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.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

Mr. Mark Watkins submits this reply brief in response to the prosecution's response brief, filed on January 12, 2024 ("Resp. Br.").

POINT

In this single-witness stranger cross-racial identification case with no forensic or probative video evidence, 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 Prosecution's Focus on a "*Per Se*" Rule Is Misplaced.

Respondent mischaracterizes Mr. Watkins' argument as requiring a *per se* rule that counsel provides deficient performance whenever the race of the witness and suspect differ and counsel fails to request a cross-racial identification charge. Resp. Br. 26-28. Mr. Watkins has never asked this Court to adopt a *per se* rule. Neither must this Court

do so to find counsel's conduct unreasonable here. This was a single-witness identification case without corroborating evidence. Mr. Watkins' defense was that the witness, David Pena, while walking out on the street nearly a week after the assault, misidentified a Black man whom he saw walking on the street as the man who assaulted him days earlier. The defense was honest-but-mistaken identification, and defense counsel requested the expanded identification charge to ensure the jury considered factors that could undermine a reliable identification—while omitting the critical cross-racial identification instruction.

Under these circumstances, there was "no reasonable strategy that could justify counsel's failure to request" the cross-race identification charge. The charge was readily available in the Criminal Jury Instructions (CJI) and directly advanced the defense's trial theory of mistaken identification. *See, e.g.*, *People v. Debellis*, 40 N.Y.3d 431, 2023 N.Y. Slip Op. 05964, at *4 (Nov. 21, 2023). No *per se* rule is needed to reach this obvious conclusion.

Nor, as Respondent contends, does Mr. Watkins task counsel with "present[ing] *any* argument, however weak, so long as doing so would cause no active harm." Resp. Br. 36 (emphasis in Respondent's Brief). Manifestly, this was not a case of "caus[ing] no active harm[,]" but of requesting a charge that would have fully supported the defense.

B. There Was No Reasonable Defense Strategy Here.

Respondent's purported "reasons" for why counsel could have reasonably failed to request the charge are speculative and incorrect.

Respondent argues that the complainant lived in Harlem, so he would be less susceptible to the cross-race effect and the charge would have little value. Resp. Br. 33-34. Yet, if merely living in Harlem was enough to eradicate the cross-race effect, the entirety of New York City and any other diverse city in the state of New York would be immune. There would, in effect, be a "*Boone* carve-out" for every metropolitan area of New York. But the CJI contains no such carve-out. And the science makes clear that the phenomenon emerges from early childhood through interactions with faces of parents and family members.[1] To suppose that people living in diverse cities—or in so-called "gentrifying" areas—are immune from the facial-recognition problems created by the cross-racial effect is a baseless assumption that would hardly provide reasonable grounds for declining to request a favorable charge.

Respondent also speculates that the complainant's failure to select a person from the 462 photographs of Black men shows he was impervious to the cross-race effect. Resp. Br. 23. But the opposite is true: the cross-race phenomenon made an

[1] The science has demonstrated that cross-racial face recognition is developed and calibrated during childhood at a very young age based on parents, family members and close friendships. *See Brief for the American Psychological Association as Amicus Curiae in Support of Defendant-Appellant*, *People v. Boone*, 30 N.Y.3d 521 (2017) (develops as early as age 3); Hoo Keat Wong et al., *The Own-Race Bias for Face Recognition in a Multiracial Society*, 11 FRONTIERS IN PSYCHOLOGY 208, at 11-12 (2020). Moreover, self-reported interracial contact does not predict an ability for more precise cross-racial facial recognition. *See* Wong, *supra*, at 1.

identification from a group of photos more difficult.[2] The cross-race effect compromised the complainant's ability to discern between the hundreds of faces of Black men in the photo manager and resulted in his inability to make an identification. Thus, even if the photo manager had been highly selective in choosing photographs of men who closely resembled the suspect (it was not, as discussed further below) the cross-race effect would have still compromised the witness' ability to distinguish between individuals of a different race than his own.

