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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 55

OTIS BOONE,

Appellant.

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20 Eagle Street  
Albany, New York  
October 17, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE PAUL FEINMAN  
GUEST JUDGE PETER TOM

Appearances:

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1 CHIEF JUDGE DIFIORE: The first matter on this  
2 afternoon's calendar is appeal number 55, the People of the  
3 State of New York v. Otis Boone.

4 Counsel.

5 MR. LAISURE: Good afternoon, Your Honors; Skip  
6 Laisure with Appellate Advocates for Otis Boone. I'd like  
7 to reserve two minutes, please.

8 CHIEF JUDGE DIFIORE: Two minutes, sir? Yes.

9 MR. LAISURE: A simple straight-forward  
10 instruction like those adopted by the New York State Task  
11 Force, the CJI Committee, and the courts of Massachusetts  
12 and New Jersey is the fairest and most effective way to  
13 account for cross-racial identification - - -

14 JUDGE GARCIA: So, counsel, that task force  
15 recommended that this instruction be given when  
16 identification is an issue. How would you define "an  
17 issue"?

18 MR. LAISURE: Well, I would disagree with that as  
19 the threshold, but to answer the question in - - -

20 JUDGE GARCIA: But you - - - I thought - - - I'm  
21 sorry. I thought you said you agreed with the task force  
22 recommendation.

23 MR. LAISURE: Not - - - not specifically. A  
24 rule, but - - - but I think the Mass. rule is the better of  
25 the - - - of those rules.



1 JUDGE GARCIA: So what would your rule be?

2 MR. LAISURE: So the rule would be that if the  
3 witness and the person identified appear to be of different  
4 races, you should consider that people have greater  
5 difficulty accurately identifying someone of a different  
6 race as opposed to someone of their own race.

7 JUDGE GARCIA: So appear to be of different races  
8 would be a jury issue?

9 MR. LAISURE: Correct.

10 JUDGE GARCIA: So if it's obviously to anyone in  
11 the courtroom, particularly the judge, that this isn't a  
12 cross-racial ID, but you ask for it, you get it, and that  
13 instruction goes to the jury?

14 MR. LAISURE: Right. Because the jury - - -

15 CHIEF JUDGE DIFIORE: Counsel, what is the  
16 threshold that you advocate for?

17 MR. LAISURE: Well, if - - - if the parties agree  
18 that there's no cross-racial identification, that's the  
19 threshold. No need for the instruction. The parties  
20 disagree, then give the instruction.

21 JUDGE GARCIA: So if the prosecutor wants it,  
22 they get it?

23 MR. LAISURE: Sure.

24 JUDGE GARCIA: Even if it's not a cross-racial  
25 case?



1 MR. LAISURE: I - - - I think that's right. I  
2 think - - -

3 JUDGE GARCIA: And then they would argue this  
4 isn't a cross-racial ID, so you know it's better?

5 MR. LAISURE: Well, then they can't go that far.  
6 As that was the Alexander case and - - - and

7 JUDGE GARCIA: But Alexander was before we made a  
8 mandatory rule.

9 MR. LAISURE: I understand that. But the - - -  
10 but you can't say something is good because something else  
11 is bad. The fact that - that there is - - - there is no  
12 proof about cross - - - or that the cross-racial effect  
13 makes - - - makes for a bad ID doesn't mean a non-cross-  
14 racial effect is a good ID.

15 JUDGE STEIN: If we - - - if we were to take, for  
16 example, the - - - the proposal of the CJI or the task  
17 force, they - they both - - - Judge Garcia started along  
18 this line. They both use the phrase placed in issue or is  
19 an issue or something like that. If we were to go that  
20 way, what - - - how should - - - how would we determine  
21 that in your view?

22 MR. LAISURE: Well, certainly, if the defense  
23 asks for it, it would be placed in issue. And I think if -  
24 - - if the court itself sua sponte recognizes it I think it  
25 would be an issue.



1 JUDGE STEIN: But - - - but what would be the  
2 basis for the court to recognize it - - -

3 MR. LAISURE: Appearance.

4 JUDGE STEIN: - - - if it wasn't requested?

5 MR. LAISURE: Appearance. It's the - - - it's  
6 the eye of the beholder that determines whether there's a  
7 possibility of a cross-racial identification and therefore  
8 the possibility of an effect.

9 JUDGE GARCIA: But how would you ever review that  
10 if the defense didn't ask for it? So if it's the court sua  
11 sponte without a request doing it, really, there's no  
12 review of that.

