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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 202

ANTHONY PERKINS,

Appellant.

20 Eagle Street
Albany, New York 12207
November 16, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next matter on
2 this afternoon's calendar is appeal number 202, the
3 People of the State of New York v. Anthony Perkins.

4 MR. YOUNGER: Good afternoon, counsel.

5 May it please the court. I'd like to reserve
6 two minutes of my - - - my - - - my time for rebuttal,
7 please.

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. YOUNGER: It's Stephen Younger for
10 Appellant Anthony Perkins.

11 This appeal concerns a serious legal error that
12 was made by the suppression court.

13 It's a case where all of the witnesses were
14 shown a photo array with people having nobody - - -
15 nothing but dreadlocks, it's A1065, and then put in a
16 lineup with people who he was the only one with
17 dreadlocks.

18 JUDGE ABDUS-SALAAM: Is that an argument
19 that was made to the trial court, counsel?

20 MR. YOUNGER: Yeah. This is preserved - -
21 -

22 JUDGE ABDUS-SALAAM: The suppression court.

23 MR. YOUNGER: - - - if you look at page
24 RA5, which is attached to the People's brief, it's
25 the brief that was submitted to the suppression

1 court, the tie between the photo array and the lineup
2 was expressly argued by defense counsel before the
3 suppression court said that that resulted in simply a
4 confirmation of what had happened on the photo array.

5 And particularly pointed to the fact that
6 the witnesses were told that the person you picked
7 out of the photo array is going to be in the lineup,
8 drawing that connection for them. And that was put
9 before them.

10 And regardless, this is a legal question here.
11 The legal issue is, what is the totality of the
12 circumstances? That's what the test is on the due
13 process. And in this case, the court cut out of the
14 analysis a whole range of issues. A whole range of
15 circumstances. The only thing the court would look at,
16 they said it has no - - -

17 JUDGE STEIN: Have they adopted that rule?
18 That - - - that's a - - - that's not our rule, right.

19 MR. YOUNGER: Well, it's a very interesting
20 line of case that you have to follow. It is your
21 rule as a minimum threshold for due process for
22 lineups. You've adopted a per se rule for show ups,
23 you know, throwing out any other cases that will - -
24 - coming up with a tighter rule, but you still have
25 to meet the Supreme Court standard in - - - in - - -

1 in Brathwaite, which is totality of the
2 circumstances; you can't fall below it.

3 So - - - so what does the court say? It says,
4 we're only going to look at a very small snapshot. It has
5 no legal significance that this person was the only one in
6 the lineup. Why? Because all we're going to look at is
7 what was told to the police. Now, that has a lot of great
8 consequences because it can happen in a two to three
9 second encounter, as we have here, you don't remember
10 everything, it can happen in a 911 call, which is under
11 very extreme emotional circumstances, as we have here.

12 JUDGE PIGOTT: If you look it in that taut
13 - - - tautologically, but they - - - they - - - the
14 victims described who they believed to be the
15 perpetrator. And they don't mention here, they don't
16 mention dreadlocks.

17 MR. YOUNGER: Well, two out of the four - -
18 -

19 JUDGE PIGOTT: You didn't - - -

20 MR. YOUNGER: - - - at least, and I believe
21 three out of the four do.

22 JUDGE PIGOTT: Well, let's assume - - - all
23 right. I'll take - - - I'll take the one.

24 MR. YOUNGER: Okay. One of them then.

25 JUDGE PIGOTT: Now they've picked him out

1 of the photo array. Right. If they had stopped
2 there, if the police had stopped there, you wouldn't
3 be here, right?

4 MR. YOUNGER: Nor would we have a
5 conviction, because - - -

6 JUDGE PIGOTT: Well - - -

7 MR. YOUNGER: - - - the folks who did have
8 a lineup acquitted.

9 Then - - - then when they go to the lineup to,
10 let's assume, confirm what they saw in the photo array,
11 and they pick out the same person, you're saying that
12 that's - - - that's a denial of - - - of due process
13 because he had dreadlocks that they tried to cover up in
14 the - - - in the lineup, right?

15 MR. YOUNGER: Actually, something quite
16 different. The court found that this was a unique
17 physical attribute of my client that made him stand
18 out, including - - - with the hat. In fact, I think
19 the hat - - -

20 JUDGE ABDUS-SALAAM: That was only as to
21 two individuals.

22 MR. YOUNGER: That's to two. So there's no
23 argument here that the hat covered it up. In fact,
24 that distinguishes it from the case that they cite,
25 Kirby.

1 JUDGE PIGOTT: What struck me was that
2 let's assume a wholly different case, but that
3 there's a description of the perpetrator, there's a
4 lineup, and the person who they think did it, they
5 now recall had a scar on his forehead, and the only
6 person with a scar on his forehead is the one they
7 pick out.

