum. Behav. 200 (2011).

The extensive body of research on the reliability of cross-race identifications has made clear just how pervasive the cross-race effect is. For example, one study demonstrated that own-race bias affects children as young as three years old. See Pezdek et al., *Children's Face Recognition Memory: More Evidence for the Cross-Race Effect*, 88 J. Applied Psychol. 760 (2003). And another concluded that own-race bias “persists at different stages of the human lifespan.” Wu et al., *supra* at 202. The cross-race effect also extends to faces witnesses have seen before. See Meissner & Brigham, *supra*. Finally, while the causes of the cross-race effect are not fully understood, see *Identifying the Culprit, supra*, at 96-97, the effect is particularly strong when the witness’s opportunity to view the subject was relatively short (as in many crimes) or when there is a substantial lapse of time between the witness’s original viewing of the subject and the identification. See Meissner & Brigham, *supra*.

2. Courts have recognized the cross-race effect reflected in the research just discussed. The U.S. Supreme Court did so in *Arizona v. Youngblood*, 488 U.S. 51 (1988), quoting a study’s conclusion that “[c]ross-racial identifications are much less likely to be accurate than same-race identifications,” *id.* at 72 n.8

(quoting Rahaim & Brodsky, *Empirical Evidence versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 Law & Psychol. Rev. 1, 2 (1982)). Other courts have done likewise, including in this state. *See, e.g., People v. Radcliffe*, 764 N.Y.S.2d 773, 776 (Sup. Ct. 2003); *United States v. Stevens*, 935 F.2d 1380, 1391 (3d Cir. 1991) (“Scholarly literature attacking the trustworthiness of cross-racial identification is now legion.”). Legal scholars have written influential studies on the topic as well. *See, e.g., Rutledge, They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 Am. J. Crim. L. 207 (2001).

Courts have done more than just recognize the cross-race effect, however. A number of jurisdictions, including New Jersey and Massachusetts, now recommend or require a jury instruction about the decreased reliability of cross-race identifications when such an identification is at issue. *See Henderson*, 27 A.3d at 926; *Commonwealth v. Bastaldo*, 32 N.E.3d 873, 877 (Mass. 2015). And the American Bar Association has recommended that such instructions always be mandated. *See ABA, American Bar Association Policy 104D: Cross-racial Identification*, 37 Sw. U. L. Rev. 917, 917 (2008). The instructions also appear in model jury instructions in several states—including, as noted, this one. *See New York Criminal Jury Instructions 2d, Identification - One Witness* (2011); *New Jersey Criminal Model Jury Charges* (rev. July, 2016); *California Criminal Jury*

Instructions - Criminal 2.9 (2016); North Carolina Criminal Practice Forms § 27:9 (2016).

In light of the research documenting not only the existence of the cross-race effect but also many jurors' unfamiliarity with it, this Court should join other jurisdictions in requiring trial courts to instruct juries about the effect whenever a cross-race identification is part of the evidence at trial. Such instructions do not invade the province of the jury; jurors remain free to give a cross-race (or other eyewitness) identification the weight they see fit. Such instructions are nonetheless critical to the truth-seeking process because, by informing jurors about the risks of mistaken identifications, they reduce the likelihood of an erroneous conviction.

II. EYEWITNESS-IDENTIFICATION RESEARCH IS RELIABLE

As explained, a cross-race jury instruction in cases like this is well supported by psychological research on the limitations of eyewitness identification in general, and of cross-race identifications more specifically. That is relevant, and should be given great weight by this Court, because that body of research is highly reliable. This reliability stems principally from three factors.

First, the methods that researchers use reflect best practices in scientific psychological research. Like other scientists, "psychologists rely upon basic principles of scientific inquiry that ensure the reliability and validity of their

findings.” Malpass et al., *supra*, at 11. These basic principles include forming hypotheses based on prevailing theories and available data, and then testing those hypotheses through experiments or review of archival sources. *See id.* at 11-14. The testing process typically involves experiments in which researchers expose a controlled set of subjects to different videotaped or staged crimes and then test the accuracy of the subjects’ identification skills. *See, e.g., Wells et al., Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. in Pub. Int. 45, 49-50 (2006). This approach is widely considered to yield “the most robust findings.” Malpass et al., *supra*, at 13; *see also* Wells et al., *supra*, at 49. The next step—analysis of the results produced by the experiments—is equally sound: It normally involves inferential statistical methods, which have been “developed and accepted by researchers over a period of more than a century.” Malpass et al., *supra*, at 14.

Second, studies in this field are typically subject to two layers of peer review, first at the funding stage and then at the publication stage. *See* Cutler & Penrod, *Mistaken Identification* 66 (1995). The high standards and low acceptance rates that apply at both stages provide an additional check on the methodological soundness of the research. *See id.* at 66-67; Malpass et al., *supra*, at 14.

Third, APA’s Ethical Principles and Code of Conduct forbids psychologists from fabricating data or making false or deceptive statements. *See* APA Standard 8.10(a). It also imposes more affirmative duties, including the obligation to share

the data they use with any competent professional seeking to validate their work. *See* APA Standard 8.14(a). Nor is the code the only source of an ethical check on research. Universities at which much psychological research is conducted typically require that it be reviewed in advance by internal ethics boards. *See, e.g., Meyer, Regulating the Production of Knowledge: Research Risk-Benefit Analysis and the Heterogeneity Problem*, 65 Admin. L. Rev. 237, 243-250 (2013). And many journals that publish the research require statements of compliance with ethical standards. *See, e.g., APA Certification of Compliance with APA Ethical Principles*, available at <http://www.apa.org/pubs/authors/ethics02.pdf> (last visited March 16, 2017) (requirement applies to APA journals).

Further evidence regarding the reliability of psychological research on eyewitness identifications is the fact that there is overwhelming consensus as to the core findings of that research. In a 1989 study, for example, researchers surveyed psychologists who had published in the field. *See* Kassin et al., *The “General Acceptance” of Psychological Research on Eyewitness Testimony, A Survey of the Experts*, 44 Am. Psychologist 1089, 1090 (1989). This survey showed general agreement among experts that at least nine variables had been reliably shown to influence eyewitness accuracy. *See id.* at 1093, 1094 & tbl. 4. A follow-up survey conducted in 2001 confirmed the 1989 results as to each of those nine variables. *See* Kassin et al., *On the “General Acceptance,” supra*, at 410, 413 tbl. 5. More

recent results likewise confirm this near-universal acceptance. *See* Hosch et al., *Expert Psychology Testimony on Eyewitness Identification: Consensus Among Experts?*, in *Expert Testimony on the Psychology of Eyewitness Identification* 143, 152 (Cutler ed. 2009) (according to a 2008 study, “the level of general acceptance in the field is higher than it was in 2001”). As one study put it, “relative to other scientific research that enters courtrooms, the lack of controversy in the field of eyewitness identification is remarkable.” Schmechel et al., *supra*, at 179.

In short, psychological research on the unreliability of eyewitness identification is highly reliable. To ensure fair trials for criminal defendants, juries should have the benefit of guidance regarding this research in their instructions from the court.

CONCLUSION

Decades of research have yielded a scientific consensus that the risk of eyewitness misidentification is substantial—and that misidentifications are particularly likely when the witness and the subject are of different races. In cases like this one, trial judges should instruct jurors on these points.

ALAN SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, New York 10007
Tel: (212) 230-8800
Fax: (212) 230-8888

Daniel S. Volchok

DANIEL S. VOLCHOK, *pro hac vice* pending
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue N.W.
Washington, D.C. 20006
Tel: (202) 663-6000
Fax: (202) 663-6363