APL-2023-00099

To be argued by
MICHAEL J. YETTER
(20 Minutes Requested)

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

MARK WATKINS,

Defendant-Appellant.

BRIEF FOR RESPONDENT

ALVIN L. BRAGG, JR.
District Attorney
New York County
Attorney for Respondent
One Hogan Place
New York, New York 10013
Telephone: (212) 335-9000
Facsimile: (212) 335-9288
danyappeals@dany.nyc.gov

STEVEN C. WU
CHIEF, APPEALS DIVISION
STEPHEN J. KRESS
MICHAEL J. YETTER
ASSISTANT DISTRICT ATTORNEYS
Of Counsel

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COURT OF APPEALS
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-against-

MARK WATKINS,

Defendant-Appellant.

BRIEF FOR RESPONDENT

PRELIMINARY STATEMENT

By permission of the Honorable Shirley Troutman, Associate Judge of the Court of Appeals, defendant Mark Watkins appeals from a June 9, 2022 order of the Appellate Division, First Department. By that order, the Appellate Division unanimously affirmed a March 26, 2018 judgment of the Supreme Court, New York County, convicting defendant, after a jury trial, of Attempted Assault in the First Degree (Penal Law §§ 110.00, 120.10[1]), Assault in the Second Degree (Penal Law § 120.05[2]), and Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02[1]). Defendant was sentenced, as a second violent felony offender, to an aggregate term of 13 years in prison to be followed by five years of post-release supervision. He is currently incarcerated pursuant to that judgment.

The judgment arose from an attack that occurred at about 1:00 p.m. on October 7, 2016, on East 103rd Street in the East Harlem neighborhood of Manhattan. Defendant, who is Black, approached 65-year-old David Pena, a non-Black Hispanic who was a 25-year resident of East Harlem, and punched Pena in the face with his right hand while clutching a hard object, fracturing Pena's left orbital bone. During the subsequent interaction, Pena looked at defendant's face for about 10 seconds from a distance of approximately 10 to 15 feet before defendant walked away.

On October 10, 2016, Pena reported the attack to the police. A detective had Pena view 462 mugshots of Black men who matched the description Pena had provided, but Pena correctly said that none of the mugshots were of his attacker. Two days later, Pena called 911 when he saw defendant; police then stopped a Black man who they thought matched the description Pena had given them. Pena correctly told the police that the man they had detained was not the man who had attacked him. The next morning, Pena saw defendant again and called the police. When the police arrived, Pena pointed defendant out, and defendant was arrested.

By New York County Indictment Number 4292/2016, filed on November 4, 2016, defendant was charged with one count each of attempted first-degree assault, second-degree assault, and third-degree criminal possession of a weapon. At trial, the defense theory was that Pena was mistaken when he identified defendant as his attacker. During the charge conference, defense counsel asked the judge to give the pattern jury instruction on single-witness identifications but did not request a separate instruction

on cross-racial identifications. On July 21, 2017, the jury convicted defendant of all counts. On March 26, 2018, defendant was sentenced as noted above.

The Appellate Division, First Department affirmed, rejecting defendant's argument that his trial attorney had been ineffective for failing to request a cross-racial identification charge. The court found that defendant's ineffective-assistance claim was unreviewable on direct appeal because it involved "matters not fully explained by the record." People v. Watkins, 206 A.D.3d 452, 453 (1st Dept. 2022). In the alternative, the court rejected defendant's claim on the merits, concluding that he had shown neither that "it was objectively unreasonable for counsel to refrain from requesting a jury charge on cross-racial identification," nor that "such a request would have been granted at the time of the trial, or that the absence of such a charge affected the outcome of the case." Watkins, 206 A.D.3d at 453.

This Court should affirm. Defendant's sole argument on appeal is that his trial counsel was constitutionally ineffective for failing to request a cross-racial identification charge. Defendant's argument is a categorical one: according to him, his counsel was required to request such a charge regardless of the weakness of any attack on Pena's cross-racial identification, and regardless of any reasons his trial counsel may have had for declining to pursue such a fruitless attack. For defendant, those factors are irrelevant because there could be no conceivable strategic reason not to request a cross-racial identification charge whenever a case involves a single-witness cross-racial identification.

Defendant's categorical argument is inconsistent with this Court's well-established ineffective-assistance precedents. When a defendant challenges his counsel's performance as ineffective based on a single alleged error, the error must be so egregious, clear-cut, and completely dispositive in light of the record that no reasonable attorney would have made it. Here, there was no clear legal or factual support for requesting a cross-racial identification charge at the time of defendant's trial. As a legal matter, this Court had not yet decided People v. Boone, 30 N.Y.3d 521 (2017), which for the first time held that a cross-racial identification charge was available upon demand. As a factual matter, the record developed at trial included concrete evidence that the eyewitness, Pena, had no difficulty making this cross-racial identification. Reasonable defense counsel could thus have concluded that any challenge to Pena's identification on cross-racial grounds was so weak as to not be worth making, especially in comparison to other, stronger challenges.

Defendant disregards these factors by asserting that counsel is constitutionally ineffective any time he omits an argument from which defendant has "everything to gain and nothing to lose." But this Court has consistently declined to adopt such a view of ineffective assistance and, to the contrary, has repeatedly recognized that counsel can reasonably decline to pursue a weak argument, even if presenting such an argument would not affirmatively harm the defendant.

Finally, even if counsel should have requested the charge, his failure to do so did not prejudice the defense or deprive defendant of a fair trial. As the Appellate Division

correctly concluded, there is no indication that the trial court would have granted such a charge prior to Boone, and even less indication, given the trial record, that the jury would have drawn the adverse inference permitted but not mandated by the cross-racial identification charge.

QUESTION PRESENTED

Has defendant conclusively established on the existing record that his attorney was constitutionally ineffective solely for not requesting a cross-racial identification charge, when (1) there were legitimate reasons that counsel might not have requested the charge, including the weakness of any challenge to the particular witness's cross-racial identification; and (2) there was no reason to conclude that the court would have granted the request or that the jury would have drawn an adverse inference against the eyewitness's ability to identify a defendant of a different race?

STATEMENT OF THE CASE[1]

A. The Evidence at Trial

1. Defendant Attacks Pena on October 7, 2016.

In October 2016, DAVID PENA was a 65-year-old handyman who worked at three buildings located next to each other on East 103rd Street in Manhattan. Pena, who is non-Black Hispanic, was born in the Dominican Republic and moved to New York City in 1991 or 1992. He lived in East Harlem with his wife and had worked as a handyman in the same buildings since 2005 (Pena: A21-25, 82).

On Friday October 7th, Pena took a smoke break at about 1:00 p.m. As he stood on the sidewalk, he was approached by defendant, who was walking west toward Park Avenue. Defendant was holding an object in his right hand and had a dark-colored hoodie draped over his right shoulder. As Pena was looking up at the sky, defendant forcefully struck Pena with the object on Pena's left cheek (People's Exh. 4 [surveillance video], Video 1, 0:00:00-0:00:11; id., Video 2, 0:00:00-0:00:12; Pena: A21, 23-27, 30, 75, 82-83, 102).[2] The object was hard, "like a piece of cement"

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[1] Unless otherwise specified, parenthetical references preceded by "A" are to Defendant's Appendix; those preceded by "SA" are to the People's Supplemental Appendix.

[2] People's Exhibit 4, which will be submitted under separate cover, contains two video files, named "Det Turner video 1" and "Det Turner video 2." Both videos depict the incident from a camera that is oriented to the northeast on East 103rd Street. The second video is 16 seconds longer. That video shows defendant hitting Pena, as well as their subsequent interaction. It also shows an additional camera angle from the same building that is oriented northwest on East 103rd Street. References to time in the citations to the videos refer to the time reflected on the video player.

