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Court of Appeals No. 64466-1-1

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BRYAN ALLEN,

Petitioner.

**FILED**  
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STATE OF WASHINGTON

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[CORRECTED] MEMORANDUM OF *AMICUS CURIAE*  
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN  
SUPPORT OF PETITION FOR REVIEW

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Fred T. Korematsu Center for Law and Equality (Korematsu Center) is a non-profit organization based at Seattle University School of Law that works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied military orders during World War II that led ultimately to the incarceration of 110,000 Japanese Americans. He took his challenge to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to successfully vacate his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center has a special interest in promoting fairness in the courts of our country. The Korematsu Center does not, in this memorandum or otherwise, represent the official views of Seattle University.

## **II. INTRODUCTION AND SUMMARY OF ARGUMENT**

Whether this Court should mandate a jury instruction on cross-racial eyewitness identification is a question of substantial public interest and constitutional significance. Most jurors do not know that cross-racial eyewitness identification is not very reliable and is the single leading

cause of wrongful convictions. Additionally, as the Court of Appeals points out, there exists an apparent conflict in Washington State Supreme Court precedent. The Court of Appeals cannot resolve this issue. Only the Supreme Court can determine whether cross-racial eyewitness identification is sufficiently problematic that it ought to be given "a special kind of attention." *State v. Carothers*, 84 Wn.2d 256, 268, 525 P.2d 731 (1974), *overruled on other grounds by State v. Harris*, 102 Wn.2d 148, 685 P.2d 584 (1984).

Accordingly, the Court should grant Allen's Petition for Review to determine whether to require jury instructions regarding this evidence. *See* RAP 13.4(b).

### **III. THE COURT SHOULD GRANT ALLEN'S PETITION FOR REVIEW**

#### **A. CROSS-RACIAL EYEWITNESS IDENTIFICATION IS INHERENTLY UNRELIABLE**

During a recent trial in Maryland a Hispanic eyewitness identified a young black man sitting at the defense table as the perpetrator. David E. Aaronson, *Cross-Racial Identification of Defendants in Criminal Cases*, 23 Crim. Just. 4 (2008). Unbeknownst to the witness, the young black man he pointed to was not the defendant. *Id.* In fact, the young black man was a law student, representing the defendant as part of a legal clinic. *Id.*

Allen's conviction also rests upon untrustworthy eyewitness identification. Gerald Kovacs, a white man, identified a black man who was found near the scene of the crime. The officers presented Allen to Kovacs as their prime (and only) suspect and asked Kovacs to identify him from 15-20 feet away, while Allen was wearing large sunglasses and a lowered hat. This flawed identification process exacerbated the critical issue presented in this case: Kovacs was identifying an individual of another race.

Although the Court is not being asked to consider the validity of eyewitness testimony generally, Washington appellate courts have emphasized that eyewitness testimony is problematic.<sup>1</sup> *State v. Allen*, 161 Wn. App. 727, 734, \_\_\_ P.3d \_\_\_ (2011). As this Court recently pointed out, nearly 80% of wrongful convictions were based on eyewitness identification – identifications that we now know were wrong. *State v. Riofta*, 166 Wn.2d 358, 371, 209 P.3d 467 (2009). But the issue here is not eyewitness identification generally, but rather the unique problems caused by *cross-racial* eyewitness identification, particularly. As the opinion

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<sup>1</sup> In one A-recent study found that eyewitnesses have had a 50% error rate. Jennifer E. Dysart *et al.*, *Show-ups: The Critical Issue of Clothing Bias*, 20 APPLIED COGNITIVE PSYCHOL. 1009, 1017-18, 1019 (2006). The researchers concluded "that if a person who resembles the perpetrator is apprehended near the scene of the crime, and is wearing distinct clothing similar to that described by the eyewitness, the likelihood of false identification is considerable." *Id.* All cited social sciences articles are attached as Appendix A.

below acknowledged, “cross-racial identification . . . is an especially problematic identification.” *Allen*, 161 Wn. App. at 735.