8 Now, the police don't know that, and that's what
9 I think what the - - -what the court was relying on
10 saying, nobody talked here. And so, you know, what the
11 police did here was exactly what they should have done in
12 terms of - - -

13 MR. YOUNGER: And respectfully, that kind
14 of analysis can't apply to a pattern case. We don't
15 have a single one-off case where - - - most of the
16 cases they relied on are single one-off cases. Here,
17 you have police who were investigating a pattern
18 where two, and now it looks like three, because of
19 difficulty and language, people say the person who
20 robbed me had dreadlocks.

21 So the police know, it's not a question of
22 - - - you know, in fact, if you look at the
23 testimony, the police officer said he put the
24 defendant's photo into a computer, and this was spit
25 out by the computer. So there - - - and he testified

1 that was because of the description. So that - - -
2 that is what - - - it's not a case where the police
3 aren't looking for someone with a scar.

4 JUDGE PIGOTT: But the description is not
5 dreadlocks. Right?

6 MR. YOUNGER: The description of that
7 imposing act is clearly dreadlocks, and at trial,
8 Bukowik said, I told them long hair - - -

9 JUDGE PIGOTT: Longer.

10 MR. YOUNGER: - - - and - - - and dreads,
11 but I don't know the word for dreads in Polish.

12 JUDGE PIGOTT: Okay.

13 MR. YOUNGER: So there was a, you know, a
14 difficulty, which is part of the reason you can't
15 just look at what the victims told the police because
16 there can be communication issues.

17 JUDGE STEIN: Aren't you also saying that
18 because they set up the photo array in the way that
19 they did, they obviously knew that the dreadlocks
20 were a distinctive feature?

21 MR. YOUNGER: More than obviously; that was
22 the detective's testimony. The detective's testimony
23 was that he put this into a computer, and these
24 lineups are generated based on the description. The
25 description had to then include dreadlocks. You

1 wouldn't come up with all these guys wearing
2 dreadlocks.

3 JUDGE PIGOTT: Well, could they have - - -

4 JUDGE RIVERA: What would - - - what could
5 they have done?

6 MR. YOUNGER: There's several things.

7 First, which is done very commonly, in the photo
8 array, you could have Photoshopped the dreadlocks
9 out. So with the people who didn't mention
10 dreadlocks, you're not sticking that idea in their
11 mind.

12 But I think, more importantly, at the lineup,
13 which is what we're really focusing on, three other
14 witnesses said this defendant was wearing a hoodie. And
15 including the witness who said that she didn't really see
16 the - - - the hair. So if you wear a hoodie, as - - - as
17 they said they virtually all saw him, you wouldn't have
18 seen this, as opposed to a hat, which if you see in the
19 photos, it's sticking up here, and everything is sticking
20 right out.

21 And - - - and, you know, I don't think it's our
22 job to sit there, and second guess and say, you could have
23 done this, you could've done this. The point is, they had
24 three weeks to do this lineup. It's not a case of an
25 exigent circumstance; they waited three weeks. And in

1 fact, they waited three months to indict my client. So
2 they had plenty of time to find people who wore
3 dreadlocks, but if you couldn't, there are other ways that
4 - - -that could have covered up.

5 And I think, the real question is, what's the
6 policy here, which is, that we want to avoid the risk of
7 misidentification. And by doing that, you can't just look
8 at a very narrow snapshot. Totality of circumstance is
9 everything that went on.

10 JUDGE GARCIA: Counsel, let me just - - -

11 JUDGE ABDUS-SALAAM: That's the rule - - -

12 I'm sorry. That's the rule that you would propose,
13 that it be totality of the circumstances, not if the
14 victim or complaining witness says it's a distinctive
15 feature, or a feature that they remember.

16 MR. YOUNGER: That police description is
17 part of it. So for example, if I tell the police I
18 just saw someone running out with a red jacket,
19 someone else may not have seen that red jacket. And
20 that, you know, by only putting someone with a red
21 jacket on makes it distinctive as to me, may not make
22 it distinctive as to somebody else.

23 But, you know, I think that the rule here is
24 when you look at the totality of the circumstances, you
25 can't say the only thing I'm looking at is the police

1 description, that everything else is legally
2 insignificant.

3 JUDGE GARCIA: Yeah, and my question goes
4 to that. So let's say you have a - - - you didn't
5 have the photo array here and you just had these
6 lineups; suggestive or not suggestive?

7 MR. YOUNGER: I think we have a different
8 case there would be a much, you know, more difficult
9 case. The difficult is that you would still have the
10 suppression court's finding that that was a
11 distinctive feature, enough to make it suggestive to
12 two people.

13 JUDGE GARCIA: And would it - - - what
14 interests me in that way of looking at it is, there
15 has to be a certain amount of objectivity in this
16 type of feature, right?