In any event, there is no actual evidence that the photo-manager photographs resembled the suspect because the prosecution did not introduce those photographs into evidence and never proved whether the individuals depicted had long or short hair, facial hair, etc. *See People v. Wilder*, 93 N.Y.2d 352, 357 (1999) ("An eyewitness's ability to select the perpetrator from a lineup of suspects that *are close in appearance* to the perpetrator enhances the credibility of the witness") (emphasis added); A152-155

[2] Cross-racial identifications are unreliable because individuals have difficulty distinguishing the facial characteristics of members of different races. Harvey Gee, *Cross-Racial Eyewitness Identification, Jury Instructions, and Justice, Review Essay Let's Get Free: A Hip-Hop Theory of Justice, the New Press,* at 185 (2009), 11 RUTGERS RACE & L. REV. 70, 102 (2009) ("Elizabeth Loftus, forensic psychologist, and a leading eyewitness identification expert, asserts that ... '[w]e do have more difficulty identifying the faces of strangers of a different race than the faces of strangers of our own race. . . If you're looking at the face of an Asian person and you're Caucasian maybe you notice those eyes because they are a little bit unusual. Later you go to a lineup and those unusual eyes are present in all the cases because you've got a lineup that's full of Asian[] [people] and that doesn't help you very much in making that discrimination—which particular face did I see.'"); Am. Bar Ass'n, *American Bar Association Policy 104D: Cross-Racial Identification*, 37 SW. U. L. REV. 917, 918 (2008) ("Persons of one racial group may have greater difficulty distinguishing among individual faces of persons in another group than among faces of persons in [their] own group... [and] will better perceive and process the subtlety of facial features of persons within their own racial group than persons of other racial groups. In terms of personal experience, who has never heard the phrase, 'they all look alike to me'?").

(detective in Mr. Watkins' case only inputted the computer system to generate images of Black men, age 25-35, five-foot-eight to five-foot-ten; "didn't enter a weight," "hair color," "facial hair description," "hairstyle," "hair length" or "eye color" into the system); A31, A254 (the suspect had a beard and shaven head).

Regardless, the speculative reasons the prosecution attributes to defense counsel for not requesting the charge—that the complainant lived in a diverse community and did not select anyone from the photo manager—are immaterial to the deficient-performance question. Simply because the jury might possibly reject the substance of a favorable charge is not a reason to not request it in the first place. *Debellis*, 2023 N.Y. Slip Op 05964, at *4 (while the jury could have chosen to not credit the defendant's "far-fetched" testimony, that would not "justify" his lawyer's failure to request a defense theory charge correlating with that testimony as "questions as to the credibility of the defendant's testimony or inconsistencies in the evidence presented do not disentitle the defendant to an instruction ... those questions of fact are to be resolved by the jury."). A cross-race jury charge would *serve to call into question* the accuracy of the complainant's identification abilities. Worst case, the jury, after listening to the charge, would reject the cross-race phenomenon as a reason to doubt the identification. Yet, without that instruction, the jury would not have meaningfully considered this important risk factor *at all*.

Respondent adds that defense counsel could have reasonably opted to focus on "more substantial" CJI identification factors at the expense of the cross-racial

identification instruction. Resp. Br. 26. Even so, no reasonable attorney would forego a powerful identification instruction designed to avoid "wrongful convictions" simply because there may be other entirely consistent defense arguments available. *People v. Boone*, 30 N.Y.3d 521, 537 (2017) ("developments in the understanding of wrongful convictions and cross-racial identifications ... demand a new approach" with the administration of the cross-race charge).

Respondent's attempt to minimize the cross-racial factor as less substantial than other CJI factors, Resp. Br. 26, also ignores the integral importance of jury charges in situations where the jury may need to be educated about an otherwise unknown phenomenon. Unlike factors such as lighting and distance, jurors may not be aware of or understand the phenomenon without the cross-race instruction. *Boone*, 30 N.Y.3d at 529 (the "need for a charge on the cross-race effect is evident" because "while the cross-race effect is a matter of common sense and experience for some jurors, it is by no means a universal belief shared by all"); *see also People v. Powell*, 37 N.Y.3d 476, 526 (2021) (Rivera, J., dissenting) ("The cross-race effect [is a] factor[ ] that ha[s] been identified by this Court as being counterintuitive to a jury's understanding of human behavior and memory") (citing *People v. Santiago*, 17 N.Y.3d 661, 672 (2011), *People v. Abney*, 13 N.Y.3d 251, 268 (2009), *People v. Lee*, 96 N.Y.2d 157, 162 (2001)).

C. This Failure to Request the Charge Was Prejudicial Under Both State and Federal Standards.

Respondent's brief ignores that prejudice is assessed under the law in effect at the time of the ineffective assistance of counsel claim, not the trial. *See Lockhart v. Fretwell*, 506 U.S. 364, 365 (1993). Mr. Watkins' case is on direct appeal, and *Boone* is now law. *Boone*, 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).

Next, the prosecution misstates the legal standard, faulting the defense for "fail[ing] to show that the trial court would have granted defense counsel's request" for the charge. Resp. Br. 40. Yet, all that *Strickland* requires is a "reasonable probability" that the charge would have been granted. *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984).