(Pena: A30, 87, 117). As a result of the blow, Pena felt some pain in his face, but he did not lose consciousness or suffer memory loss (Pena: A32-34, 116).

Immediately after being hit, Pena went to the basement of 124 East 103rd Street and retrieved a wooden stick. Meanwhile, defendant paced back and forth outside. Armed with the wooden stick, Pena left the building, approached defendant, and, from a distance of about two car lengths, which Pena estimated to be about 10 to 15 feet, asked, "Why did you hit me?" (People's Exh. 4, Video 1, 0:00:11-0:00:23; id., Video 2, 0:00:12-0:00:25; Pena: A27, 28-29, 62-63, 103, 115-16). Defendant did not respond to Pena's question; he instead stood facing Pena for about five seconds, and, at one point, briefly pointed at Pena with his right hand. Defendant then turned his back to Pena and walked a few steps before turning and facing Pena again for another five or six seconds (Pena: A27, 63-66, 111, 117; People's Exh. 4, Video 1, 0:0023-0:00:38; id., Video 2, 0:00:25-0:00:40).

When defendant looked in Pena's direction, Pena saw his face. It was sunny, the weather was clear, and there was nothing between the two men obstructing Pena's view. Pena had not consumed any alcohol or other intoxicating substances that day (Pena: A27-29, 64-65). He saw that defendant was Black, that he had a shaved head and a "little bit of a beard," and that he was holding a hoodie in his hand (Pena: A31). Defendant was a little taller and heavier than Pena, who was about 5'10" and weighed 150 pounds (Pena: A31-32, 93). Pena had seen defendant on East 103rd Street the day

before the attack, but he did not realize that it had been defendant until after the attack (Pena: A38-40, 142).[3]

Defendant then walked away from Pena and headed west toward Park Avenue. Pena followed defendant but lost sight of him once defendant went under the Metro North train tracks above Park Avenue (Pena: A27, 32, 63, 71-72, 117; People's Exh. 4, Video 1, 0:00:38-43; id., Video 2, 0:00:40-0:01:08). Pena returned to work, gathered his tools, and, a half hour later, went home. Although he told his boss and co-workers that he had just been assaulted, he did not call 911. At home, Pena took Excedrin for the pain he was experiencing, but he did not take any other medicine or seek medical treatment that day. He noticed that he had some bruising on the left side of his face as a result of the attack (Pena: A34-35, 37, 83, 85, 92, 118).

2. Pena Reports the Attack to the Police, Prompting an Investigation that Culminated in Defendant's Arrest.

Three days later, on October 10, 2016, Pena's face was "looking bad," so he went to the 23rd Police Precinct stationhouse and filed a report regarding the October 7 attack. Pena spoke first with a uniformed police officer, and was then brought to the Detective Squad, where he spoke with Detective FACELIS TURNER (Pena: A40-41, 93-94; Turner: A150, 160-62). Pena told Turner what had happened to him and described his attacker as a Black man who was a little taller than him. The man wore

[3] At trial, Pena initially denied having seen defendant before October 7, 2016, answering, "No. No" (Pena: A38). He then clarified that he saw defendant on October 6, 2016, when defendant walked by him on East 103rd Street (Pena: A38-39).

black or brown pants, a white t-shirt, and tennis shoes, and he had a hoodie (Pena: A41-42, 101, 119-20; Turner: A150-52, 160, 163). Pena told Turner that he had seen the attacker more than once before the attack (Turner: A160).[4]

Detective Turner took the description Pena had given her and input the pertinent information into the NYPD's Photo Manager computer program, which stores mugshots of people who have been arrested anywhere in New York City (Turner: A148-49, 152, 159). Specifically, Turner input that the suspect was a Black man, between 25 and 35 years old, whose height was between 5'8" and 5'11";[5] she limited the geographic area to the 23rd Precinct (Turner: A153, 155-56). Pena then reviewed 462 mugshots, none of which were of defendant, and accurately told Turner that he did not see his attacker in any of them (Pena: A42-43; Turner: A156-57, 184).

During their meeting, Detective Turner took a photograph of Pena's face because she saw bruising below his left eye (Turner: A151-52). Before Pena left the stationhouse, Turner told Pena to call 911 if he saw defendant again (Pena: A43; Turner: A157). Afterwards, Turner tried to locate video footage of the attack. She

4 At trial, the People entered a "DMV Driving Abstract" into evidence through Department of Motor Vehicles ("DMV") representative WAN WONG. The abstract, dated June 27, 2017, listed defendant's address as 50 East 104th Street, Apartment 3A (Wong: A257-65; see A434 [People's Exh. 11 (Defendant's Abstract of Driving Record)]).

5 At trial, Turner explained that she chose this height range because Pena was 5'10" and said the assailant was both "taller" than him and "[his] height" (Turner: A154). She added that because, in her experience, even police officers' estimates of height can be inaccurate, she chose that height range to leave room for error (Turner: A154, 163-69).

recovered video from 122 East 103rd Street by contacting the building's superintendent (Turner: A156-57, 184, 186).[6]

Two days later, on October 12, 2016, Pena called 911 at about 9:20 a.m. after he saw defendant walking west on East 103rd Street near Park Avenue (Pena: A44-45, 121, 123-24). Uniformed Police Officer EDWIN SANCHEZ and his partner responded to a radio transmission stating that a 911 caller had seen someone who had previously committed a crime against them. Sanchez drove his marked patrol car to East 103rd Street and Park Avenue, where the officers met Pena (Sanchez: A245-50). Sanchez spoke with Pena, confirmed that Pena had called 911, and had Pena get into the back of the patrol car so they could canvass the area (Pena: A45; Sanchez: A250).

At approximately the same time, uniformed Police Officer JOSEPH KING and his partner were driving in a marked patrol car on East 102nd Street when they received the same radio transmission as Officer Sanchez. The transmission included a description of the suspect as a tall Black man who was wearing a hat and a blue hoodie and who was walking west toward Madison Avenue and Mount Sinai Hospital (King: A202-05, 220-21). King saw a man that matched that description on East 102nd Street, halfway between Park Avenue and Madison Avenue. He drove slowly behind the man until the man entered a Duane Reade located on the corner of East 102nd

[6] Because the DVR system was locked, Turner filmed the surveillance video on her iPhone while it played on the monitor (Turner: A158-59).

Street and Madison Avenue (King: A205-06, 221-23). At that point, King radioed the other officers and told them to bring Pena to that location so that he could conduct a show-up identification procedure. King then entered the Duane Reade, stopped the man, told him that he was a suspect in an assault case, and brought him to the store's entrance (King: A207-09, 223-25).

Officer Sanchez drove Pena to Duane Reade and, from the back of Sanchez's patrol car, Pena viewed the man in King's custody (Pena: A45-47; Sanchez: A251-52). Pena looked at the man, who was flanked by two police officers, and correctly told the officers that the man was not his attacker. Sanchez gave a thumbs-down signal to King, and the man was released (Pena: A46-47; King: A209-11, 224; Sanchez: A252-53).

Afterwards, Officer Sanchez continued canvassing the area with Pena. As they drove around, Pena told Sanchez that the attacker was a Black man in his thirties with a beard with a blue hoodie and a black jacket (Pena: A47; Sanchez: A253-54). Sanchez put this description out over the radio but did not see anyone who matched that description as they drove around. When the canvass ended, Sanchez told Pena to call 911 if he saw his attacker again. Sanchez added that, if Pena called 911 again, he should stay in the same location, wait for the police to respond, and refrain from saying anything to the person (Sanchez: A255-56).