13 MR. LAISURE: Probably not, Your Honor. That's  
14 why I think the better rule is the Massachusetts one.

15 JUDGE GARCIA: Which you ask for it you get it?

16 MR. LAISURE: Right.

17 JUDGE GARCIA: So - - -

18 MR. LAISURE: No, no. It - - - it's given no - -  
19 - unless everyone agrees not to. Then that's - - - that's  
20 where the review comes in.

21 JUDGE TOM: Counsel, the - - - you say all you  
22 have to do is just ask for it and you meet the threshold?

23 MR. LAISURE: Well, I'm - - - I'm suggesting that  
24 the threshold is there whenever the parties don't agree  
25 that there isn't one.



1 JUDGE TOM: Well, don't you have to offer some  
2 sort of evidentiary proof to - - - you know, to raise an  
3 issue whether the identification was reliable or not?

4 MR. LAISURE: I don't think an evidentiary basis  
5 is - - - is called for here. The - - - the Massachusetts  
6 and New Jersey and the federal courts - - -

7 JUDGE TOM: Well, I know the Massachusetts and  
8 New Jersey rule. We - - - we're talking about New York  
9 now.

10 MR. LAISURE: Right. And - - - and the reason  
11 those - - - no. I was just going to say that the reason  
12 those - - - those courts went that way is because  
13 recognition of a face is a subjective operation. There is  
14 not something that you can cross-examine a witness about  
15 that indicates he or she is going to be operating under  
16 that effect.

17 JUDGE TOM: Well, it's based on accuracy. I mean  
18 if a witness is familiar with a - - - with a different  
19 race, assuming that witness lives in the - - - you know,  
20 think example. We talking about black defendant. The  
21 witness lives in Harlem. He comes in daily contacts with  
22 African-Americans. I mean in a situation like that should  
23 this charge be given just for the mere, you know, of asking  
24 for it and you get it?

25 MR. LAISURE: Yes. And - - - and there's a



1 reason for that. First of all, the contacts that you're  
2 talking about are not proven scientifically to diminish the  
3 - - - the cross-racial effect. There are some cases - - -  
4 some studies that say it does. Some does not. And the - -  
5 - the nature and the quality of the interactions is what -  
6 - - is what goes into the determination whether there was a  
7 mitigating effect based on history and contacts with the  
8 other race.

9 JUDGE STEIN: What other comparable issues are -  
10 - - are subject to mandatory jury charges?

11 MR. LAISURE: When there is any evidence, for  
12 instance, of justification, accomplices, matter of fact,  
13 they're - - -

14 JUDGE STEIN: Okay. But that - - - that requires  
15 showing that there's a reasonable view of the evidence.  
16 The - - - the court - - -

17 MR. LAISURE: That's right.

18 JUDGE STEIN: It's not mandatory in all cases  
19 whether it's asked for or not.

20 MR. LAISURE: That's right.

21 JUDGE STEIN: Correct? Okay. So - - -

22 MR. LAISURE: But the - - - but the threshold  
23 here is similar. The threshold here is there is - - -  
24 there is - - - people believe that there's a possibility of  
25 a cross-racial identification occurring in this case.



1           JUDGE GARCIA: But there's no showing required.  
2           I think, as I understand it, it's not even you have to ask  
3           for it. You have to have affirmatively say it isn't there  
4           in an agreement between the two parties, so there's no  
5           showing. And as I understand your rule, there is no  
6           discretion with the trial court not to give this unless the  
7           parties agree the trial court shouldn't give it. So the  
8           parties are - - - I think what Judge Stein is saying, the  
9           parties are dictating the charge. There is no discretion.  
10          There is no showing required. Unless both parties agree,  
11          you get this no matter what the facts and circumstances of  
12          the case?

13          MR. LAISURE: That's the Massachusetts rule that  
14          we're espousing. There are other rules. The other rules  
15          do - - - one other rule is that the defense requests it.  
16          And then there is some - - -

17          JUDGE STEIN: I guess my question - - -

18          JUDGE RIVERA: Well, wasn't this like - - - how  
19          is this different from what's already been suggested to  
20          you? Because I - - - I thought in part you were arguing  
21          about the issue itself is a unique one, it's difficult for  
22          defense counsel to - - - to broach this issue with respect  
23          to summation or throughout the arguments in the trial so  
24          that the jury can appreciate that - - - that there's  
25          something that's of consequence that this comes from the





1 judge as opposed to just from the defense counsel.

