To be argued by: Elizabeth Vasily
20 Minutes Requested

Court of Appeals of the State of New York

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

APL 2023-00099

v.

MARK WATKINS,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from a June 9, 2022 order of the Appellate Division, First Department. Appendix 1-2 ("A"); 206 A.D.3d 452 (1st Dept. 2022). That order affirmed a March 26, 2018 judgment of the New York County Supreme Court convicting Appellant Mark Watkins of attempted assault in the first degree, assault in the second degree, and criminal possession of a weapon in the third degree and sentencing him to thirteen years' incarceration with five years' post-release supervision (Ross, J.). A1-2, A3. On June 22, 2023, Judge Shirley Troutman issued a certificate granting leave to appeal. A4. This Court subsequently assigned the Center for Appellate Litigation to this appeal. Appellant is currently incarcerated under the judgment at issue.

QUESTION PRESENTED

> In this single-witness stranger cross-racial identification case with no forensic or probative video evidence, was trial counsel—who argued an honest-but-mistaken misidentification defense—ineffective for failing to request a cross-racial identification charge where the New York Criminal Jury Instructions (CJI) had incorporated a cross-race charge six years earlier?

SUMMARY OF THE ARGUMENT

There was no doubt that a man attacked the complainant on October 7, 2016, but the same could not be said for Mark Watkins' identity as the assailant. The prosecution did not introduce any forensic evidence or statements. The video footage purporting to capture the incident was poor quality. The case revolved solely around a single-witness identification of the complainant, whose ability to view and identify the perpetrator was severely compromised because he was hit in the eye socket with a brick during the incident.

At trial, the defense attorney argued an honest-but-mistaken misidentification defense. Yet, counsel overlooked a critical reason for the jury to doubt the prosecution's case: the identification was cross-racial. Despite the wide prevalence—in New York's pattern jury instructions and elsewhere—of jury charges cautioning about the dangers of cross-

racial identifications at the time of Mr. Watkins' trial, counsel never requested one. Mr. Watkins was convicted and sentenced to thirteen years in prison.

Counsel's failure to request a cross-racial identification charge in these circumstances amounted to ineffective assistance of counsel. No reasonable defense attorney—having chosen a misidentification defense—would have failed to request a charge that injected a significant source of doubt in the case. Absent any other corroboration connecting Mr. Watkins to the scene, the prejudice was clear. Direct appeal is the proper forum because there would be no conceivable strategy behind not requesting an instruction that only strengthened the defense. Accordingly, Mr. Watkins' conviction should be reversed for a new trial in which the jury can properly consider the cross-racial aspect of this already tenuous stranger single-witness identification.

STATEMENT OF FACTS

The Trial

Opening Statements

The prosecution acknowledged that the surveillance video depicting the offense was of poor quality and that its entire case relied upon the complainant's eyewitness identification. A9. The defense opened that the jury had to focus on "the lack of reliability of a one-witness identification." A16. The complainant's original description of a Black male between five-foot-eight and five-foot-eleven and between 25 and 35 years old contrasted with Mr. Watkins, who was six-foot-two and 37. A17. Disturbingly, the complainant had misidentified a different Black man the day before Mr. Watkins' identification. A18. Because there was no forensic evidence or other forms of corroboration, the complainant's identification was unreliable. A18.

The People's Case

The prosecution presented a single eyewitness at trial—the complainant, David Pena. On October 7, 2016, at approximately 1 PM, a man quickly approached the complainant—who was smoking on a work break—and hit him in the eye socket with a hard object. A25-26. While

the complainant testified that the suspect was holding a piece of cement, he previously reported a brick. A67, A233-34. The complainant immediately ran to his office to grab a piece of wood to protect himself. A27. After the complainant came back out, the man was standing around fifteen to twenty feet away. A115-16. From that distance, the complainant asked the man why he had hit him. A27. The man declined to respond and walked away. A27.