The next day, October 13, 2016, at about 9:35 a.m., Pena left the building he was working in and walked out onto East 103rd Street to buy a cup of coffee. He saw defendant on the street again and watched as defendant sat down and smoked a

cigarette in front of a pizzeria on East 103rd Street, between Lexington Avenue and Third Avenue. Defendant was alone. Pena called the police and said that he was looking at the man who had attacked him on October 7 (Pena: A48-49, 124). Officer King and his partner drove to that location and met Pena. Pena pointed across the street to where defendant was sitting. King approached defendant and placed him under arrest (Pena: A49-50, 124; King: A214-16, 231-33). King drove defendant to the 23rd Precinct stationhouse where defendant was photographed (King: A217-19, 233; A433 [People's Exh. 10 (photograph of defendant)]). Pena also went to the stationhouse, where additional photographs of his facial injuries were taken (Pena: A50-52).

3. Pena Goes to the Hospital and is Diagnosed with a Fractured Orbital Bone.

On October 14, 2016, Pena went to Metropolitan Hospital because his face had gotten progressively more swollen and was hurting "very much" (Pena: A57-58). He was also experiencing dizziness and headaches (Pena: A125). At the hospital, Pena was diagnosed with a fracture of his left orbital bone (see Pena: A58-59). Doctors gave him Tylenol or Excedrin to manage his pain and he went home the same day. After taking the pain medication, Pena "was forgetting things" and had "hallucinations," which to him meant that he got dizzy and "a little stupid in the head" (Pena: A59, 125, 138). He was in pain for another 15 days and the facial swelling went down within a month (Pena: A59, 126-27). Pena did not return to the hospital or follow up with a clinic after October 14th (Pena: A126-27).

*   *   *

At trial, Pena identified defendant as the man who had attacked him on October 7, 2016; as the man depicted in the surveillance video attacking him; and as the man he saw and pointed out to the police on October 13, 2016 (Pena: A30, 70-71). Officer King identified defendant as the person he arrested after Pena pointed defendant out on October 13, 2016 (King: A215-16, 232-33).

B. The Charge Conference

At the charge conference, the prosecutor requested, as relevant here, that the judge give the jury the "Witness Plus" identification charge from the Criminal Jury Instructions ("CJI") (Charge Conference: A297). Defense counsel countered that the jury should instead receive the CJI's "One Witness" identification charge, which is the same as the "Witness Plus" charge except for two additional paragraphs specifically directed at cases involving single-witness identifications (Charge Conference: A298). The court agreed and said it would deliver the "One Witness [c]harge" because the only evidence identifying defendant as the perpetrator in this case came from one witness (Charge Conference: A301-02).

The court accordingly decided to instruct the jury that, in evaluating the accuracy of an identification, the jury should consider a non-exhaustive list of factors (as identified in the "Witness Plus" charge):

> What were the lighting conditions under which the witness made his/her observation?

What was the distance between the witness and the perpetrator?

Did the witness have an unobstructed view of the perpetrator?

Did the witness have an opportunity to see and remember the facial features, body size, hair, skin color, and clothing of the perpetrator?

For what period of time did the witness actually observe the perpetrator? During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

Did the witness have a particular reason to look at and remember the perpetrator?

Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the defendant, as you find the defendant's appearance to have been on the day in question?

What was the mental, physical, and emotional state of the witness before, during, and after the observation? To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

Did the witness ever see the person identified prior to the day in question? If so, how many times did the witness see the person and under what circumstances? To what extent, if any, did those prior observations affect the witness's ability to accurately recognize and identify such person as the perpetrator?

When and under what circumstances did the witness identify the defendant? Was the identification of the defendant as the person in question suggested in some way to the witness before the witness identified the defendant, or was the identification free of any suggestion?

CJI2d(NY) Identification – Witness Plus.

The court then added the additional paragraphs from the "One Witness" identification charge:

> Our system of justice is deeply concerned that no person who is innocent of a crime be convicted of it. In order to avoid that, a jury must consider identification testimony with great care, especially when the only evidence identifying the defendant as the perpetrator comes from one witness.
>
> Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the defendant as the person who committed the charged crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince you beyond a reasonable doubt that all elements of the charged crime have been proven and that the identification of the defendant is both truthful and accurate.

CJI2d(NY) Identification – One Witness.

Defense counsel did not request a cross-racial identification charge. At that time, the CJI included a model charge on cross-racial identification that provided:

> 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.

CJI2d(NY) Identification – One Witness (rev. Jan. 2011); CJI2d(NY) Identification – Witness Plus (rev. Jan. 2011).[7]

C. Summations

On summation, defense counsel argued that the key issue in the case was whether the People had proven beyond a reasonable doubt that it was defendant who attacked Pena. Counsel asserted that the answer was "a resounding no" because of asserted doubts about Pena's identification (Defense Summation: A312). Counsel attacked Pena's identification testimony in several respects. Counsel urged the jury to consider that Pena, after being hit with the hard object, was in pain, shocked, puzzled, and angry when he saw his attacker. Counsel also argued that Pena had seen defendant for a "very short time" from a distance of at least two car lengths, which counsel submitted was roughly 30 to 40 feet, and that Pena did not have an opportunity to see defendant again (Defense Summation: A321-24). In addition, counsel asserted that Pena had "[a]bsolutely not" seen the perpetrator before the attack. The jury could infer that,

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[7] The charge was revised following the Court's decision in People v. Boone, 30 N.Y.3d 521 (2017). It now states:

> You should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and if so, you should consider that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race, and, therefore, you should consider whether the difference in race affected the accuracy of the witness's identification.

CJI2d(NY) Identification – One Witness; CJI2d(NY) Identification – Witness Plus.

counsel continued, because Pena did not tell the police or his co-workers that fact, and, if Pena had seen the perpetrator the day before the attack, he would have said that to everyone involved in the case (Defense Summation: A324-28).

Counsel also attacked Pena's credibility in general, contending that Pena's testimony was not credible because he was inconsistent about whether the "hard object" he had been struck with was a piece of concrete or a brick (Defense Summation: A318-19); because he had initially said that he had gone to the hospital on October 9 but, after conferring with the prosecutor during a break, testified that he went to the hospital on October 14 (Defense Summation: A319); and because his testimony that the pain medication given to him by doctors—Tylenol or Excedrin—caused him hallucinations was unworthy of belief (Defense Summation: A321). Counsel thus contended that Pena was "mistake-prone" and that it was "immaterial" whether Pena's mistakes were honest ones (Defense Summation: A329).

Additionally, counsel argued that this case was built upon "sloppy police work" (Defense Summation: A329-30). For example, counsel criticized Detective Turner for inputting heights ranging from two inches shorter than Pena to one inch taller than him into the NYPD Photo Manager system even though Pena told her that his attacker was taller than him. Because defendant's clothing was not vouchered after his arrest, moreover, counsel asserted that the jury should not believe that defendant was wearing a blue hoodie when he was arrested simply because he appeared to be wearing one in his mugshot. Likewise, although the People had introduced a photograph of a nearby

building that was undergoing construction and had loose concrete in front of it, counsel argued that there was no proof that the hard object Pena had been struck with came from that building. And finally, counsel claimed that the jury should discount the testimony of the police witnesses because there was no indication that they had communicated with each other during the investigation and shared information they had learned from Pena, including descriptions of the suspect (Defense Summation: A330-33). Counsel asked the jury to acquit on all counts (Defense Summation: A336).