2 MR. LAISURE: Well, that's the reason for - - -  
3 for having the instruction as opposed to having an expert  
4 or having cross-examination. Because the - - - it's going  
5 to be viewed as the defense playing the race card whenever  
6 the defense tries to do something about this as far as  
7 establishing some evidentiary basis for either contacts,  
8 which I think is the People's burden and we can get into  
9 that, or the cross-racial effect itself. It's a - - - it's  
10 an untenable position for the defense to - - - to do  
11 anything along those lines. And in fact, likely will be -  
12 - - will prevent many defendants from - - - from getting  
13 the benefit of the jury understanding this because it's too  
14 dangerous to go into. There's no reason why - - - there's  
15 no reason not to give the instruction. What's the  
16 downside, so to speak?

17 JUDGE FEINMAN: So can - - -

18 MR. LAISURE: Yes?

19 JUDGE FEINMAN: Can we get to a result that  
20 requires the instruction without overruling Whalen and  
21 Knight?

22 MR. LAISURE: Yes, easily. And that's because  
23 there's two different sets of identification instructions  
24 that are involved here. Whalen and Knight goes to the  
25 expanded charge and the expanded charge as opposed to the



1 general charge. Those charges all go to factors that are  
2 within the jury's knowledge, lighting, opportunity to  
3 observe, duration, you know, that - - - those kinds of  
4 things. And that is - - - the court is very well able to  
5 look at those things and say we don't need that instruction  
6 in this case. An example would be a defendant is in a - -  
7 - in a dispute with somebody in a well-lit lobby, there's  
8 no distinctive features, there's nothing in particular  
9 going on here. There's plenty of time to view - - -

10 JUDGE FEINMAN: Well, what if it's a gunpoint  
11 robbery? What do we do about weapon focus?

12 MR. LAISURE: Well, I'll - - - let me - - - let  
13 me finish this and - - - because that goes right to your  
14 question. The cross-racial aspect of that interaction  
15 might well be there and may be affecting the ID. So the  
16 court can say, no. You don't get an expanded charge, but  
17 the - - - but the cross-racial ID should be given, right?  
18 And to go to your question, if - - - if weapon focus, if  
19 confidence, those other things start to get the kind of  
20 universal acceptance that cross-racial effect has than  
21 those ought to get mandatory instructions as well. We're  
22 not there yet.

23 JUDGE GARCIA: May I - - - Chief Judge, may I  
24 ask?

25 CHIEF JUDGE DIFIORE: Yes. You may. Of course.



1 JUDGE GARCIA: Counsel, last time this was argued  
2 there was some discussion on retroactivity. I assume the  
3 position would be the same that you're not - - - are you  
4 taking a position on retroactivity in this argument?

5 MR. LAISURE: We're not, Your Honor. The - - -  
6 assuming that this would be a new rule I think that the  
7 retroactivity of it would - - - would come into play only  
8 if it's the kind of a fundamental new rule that should be  
9 applied retroactively and that would require briefing.  
10 We're just - - - we're just not set up for that.

11 JUDGE GARCIA: You're not prepared to concede it  
12 or to argue it, neither?

13 MR. LAISURE: Right.

14 JUDGE GARCIA: Understood. Thank you.

15 CHIEF JUDGE DIFIORE: Counsel, one last question.

16 MR. LAISURE: Yes.

17 CHIEF JUDGE DIFIORE: So when would this charge  
18 need to be requested?

19 MR. LAISURE: If we went that route, the - - -  
20 the charge should be requested whenever the defense thinks  
21 that there's a possibility of a cross-racial  
22 identification. Again, if there's not and the instruction  
23 is given the jury's going to ignore the instruction.  
24 There's no confusion here to worry about. The only  
25 confusion comes in when we talk about the mitigating



1 effects of - - - of the contacts kind of things. That's  
2 where the confusion lines because the science isn't clear.  
3 On the effect itself, it's - - - it's an on-off switch.  
4 Either it's there or it's not there, and there's no reason  
5 to - - - to second guess whether the jury can make that  
6 determination.

7 CHIEF JUDGE DIFIORE: One final question. Judge  
8 Tom?

9 JUDGE TOM: Yeah. To - - - to get a expanded  
10 identification charge you still need an offer of proof  
11 regarding the lighting, distance, and the time that the  
12 crime took place. You need evidentiary proof, but yet  
13 you're saying for the cross-racial identification you do  
14 not need any proof. All you have to do is ask for it.

15 MR. LAISURE: The proof is in the visual. It's  
16 what the parties look like.

17 JUDGE TOM: But that's not proof. That's the  
18 facts. That's not proof. That's not evidence.

19 MR. LAISURE: Well, certainly it is.

20 JUDGE TOM: You're saying it's based on the  
21 facts.

22 MR. LAISURE: Well, Your Honor, the - - - the  
23 appearance of the defendant and the appearance of the  
24 witness - - -

25 JUDGE TOM: That's the facts. That's not



1 evidence.