17 MR. YOUNGER: Agreed.

18 JUDGE GARCIA: I mean, it can't all depend
19 on a witness statement. I mean, isn't there
20 something that you look at this, because as you're
21 saying, what you want to ensure is that this is a
22 reliable way of making an identification, right, so
23 if there's one person with a startlingly different
24 physical characteristic and you think that's the
25 person that did it, what's the obligation there,

1 then?

2 MR. YOUNGER: I mean, if you put me in a
3 lineup with five bald guys, you know, I have no doubt
4 that I'd be the guy that sticks out like a sore
5 thumb.

6 JUDGE PIGOTT: But if - - - can they just
7 look at this and, I mean, the fact finding court and
8 say, it looks fine to me.

9 MR. YOUNGER: Actually, no. The
10 suppression court said it wasn't fine. The
11 suppression court found there was a unique feature
12 that was unduly suggestive, based not just on that,
13 but also on the testimony.

14 JUDGE PIGOTT: Yeah. All right.

15 CHIEF JUDGE DIFIORE: Mr. Younger, do you
16 care to move on to the Batson issue?

17 MR. YOUNGER: Yeah. Can I - - - the Batson
18 issue or the 911 tape?

19 CHIEF JUDGE DIFIORE: Batson issue.

20 MR. YOUNGER: Okay.

21 CHIEF JUDGE DIFIORE: Well, actually, your
22 preference.

23 MR. YOUNGER: I, first, if I could just
24 briefly talk about the tape issue. That's a case
25 which I think is controlled by this court's decision

1 in Handy; it's virtually no different.

2 JUDGE FAHEY: You're talking about Dayshawn
3 Handy, the videotape in the prison?

4 MR. YOUNGER: Correct.

5 JUDGE FAHEY: Right.

6 MR. YOUNGER: You have a situation where
7 the government's policy results in the elimination of
8 evidence, not negligently, but intentionally.

9 JUDGE FAHEY: I think there, it was - - - I
10 think there, they destroyed the tapes in thirty days
11 and - - -

12 MR. YOUNGER: Here it's ninety.

13 JUDGE FAHEY: - - - and here it's ninety.
14 Right.

15 JUDGE STEIN: And wasn't that Brady, not
16 Rosario? Doesn't that make a difference?

17 MR. YOUNGER: It doesn't. Because
18 actually, in Handy, it was just pure evidence flaw.
19 The pattern jury instructions, that's what this court
20 relied on, it's been along this state forever,
21 evidence is potentially destroyed to get an adverse
22 inference. And what they're saying, we're talking
23 about a lesser sanction than dismissal. It wasn't,
24 you know, dealing with Rosario issues.

25 The argument my adversary is making is, well,

1 you need prejudice. Well, this court said, no, you don't
2 have to have prejudice if it's - - - if it's simply an
3 intentional destruction as opposed to negligence.

4 JUDGE ABDUS-SALAAM: Yeah, but - - -

5 MR. YOUNGER: I'm sorry.

6 CHIEF JUDGE DIFIORE: You may.

7 JUDGE ABDUS-SALAAM: I was just going to
8 ask, in terms of - - - in Handy, I don't know if
9 there was an issue about how you store these things
10 or how many - - - I mean, 911 calls come in, I heard
11 there must be a thousand already today, 911 calls, so
12 where are they supposed to store this stuff?

13 MR. YOUNGER: I want to make it clear, I'm
14 not arguing the NYPD policy. In fact, they've
15 lengthened it now. That's not the issue. The
16 question is, do you get an adverse inference. You
17 could say the same thing about prisons. I mean,
18 there are cameras all over the place that are running
19 twenty-four-seven. It's not a question of burden.

20 And, you know, I mean, in this day of
21 digital storage, I mean, you can store things longer
22 than ninety days. You're not running over a magnetic
23 tape. But all I'm arguing is simply, you know, pure
24 evidence law, that you're entitled to an adverse
25 inference.

1 So on both the suggestive lineup and the 911
2 tape, we would ask for a reversal as to Bukowik, who
3 didn't - - - wasn't able to identify anybody at trial, and
4 a remand as to Huynh. Thank you.

5 CHIEF JUDGE DIFIORE: Thank you.
6 Counsel.

7 MS. TALCOTT: Good afternoon. May it
8 please the court. My name is Nancy Talcott from the
9 Office of Richard A. Brown, the District Attorney of
10 Queens County, representing the respondent in this
11 matter.

12 This does involve a mixed question of law and
13 fact, and there's ample record support, And that's the
14 standard before this court, is there ample record support
15 for the hearing court's determination, which was left
16 undisturbed by the Appellate Division, that the lineup was
17 non suggestive as to the witnesses who did not describe
18 the robber's hair to the police.

19 JUDGE GARCIA: Can we, to that point - - -

20 JUDGE PIGOTT: Could you tell me what these
21 are?

22 MS. TALCOTT: I think that might be that
23 back, to show you that those are the exhibits. The -
24 - - that's - - - we put stickers on the exhibits.