The prosecutor, for his part, began by noting that Pena had looked at 462 mugshots and a man in a show-up identification, and said that none of those people were his attacker. The prosecutor argued that counsel had not mentioned that evidence because it was "devastating to the defense" (People's Summation: A338). The prosecutor emphasized the quality of Pena's identification testimony and argued that, under the relevant factors, the People had proved beyond a reasonable doubt that it was truthful and accurate (People's Summation: A340-60, 367, 371). The prosecutor contended that defendant's guilt of each crime had been proven beyond a reasonable doubt and asked the jury to find defendant guilty (People's Summation: A364-67, 371).

D. Charge, Verdict, and Sentencing

On July 21, 2017, the court charged the jury, in pertinent part, with the One Witness identification charge, as described above (Jury Charge: A382-85). The same day, the jury convicted defendant as charged (Verdict: A428-32).

On August 22, 2017, defense counsel persuaded the judge to allow him additional time to investigate defendant's mental health history (Aug. 22, 2017 Min.: SA9-15), and, on January 25, 2018, the court ordered defendant to undergo a CPL Article 730 examination (Article 730 Order, dated Jan. 25, 2018: SA16). Defendant was subsequently found fit to proceed (see Article 730 Examination Reports: SA17-29).

At the March 26, 2018, sentencing, defense counsel used the information gathered about defendant's mental health as part of his presentation. Counsel also told the court that defendant was "grateful" that Pena did not suffer a more significant injury. Counsel requested the minimum seven-year sentence (Sentencing: SA38-43). The court sentenced defendant, as a second violent felony offender, to a determinate term of 13 years, to be followed by 5 years of post-release supervision, on the attempted first-degree assault conviction; a determinate prison term of 7 years, to be followed by 5 years of post-release supervision, on the second-degree assault conviction; and an indeterminate prison term of 3.5 to 7 years on the third-degree weapon possession conviction. All sentences were ordered to run concurrently with each other (Sentencing: SA45-46).

E. Appeal to the Appellate Division

Before the Appellate Division, defendant argued that his trial attorney was ineffective for failing to request a cross-racial identification charge; that the verdict was based on legally insufficient evidence and was against the weight of the evidence because the People did not prove his identity as the perpetrator; and that his sentence

was excessive (Defendant's Appellate Division Brief: SA47-79; Defendant's Appellate Division Reply Brief: SA133-43).

On June 9, 2022, the Appellate Division unanimously affirmed. People v. Watkins, 206 A.D.3d 452 (1st Dept. 2022). The Appellate Division held that defendant's ineffective assistance claim was unreviewable on direct appeal "because it involve[d] matters not fully explained by the record." Id. at 453 (citing People v. Rivera, 71 N.Y.2d 705, 709 [1988]; People v. Love, 57 N.Y.2d 998, 999-1000 [1982]). Because defendant had not filed a CPL 440.10 motion, "the merits of the ineffectiveness claim" could not be addressed. Watkins, 206 A.D.3d at 453.

Alternatively, the Appellate Division found that, to the extent the record permitted review, "defendant received effective assistance under the state and federal standards." Id. Defendant had "not shown that it was objectively unreasonable for counsel to refrain from requesting a jury charge on cross-racial identification." Id. Indeed, the Appellate Division noted that, at the time of defendants trial, this Court had not yet decided People v. Boone, 30 N.Y.3d 521 (2017), which for the first time held that the court should grant such a charge upon request. Watkins, 206 A.D.3d at 453. The Appellate Division also found that defendant was not prejudiced by counsel's failure to request the charge because he had not shown that a request for a cross-racial identification charge would have been granted at the time of his trial, "or that the absence of such a charge affected the outcome of the case." Id.

In addition, the Appellate Division rejected defendant's legal sufficiency, weight of the evidence, and excessive sentence claims. Id.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

To establish an ineffective assistance claim under the United States Constitution, a defendant must first demonstrate that his counsel's performance was so deficient that the attorney was not functioning as the professional counsel guaranteed by the Sixth Amendment. That demonstration must overcome the strong presumption that counsel's conduct fell "within the wide range of reasonable professional assistance" appropriate under the circumstances of the case. Strickland v. Washington, 466 U.S. 668, 689-90 (1984). Even if a defendant can surmount that hurdle, he must further demonstrate prejudice—that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

New York law provides a similar two-step standard. On the first prong, as under the federal Constitution, a defendant must show that his counsel's performance fell below a permissible standard of "meaningful representation" considering the evidence, the law, and the circumstances of the particular case, viewed in their totality. People v. Wragg, 26 N.Y.3d 403, 409 (2015); People v. Benevento, 91 N.Y.2d 708, 712 (1998). An attorney is presumed to have provided meaningful representation. See People v. Hobot, 84 N.Y.2d 1021, 1022 (1995). That presumption can be overcome only if the

defendant "demonstrate[s] the absence of strategic or other legitimate explanations for counsel's alleged shortcomings." Benevento, 91 N.Y.2d at 712 (internal quotation mark omitted). In making that assessment, "counsel's efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have been more effective." Id. (citing People v. Satterfield, 66 N.Y.2d 796, 799 [1985]). "The test is 'reasonable competence, not perfect representation.'" People v. Nicholson, 26 N.Y.3d 813, 831 (2016) (quoting People v. Modica, 64 N.Y.2d 828, 829 [1985]).

On the second prong, although a defendant need not "fully satisfy the prejudice test of Strickland" under New York law, People v. Caban, 5 N.Y.3d 143, 155 (2005), he must still show that "counsel's acts or omissions 'prejudice[d] the defense or [his] right to a fair trial.'" Benevento, 91 N.Y.2d at 713-14 (quoting Hobot, 84 N.Y.2d at 1024). This Court has been "skeptical of an ineffective assistance of counsel claim absent any showing of prejudice." People v. Stultz, 2 N.Y.3d 277, 283-84 (2004).

Defendant contends that he was deprived of the effective assistance of counsel here based on a single alleged error: his attorney did not request a cross-racial identification charge. In making that contention, defendant does not identify any evidence in the record establishing that counsel lacked a strategic or legitimate reason for refraining from making that request; nor does he complain about his counsel's performance in any other respect. He instead advocates for a *per se* rule that a defense attorney is ineffective for failing to request the charge in cases involving a disputed

single-witness cross-racial identification, reasoning that in such cases there is only upside, and no downside, to making the request.

This Court should reject defendant's categorical argument and affirm the decision below. It is well-established that defense counsel can be ineffective based on a single trial error only in the rare case where counsel omits a defense that is so clear-cut and dispositive that no reasonable attorney would have declined to pursue it. Here, far from being clear-cut or dispositive, the viability of a cross-racial identification challenge faced both legal and factual impediments. As a legal matter, this Court had not yet decided Boone, and the prevailing law at the time allowed trial courts to reject requests for cross-racial identification charges—including when, as was indisputably the case here, neither defense counsel nor the People introduced evidence at trial suggesting that the eyewitness had difficulty identifying members of another race. As a factual matter, there was concrete evidence in this case that Pena in fact had no difficulty making a cross-racial identification—for example, Pena had looked at over 450 mugshots of Black men and participated in a show-up identification with a Black man, and in both instances correctly told the police that none of the men were defendant. Defense counsel thus could reasonably have concluded that it was not worth making a request for a permissive inference that the court was not likely to grant and that the jury was not likely to apply.