The complainant's descriptions of the man who had assaulted him evolved throughout the course of the case. The complainant did not call 911 that day, but he reported the incident to the police two days later. A27, A40, A44. The complainant's description to the police about his attacker was barebones and significantly less detailed than his trial testimony about how the suspect appeared. A31-32, A41-42.[1] Based on the complainant's account, Officer Facelis Turner inputted into the computer system the description of a Black male, age 25-35, five-foot-eight to five-foot-ten. A152-53. Although she initially thought the

[1] The complainant's description to the police was merely a "[B]lack male, a little taller, hoodie, sneakers, brown pants[.]" A41-42. His description did not mention hair or facial hair. His trial testimony, however, described a Black man with a shaven head and a slight beard, who was a little bit taller than five-foot-ten. A31-32.

complainant signaled that the suspect was around his own height of five-foot-ten, she later testified that she may have misjudged the complainant's hand signaling. A152-53, A163, A165-66. The complainant looked at 462 photographs of Black men in the computer management system and did not identify his attacker. A157. The prosecution introduced no evidence regarding the appearance of anyone in this "computer system," including whether they, like Mr. Watkins, had short shaven hair or had a beard. The officer who arranged for the computer observation did not input "hair color," "facial hair description," or "hair length" into the system. A154-A155.

The complainant gave shifting accounts of whether he had previously seen the man who assaulted him. When first asked whether the complainant had seen the man before the day of the assault, the complainant testified "no, no." A38. However, when the prosecution "ask[ed] again" if the complainant had "ever seen him before in the neighborhood," the complainant responded that "he passed by one day before the incident." A38. When counsel inquired on cross-examination if the complainant had told Detective Turner that he had seen the person before, he answered, "I had never seen him." A142.

Five days after the incident, the complainant initially identified someone else as the assailant by calling the police and claiming that he thought he saw the assailant. A44, A120-22. Officers Joseph King and Edwin Sanchez arrived at the scene. A202, A248-49. While King testified that the description that day was a tall Black male with a blue hoodie, Sanchez testified the description was a Black male in his 30s with a beard and a blue hoodie. A204, A254. The officers detained an individual in the vicinity matching the complainant's description. A202, A207, A208-209. When the officers conducted a show-up procedure, however, the complainant's identification was negative. A209.

The following day, six days after the incident, the complainant called the police again, claiming that he saw his attacker in the same general area where the assault had occurred. A24, A48, A214. On that day, the complainant's eye socket injury had escalated to the point of causing dizziness, headaches, and facial swelling. A125-26. At that time, he was also "forgetting things and [] had hallucinations." A125. When the officers arrived, the complainant pointed to Mr. Watkins, who was wearing a hat and sitting down on the opposite corner across the street. A31, A48-49, A215. The police arrested him. A216. The complainant then

observed Mr. Watkins in the police car. A50. No other identification procedures took place. The complainant eventually identified Mr. Watkins in court. A30.

The officers took a photograph of Mr. Watkins at the time of his arrest. A217, A433. Although Mr. Watkins was allegedly wearing a blue hoodie, the police never vouchered it. A217, A234. According to the arrest photograph, Mr. Watkins was wearing black clothing and had a slight beard. A433. His head was not completely shaven, but he had some hair on top. A433, A339.

The day after Mr. Watkins' arrest, the complainant went to the hospital for the variety of symptoms that he had been experiencing for the preceding week. A57, A125-26. Although the complainant originally stated that he went to the hospital a day or two after the incident, after the prosecutor corrected him during a lunch-break discussion, the complainant later clarified that he went to the hospital a week after the incident. A57, A77-79. The doctors diagnosed him with a fractured orbital (eye socket) bone. Medical Records at 8; A58, A352.

Although the prosecution introduced video surveillance of the attack, the footage was too blurry to depict the assailant's face. A8, A301,

A353-54. The police never conducted a DNA test on the complainant's clothes, the hard cement-like object, or anything else. Mr. Watkins made no statements to the police. There were no other eyewitnesses. The prosecution introduced a Department of Motor Vehicles (DMV) report indicating that Mr. Watkins' home address was in the area of the assault and where the complainant identified him. A434.