25 JUDGE PIGOTT: These are the backs of 1076

1 well, the witness didn't tell me it was an African
2 American. So where do you draw that line?

3 MS. TALCOTT: It does - - - well, it
4 doesn't always hinge on what the witness has said.
5 But here, when you have an otherwise fair lineup, if
6 you look at the photos - - - and we submitted the
7 side views, but does that show - - -

8 JUDGE STEIN: But to me, it seems like the
9 court did hinge it only on that. Because for - - -
10 for two of the victims who mentioned the dreadlocks,
11 it was unduly suggestive as to them, and for two of
12 the victims who didn't, it was not unduly suggestive.

13 So how - - -how do you - - - how can that not
14 be, you know, based on a wrong standard, if we say that's
15 not the standard and that's not the only factor?

16 MS. TALCOTT: Because in attempt to make
17 this a question of law, when it's really a question
18 of law and fact, the defendant characterized the
19 court's decision as such. When you read the court's
20 decision in its entirety, it's clear, it actually
21 stated twice, on page A10 and A12, that it was using
22 a totality of circumstances standard. It references
23 that same standard on page A27.

24 He did - - - the court did not just rely on
25 the sole fact that the description didn't refer to

1 the perpetrator having dreadlocks.

2 JUDGE PIGOTT: - - - but the follow-up like
3 on what Judge Garcia was asking, if - - - and I think
4 this is part and parcel a defenseless argument.

5 If you - - - if you had the lineup, got it,
6 you know, we can argue one way or the other. If you
7 have the show up for the photos, got it, you can
8 argue one way or the other. But when the - - - when
9 the photos tip off - - - my word, nobody else's, as
10 to who the perpetrator is, and then you move that
11 perpetrator into the lineup, doesn't that taint it?

12 MS. TALCOTT: Well, just as an initial
13 matter, before I get to the merits of that, this
14 particular novel issue is completely unpreserved for
15 appellate review. It was not raised in the court,
16 and it was not addressed by the court.

17 The argument with respect to the photo arrays,
18 and then linking it, the photo arrays tainted the
19 subsequent lineup, the underlying arguments attacking
20 those, with regard to Bukowik, it had to do with what
21 Detective Kramer (ph.) said to her. He didn't remember.
22 It also had to do with even - - - so it might have been
23 suggestive. Also, she used an interpreter. Maybe it
24 wasn't interpreted properly.

25 And the distinctive factor they pointed out,

1 attacking the photo arrays, and then trying to link that
2 to the lineup, was the fact that she said he wore a dark
3 sweatshirt. Nothing was raised with respect to the hair,
4 or that all the photo array participants had dreadlocks.

5 JUDGE STEIN: Getting back to the - - - to
6 the totality of the circumstances. What
7 circumstances were different among the four victims,
8 other than that two had mentioned the dreadlocks and
9 two hadn't? So even if the court said that's what
10 they were doing, what - - - what circumstances were
11 different amongst those two sets of victims?

12 MS. TALCOTT: Well, other circ - - - other
13 circumstances were the same, and - - - and the court
14 looked at the lineup and noted all the other similar
15 characteristics. They noted the fillers were not
16 glaringly dissimilar.

17 JUDGE STEIN: Well, I understand that. But
18 - - -

19 MS. TALCOTT: Oh, vis-a-vis the two and the
20 two?

21 JUDGE STEIN: Yes, exactly.

22 MS. TALCOTT: I think that was the main
23 distinction. There might have been height
24 discrepancies, I don't recall each particular - - -

25 JUDGE STEIN: Okay. So - - - so then the

1 distinguishing factor then for this court was - - -
2 for the suppression court was whether they had
3 mentioned it or hadn't mentioned it to the police.
4 And if we say that that is not a distinguishing
5 factor, or the distinguishing factor, then how can we
6 differentiate?

7 MS. TALCOTT: Well, you can say, with
8 respect to those two, one said dreadlocks - - - one
9 said long hair, he didn't even say dreadlocks, but it
10 still - - -

11 JUDGE GARCIA: But if we're saying that - -
12 -

13 JUDGE STEIN: No, you - - -

14 JUDGE GARCIA: - - - that is not a valid
15 basis for saying this is not unduly suggestive, if
16 we're saying that you can't just rely on what the
17 witness told you, my hypothetical, I didn't say it
18 was an African American, but that's the only one in
19 the lineup, you can't rely on that.

20 So what is your basis for saying this is
21 not unduly suggestive as to these others, when the
22 court relied solely on the fact, it appears from the
23 record, that they hadn't said it in their
24 description?

25 Because otherwise, it would be unduly suggestive

1 if they had said it. So - - -

2 MS. TALCOTT: Well, no, because the cases
3 made clear that it - - - it does matter whether the
4 witness had said it. Raheem makes that clear.