Defendant's insistence that counsel should have requested the charge anyway—because doing so would not have been affirmatively harmful—misstates the law of

ineffective assistance. Defense counsel is not constitutionally obligated to present all available arguments that will not prejudice the defendant, however weak they may be. To the contrary, this Court has repeatedly considered the strength or weakness of an omitted argument to determine whether defense counsel was ineffective for failing to pursue it. And defendant's arguments ignore that there is a cost to pursuing weak arguments, including the risk that doing so will diminish the force of stronger arguments—including, in this case, other challenges to Pena's identification that defense counsel did vigorously pursue.

In any event, even assuming that counsel's performance here fell below constitutional standards, the Appellate Division further correctly concluded that defendant failed to establish prejudice. Here, there was no reason to suppose that the trial court would have granted the charge, or that the jury would have drawn the inference permitted by the charge—i.e., that the difference in race between defendant and Pena affected the accuracy of the identification. Thus, even "if it was a mistake [to not request the charge], it was not one so obvious and unmitigated by the balance of the representational effort as singly to support a claim for ineffective assistance." People v. Blake, 24 N.Y.3d 78, 82 (2014).

ARGUMENT

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR DECLINING TO REQUEST A CROSS-RACIAL IDENTIFICATION CHARGE IN THIS CASE

Defendant contends that his trial attorney was constitutionally ineffective based on a single error: not requesting a cross-racial identification charge as part of his "honest-but-mistaken misidentification defense" (Defense Brief ["DB"]: 2). Because defendant asserts this claim on direct appeal without the benefit of a record on his trial counsel's reasoning, and because defendant identifies only this isolated error without raising broader objections to his counsel's overall performance, defendant can prevail only if there is essentially a *per se* rule of ineffective assistance from failing to request such a charge whenever a prosecution "rest[s] on a stranger cross-racial identification" (DB: 20).

There is no such categorical rule. Depending on the circumstances of a case, defense counsel could reasonably decline to request a cross-racial identification charge—including, as here, when there was good reason to believe that the particular witness's ability to identify defendant was not confounded by defendant's race. No clear-cut rule at the time of defendant's trial provided otherwise. Indeed, a rule requiring defense counsel to request a cross-racial identification charge in nearly every case would be inconsistent with this Court's decision in Boone, which left that strategic choice to defense counsel. Finally, even assuming that counsel's performance here fell below the constitutional standard for meaningful representation, defendant has not

shown that the absence of a request for a cross-racial identification charge caused any prejudice here. This Court should accordingly affirm the decision below.

A. Because defendant identifies only a single trial error and asserts his claim on direct appeal, he can prevail only if there is effectively a *per se* rule requiring counsel to request a cross-racial identification charge in all cases involving disputed single-witness identifications.

Defendant takes the stark position that any time a case involves a disputed single-witness cross-racial identification, a defense lawyer renders constitutionally deficient performance if counsel does not request a cross-racial identification charge (see DB: 2, 20, 25, 28-30). As defendant characterizes his own argument, there can be "no conceivable strategy behind not requesting [such] an instruction" because the instruction will always "strengthen[ ] the defense's honest-but-mistaken misidentification theory" without risking any downsides (DB: 3, 20). Defendant's argument thus deems irrelevant whether there is evidence that racial differences were no impediment to a particular witness's ability to identify a defendant. And it further finds immaterial whether trial counsel might have had reason to focus on other aspects of the defense, including more substantial challenges to a particular witness's identification.

The categorical nature of defendant's appellate argument is dictated by two features of this appeal: his reliance on a single error to support his ineffective-assistance claim; and his decision to raise this claim on direct appeal, without any record developed to probe his trial counsel's possible strategy. On the first point, "[i]solated errors in

counsel's representation generally will not rise to the level of ineffectiveness." People v. Henry, 95 N.Y.2d 563, 565-66 (2000) (internal quotation marks omitted). A single failing by trial counsel will be constitutionally ineffective only if it "involve[s] an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it." People v. McGee, 20 N.Y.3d 513, 518 (2013).

On the second point, ineffective-assistance claims are generally not reviewable on direct appeal because of the absence of "an evidentiary exploration" of trial counsel's strategic choices that could be developed "by collateral or post-conviction proceeding brought under CPL 440.10." People v. Lopez-Mendoza, 33 N.Y.3d 565, 573 (2019) (quoting People v. Brown, 45 N.Y.2d 852, 853-54 [1978]); see also Stultz, 2 N.Y.3d at 284. Without such a record, a claim of ineffective assistance brought on direct appeal can succeed only when any record would essentially be irrelevant: i.e., when there could be "simply no legitimate explanation" for trial counsel's choice. People v. Oliveras, 21 N.Y.3d 339, 348 (2013).

Taken together, these features of the current appeal explain why defendant can only prevail if this Court adopts his *per se* rule here. It must have been so clear-cut that declining to request a cross-racial identification charge was error, and such a charge must have been so obviously helpful to defendant, that no reasonable defense counsel could have declined to request the charge. Absent such a showing, "the limited record in this case [would] not conclusively establish that counsel was ineffective," Lopez-Mendoza, 33 N.Y.3d at 572, and defendant would fail to satisfy his "burden of showing

… the absence of strategic or other legitimate explanations for counsel's challenged actions." People v. Clark, 28 N.Y.3d 556, 563 (2016).

B. At the time of defendant's trial, and under the circumstances of this case, it was not clear-cut that requesting a cross-racial identification charge would have been a winning strategy.

Contrary to defendant's arguments, it was far from clear-cut at the time of his trial that requesting a cross-racial identification charge was legally required, or that doing so would even have been factually supported in this case. Defendant thus cannot show that this case is one of the "rare" ones where "a single failing in an otherwise competent performance is so egregious and prejudicial as to deprive a defendant of his constitutional right" to effective representation. Turner, 5 N.Y.3d at 480 (quotation marks omitted).

As a legal matter, when defendant was convicted in July 2017, this Court had not yet decided Boone, which for the first time held that defendants were entitled to a cross-racial identification charge upon request. Thus, "there was then no legal authority absolutely entitling [the defendant] to the judicial instruction [counsel] is now faulted for not having sought." Blake, 24 N.Y.3d at 82. Indeed, in several cases, the Appellate Division had upheld the denial of requests for cross-racial identification charges, both in the First Department (where defendant's trial was then proceeding) and in the Second Department decision that this Court ultimately reversed in Boone. See People v. Boone, 129 A.D.3d 1099, 1100 (2d Dept. 2015), rev'd, 30 N.Y.3d 521 (2017); see, e.g., People v. Washington, 56 A.D.3d 258, 259 (1st Dept. 2008); People v. Applewhite,

298 A.D.2d 136, 137 (1st Dept. 2002); People v. Jenkins, 166 A.D.2d 237, 238 (1st Dept. 1990). Although this Court had stated, in dicta, that the "better practice" was to give such a charge, the prevailing law was that the decision of whether to grant a party's request for an expanded identification charge was "a matter for the Trial Judge's discretion." People v. Knight, 87 N.Y.2d 873, 874 (1995); People v. Whalen, 59 N.Y.2d 273, 279 (1983).

Even Boone itself did not make a cross-racial identification charge mandatory in all single-witness identification cases involving a witness of a different race from the defendant. Indeed, the Court considered and rejected such an argument in Boone. There, the defendant urged the Court to adopt the rule created by the Supreme Judicial Court of Massachusetts in Commonwealth v. Bastaldo, 472 Mass. 16 (2015). The so-called Massachusetts rule requires trial courts to issue a cross-racial identification instruction in all cases where the witness and the person identified appear to be of different races "unless all parties agree to its omission." Boone, 30 N.Y.3d at 533-34 (quoting Bastaldo, 472 Mass. at 27). This Court did not go so far. Instead, noting that neither the New York State Judicial Task Force nor the authors of the CJI "suggest that the instruction should *always* be given unless the parties agree to its omission," the Court held that the charge would not "be obligatory when no party asks for the charge." Boone, 30 N.Y.3d at 535-36 (emphasis added). Implicit in that conclusion was the recognition that there will be circumstances where counsel can legitimately and

strategically refrain from requesting a cross-racial identification charge even though there is a disputed cross-racial identification.