The complainant identified the race of his attacker as Black. A31-32. The complainant was Hispanic. A237.

Charge Conference

During the charge conference, the prosecution requested the "Identification Witness Plus Charge" and argued that the video footage was additional evidence of identification. A297. Defense counsel strenuously objected and instead requested the expanded "Identification – One Witness" ("One Witness") charge given that the case "rest[ed] on the identification of [the complainant] alone." A298-299. Finding that the video was not clear enough to depict a face and one "could not look at that video and say that it is [Mr. Watkins]," the court denied the prosecution's request. A301. Defense counsel never requested the cross-racial portion of the expanded identification charge.

The court administered the One Witness identification charge A382-85. The court advised that the jury "must consider identification testimony with great care [,] [e]specially when the only evidence identifying the defendant as the perpetrator comes from one witness." A383. When considering "whether the identification is truthful, that is, not deliberately false," the jury must consider "various factors for evaluating the believability of the witness' testimony[.]" A383-84.

The court listed more than a dozen factors as part of the One Witness charge, including the witness' opportunity to observe, the lighting conditions, the distance between the witness and the perpetrator, and whether the witness had an opportunity to see and remember facial features, body size, hair, skin color, and clothing.[2] A384-85.

[2] The court also instructed that the jury was allowed to consider: the period of time the witness actually observed the perpetrator, the direction the parties were facing, where the witness' attention was directed, whether the witness had a "reason to look at and remember the perpetrator," whether the perpetrator had any "distinctive features" that "the witness would be likely to notice and remember," whether the witness gave a description of the perpetrator and to what extent did it match the defendant, the witness' mental, physical and emotional state "before, during and after the observation," whether any condition affected the "witness' ability to observe and accurately remember the perpetrator," when and under what circumstances did the witness identify the defendant, whether the witness ever saw the "person identified prior to the date in question" and under what circumstances, how many times, and whether those prior observations would have affected the witness' ability to

Summations

Given the lack of corroborating evidence, counsel argued this case epitomized the "lack of reliability of a one-witness identification." A317. While the complainant was a "good hardworking man," he was "prone to make mistakes." A312-13. All week "leading up to when he went to the hospital," the complainant suffered from "dizziness, headaches, pain, inflammation of injury, [and] lightheadedness" that inevitably affected "his mental acuity" at the time he claimed to recognize Mr. Watkins as his attacker. A315. The complainant's testimony "demonstrated that he is mistake-prone" and "whether the mistake is an honest mistake, honestly, is immaterial." A329.

Recognizing that the only issue in the case was the reliability of a single-witness identification, the prosecution argued that the defense made a one-witness identification "seem like it's a dirty word, or a dirty phrase" but "it is not." A342. Although there was no evidence of the descriptions of the purported 462 people in the photo system (besides age, gender, height, and race), the prosecution argued that the complainant

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accurately recognize and identify such person, and whether the identification was suggested in some way. A384-85.

did not identify any of them as the assailant. A338. Moreover, the prosecution relied on the fact that after the complainant flagged another Black man as the culprit five days after the assault, he did not subsequently affirm his identity at the show-up. A345-46. The complainant's refusal to identify this other Black man, the argument went, showed that the complainant was not as "suggestive, or as malleable as [the defense] would have you believe" and that, had he been, that other man "would be on trial today." A345. The prosecutor also reminded the jury that whether the complainant "was mistaken" depended on his "capacity for observation, his reasoning, his memory, [] ability to observe and remember[.]" A349.

Deliberations and Verdict

During deliberations, the jury requested, through notes, the video and pictures.[3] A407.

On July 21, 2017, the jury convicted Mr. Watkins of attempted assault in the first degree (Penal Law § 110/120.10(1)), assault in the

[3] The photographs admitted into evidence were those of the complainant's injuries, the crime scene and surrounding areas, and an arrest photo of Mr. Watkins. A37, A50-51, A71, A73, A151, A217.

second degree (Penal Law § 120.05(2)), and criminal possession of a weapon in the third degree (Penal Law § 265.02(1)). A429.