2 MR. LAISURE: Okay. I was under the impression  
3 that the - - - what the jury can see as to - - - as to the  
4 parties would - - - would be, in fact, evidence.

5 JUDGE TOM: Okay. All right.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 Counsel.

8 MR. LIEBERMAN: Good afternoon. My name is Seth  
9 Lieberman. So one - - - one of the underlying questions  
10 here is whether the cross-race effect is within the ken of  
11 the average juror. But regardless of whether it is or  
12 isn't, in this case the court properly denied the request  
13 for the instruction. And I'll - - - let me just get to  
14 why. The main problem with what the defense was asking  
15 for, at least how the court reasonably interpreted the  
16 defense request, was a request for an instruction that was  
17 going to say that cross-racial identifications were  
18 unreliable, and that is not a neutral charge.

19 In contrast with how the expanded CJI charge  
20 deals with the other factors, it's a series of neutral  
21 questions. What were the lighting conditions? What was  
22 the distance between the witness and the perpetrator? And  
23 by asking for a charge that was basically going to tell the  
24 jury about cross-racial identifications in a negative  
25 fashion, something akin to the - - - the CJI cross-racial



1 identification charge, the problem is is that unfairly  
2 skews the juror's evaluation of a reliability of  
3 identification by leading them to view any cross-racial  
4 identification with skepticism.

5 So this is a proposal. If this court concludes  
6 that the cross-race effect is within the ken of the average  
7 juror, just the mere existence of the phenomenon and if  
8 this court concludes that Whalen should be overruled and  
9 Knight should be overruled and go even further and that the  
10 failure to even fail to give - - - state one of the factors  
11 could be reversible error depending on the facts, then it  
12 would be error if the instruction - - - the instruction  
13 would have to be stated in a neutral fashion, something  
14 like the - - - the first sentence in the CJI cross-racial  
15 identification charge which states: "You may consider  
16 whether there is a difference in race between the defendant  
17 and the witness who identified the defendant and if so,  
18 whether that difference affected the accuracy of the  
19 witness's identification." And that - - - that's a neutral  
20 charge but I would - - -

21 JUDGE GARCIA: Counsel, assume we agree with you  
22 - - - or we disagree with you on those points, but let's  
23 get to what would the standard be assuming we're going to  
24 say, you know, just for the purposes of this argument that  
25 you don't need expert testimony and this is a charge that



1 can be given along the lines of that or another language  
2 and another charge. As I understood the appellant's  
3 argument, it was, until the end, I think, that unless  
4 there's an agreement the charge is given. That it isn't  
5 you look out and look at the defendant and look at the  
6 accusing witness or witnesses. There is no assessment of  
7 the facts in the case. It is purely a standard of whether  
8 or not the two parties agree it doesn't have to be given.  
9 What would your thoughts be on that?

10 MR. LIEBERMAN: This - - - this you know  
11 something? I think it should be viewed as - - - as part of  
12 the package of the expanded CJI charge. Consider the  
13 lighting, consider the distance, and actually, let's not  
14 focus on the same-race aspect of it. We could say  
15 something like you may consider what is the race of the  
16 defendant and whether the defendant's race affected the  
17 ability of the witness who identified the defendant to make  
18 an accurate identification. And so the question is not  
19 whether it's a cross-racial ID but whether identification  
20 is an issue. If you - - -

21 JUDGE FAHEY: So once - - - once identification  
22 is at issue, then you - - - you would view this as part of  
23 the standard package of identification questions?

24 MR. LIEBERMAN: Stated neutrally not as the  
25 defense is asking for.



1 JUDGE FAHEY: I see.

2 MR. LIEBERMAN: Because if the assumption is that  
3 it's within the ken of the average juror you don't have to  
4 tell the jurors how to analyze it.

5 JUDGE FAHEY: Right. We don't have the expert  
6 brought. No. We understand - - - we understand that. But  
7 - - - but your argument, just so I understand, the charge  
8 is - - - identification is contested in whatever form it's  
9 contested. It could be the lighting, could be the time of  
10 day, distance, any of those kind of factors, the speed at  
11 which the car was moving, whatever. Once it's contested  
12 then you would just simply view this as - - - as a simple  
13 listing of factors that you could consider, and this would  
14 be one on of the factors that you would be considering.  
15 But you don't think the jury needs to be instructed that -  
16 - - that while it's - - - that they need to be told that  
17 there is a possibility that - - - that this is an objective  
18 factor, misidentification based on cross-race and that they  
19 should consider it in their analysis?