5 The principle question is not whether there
6 was a distinguishing feature - - -

7 JUDGE GARCIA: Well, there must be a
8 difference though, don't you think, that if - - - if
9 somebody says the person who committed this crime had
10 a - - - had a Harvard sweatshirt on, and I've got a
11 lineup that I could just look at objectively, one guy
12 has a Harvard sweatshirt on, and boy, that doesn't -
13 - - they all look physically kind of alike.

14 But if I look at this lineup, I can say
15 objectively, one of these things does not look like
16 the other, and a distinctive physical characteristic.
17 Isn't that a little bit different than the Harvard
18 sweatshirt?

19 MS. TALCOTT: I think it - - - I think it
20 depends on the circumstances. I think you can have
21 an obviously improper lineup without any input from
22 any witness. Like you said, you know, we think it's
23 a white guy, and we arrest this guy, not having any
24 input from any witnesses, we bring in a - - -

25 JUDGE GARCIA: Right.

1 MS. TALCOTT: - - - a witness who hasn't
2 given a description, and he's with four African
3 Americans.

4 JUDGE ABDUS-SALAAM: Counsel - - -

5 JUDGE GARCIA: So there has to be some
6 level - - -

7 MS. TALCOTT: You might - - - you might be
8 able to tell that on its face.

9 JUDGE GARCIA: Right. So there has to be
10 some level of objective fairness, let's call it, it's
11 the wrong word, but to the lineup, right, to make it
12 unduly - - - not unduly suggested. So the question I
13 think we're struggling with is, where is that line in
14 a characteristic, like the one we're talking about
15 now, as opposed to maybe an article of clothing that
16 would be innocuous in another case?

17 MS. TALCOTT: Well, I think the court did
18 that. I think its initial findings they found
19 overall this lineup is okay. They have the same
20 facial hair, they have the same skin color, they have
21 the same physical characteristics. Nothing really
22 singled him out. The fillers aren't glaringly
23 dissimilar.

24 There's no evidence that the manner in
25 conducting the lineup was improper. He did go

1 through other things, so then it came down - - - so
2 there was an objective assessment of the lineup in
3 general.

4 JUDGE ABDUS-SALAAM: But it came down to
5 the hair again. Counsel, you know - - -

6 MS. TALCOTT: That was one factor that
7 rendered it impermissible as to those two who had
8 mentioned it.

9 JUDGE ABDUS-SALAAM: But no, not just those
10 two. And that's why I wanted to bring it up, because
11 one of the witnesses who didn't mention hair to the
12 police officer, or at least that wasn't recorded,
13 then in court, and picked this man out of the lineup
14 and out of the photo array, then in court says, but I
15 also noticed he had that - - - had long hair.

16 So the witness never told - - - at least on
17 this record it appears that the witness never told
18 the police that the perpetrator had long hair, but
19 she mentioned that at trial. So it must have been
20 something that she was thinking about because it was
21 important enough for her to say it at trial.

22 So you have this unstated - - - this
23 feature, distinctive feature that was distinctive to
24 that witness, yet she picked him out of the lineup.

25 MS. TALCOTT: But - - - and again, maybe it

1 was a language barrier. Initially, it wasn't really
2 clear whether she said it. Because Detective Kramer
3 said she hadn't discussed the lineup. And at some
4 point after she said - - - and she said she described
5 the hair as curly, if anything, and then she said, I
6 don't really know what I said when I talked to so
7 many people and gave different descriptions.

8 Now, when they move to reopen the hearing, which
9 isn't before this court, and the Appellate Division
10 affirmed, they said, those new facts proffered were
11 unlikely to affect the original determination. So it's
12 not at all clear, just because she said hair, that that
13 would have resulted in the same conclusion of the hearing
14 court.

15 JUDGE ABDUS-SALAAM: But I think she said
16 long hair, which would be different than hair.
17 Because dreads are - - -

18 MS. TALCOTT: That - - - that came later,
19 but initially, she said curly - - -

20 JUDGE ABDUS-SALAAM: Um-hum.

21 MS. TALCOTT: - - - which interestingly,
22 the defense attorney in the hearing, that's how she
23 described all the participant's here. She said
24 defendant - - - you know, they all had curly hair,
25 but defendant stood out.

1 So it's not that clear on the court - - -
2 and that's a factual finding that the lower court
3 found, and the Appellate Division affirmed, and
4 there's record support for that that she may not even
5 have said anything to the cop because Detective
6 Kramer was sure - - - testified that she hadn't said
7 anything.

8 JUDGE ABDUS-SALAAM: So I just want to be
9 clear, are you saying that the rule that you would
10 request us to adopt would be, if the complaining
11 witness or the victim testifies or says something
12 about a physical feature, that might be unduly
13 suggestive, but if they don't, it's not?

14 MS. TALCOTT: It may, because we're also
15 looking - - - again, her subsequent testimony
16 indicates she may or may not have told the officers
17 that. His - - - the police conduct was no better or
18 worse. And that's why it wouldn't retroactively
19 negate the propriety of the lineup, with respect to
20 her. Because we're all looking at the police conduct
21 here in - - - formulated in the lineup.