Data collected over the past 30 years demonstrates that cross-racial identification is exceptionally unreliable and prone to error. Eyewitnesses are 1.56 times more likely to falsely identify an individual if the individual is of another race. See Christian A. Meissner and 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).<sup>2</sup> The problem is serious and widespread: 36% of wrongful convictions uncovered by DNA analysis involved whites misidentifying blacks. James M. Doyle, *Discounting the Error Costs*, 7 PSYCHOL., PUB. POL’Y AND L. 253 (2001). Innocent people are being sent to prison based on erroneous cross-racial identifications.

In Washington, convictions based on cross-racial identifications occur frequently and generate difficult appellate issues. Since 2010, five appellate decisions in Washington have involved cross-racial identification. *Allen*, 161 Wn. App. 727; *State v. Jaime*, 168 Wn.2d 857, 233 P.3d 554 (2010); *State v. Seals*, No. 63883-1-I, 2011 WL 1226896

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<sup>2</sup> Another study found that witnesses falsely identified suspects 50% of the time, and falsely identified lineup “foils” (unrelated similar-looking individuals inserted into lineups) 24% of the time. See Bruce W. Behrman & Sherrie L. Davey, *Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 L. AND HUMAN BEHAV. 475, 482 (2001).

(Wn. App. Div. I, April 4, 2011); *State v. Hassan*, No. 63556-5-I, 2010 WL 4409691 (Wn. App. Div. I, Nov. 8, 2010); *State v. Conley*, No. 37970-8-II, 2010 WL 2283509 (Wn. App. Div. II, June 8, 2010).

**B. MOST JURORS ARE UNAWARE THAT THIS TESTIMONY IS UNRELIABLE**

Despite the inherent risks linked to cross-racial identifications, juries regularly consider this testimony without judicial guidance regarding its limitations. In fact, contrary to the data, ~~most~~many jurors believe that cross-racial identification is more rather than less accurate. Richard S. Schmechel *et al.*, *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS 177, 200 (2006).<sup>3</sup> This Court has acknowledged that juries need assistance in understanding the limits of cross-racial identification. In *State v. Cheatam* the Court concluded “that where eyewitness identification of the defendant is a key element of the State’s case, the trial court must carefully consider” multiple factors when deciding whether to admit expert testimony regarding the reliability of eyewitness identification. 150 Wn.2d 626, 649, 81 P.3d 830 (2003). One of the factors the Court singled out for consideration is whether the eyewitness and suspect “are of the same

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<sup>3</sup> See also Tanja Rapus Benton *et al.*, *Eyewitness Memory is Still Not Common Sense: Comparing Jurors, Judges, and Law Enforcement to Eyewitness Experts*, 20 APPLIED COGNITIVE PSYCHOL. 115, 119-20 (2006) (finding “large discrepancies” between juror and expert knowledge regarding the reliability of cross-racial identification).

race.” *Id.* The Court reasoned that because most jurors do not know that the cross-racial factor decreases the reliability of the identification, this factor ought to be considered when determining whether to admit expert testimony regarding eyewitness identifications. *Id.* at 645-46 (“[N]umerous studies relied upon by researchers ... show ... certain subjects thought to be commonly understood are actually not as straightforward as thought. [T]here are numerous studies showing that contrary to many jurors’ beliefs upon questioning, it is more difficult for people of one race to identify people of a different race.”) (emphasis added). See also *United States v. Hines*, 55 F. Supp. 2d 62, 72 (D. Mass. 1999) (“While jurors may well be confident that they can draw the appropriate inferences about eyewitness identification . . . their confidence may be misplaced, especially where cross-racial identification is concerned.”) (emphasis added) (citation omitted).

### **C. CAUTIONARY JURY INSTRUCTIONS OFFER A LOW-COST ALTERNATIVE TO EXPERT TESTIMONY**

Since *Cheatam*, some courts have admitted expert testimony regarding eyewitness testimony and cross-racial identification. However, expert testimony is often unavailable because its costs are prohibitive. As Judge Ellington points out in her concurrence which Judge Cox joined, “such experts are few and expensive, and it is unrealistic to suppose an

expert will be available and affordable in every case where cross-racial identification is a key part of the State's evidence." *Allen*, 161 Wn. App. at 757 (Ellington, J., concurring). Issuing cautionary jury instructions is a low-cost alternative to expert testimony and provides valuable information to jurors regarding the nature of cross-racial identifications.