The Cross-Race Identification Charge and Criminal Jury Instructions

In 2011, six years before Mr. Watkins' trial, the Criminal Jury Instructions (CJI) added a new subsection into the One Witness charge: a cross-race identification instruction, which read:

> You may consider whether there is a difference in race between the defendant and the witness who identified the defendant, and if so, whether that difference affected the accuracy of the witness's identification. Ordinary human experience indicates that some people have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race. With respect to this issue, you may consider the nature and extent of the witness's contacts with members of the defendant's race and whether such contacts, or lack thereof, affected the accuracy of the witness's identification. You may also consider the various factors I have detailed which relate to the circumstances surrounding the identification (and you may consider whether there is other evidence which supports the accuracy of the identification).
>
> CJI 2d (NY) Identification (One Witness) (as rev. 2011).

The charge was listed among a variety of other reliability factors for the jury's consideration. A footnote accompanying the charge noted that both the American Bar Association (ABA) and the New York State Justice Task Force had recommended that courts administer cross-racial

identification charges—regardless of whether an expert has testified. *Id*. at n.7.

In 2017, after this Court's decision in *People v. Boone*, 30 N.Y.3d 521 (2017), the CJI's cross-racial instruction read:

> 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.
>
> CJI 2d (NY) Identification (One Witness) (as rev. 2018).

The Appellate Division

On appeal to the First Department, Mr. Watkins argued, among other things, that counsel was constitutionally ineffective for failing to request a cross-racial identification charge. Watkins App. Div. Br. Pt. II. The Appellate Division held this claim "unreviewable on direct appeal because it involve[d] matters not fully explained by the record." A1.

Alternatively, counsel was not ineffective because Mr. Watkins did not show "it was objectively unreasonable for counsel to refrain from requesting a jury charge on cross-racial identification." A2. The

Appellate Division did not explain its holding further beyond noting that *Boone* had not yet been decided at the time of trial. A2.

The court also found that Mr. Watkins did not demonstrate prejudice because he had "not shown that such a request would have been granted at the time of trial, or that absence of the charge affected the outcome of the case." A2.

Judge Troutman granted Mr. Watkins leave to appeal to this Court. A3.

ARGUMENT

POINT

In this single-witness stranger cross-racial identification case with no forensics, or video depicting the perpetrator's face, trial counsel—who argued an honest-but-mistaken misidentification defense—was ineffective for failing to request a cross-racial identification charge where the New York Criminal Jury Instructions (CJI) had incorporated a cross-race charge six years earlier.

A. The Science and Governing Legal Standards

1. History of Cross-Race Identification Jury Charges

Cross-racial identifications are especially unreliable. "Social scientists have found that the likelihood of misidentification is higher

when an identification is cross-racial." *People v. Boone*, 30 N.Y.3d 521, 528 (2017). "Generally, people have significantly greater difficulty accurately identifying members of other races than members of their own race." *Id*. As this Court explained in *Boone*, "a meta-analysis of 39 psychological studies of the phenomenon" confirmed that people were 56% more likely to falsely identify a stranger of a different race than of their own. *Id*. (citing C.A. Meissner & J.C. Brigham, *Thirty Years of Investigating the Other-Race Effect in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOLOGY, PUB. POLICY, AND LAW 3, 15 [2001]).