20 MR. LIEBERMAN: There's so many factors that  
21 contribute to misidentification - - -

22 JUDGE FAHEY: No. But we're drawing - - - we're  
23 drawing attention to it. I think - - -

24 MR. LIEBERMAN: Yeah. But why?

25 JUDGE FAHEY: Let me - - - let me finish. I'll





1 tell you.

2 MR. LIEBERMAN: Yeah. Sure. Sorry.

3 JUDGE FAHEY: Simply I think because it's been  
4 identified as - - - as a problem in creating wrongful  
5 convictions. And as a result of that a charge would then  
6 focus on that as a policy matter to try and prevent those  
7 wrongful convictions.

8 MR. LIEBERMAN: Right. Okay. Couple of things.

9 JUDGE FAHEY: All right.

10 MR. LIEBERMAN: First is when is the court in the  
11 business of telling jurors things that are not within their  
12 ken? That is the subject of expert testimony.

13 JUDGE FAHEY: Um-hmm.

14 MR. LIEBERMAN: If it's within their ken they  
15 understand how to do it. If you just say consider race,  
16 they - - - they should presumably know what to do. If it's  
17 within their ken - - -

18 JUDGE FAHEY: I think you're right and that - - -  
19 that's a fair - - - that's fair. If the jurors are  
20 deciding that we don't need to go into the science.

21 MR. LIEBERMAN: Right.

22 JUDGE FAHEY: Go ahead.

23 MR. LIEBERMAN: And - and - and - either side can  
24 fill in the gaps with expert testimony.

25 JUDGE RIVERA: But, see, counsel, this is where



1 I'm having problems with your argument. There are things  
2 that are within the ken and things that are not. The  
3 question of whether or not someone is from a particular  
4 racial group, I - - - yes. That sounds like that's within  
5 their ken, right? That's his point that they can, based on  
6 appearance or some other testimony reach that decision.  
7 The question of what impact cross-racial identification has  
8 on the accuracy of the identification, not the belief by  
9 the witness that they're making an accurate, right? An  
10 accurate identification - - -

11 MR. LIEBERMAN: I totally understand what the  
12 cross-race effect is. Yes.

13 JUDGE RIVERA: Excuse me. Excuse me. That that  
14 is not within the ken.

15 MR. LIEBERMAN: Well, if it's not within the ken  
16 - - -

17 JUDGE RIVERA: Or within the ken but there may  
18 already be enough experience to say that the only way that  
19 that can be addressed is through the neutral person in the  
20 room, the judge, informing the jury that this may be  
21 something they wish to take into consideration because it  
22 works against what jurors may already believe.

23 MR. LIEBERMAN: I don't understand where this is  
24 coming from. Where - - - where is the jurisprudence that  
25 says if something's not within the ken of a juror the



1 court's supposed to tell them what it is. Isn't that  
2 always the subject of expert testimony? Should we be  
3 having courts telling jurors about rape trauma syndrome,  
4 how great DNA evidence is, all these things that we require  
5 experts to testify about. You either come to the  
6 conclusion that's within the ken - - -

7 JUDGE RIVERA: Do you - - - do you take the  
8 position that there is not something unique and different  
9 about race and - - - and people's cross-racial  
10 identification that perhaps put this in a different basket  
11 from some of the other things you say are neutral because  
12 race is not neutral?

13 MR. LIEBERMAN: Well, race might be a more  
14 sensitive matter, but the things that are within the ken of  
15 the juror and the things that aren't within the ken of the  
16 juror, those are two separate categories. And the court  
17 should not be in the business of telling jurors how to  
18 evaluate things that are within their - - - that are  
19 outside their ken and - - -

20 JUDGE RIVERA: What about reminding them of  
21 something that's in their ken?

22 MR. LIEBERMAN: So if it's in their - - - okay.

23 JUDGE RIVERA: Considering - - -

24 MR. LIEBERMAN: Okay. Yes.

25 JUDGE RIVERA: Considering the unique aspect of



1 race and what role it plays in the courtroom.

2 MR. LIEBERMAN: Well, if - - - if jurors - - -

3 JUDGE RIVERA: And then it could - - - defense  
4 counsel cannot easily address these issues.

5 MR. LIEBERMAN: If the - - - if the court's going  
6 to mention it just as one of the tick offs, excuse me,  
7 lighting, distance, time, race, all neutrally, that's not a  
8 problem as long as all these things are within their ken.  
9 All those other factors that are mentioned in the expanded  
10 CJI charge are within the ken of the jury and are equally  
11 contribute to misidentifications.