Moreover, a cautionary instruction will have benefits beyond the juror box. Such an instruction will indirectly instruct prosecutors and law enforcement officers that cross-racial identifications should be treated with caution, thereby encouraging officers to collect more corroborating evidence where a cross-racial identification is involved. In this way, a cautionary instruction helps produce a more reliable adversarial process.

Because the Court agrees that cross-racial eyewitness identification is a problem about which jurors are unaware, it should grant review in this case to determine whether trial courts should require cautionary jury instructions regarding cross-racial identifications.<sup>4</sup>

**D. THE SUPREME COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT REGARDING THE REQUIREMENT OF CAUTIONARY JURY INSTRUCTIONS**

In its decision, the Court of Appeals points out an apparent conflict between two Supreme Court cases.

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<sup>4</sup> As Judge Ellington writes in her concurrence to the decision below, "[the court] should advise jurors of a fact known to us but contrary to their intuition: that cross-racial identification should be carefully scrutinized. We can draft such an instruction without making a judicial comment on evidence, and I believe it is past time to do . . ."

In 1974 this Court mandated a cautionary jury instruction on accomplice testimony because that evidence has been shown to be particularly problematic. *Carothers*, 84 Wn.2d at 267. The Court reasoned that judges have an expertise regarding accomplice testimony that a juror cannot be expected to have. *Id.* at 267-70. This expertise came after years of observing an adversarial process where innocent people had been convicted based upon accomplice testimony. *Id.* at 268. This Court concluded that “the jury must be advised that the accomplice is a special kind of witness, required, as a matter of law, to be given a special kind of attention.” *Id.*

Ten years after *Carothers*, this Court expressed a reluctance to require a specific cautionary jury instruction regarding cross-racial identification in *State v. Laureano*, 101 Wn.2d 745, 767-68, 682 P.2d 889 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 132-33, 761 P.2d 588 (1988). However, in *Laureano* the Court made clear that it was rejecting the defendant’s particular jury instruction in that case because it was “impermissibly slanted.” 101 Wn.2d at 768. The Court emphasized that it “ha[d] not yet ruled whether *Telfaire* instructions are appropriate” for cross-racial identifications. *Id.* The *Laureano* Court never addressed *Carothers*.

As the Court of Appeals correctly points out, “[t]he rationale

applied in *Carothers* could apply in equal force to a cross-racial eyewitness identification instruction[.]” *Allen*, 161 Wn. App. at 745.

“Basic fairness requires that jurors be informed about established frailties in certain kinds of evidence when such frailties are not common knowledge.” *Id.* at 757 (Ellington, J., concurring). Like uncorroborated accomplice testimony, a conviction should not rest solely on cross-racial eyewitness identification unless “the jury has been sufficiently cautioned by the court to subject the . . . testimony to careful examination and to regard it with great care and caution.” *Carothers*, 84 Wn.2d at 269. But without more guidance, the Court of Appeals decided it was bound by *Laureano* and could not require the trial court to issue a cautionary instruction.

The time is right to return to this issue. Scientific knowledge of cross-racial identification has developed substantially since 1984. The reluctance expressed in *Laureano* is now anachronistic; this Court and other courts have repeatedly taken notice that cross-racial identification is inherently unreliable. *See Cheatam*, 150 Wn.2d at 649; *State v. Jaime*, 168 Wn.2d 857, 868-69, 233 P.3d 554 (2010), *as amended*, (Sept. 30, 2010) (Sanders, J. concurring) (“I would also reverse and remand because the trial court erred when it excluded relevant expert testimony on [cross-racial] identification.”); *see also Allen*, 161 Wn. App. at 757 (Ellington, J.,

concurring) (“The experience of courts has similarly revealed the frailties of cross-racial identification . . .”).

The Supreme Court should grant review to resolve the conflict between *Laureano* and *Carothers*.

#### IV. CONCLUSION

The Court should grant review because cross-racial identification poses a serious threat to the criminal justice system’s ability to produce just results. Despite the overwhelming data to the contrary, most jurors believe that cross-racial identifications are reliable. The trial court’s refusal to give cautionary jury instructions raises serious doubt about the validity of the jury’s guilty verdict. Additionally, the Court should grant review to resolve a serious conflict in its own precedent that is causing confusion in the lower courts.

RESPECTFULLY SUBMITTED this \_\_\_\_ day of August, 2011.

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By \_\_\_\_\_

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