Given the grave danger of mistake in cross-race identifications—and their ability to lead to a wrongful conviction, especially where the identification is the only evidence—courts across the country have utilized jury instructions over the past decade to ameliorate this heightened risk of false identifications. In 2008, considering the widespread acceptance of the science, the ABA recommended that courts administer cross-racial identification in any applicable case even without an expert. In 2011, for the same reasons, the New York State Justice Task Force recommended the charge irrespective of whether an expert testified. Additionally, in 2011, New York's CJI added a cross-race

identification instruction as part of the expanded identification charge. That same year, New Jersey made cross-racial instructions mandatory. *State v. Henderson*, 208 N.J. 208 (2011). The following year, Hawaii followed and required the administration of those charges in applicable cases. *State v. Cabagbag*, 127 Hawai'i 302, 304 (2012). In 2015, Massachusetts mandated the implementation of cross-race identification charges. *Commonwealth v. Bastaldo*, 472 Mass. 16 (2015). In December 2017, this Court required that New York courts provide cross-racial identification instructions upon request. *Boone*, 30 N.Y.3d at 535.

2. Ineffective Assistance of Counsel

"The right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez v. Ryan*, 566 U.S. 1, 12 (2012). To establish ineffective assistance under the state or federal constitutions, the accused must first identify an objectively unreasonable error. *Hinton v. Alabama*, 571 U.S. 263, 272-73 (2014) (per curiam); *People v. Turner*, 5 N.Y.3d 476, 480 (2005); *Strickland v. Washington*, 466 U.S. 668, 688-91 (1984); U.S. Const. Amend. VI; N.Y. Const. Art. I § 6. Then, the court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide

range of professionally competent assistance." *Strickland*, 466 U.S. at 690.

The next step is a prejudice assessment. *Id.* at 692. Under the federal standard, prejudice is defined as whether there was a "reasonable probability" that, but for counsel's error, the outcome would have been different. *See Strickland*, 466 U.S. at 694. New York's prejudice rule, on the other hand, is more protective than *Strickland*, as this Court has repeatedly stated. *See, e.g.*, *People v. Caban*, 5 N.Y.3d 143, 156 (2005) ("our state standard [] offers greater protection than the federal test"). New York instead more generally requires a failure of "meaningful representation." *People v. Benevento*, 91 N.Y.2d 708, 712-13 (1998). New York state standards do "not require a defendant to 'fully satisfy the prejudice test of *Strickland*.'" *See Caban*, 5 N.Y.3d at 156 ("under our State Constitution, even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial.").

A single prejudicial error may constitute ineffective assistance. *See Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) (inquiry focuses on the "'identified acts or omissions'" and conduct beyond those acts/omissions

is only relevant if it sheds light on whether those identified errors were reasonable); *Rosario v. Ercole*, 601 F.3d 118, 125-26 (2d Cir. 2010) (warning of the "danger" that "some courts might misunderstand the New York standard and look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial[,]" which would "produce an absurd result inconsistent with New York constitutional jurisprudence and the mandates of *Strickland*"); *People v. Jones*, 167 A.D.3d 443, 443 (1st Dept. 2018) ("Under both the state and federal standards, a single, prejudicial error may constitute ineffective assistance, regardless of whether counsel's overall performance 'bespoke of general competency'").

If the identified error constituted deficient performance and prejudiced the defense, counsel's otherwise competent performance at other stages of the proceeding is irrelevant. An attorney's otherwise adequate advocacy cannot offset a single error that would have alone created a "reasonable probability" that the outcome would have been different. *See Kimmelman*, 477 U.S. at 385-86; *Rosario*, 601 F.3d at 125-26; *Jones*, 167 A.D.3d at 443; *People v. Carter*, 142 A.D.3d 1342, 1343 (4th Dept. 2016).

B. Counsel's Failure to Request a Cross-Racial Identification Charge in a Case Where the Only Evidence Was a Stranger Cross-Racial Identification Was Deficient Performance.

The prosecution's entire case rested on a stranger cross-racial identification. On this record, counsel unreasonably failed to request a charge that would have only injected further doubt into an already tenuous single-witness identification. The instruction would have undoubtedly strengthened the defense's honest-but-mistaken misidentification theory. Counsel had "everything to gain and nothing to lose" by requesting it. *See People v. Gil*, 285 A.D.2d 7, 13 (1st Dept. 2001). Accordingly, counsel's failure to request the instruction was objectively unreasonable.