22 JUDGE FAHEY: Can I just - - - your time is
23 almost up, and I just wanted to ask you briefly about
24 the 9-1 - - - or the - - - yeah, the 911 tapes.
25 What's a Sprint report?

1 MS. TALCOTT: A Sprint report - - -

2 JUDGE FAHEY: Take your time. Go ahead.

3 Go ahead. I don't mean to - - -

4 MS. TALCOTT: It's a simultaneous

5 memorialization of the call.

6 JUDGE RIVERA: Is it a transcript of the

7 recording, or is it just, name and what time they

8 called?

9 MS. TALCOTT: No, it documents what they

10 actually say.

11 JUDGE FAHEY: I see.

12 MS. TALCOTT: And, you know, there's an

13 incentive for its accuracy because this is what's

14 being then relayed to the police.

15 JUDGE RIVERA: Who writes it?

16 MS. TALCOTT: I think the 911 operator,

17 promptly.

18 JUDGE RIVERA: The operator - - -

19 MS. TALCOTT: Because at the end we could

20 have admitted this evidence, you know, concerning the

21 background and the accuracy and the checking - - -

22 JUDGE RIVERA: So it's basically the

23 operator - - - it's basically the operator's notes as

24 to what he or she heard?

25 MS. TALCOTT: That's my understanding. But

1 again - - -

2 JUDGE RIVERA: I'm the operator, I take the
3 call, and then after the call is done I take notes,
4 or am I taking it simultaneously?

5 MS. TALCOTT: No, it's done simultaneous,
6 real time, yes.

7 JUDGE RIVERA: It's what I write from what
8 I hear.

9 MS. TALCOTT: Yes, yes.

10 JUDGE RIVERA: Okay.

11 MS. TALCOTT: But again, a lot of that
12 evidence could have been put forth regarding Sprint
13 reports in general, had this issue been raised. The
14 general attack on the police policy was never raised
15 until - - -

16 JUDGE RIVERA: Your time ran out. Do you
17 want to say anything quickly about Batson?

18 MS. TALCOTT: About Batson?

19 JUDGE RIVERA: Yes. Like 30 seconds.

20 MS. TALCOTT: You know, again, this is a
21 factual finding which this court has set forth that
22 is - - - should be afforded great deference.

23 And the court made clear, the prosecutor
24 said, you know, she wasn't - - - she didn't have a
25 good rapport with certain jurors. She also expanded

1 on that with respect to at least two regarding
2 employment. And you don't have to agree with the
3 employment. Some might stem from stereotypes. The
4 court doesn't have to agree.

5 CHIEF JUDGE DIFIORE: How does the court
6 review that rapport? I mean - - -

7 MS. TALCOTT: It's very hard to. And I
8 think - - - I think the court made note of that.
9 Whatever it had seen, it said, you know, this is
10 based on my observation of these courtroom dynamics.
11 Whatever he saw, he said, if the prosecutor says
12 this, and I make a factual determination that her
13 reasoning is not pretextual, that's my factual
14 determination.

15 He specifically said that, that was his
16 factual determination. Based on what she said, based
17 on his own observations, and he didn't really get the
18 employment thing, but he doesn't have to. All he has
19 to find was that it's not pretextual. Somebody might
20 remind somebody of their second grade teacher who was
21 horrible. Well, a judge might not agree with that or
22 understand it; he might think it's silly.

23 CHIEF JUDGE DIFIORE: What about the woman
24 who was - - - whose occupation was the mortician
25 where there were no questions asked of her.

1 MS. TALCOTT: Again, employment. Whether
2 it seems logical or not, whether it's related to the
3 facts of the case or not, it can still be deemed not
4 pretextual. And she actually did posit a reason
5 although I don't think she articulated it fully. The
6 judge said, well, do you have a dead person here?

7 JUDGE RIVERA: Does this - - -

8 MS. TALCOTT: And she said, no. That's
9 exactly why I'm precluding her.

10 JUDGE RIVERA: Does - - -

11 MS. TALCOTT: Because you have people who
12 weren't even physically hurt. I apologize.

13 JUDGE RIVERA: Doesn't your approach though
14 allow - - - not you, of course - - - allow perhaps
15 not such a well-intentioned prosecutor to come up
16 with any excuse, no matter how - - - as even this
17 judge says, these sound not logical to me. In terms
18 of the employment, doesn't seem to make any sense to
19 me. But it's a preemptory. You get to do that if
20 you want.

21 So then at what point is it - - - does it
22 tip from, yes, of course you get a preemptory, unless
23 - - - unless the defendant has made that - - - past
24 the first step of Batson, you don't have to explain
25 it. But at what point does it tip to these

1 explanations now, in context, perhaps individually,
2 they don't show animus, or they don't show
3 discriminatory intent, or they don't otherwise show a
4 pattern. But taken together, there's a problem.