12 JUDGE TOM: But, counsel, this is really not a -  
13 - - a extremely complex concept where you have to bring in  
14 an expert to - - - to educate the jury. I mean the - - -  
15 the charge merely states: "That some people have greater  
16 difficulty in accurately identifying members of a different  
17 race than they do in identifying members of their own  
18 race." This - - -

19 MR. LIEBERMAN: No. I - - - I understand.

20 JUDGE TOM: This is a very simple concept.

21 MR. LIEBERMAN: I understand. But - - -

22 JUDGE TOM: It is just explaining, you know, if  
23 you're going to look at the lighting, the distance, race,  
24 the race should be explained through this charge. It's  
25 really not a complex - - -



1 MR. LIEBERMAN: I - I - I - I understand in the  
2 sense that if it's understood by the jurors, if it's within  
3 their ken, you don't have to tell them how to analyze it.  
4 You don't - - - you're not telling them how to analyze  
5 lighting. You're not telling them how to analyze distance.  
6 But you're giving undue prominence to race when race not  
7 have even be, in most cases, a prominent factor. You know  
8 what - - -

9 JUDGE FAHEY: No.

10 MR. LIEBERMAN: You know what - - -

11 JUDGE FAHEY: I think - - - I think, in fairness,  
12 the way I understand the charge - - - and you bring some  
13 legitimate points up, but the way I understand the charge  
14 is what we're saying is we want you to be extra careful  
15 about this because it is a - - - it's not the - - - it's a  
16 common canard, a common lie, that's told among people that  
17 - - - that people will say such-and-such is of this race  
18 and they all look alike. Those are things that are said  
19 among people and believed among people. Those common  
20 canards can be attacked by saying now we all know people  
21 say or think these things. Be careful here. Don't do  
22 that.

23 MR. LIEBERMAN: But I - - - that's not what the  
24 charge is saying. And - and - and by the way, you know,  
25 the whole notion of - - - I mean we are living - - - we are

1 living in a rapidly changing society where the amount of  
2 intermarriages is increasing.

3 JUDGE FAHEY: Well, don't you think that makes it  
4 even more important?

5 MR. LIEBERMAN: Well, no. Actually, it's - - -  
6 to focus on the cross-race - - -

7 JUDGE RIVERA: Coun- - - counsel, is it the  
8 People's position that there is no cross-racial effect?

9 MR. LIEBERMAN: That is not the People's  
10 position. But - - - but the People's position is that just  
11 as - - -

12 JUDGE RIVERA: So then you agree that there is a  
13 cross-racial effect?

14 MR. LIEBERMAN: The - - - we have never - - - we  
15 have constantly in this brief taken that position.

16 JUDGE RIVERA: Okay.

17 MR. LIEBERMAN: But - - -

18 JUDGE RIVERA: So then again then I'll just what  
19 counsel asked before. What is - - - what is the danger  
20 that concerns you about the charge if you agree that there  
21 is a cross-racial effect?

22 MR. LIEBERMAN: I'm - - - I - - - what is of  
23 concern to the People is that it's treating race  
24 differently than the other factors.

25 JUDGE RIVERA: Correct.



1 MR. LIEBERMAN: If - - - but why - - -

2 JUDGE RIVERA: Correct. For numerous reasons.

3 MR. LIEBERMAN: Excuse me?

4 JUDGE RIVERA: For numerous reasons.

5 MR. LIEBERMAN: But the - - - the reasons - - -  
6 if the - - - if you mention race in a neutral fashion you  
7 permit the jurors and you permit the defense or the  
8 prosecutor to make arguments about, you allow for the  
9 introduction of expert testimony and to focus on the cross-  
10 race aspect when there are so many people in this society -  
11 - -

12 JUDGE RIVERA: But if the People acknowledge  
13 there is a cross-racial effect, what's the expert testimony  
14 you plan to bring in? To say there is no cross-racial  
15 effect?