Because New York's Pattern CJI and other authorities had widely implemented cross-race jury charges for six years prior to trial, a competent defense attorney who had "taken the time to review and prepare both the law and the facts relevant to the defense," *People v. Droz*, 39 N.Y.2d 457, 462 (1976), would have been aware of their importance. New York's CJI are the starting point for any defense lawyer preparing for trial. The charge had also been recommended by the New York State Task Force, the ABA, as well as required in the states of New

Jersey, Hawaii, and Massachusetts. Given the unusually disturbing facts surrounding this identification—and the identification's centrality to the prosecution's case—a reasonable attorney would have located and requested the charge.

Counsel's request for the One Witness charge further confirms that counsel's omission here was objectively unreasonable and not a "strategic" choice. A reasonable attorney requesting a jury instruction from the CJI—which explicitly explained that the ABA and Task Force recommended such instruction regardless of whether an expert testified—would have understood that the court would have likely granted such pattern instruction. *See* CJI (as rev. 2011), n. 7. Moreover, competent counsel would have been aware of *People v. Whalen*, which "urge[d] trial courts[,]" *Boone*, 30 N.Y.3d at 537, to grant defense requests on expanded charges on eyewitness identifications as the "better practice." 59 N.Y.2d 273, 279 (1983). Even before *Boone*, the cross-race instruction was already a well-known part of an important pattern jury instruction, which this Court had urged trial courts to administer

decades prior to trial.[4] The charge request therefore had a significant "chance of success." *Cf. Caban*, 5 N.Y.3d at 152. Accordingly, there would be no merit behind a lawyer's impression that requesting such a charge would have been futile.

Regardless, even if a "defense lawyer ... might have doubted that" the charge request was "a clear winner ... no reasonable defense lawyer could have found it so weak as to be not worth raising." *See Turner*, 5 N.Y.3d at 476; *People v. Heidgen [McPherson],* 22 N.Y.3d 259, 278 (2013). Accordingly, a competent attorney would have at least *requested* the charge, and failure to do so was deficient performance. *See, e.g., People v. Blake*, 24 N.Y.3d 78, 82 (2014) ("[p]erhaps it was a mistake not to seek the charge, which likely would have been given as a matter of discretion").

C. Counsel's Failure Prejudiced the Defense.

Counsel's failure to request a cross-racial identification charge prejudiced the defense under both state and federal constitutions. N.Y. Const. Art. I § 6; U.S. Const. Amend. VI. There was a "reasonable

[4] This Court's decision in *People v. Boone*, mandating that courts grant defense requests for such charges, only further emphasized the importance of the already widely utilized charge. 30 N.Y.3d 521, 535 (2017).

probability," *Strickland*, 466 U.S. at 693-94, that the instruction would have been granted, and the charge would have injected further doubt and strengthened the precise defense theory. Accordingly, the absence of the charge undoubtedly prejudiced the defense.

1. *There Was a Reasonable Probability That the Charge Would Have Been Granted.*

There can be little doubt that, had the charge been requested, it would have been granted. Not only was the charge part of the *pattern instruction*, but it was also part of an incredibly important one—expanded identification. *See Whalen*, 59 N.Y.2d at 279 (due to possible unreliability of identifications, the "better practice" is for courts to grant requests for expanded identification charges).

Perhaps the most compelling evidence that the court would have granted a cross-race charge was that it had already granted the One Witness instruction. Accordingly, the court recognized the importance of an expanded identification charge in a case that revolved exclusively on the reliability of a stranger identification. Under these same principles,

the court would have likely agreed to the inclusion of the cross-race portion if requested.[5]

Regardless, under *Lockhart v. Fretwell*, prejudice is assessed under the law in effect at the time of the ineffective assistance of counsel claim, not the trial. 506 U.S. 364, 365 (1993). Mr. Watkins' case is on direct appeal, and *Boone* is now law. 30 N.Y.3d at 535. Accordingly, *Boone* applies to the prejudice calculus as the charge would have been granted if requested now. *Fretwell,* 506 U.S. at 372 (the *Strickland* prejudice component is not determined under the laws existing at the time of trial).