5 When does that tip?

6 MS. TALCOTT: Well, it tips when the trial
7 court who is there actually viewing it, and that's
8 why this court has stated, it really has to be
9 afforded great deference. Because it really comes
10 down to the - - -

11 JUDGE STEIN: The question is - - -

12 MS. TALCOTT: - - - credibility
13 determination of the prosecutor or the party
14 defending the strikes.

15 JUDGE STEIN: What I'm hearing you say is
16 that it can almost never be overturned though.

17 MS. TALCOTT: This court has rarely
18 overturned a step-three Batson challenge, I will say
19 that.

20 JUDGE STEIN: When could it be overturned?
21 How - - - what - - - give me an example.

22 MS. TALCOTT: I guess if it was blatant and
23 it just defied reason, the record - - - I can't think
24 of an example.

25 JUDGE RIVERA: Well, here's what I want to

1 ask you. I understand your argument about the
2 factual determination is certainly what the judge
3 says more than once. This is my factual
4 determination, based on what I think the prosecutor
5 believes, based on these dynamics.

6 But isn't in part the possibility to create
7 the dynamics is within the control of the prosecutor?
8 I mean, on one of these, he says, I didn't even ask
9 her anything, but I have no rapport with her. How
10 can you determine rapport, when the prosecutor is
11 able to control the opportunity to ask questions to
12 see if there is a rapport?

13 MS. TALCOTT: They aren't limited, in some
14 respect, because of the time constraints.

15 JUDGE RIVERA: Um-hum.

16 MS. TALCOTT: So based on perhaps
17 questions, and again, it's not just questions she
18 gave to the entire panel. She's also viewing the
19 questions the court asked the entire panel, and the
20 questions that the defense attorney asked the entire
21 panel. So she may not have chosen to use her time
22 asking that particular witness - - -

23 JUDGE RIVERA: I'll tell you what's
24 difficult is to see whether or not there's no rapport
25 with someone who is not of this racial group, because

1 that record is hard to place. And that's what I'm
2 saying about the opportunity that that prosecutor has
3 to control the creation of a reason that sounds not -
4 - - not - - - not in violation of Batson, and the
5 opportunity to not allow the record to be so clear.

6 MS. TALCOTT: Well, I think she did try to
7 make a record. I'm not so sure if it was complete,
8 with respect to the employment, and she did offer the
9 alternative reasons in addition to rapport, with
10 respect to at least the two. The third one,
11 actually, I think there was some question as to her
12 ethic background. So she - - - they are limited in
13 their ability to make a record. And defendant didn't
14 refute the court's findings.

15 JUDGE ABDUS-SALAAM: With the Chief Judge's
16 permission - - -

17 CHIEF JUDGE DIFIORE: Yes.

18 JUDGE ABDUS-SALAAM: - - - to ask. I just
19 wanted to ask, counsel, because you answered the
20 question regarding the destruction of the 911 tapes
21 as if the defendant is challenging the NYPD's policy,
22 but that's not what they're saying. They're saying
23 it's just a purely evidentiary issue that evidence
24 was destroyed, and they are entitled to an adverse
25 inference charge. What's your position?

1 MS. TALCOTT: This is Rosario. So in
2 Martinez, the second Martinez, this court said then,
3 non-willful, non-negligent destruction of Rosario,
4 you have to show prejudice.

5 Not only did he not show prejudice, he
6 didn't even allege it, with respect to Huynh. And
7 that's the person who's caused at issue here.

8 And there's no fair reading of the record that
9 he wasn't only, exclusively, referring to Batt (ph.). He
10 actually says, in this particular case, Mr. Batt's case.
11 It's clear he didn't - - - he didn't allege, let alone
12 show, any claim of prejudice with respect to Huynh.

13 And even under the Handy standard, there's no -
14 - - there's no claim that the evidence destroyed in Handy,
15 which could have implicated the officer who destroyed it,
16 could be acquitted with the 911 call. They had the Sprint
17 report, the witness herself testified, and you had police
18 reports documenting. So he was able to establish any
19 prejudice, but there was none.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MS. TALCOTT: Thank you.

22 CHIEF JUDGE DIFIORE: Mr. Younger, how does
23 defense counsel go about establishing his or her
24 burden on pretext in the Batson context, of course if
25 - - - if the prosecutor's alleging, I didn't have a

1 rapport with these women.

2 MR. YOUNGER: So let me talk about how it
3 happened in this case. In this case, there are four
4 preemptory challenges to the fourth - - - and the
5 court found they were all female African Americans.
6 The court said, you have raised a prima facie case.
7 So now defense has made their case, the burden shifts
8 - - - always have the burden on the defense, but the
9 burden shifts to the People.