By itself, the absence of clear-cut authority requiring defense counsel to request a cross-racial identification charge dooms defendant's single-error ineffective-assistance claim. This Court reached a similar conclusion in Blake, a case with close parallels to this one. In Blake, as here, the defendant claimed that his counsel had been ineffective because of a single charging error: specifically, the failure to request an adverse-inference charge based on a missing videotape. Blake 24 N.Y.3d at 81. This Court acknowledged that such a charge was available and "likely would have been given as a matter of discretion" by the trial judge. Id. at 82. It nonetheless rejected the ineffective-assistance claim. As this Court explained, although competent counsel could have (and probably would have) requested an adverse-inference charge, a defendant's legal entitlement to such a charge "was not conclusively established until" after defendant's conviction. Id. As a result, any error in not requesting the charge "was not one so obvious and unmitigated by the balance of the representational effort as singly to support a claim for ineffective assistance." Id. The same conclusion is warranted here.

Defendant's contrary arguments (DB: 20-22) at most establish that a cross-racial identification charge would have been available, even recommended. But that fact was true as well for the adverse-inference charge at issue in Blake. Yet the mere availability and advisability of such a charge was not enough for this Court to find ineffective assistance based solely on counsel's failure to request the charge, in the absence of

precedent requiring that such a charge be given upon request. Thus, before Boone, and arguably even after, the legal issue was not sufficiently clear-cut to allow a single omission by trial counsel to support defendant's ineffective-assistance claim here.

In addition to the lack of clear legal support, there was also a lack of clear factual support for requesting a cross-racial identification charge here, thus further undercutting any claim that a cross-racial identification charge would have been a clear-cut or dispositive benefit to defendant. At trial, neither side elicited any facts suggesting that the eyewitness, Pena, had any difficulty identifying members of another race, including Black men like defendant.[8] Indeed, the record evidence strongly suggested that Pena had no such difficulties, making it sensible for reasonable defense counsel to decline to challenge his identification on that basis.

For example, counsel would have been aware that, on October 10, 2016, Pena viewed 462 mugshots of Black men who had been arrested in the 23rd Precinct and correctly told Detective Turner that none of the mugshots were of his attacker (Pena: A42-43; Turner: A156-57, 183-84). Additionally, counsel would have known that, on October 12, 2016, Pena viewed a Black man during a show-up identification procedure and again accurately said that the man was not his attacker (Pena: A45-47, 122-23; King: A209-11; Sanchez: A251-53). (For the first time, and without record

[8] Defendant does not predicate his current ineffective-assistance claim on defense counsel's failure to develop such evidence, nor does the available record on this direct appeal suggest that any such evidence would have been available.

support, defendant claims that Pena "misidentified" this man as his attacker (DB: 4, 12); as explained in the footnote, there was no misidentification here.[9]) Counsel would also have known that Pena finally saw defendant again on October 13, accurately identified him, and called police to place him under arrest (Pena: A48-50, 124; King: A214-16, 231-33). Finally, having seen the video of the attack, counsel would have known that Pena had a direct, unobstructed view of defendant's face for about 10 seconds (People's Exh. 4, Video 1, 0:00:23-0:00:38; id., Video 2, 0:00:25-0:00:40). Reasonable defense counsel could have concluded that all of this evidence undermined any claim that Pena would have had difficulties identifying defendant because of their racial differences.

These facts would have made a cross-racial identification charge particularly weak here because of the nature of the charge in question. Like an adverse-inference charge, a cross-racial identification charge "neither establishes a legal presumption nor furnishes substantive proof." People v. Handy, 20 N.Y.3d 663, 670 (2013) (quoting Cost v. State, 417 M.D. 360, 382 [2010]). Instead, it allows, but does not require, the

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[9] Defendant mischaracterizes the record in claiming that this event constituted a misidentification by Pena. What the evidence showed is that Pena called the police on October 12, 2016 after seeing defendant and accurately identifying him, but the police then stopped a *different* Black man who they thought matched the description Pena had given. After a show-up procedure, Pena correctly said the man whom the police had stopped was not his attacker (Pena: A44-47; King: A202-11, 220-25; Sanchez: A245-53). There was thus simply no misidentification by Pena. Instead, Pena's *accurate* rejection of the Black man whom the police had mistakenly detained further supported his ability to identify defendant without being confounded by their racial differences.

jury to consider whether the cross-racial nature of the identification affected its accuracy. Thus, at the time of defendant's trial in July 2017, the pre-Boone cross-racial identification charge instructed the jury that it "*may* consider whether . . . a difference in race between the defendant and the witness who identified the defendant . . . affected the accuracy of the witness's identification." CJI2d(NY) Identification – One Witness (rev. Jan. 2011) (emphasis added); CJI2d(NY) Identification – Witness Plus (rev. Jan. 2011) (emphasis added).[10]

Here, in light of the facts discussed above, reasonable defense counsel would have questioned whether the jury would have drawn a merely permissive inference in light of the direct and concrete evidence showing that the eyewitness had no difficulty accurately identifying Black men like defendant. And reasonable defense counsel would have considered any such inference even less likely in light of another aspect of the cross-racial identification charge, which advised the jury that it could 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." CJI2d(NY) Identification – One Witness (rev. Jan. 2011). Defense counsel would have known that the eyewitness, Pena, had moved to New York City in

[10] After Boone, the charge was revised to instruct jurors that they "*should*" consider whether there is a racial difference; they "*should* consider that some people have greater difficulty in accurately identifying members of a different race"; and they "*should* consider whether the difference in race affected the accuracy" of the identification. CJI2d(NY) Identification – One Witness (emphasis added); CJI2d(NY) Identification – Witness Plus (emphasis added).

1991 or 1992 and had resided in East Harlem ever since (Pena: A21-22, 25). There is no indication that Pena would have lacked regular contact with members of defendant's race in the decades that he has lived in his neighborhood.[11]

The indeterminate nature of the cross-racial identification charge and the absence of any facts supporting it easily distinguish this case from the "extremely limited" precedents, People v. Harris, 26 N.Y.3d 321, 328 (2015), cited by defendant where courts have been willing to find ineffective assistance based on a single error by trial counsel. For example, in Turner, this Court found that the defendant had been deprived of the effective assistance of counsel where counsel "had neglected to raise a 'clear-cut and completely dispositive' statute of limitations defense" relating to a lesser-included offense. People v. Brunner, 16 N.Y.3d 820, 821 (2011) (quoting Turner, 5 N.Y.3d at 481). In People v. Nesbitt, 20 N.Y.3d 1080 (2013), the Court found that defense counsel, in responding to a first-degree assault charge, was ineffective for not requesting the submission of a lesser-included offense when counsel had "a good-faith basis" to argue that the victim had not suffered a serious physical injury. Id. at 1081-82. And in People v. Debellis, — N.Y.3d —, 2023 N.Y. Slip Op. 05964 (Nov. 21, 2023), the Court found ineffective assistance when counsel pursued a defense to weapon-possession charges premised on the theory that the defendant was taking a gun

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[11] See, e.g., Community Health Profiles 2015, Manhattan Community District 11: East Harlem, *available at* https://www.nyc.gov/assets/doh/downloads/pdf/data/2015chp-mn11.pdf.

to a police department to turn it in pursuant to a buyback program, but then never requested that the jury be charged on the defense of "voluntary surrender under Penal Law [§] 265.20(a)(1)(f)," even though that charge was "the only jury instruction that would give [the defense presented at trial] any legal weight." Id.