16 MR. LIEBERMAN: Well, for - - - no. For one  
17 thing, there's been some dispute about the nature of the  
18 contacts that might alleviate the cross-race effect but  
19 what I want to say is that there - - - there are numerous  
20 people that - - - in this society that they have greater  
21 difficulty identifying people of their own race than people  
22 of another race because they were raised in households and  
23 in communities of races other than their own. And those  
24 people, presumably, will have an easier time identifying  
25 people of the - - - the people - - - the race of the people

1 in the community they grew up with and the family they grew  
2 up with than their own race who might live in another  
3 community that they haven't - - -

4 JUDGE RIVERA: You can bring that up with your  
5 argument, right?

6 JUDGE STEIN: So - - - so are you saying - - -

7 JUDGE RIVERA: Isn't that your point? You would  
8 bring that up as - - - that would be the - - -

9 MR. LIEBERMAN: The point - - -

10 JUDGE RIVERA: The People would have - - -

11 MR. LIEBERMAN: The point - - -

12 JUDGE RIVERA: - - - the opportunity to present  
13 that?

14 MR. LIEBERMAN: The point would be that a neutral  
15 - - - a neutral instruction that just focuses on - - - says  
16 consider what the race of the defendant is and whether that  
17 - - - the race of the defendant had any - - - had what  
18 effect, if any, that had on the witness's ability to make  
19 an accurate identification. That kind of neutral  
20 instruction would permit arguments on either side so you  
21 could introduce evidence about the witness's exposure to  
22 either people of their own race or people of the other  
23 race. And it becomes like all the other factors which are  
24 equally important in the analysis of an identification - -  
25 -





1 JUDGE TOM: Regardless of the - - - the charge is  
2 you may consider. It's not that you have to consider.  
3 It's you may consider. This is a very neutral worded  
4 charge.

5 MR. LIEBERMAN: No. No. No. But it's telling  
6 them how to look at it.

7 JUDGE TOM: You may.

8 MR. LIEBERMAN: But you - - - but compare it to  
9 how - - -

10 CHIEF JUDGE DIFIORE: It's a permissive  
11 instruction to the jury.

12 MR. LIEBERMAN: That - - - that - - that's right.  
13 Definitely permissive, but again, if it's within the ken of  
14 the jurors why are they being - - - being told how to do  
15 it. If it's not within the ken, why are they being told it  
16 at all and not - - -

17 JUDGE RIVERA: What that tell - - - what's the  
18 part that tells them how to do it?

19 MR. LIEBERMAN: Excuse me?

20 JUDGE RIVERA: What's the part of the instruction  
21 that tells them how to do it, whatever the it is.

22 MR. LIEBERMAN: It says - - - it says: "Some  
23 people have greater difficulty in accurately identifying  
24 members of a different race than they do in identifying  
25 members of their own race."

1 JUDGE RIVERA: You agree with that. You said the  
2 People agree with that.

3 MR. LIEBERMAN: It's not a question of agreeing  
4 or disagreeing. I'm - - - I'm talking about that's not a  
5 neutral statement. You could also say, you know, people,  
6 when it's dark out it's really hard to see people and hard  
7 to make out their features. When the distance is long,  
8 it's really - - - and if the court goes on and on about all  
9 these things you know what - - - what's that - - - there's  
10 so much in the literature of psychology now about framing.  
11 If you frame instructions in a different way, it's going to  
12 skew how people make decisions. So we want jurors to make  
13 fair decisions, present the information to them neutrally  
14 so they're not pushed in either direction. Do not tell  
15 them things that's not within their ken. If it's within  
16 their ken they know what to do and just propose it  
17 neutrally.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 Counsel.

20 MR. LAISURE: Your Honor - - -

21 JUDGE GARCIA: Counsel, just to follow up on your  
22 - - - your last answers to Judge Tom, I was a little  
23 confused. I thought the rule you were advocating was  
24 unless they agree it's not given, the parties agree, it's  
25 given. There's no assessment of what the ID was here.



1 MR. LAISURE: That - - - well, there isn't with  
2 respect to - - - to the charge being given.

3 JUDGE GARCIA: Right.

4 MR. LAISURE: I - - - what I understood Judge Tom  
5 to be asking was what basis would there be for determining  
6 whether it applied in a - - - in a given case.

7 JUDGE GARCIA: What if the jury comes out and  
8 says you gave us this cross-racial instruction and why? We  
9 don't see it?

10 MR. LAISURE: Then - - -

11 JUDGE GARCIA: What's the instruction you give  
12 back?

13 MR. LAISURE: That's - - - the instruction you  
14 give back is simply it's up to you to decide whether - - -  
15 whether there is an effect or not. Whether - - - you know,  
16 whether - - - I mean, sorry. Whether there was a cross-  
17 racial identification or not. The beauty of having the  
18 jury do it is that if they find that it's - - - there's  
19 very little indication that there's a cross-racial ID then  
20 they're probably also going to find very little effect. If  
21 they find there is a racial - - - cross-racial ID, then  
22 they might have more of a - - - of an effect to talk about.  
23 To split it up between the judge and the jury doesn't seem  
24 to make sense to me.