2. The Charge's Administration Would Have Had a Reasonable Probability of Affecting the Verdict.

Given the lack of corroboration and presence of several other disturbing misidentification risk factors, the charge was plainly material to the jury's task of determining the identification's reliability. There was no other evidence inculpating Mr. Watkins. At the time of this identification, the complainant was suffering from an eye socket injury

[5] Contrary to the Appellate Division's opinion, Mr. Watkins need not demonstrate that the charge would have assuredly been granted. A2. Instead, *Strickland*'s prejudice standard only requires a "reasonable probability" that the charge would have been granted. Nevertheless, as discussed *infra*, under *Lockhart v. Fretwell*, 506 U.S. 364, 365 (1993), and *Boone*, 30 N.Y.3d at 535, Mr. Watkins has satisfied even this heightened standard.

and was experiencing dizziness, headaches, facial swelling, "hallucinations" and was "forgetting things." The complainant was struck in the eye area at the time of the attack and initial viewing of the perpetrator, who was standing at 15-20 feet away. The general descriptions given to the police did not include any distinctive facial features or characteristics, even though Mr. Watkins had a shaven head and beard. And, the complainant had a perceived familiarity with Mr. Watkins and thought he had "seen him" around the neighborhood before, raising the possibility that the recognized phenomenon of "unconscious transference" influenced the complainant's identification of Mr. Watkins.[6] Accordingly, a cross-racial identification charge would have harmonized with multiple other reliability issues, been consistent with the *only* defense in this case—the complainant was simply mistaken—and undermined the entire case in favor of an acquittal. The fact that

[6] "Unconscious transference" is a red flag for misidentification. It refers to the psychological phenomenon of "transferring" a perceived familiarity from observing the individual in other contexts to misidentifying someone as the perpetrator of a crime. *See, e.g., People v. Russell*, 99 A.D.3d 211 (1st Dept. 2012) (reversing conviction in part because of unconscious transference in which the complainant regularly saw the defendant near the incident and therefore likely misidentified him as the perpetrator of the crime); *see also People v. Santiago*, 17 N.Y.3d 661, 673 (2011) (recognizing unconscious transference).

counsel argued an "honest-but-mistaken" misidentification defense only enhances the prejudice. *Boone* itself reinforces the integral importance of cross-racial identifications in cases with "honest-but-mistaken" complainants. 30 N.Y.3d at 531 ("[M]ost eyewitnesses think they are telling the truth even when their testimony is inaccurate, and because the eyewitness is testifying honestly [i.e. sincerely], [they] will not display the demeanor of the dishonest or biased witness"). By contrast, if the defense had contended justification or a fabrication "framing" misidentification, the charge would have been academic. Yet, for this specific type of misidentification, there was only an upside to allowing the jury to consider a crucial factor that could have contributed to the "honest mistake."

Beyond depriving the jury of critical authoritative guidance, *Boone*, 30 N.Y.3d at 528-29, 533, the omission of the crucial cross-race factor from the expanded identification charge's list of various reliability factors effectively communicated that the jurors could *not* consider race, or at least that it was not important. Accordingly, even those jurors *with* some prior knowledge of the dangers of cross-racial identification would have believed they were not permitted to consider cross-race unreliability.

Accordingly, the absence of the instruction assuredly—much more than the requisite threshold of a reasonable probability—affected the jury's verdict. Put differently, it is hard to imagine a case where a defendant could show prejudice if, in a single-witness misidentification case with no other corroboration, the failure to request an integral aspect of an expanded identification charge does have a reasonable probability of affecting the verdict. *See Strickland*, 466 U.S. at 694.