In all of these cases, the defense that counsel failed to articulate had two features that are missing here: the defense would have been "completely dispositive" in that it could have resulted in the outright dismissal of the challenged offense, Turner, 5 N.Y.3d at 481;[12] and there was clear evidence supporting such a defense. By contrast, this Court has consistently rejected single-error ineffective-assistance claims in a variety of other cases where a trial attorney's omission did not involve any similarly "clear-cut and completely dispositive" issue—such as when counsel merely "overlook[ed] a useful piece of evidence" or "fail[ed] to take maximum advantage of a Rosario violation." Turner, 5 N.Y.3d at 480. Such errors "do not in themselves render counsel

[12] In Harris, this Court addressed whether the issue in that case (a plainly meritorious statute of limitations claim) would have been "completely dispositive" if raised, when only one of the two counts against the defendant would have been time-barred. Analyzing that question, the Court found that, under the prejudice prong of Strickland, it was "irrelevant that the omission [was] not 'completely dispositive' of the entire case," because "[a]ll a defendant must show is 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been *different*,'" and, under the particular facts, the dismissal of one count would have altered the complexion of the other." Harris, 26 N.Y.3d at 328 (quoting Strickland, 466 U.S. at 755). Because the "reasonable probability" in Harris did not pertain to whether the issue itself was completely dispositive, but rather whether its omission resulted in prejudice, Harris did not lower the standard articulated in Turner.

constitutionally ineffective where his or her overall performance is adequate." Id. at 480-81. The same is true here.

C. Contrary to defendant's position, defense counsel does not render ineffective assistance by declining to pursue a weak argument, even if doing so would not have actively harmed the defense.

Rather than grappling with the lack of clear-cut legal or factual support for requesting a cross-racial identification charge, defendant instead argues that any such weakness is essentially irrelevant to his ineffective-assistance claim. Specifically, defendant contends that counsel's failure to request the charge was constitutionally ineffective because the charge "would have only injected further doubt into an already tenuous single-witness identification." Counsel thus had "'everything to gain and nothing to lose' by requesting it" (DB: 20 [quoting People v. Gil, 285 A.D.2d 7, 13 [1st Dept. 2001]).

Defendant is wrong to assert that defense attorneys are constitutionally obligated to present *any* argument, however weak, so long as doing so would cause no active harm. This Court has repeatedly declined to adopt a standard that counsel is ineffective any time she fails to pursue a course of action from which the defense has "nothing to lose and everything to gain." See, e.g., People v. Gray, 27 N.Y.3d 78, 82-84 (2016) (holding that counsel was not ineffective for failing to move to re-open the suppression hearing, despite the dissent's assertion that there was "nothing to lose and everything to gain by revisiting the suppression question"); People v. Flores, 84 N.Y.2d 184, 188-89 (1994) (holding that counsel was not ineffective for failing to take maximum

advantage of a Rosario violation, notwithstanding the dissent's contention that the defendant "had nothing to lose and everything to gain" by doing so); accord Knowles v. Mirzayance, 556 U.S. 111, 122 (2009) ("This Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating Strickland claims."). And in numerous single-error cases, this Court has expressly considered the relative strength of an argument as an important, even dispositive, factor in determining whether counsel was ineffective in declining to pursue it. See, e.g., Turner, 5 N.Y.3d at 481 ("that question in turn depends on how strong defendant's statute of limitations defense was"); People v. Carter, 7 N.Y.3d 875, 876-77 (2006) ("that argument was not so compelling that a failure to make it amounted to ineffective assistance of counsel"); Debellis, 2023 N.Y. Slip Op. 05964, at *2 (faulting defense counsel for "fail[ing] to present a crucial defense supported by the evidence").[13]

Moreover, defendant's contention that defense counsel must pursue every colorable argument, and cannot constitutionally decline to pursue weak arguments, is

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[13] Defendant's reliance on Gil is misplaced. That Appellate Division ruling is of course not binding on this Court. The decision also does not go as far as defendant contends. In that case, at the defendant's arraignment, defense counsel had waived pre-trial discovery and motion practice; counsel had also conducted no investigation, did not meet with the defendant, and agreed to proceed immediately to trial believing that the People were bluffing when they announced their trial readiness. Counsel's conduct at the subsequent trial suggested that he believed there were meritorious suppression issues that could have been raised. See Gil, 285 A.D.2d at 10-13. It was under those circumstances that the Appellate Division concluded that counsel "had everything to gain and nothing to lose by moving for suppression of the evidence." Id. at 13. Nothing about that language suggested that the Appellate Division was announcing a general rule applicable to all ineffective-assistance claims, as opposed to commenting on the dire nature of the representation offered in that specific case.

incompatible with the general test for evaluating ineffective-assistance claims. That test requires a defendant to demonstrate that counsel's performance, viewed in its totality, was constitutionally deficient due to "the absence of strategic or other legitimate explanations for counsel's alleged failure." Wragg, 26 N.Y.3d at 409; see Strickland, 466 U.S. at 688-90. In assessing performance, courts apply the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; see generally People v. Ellis, 81 N.Y.2d 854, 856 (1993) ("Trial practice is as much an art as a science. Trial lawyers bring their own talents, experiences and personality into the courtroom, and given the unique attributes of each case, must devise and execute appropriate strategy."). And this Court has repeatedly recognized that trial counsel may face difficult strategic decisions about the relative strengths and weaknesses of different approaches to defending against criminal charges. See, e.g., McGee, 20 N.Y.3d at 519 ("[T]he decision to request or consent to the submission of a lesser included offense is often based on strategic considerations, taking into account a myriad of factors, including the strength of the People's case."); People v. Smith, 82 N.Y.2d 731, 733 (1993) ("Counsel's decision not to call a witness, whose testimony he assessed as weak, was a strategic legal decision which does not amount to ineffective assistance of counsel."). Moreover, pursuing a weak legal argument is not costless; among other harms, doing so risks distracting the jury from other, stronger arguments that defense counsel may wish to focus on.

Thus, far from being irrelevant, the fact that a particular legal strategy may be weak in fact plays a critical role in understanding why defense counsel may have approached a trial in a particular way. Defendant cannot simply deem irrelevant a factor that this Court has repeatedly considered in evaluating ineffective-assistance claims.

D. In any event, defendant has failed to establish any prejudice from counsel's decision not to request a cross-racial identification charge here.

Even if the failure to request a cross-racial identification instruction amounted to constitutionally deficient performance in a particular case, that does not end the inquiry because the defendant would still need to establish prejudice. Defendant has failed to make that showing here.

First, the trial court may not have granted a request for a cross-racial identification charge—and, prior to Boone, was not required to do so, as explained above. Defendant speculates that the trial court "would have likely granted such [a] pattern instruction" (DB: 21) but identifies no record support for that supposition. To the contrary, at least on the limited record presented in this direct appeal, it seems more likely that the trial court would have denied such a request under then-extant law. It is undisputed that the trial record contained no evidence suggesting that Pena had any particular difficulty identifying Black men. Under then-existing law, as articulated in the Appellate Division's decision in Boone, a court could "properly decline[ ] to charge the jury on the unreliability of cross-racial identification" when, as here, "the defendant never placed the issue in evidence during the trial." Boone, 129 A.D.3d at 1099.