25 JUDGE RIVERA: So is it - - - is it within the



1 ken?

2 MR. LAISURE: No. I don't think it is within the  
3 ken. I think about half of the jurors on any given panel  
4 are - - - are not going to realize that there's a cross-  
5 racial effect.

6 JUDGE STEIN: Then - - - then, then don't we  
7 usually require expert testimony in those circum- - - -

8 MR. LAISURE: Yes. We do. And there's no need  
9 to do it here - - -

10 JUDGE STEIN: And why is that different?

11 MR. LAISURE: Because there - - - what would the  
12 - - - what would the expert say that's different from the  
13 charge? Not - - - there is no other information the expert  
14 can give to the jury other than here's the effect. But - -  
15 -

16 JUDGE STEIN: Well, do we give a charge for DNA  
17 evidence? Do we give a charge for child abuse, child  
18 sexual abuse syndrome? I mean there's - - - there are a  
19 lot of things that experts testify - - -

20 MR. LAISURE: Certainly.

21 JUDGE STEIN: - - - about that we don't give  
22 charges for.

23 MR. LAISURE: That's right. Because there are  
24 lots of factors to be considered in rape trauma syndrome  
25 and other kinds of identification situations.



1 JUDGE STEIN: Well, but isn't that - - - isn't  
2 that the argument here that there are lots of factors to be  
3 considered and - - - and we're just, you know - - -

4 MR. LAISURE: There's one factor.

5 JUDGE STEIN: - - - skimming the surface? Well,  
6 there are some studies - - - and I'm not saying that we do  
7 or don't agree with them - - - that says that the amount of  
8 exposure you have to members of other races and - - - I  
9 mean there may be a whole bunch of other things that we  
10 don't know yet. I'm - - - I'm just trying to figure out  
11 what makes this so different - - -

12 MR. LAISURE: Right.

13 JUDGE STEIN: - - - from every other jury charge  
14 that we give on any subject in our - - - in our courts.

15 MR. LAISURE: Part of it is we have a cart and a  
16 horse problem. The cart is - - - is - is the question of -  
17 - - of how many contacts, what kind of contacts. That is I  
18 - - - what I think is the People's obligation to mitigate  
19 the effect if they want. They want to call a witness, an  
20 expert witness, who talks about, okay, this is - - - and  
21 they can - - - they can examine their witness. It's their  
22 witness. They have control over about what history that  
23 person may have. And they bring their expert in and say  
24 these are just the kind of things that makes for a more  
25 reliable cross-racial identification. They can do that.



1 But the - - - the horse is the cross-racial effect to begin  
2 with. That's what the defense is entitled to, and that's  
3 very simple. It's very straightforward as Your Honor  
4 pointed out. There's nothing that an expert can really add  
5 to that. So - - - so that's where we start, and then the  
6 People can - - - can bring in mitigation evidence if they  
7 need.

8 JUDGE RIVERA: What's wrong with - - - with the  
9 People's suggestion just make it neutral?

10 MR. LAISURE: Because it doesn't - - - it doesn't  
11 establish for the - - - for the jury what the effect is.  
12 You have to tell the jury there is an effect. It's not  
13 neutral. There isn't anything neutral about it. People  
14 have more difficulty, you know, recognizing someone of a  
15 different race. That's not a neutral statement. That's a  
16 fact, though, given what we know about the research.

17 JUDGE STEIN: But why - - - why shouldn't we let  
18 the judges, as we do in so many other issues, look at the  
19 proof and see if there's any reasonable chance that this  
20 could be a mistaken ID because of cross-racial  
21 identification problems and then decide in the exercise of  
22 the court's discretion whether to grant the - - - to give  
23 the charge or not?

24 MR. LAISURE: Because the judge is in no better  
25 position than the jury, Your Honor, respectfully. The



1 judge has the same kind of perception abilities that the  
2 jurors have. And as I said - - -

3 JUDGE STEIN: But that's true with regard to  
4 lighting and distance and - - - and - and all sorts of  
5 things, right?

6 MR. LAISURE: But those are all within the - - -  
7 within the ken of the jurors. That's why the judge can  
8 decide whether or not it's necessary to give that  
9 instruction, and that's why I think Knight and Whalen can  
10 survive this case. It's not within the ken of the jurors  
11 that the - - - that there is this effect. And it's  
12 actually antithetical to most juror's understanding of IDs  
13 being so infallible, which we know they're not.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.

15 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Otis Boone, No. 55 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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