By depriving the jury of critical eyewitness-identification guidance in an otherwise weak single-witness case, counsel's blunder undermined confidence in the outcome and deprived Mr. Watkins of a fair trial. Cross-racial identifications pose a grave risk that an innocent person will be incarcerated. *Boone*, 30 N.Y.3d at 528-29. And the entire premise of New York's longstanding pattern instruction and *Boone* is that a jury cannot fairly and accurately assess a cross-racial identification without "authoritative" judicial guidance on the subject. *Id.* at 533 (quoting *Henderson,* 208 N.J. at 298); *id.* at 528-29; *People v. Owens*, 69 N.Y.2d 585, 589 (1987) ("'The court's charge is of supreme importance to the accused. It should be the safeguard of fairness and impartiality and the guarantee of judicial indifference to individuals.'" (quoting *People v.*

Odell, 230 N.Y. 481, 487 [1921])). The "need for" this "essential" charge is "evident." 30 N.Y.3d at 529-30 (a majority of jurors are unfamiliar with the cross-race effect); *id. at* 532 ("'As a society, we do not discuss racial issues easily. Some jurors may deny the existence of the cross-race effect in the misguided belief that it is merely a racist myth . . . while others may believe in the reality of this effect but be reluctant to discuss it in deliberations for fear of being seen as bigots. That, however, makes an instruction all the more essential'") (quoting Brief of Former Judges and Prosecutors as Amici Curiae Supporting Otis Boone at 15, *People v. Boone*, 30 N.Y.3d 521, 538 [2017])). Simple fairness requires a new trial before a properly charged jury.

D. Direct Appeal Is the Proper Procedural Vehicle.

As the prosecution's case entirely relied on a cross-racial identification, no reasonable strategy could justify failing to request a charge that would have only strengthened the defense theory and cast further doubt on the prosecution's *only* evidence. This claim is therefore reviewable on direct appeal because the record plainly establishes that there was no reasonable strategy for this blunder. *See, e.g.*, *People v. Wright*, 25 N.Y.3d 769, 780-82 (2015); *People v. Nesbitt*, 20 N.Y.3d 1080,

1081-82 (2013); *People v. Holland*, 115 A.D.3d, 492, 493 (1st Dept. 2014) (direct appeal appropriate because "this Court [can] determine from the record that there was no conceivable strategic purpose for counsel's conduct").

Direct appeal is the proper forum because the charge goes directly to the crux of the defense theory. While there are certainly cases in which a cross-racial identification charge would not significantly affect a defense—and, accordingly, a collateral attack would be necessary to reveal possible strategies—this was simply not that case. If, for example, the defense argued that Mr. Watkins was framed, a cross-racial identification charge would not have necessarily posed strategic relevance and an attorney could have reasonably refrained from requesting it. Yet, as *Boone* itself affirmed, this jury charge went to the very core of this specific type of "honest-but-mistaken witness" misidentification defense. 30 N.Y.3d at 531. Accordingly, there would be no conceivable strategy behind not requesting an instruction that only strengthens that specific theory of the case.

There was simply no danger that the charge could backfire and hurt the defense. Worst case—if, for example, the jury concluded after hearing

the charge that the particular complainant was fully capable of identifying members of a different race—the jury would simply reject cross-race as a reason to doubt the identification. Yet, without that charge, the jury would not consider this important risk factor *at all*. No competent attorney would forgo this valuable charge. Because there could be no strategic or other legitimate explanation for counsel's failure to seek the charge, direct appeal is appropriate.

While a defense attorney may be uncomfortable talking about race or may want to shy away from the topic, that cannot excuse defense counsel's dereliction or failure. As *Boone* itself states, the fact that "[as] a society we do not discuss race issues easily" only "makes an instruction all the more essential." 30 N.Y.3d at 532 (quoting Brief of Former Judges and Prosecutors as Amici Curiae at 15). Here, the races of both the complainant and Mr. Watkins were discussed in the testimony at trial. The lawyer's indefensible failure to later request the charge and "connect the dots" to the jury cannot be insulated from review. An attorney's trepidation to talk about race is not a reasonable "strategy." The record on appeal plainly supports that effective counsel should have requested the charge.

CONCLUSION

This Court should vacate the judgment and order a new trial.

Respectfully submitted,

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