Defendant has thus failed to show that the trial court would have granted defense counsel's request for a cross-racial identification charge that was bereft of any evidentiary support. See Caban, 5 N.Y.3d at 152 ("Because the evidence adduced at trial did not establish that [a witness] was an accomplice as a matter of law, counsel's failure to request that the jury be charged that he was did not constitute ineffective assistance."); cf. People v. Reynoso, 73 N.Y.2d 816, 818 (1988) ("a court need not charge justification if no reasonable view of the evidence establishes the elements of the defense").

Second, even if the trial court had delivered the charge to the jury, there is no reason to suppose, as defendant does (DB: 20-22), that the jury would have drawn the permissive inference that Pena had difficulty identifying defendant solely because of their racial differences. As explained above, the available evidence strongly suggested the opposite: namely, that Pena had no difficulty accurately identifying defendant, and that he had not been impeded in doing so by the fact that defendant was of a difference race—as shown by the fact that Pena correctly rejected 462 photos of other Black men as not including defendant. In this respect as well, this case parallels Blake. In that case, this Court concluded that the evidence at trial meant that there was not "even a reasonable possibility, much less a reasonable probability, that the jury, if offered the opportunity, would have elected to draw an inference adverse to the prosecution." Blake, 24 N.Y.3d at 83. The same is true here in light of the trial evidence directly

supporting Pena's ability to make an accurate cross-racial identification and the complete absence of any evidence suggesting otherwise.

Third, further undercutting any suggestion that the jury would have drawn any adverse inference was their rejection of defense counsel's other vigorous arguments against Pena's identification. Counsel sought to establish that Pena would not have been able to make an accurate identification after being forcefully struck near the eye with a hard object and looking at his attacker for a brief period of time from a distance of 30 to 40 feet. Counsel also attacked Pena's general credibility, highlighting, among other things, inconsistencies in his testimony about the nature of the object he was struck with and the time he went to the hospital. Counsel then used the evidence to obtain a "One Witness" identification charge and made summation arguments consistent with the factors identified in that charge. The jury plainly did not credit these attacks. Given that the jury rejected defense counsel's attempts to undermine Pena's identification based on arguments that were supported by the record, there is no basis to believe that the jury would have drawn an adverse inference about cross-racial identification that counsel did not even flag during the trial itself.

Defendant's only argument in response seems to be that prejudice should be presumed where counsel does not request a cross-racial identification charge because the charge is of "integral importance" whenever the defense is that the witness's identification testimony is honest but mistaken (DB: 26). That argument is inconsistent with this Court's articulation of the prejudice requirement in Blake, which also involved

a permissive inference like the one here. As this Court explained, "the viability of [an ineffective-assistance] claim, conditioned upon a demonstration of prejudice attributable to counsel's inadequacy, would depend, in crucial part, upon facts making the … inference [that the cross-racial identification charge] merely makes available at least reasonably plausible." Blake, 24 N.Y.3d at 83. Thus, far from presuming prejudice, this Court has required that a defendant identify facts in the record indicating that the jury in his particular case would have drawn a permissive inference. Defendant has failed to do so here.

E. Defendant's remaining arguments are meritless.

None of defendant's remaining arguments has merit. For example, to the extent defendant argues that the existing record demonstrates that his attorney was uncomfortable or harbored "trepidation to talk about race" (DB: 30), he points to nothing in the record supporting that argument. Counsel's mere failure to request the charge does not support an implication that counsel feared speaking about race. If defendant thinks that is true, he must establish that fact in a post-judgment proceeding pursuant to CPL 440.10, not by resorting to "supposition and conjecture." Rivera, 71 N.Y.2d at 709.

Defendant also contends that he was prejudiced because the absence of the cross-racial identification charge "effectively communicated that the jurors could *not* consider race, or at least that it was not important" (DB: 26). But the absence of a cross-racial identification instruction did not imply, in the slightest, that the jury could

not consider the cross-racial nature of the identification or that it was unimportant. Nor did the absence of the cross-racial identification charge communicate to "jurors *with* some prior knowledge of the dangers of cross-racial identifications" that they were "not permitted to consider cross-race unreliability" (DB: 26).

Indeed, this argument ignores the balance of the court's final charge. Among other things, the court instructed the jury that they brought with them "all of the experiences and background of [their] lives," that they should apply the "same tests" applied in their "everyday dealings" in their "deliberation to determine the believability and reliability of a witness' testimony," and the court even listed examples of some of those tests for the jury (Jury Charge: A381-82). Then, in issuing the One Witness identification charge, the court specifically instructed the jury that they should consider whether the witness had "an opportunity to see and remember the facial features, body size, skin color and clothing of the perpetrator," and whether the perpetrator had "distinctive features that the witness would be likely to notice and remember" (Jury Charge: A384). Nothing in these instructions could reasonably be construed as having communicated or signaled to the jury that, in evaluating Pena's identification testimony, they could not consider the cross-racial nature of the identification.

Finally, defendant criticizes the value of Pena having reviewed 462 mugshots of Black men because there was "no evidence regarding the appearance of anyone" whose mugshots were displayed to Pena, and Detective Turner did not input information regarding hair color, hair length, or facial hair into the Photo Manager system

(DB: 6, 11-12). But defense counsel did not seek to enter the mugshots into evidence. And it is understandable why he did not, because doing so risked the possibility that some of the mugshots depicted men with similar hair color, hair length, and facial hair as defendant. Presenting that evidence to the jury would have only strengthened Pena's identification testimony.

More fundamentally, though, the issue here concerns a cross-racial identification instruction. Unlike another part of the "One Witness" identification charge, the cross-racial instruction is not concerned with hair or facial features. It instead focuses on "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." CJI2d(NY) Identification – One Witness (rev. Jan. 2011). Here, there is no dispute that Pena viewed mugshots of 462 Black men (see DB: 6) and accurately reported that defendant was not among them. That fact may reasonably have influenced defense counsel's calculus regarding whether the difference in race between defendant and Pena affected the accuracy of the identification. And given Pena's otherwise accurate identifications, it was "not utterly implausible that defense counsel reasonably elected not to seek" a cross-racial identification charge. Blake, 24 N.Y.3d at 81. At the very worst, "if it was a mistake" not to request the charge, "it was not one

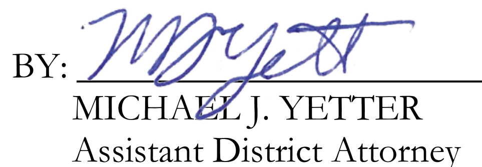
so obvious and unmitigated by the balance of the representational effort as singly to support a claim for ineffective assistance." Id. at 82.[14]

CONCLUSION

The order of the Appellate Division should be affirmed.

Respectfully submitted,

ALVIN L. BRAGG, JR.
District Attorney
New York County

BY: 
MICHAEL J. YETTER
Assistant District Attorney

STEVEN C. WU
Chief, Appeals Division
STEPHEN J. KRESS
MICHAEL J. YETTER
Assistant District Attorneys
Of Counsel

January 12, 2024

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[14] In focusing on a single alleged error, defendant ignores that defense counsel ably represented him throughout the case. As defendant has never disputed, counsel, among other things, vigorously cross-examined Pena and the police witnesses, interposed numerous objections, some of which were successful, made an appropriate motion for a trial order of dismissal, successfully obtained the One Witness identification charge, gave a forceful summation, and zealously represented defendant at sentencing (see Respondent's Appellate Division Brief: SA118-20).

WORD COUNT CERTIFICATION

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