Respondent's argument that the court would have denied the charge because it was never "placed" at issue is also wrong. Resp. Br. 39-40. The plain language of the CJI indicates that, for the court to grant the instruction, all that is required is "a difference in race between the defendant and the witness." CJI 2d (NY) Identification – One Witness (rev. 2011). A corresponding footnote in the CJI states that the cross-race charge should be granted "regardless of whether an expert testifie[d]" on the subject. *Id.* at n.7. The CJI does not require, as respondent suggests, that the defendant

put forth specific "evidence that [the witness] had any particular difficulty identifying Black men." Resp. Br. 39. At the very least, there is a reasonable probability that the court would have provided an instruction justified by the plain text of the CJI. Perhaps, it would not have been reversible error to decline the charge, but it would have likely been provided. *See People v. Whalen*, 59 N.Y.2d 273, 279 (1983).

Respondent's reliance on *People v. Blake*, Resp. Br. 24, 28, 30, 40-42, 44-45, is misplaced.[3] 24 N.Y.3d 78 (2014). Unlike Mr. Watkins' case, the adverse-inference instruction in *Blake* was not authorized by either the CJI or a directive from this Court to provide the instruction as the "better practice." *Whalen*, 59 N.Y.2d at 279. Furthermore, in *Blake*, the adverse-inference instruction would have made absolutely no difference because overwhelming evidence, including video footage and forensic evidence, confirmed the defendant's guilt. *Blake*, 24 N.Y.3d at 83. The adverse-inference theory was even effectively demolished by evidence that Mr. Blake himself had tried to destroy the very evidence at issue. *Id.* Here, however, the instruction bore on the reliability of a stranger's identification, which was the *only* evidence against Mr. Watkins. *Blake* is nothing like this case.

[3] As for deficient performance, this Court in *Blake*—while not ultimately reaching a firm conclusion because of the prejudice analysis—stated that "perhaps it was a mistake" for the lawyer to not have requested an otherwise advantageous adverse inference instruction regarding a missing video. *Blake*, 24 N.Y.3d at 82. The instruction was available, although not yet mandatory upon request since *People v. Handy*, 20 N.Y.3d 663 (2013), was not decided until after. It follows that counsel's failure to request the cross-race charge here, which was "available" and "recommended[,]" Resp. Br. 30, although not yet mandatory per *Boone*, was also a "mistake."

When all else fails, the prosecution suggests that Mr. Watkins must show that the administration of the cross-racial identification charge would have been "clear cut and dispositive." Resp. Br. 26-28, 31. At some points in its brief, Respondent defines "clear cut and dispositive" to refer to an argument "result[ing] in outright dismissal[.]" Resp. Br. 35. But Respondent then walks back that extreme and unconstitutional limitation, recognizing that "clear cut and dispositive" includes a jury instruction a reasonable lawyer would have requested—even if they ultimately were unlikely to prevail with the jury. Resp. Br. 37 (citing *Debellis*, 2023 N.Y. Slip Op. 05964, at *2); *see also* Resp. Br. 34-35, 35 n.12 (citing *People v. Harris*, 26 N.Y.3d 321, 328 (2015) (under *Strickland*, it is "irrelevant that the omission is not 'completely dispositive' of the entire case" as "[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*.'") (quoting *Strickland*, 466 U.S. at 694)). Ultimately, this Court's cases and those of the United States Supreme Court make clear that a defendant need not show that the error would have resulted in a dismissal.[4] Instead, where a reasonable lawyer would have requested an instruction, and the omission of the instruction was prejudicial, counsel was ineffective. *Strickland*, 466 U.S. at 688-91. That standard is met here where counsel unreasonably

[4] *See, e.g.*, *People v. Turner*, 5 N.Y.3d, 476, 476 (2005) (although a "reasonable defense lawyer ... might have doubted that [the argument] was a clear winner ... no reasonable defense lawyer could have found it so weak as to be not worth raising"); *People v. Heigden [McPherson],* 22 N.Y.3d 259, 278 (2013) (counsel ineffective in unreasonably omitting an argument where argument was not a "clear winner"); *Debellis*, 2023 N.Y. Slip Op. 05964; *Hinton v. Alabama*, 571 U.S. 263 (2014).

failed to request a CJI instruction that went to the heart of this single-eyewitness case and serves as an important safeguard against wrongful convictions.

CONCLUSION

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

Respectfully submitted,

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WORD-COUNT CERTIFICATION

This brief contains 2503 words and uses 14-point Garamond font.