10 What they say first, in two employment-based
11 reasons, sister of an immigration attorney, mortician.
12 The judge said, that's illogical, it's a non sequitur,
13 there's nobody dead here. In fact, with an immigration
14 lawyer, they would more likely sympathize to you, because
15 these victims are, you know, people of diverse
16 backgrounds, than to the defense.

17 JUDGE FAHEY: But that isn't unusual on
18 jury selection. I know - - -

19 MR. YOUNGER: I agree - - -

20 JUDGE FAHEY: It's not - - - lawyers all
21 the time say, don't want any engineers on a personal
22 injury, or - - -

23 MR. YOUNGER: I can understand that, but
24 here's what's critical here.

25 JUDGE FAHEY: Um-hum.

1 MR. YOUNGER: The prosecutor then shifts,
2 the prosecutor gives up the employment based reasons
3 and shifts to rapport. That, to me, is a sign that
4 there's a pretext. Right. I gave you some reasons,
5 but that's not my real reasons. My reason is a
6 rapport.

7 With one, I didn't even talk to the person.
8 I saw you at a cocktail party, I never talked to you;
9 I didn't have a rapport. There's no basis in the
10 record for that finding. The prosecutor has just
11 shifted, but more importantly, what the prosecutor
12 said about rapport was contradicted by the record.

13 The prosecutor said, I asked him several
14 questions, I didn't get - - - he didn't ask one
15 question of each of the other three people. And - -
16 -

17 JUDGE PIGOTT: Well, the judge - - - the
18 judge made findings, you know, was the standard that
19 he applied in making those standards the appropriate
20 one, in your view?

21 MR. YOUNGER: You're absolutely correct,
22 the judge made findings, but if you try to dissect
23 through what those findings were, he basically threw
24 everything up.

25 Well, it could be this, it could be that, it

1 could be this, and there's no specific finding, nor is
2 there a record basis to say that there was actually a lack
3 of either rapport, or there was a some basis for an
4 employment-based challenge in the case.

5 JUDGE RIVERA: So is your - - - your
6 argument that it's pretext despite - - - for two of
7 them, identifying employment and - - - because at
8 some point, the prosecutor, after going through this
9 says, Your Honor, I didn't feel a rapport with these
10 people that I preempted during my jury selection,
11 that's why I preempted them - - -

12 MR. YOUNGER: Right.

13 JUDGE RIVERA: - - - including to - - -
14 including the fact that she's a mortician, I had
15 absolutely no rapport with her. And then - - - then
16 goes back to the individualized. It's that - - -

17 MR. YOUNGER: Exactly.

18 JUDGE RIVERA: It's those two couple of
19 sentences - - -

20 MR. YOUNGER: Exactly.

21 JUDGE RIVERA: - - - where after doing some
22 individualized - - -

23 MR. YOUNGER: Right.

24 JUDGE RIVERA: - - - discussion - - -

25 MR. YOUNGER: Right.

1 JUDGE RIVERA: - - - the prosecutor comes
2 back and says, I just didn't have a rapport with any
3 of them, and I've got these individual issues.

4 MR. YOUNGER: Yeah, exactly.

5 JUDGE RIVERA: I mean, but it is possible.
6 Certainly, right?

7 MR. YOUNGER: Yeah.

8 JUDGE RIVERA: In addition to the
9 individual reasons that the prosecutor doesn't have a
10 rapport. What about - - -

11 MR. YOUNGER: Oh, yeah.

12 JUDGE RIVERA: Hold on, yes. But what
13 about - - -

14 MR. YOUNGER: But then you would expect the
15 judge to put something on the record that, you know,
16 I mean, this supports - - -

17 JUDGE RIVERA: But why isn't that on the
18 record, when the judge says, look, it's hard to put
19 it into a transcript, it's my - - - my view of the
20 dynamics, it's my understanding and my factual
21 finding about what this prosecutor believes.

22 MR. YOUNGER: For example, the witness
23 prompts you to ask no questions despite saying she
24 asked several questions, she could have said, I saw
25 you looking at what - - - I wasn't - - - juror X, and

1 I saw there was, you know, a not, you know, no body
2 language. There's something specific you can point
3 to the record. Not just saying, rapport, I'm done.

4 Can I just close with one point, because I think
5 it's critical on the lineup what Bukowik testified to.

6 If you look at A698 to 99, she first said, and
7 this is what she told the police she said, not just what
8 she saw, that he had curly hair. She then, on 699, says,
9 "That's what we call it, dreads."

10 So she used the word dreads, but she used it in
11 Polish, and that's exactly the point. If you have a
12 witness who doesn't speak English as a first language,
13 communicating through a translator, you can't say that's
14 the only thing that you rely on.

15 But much more importantly, if you look at A990,
16 the prosecutor, in the summation, told the jury to rely on
17 that identification. Why? Because Bukowik saw dreads.

18 How can you, as a prosecutor, say, it doesn't
19 matter, not in the police ID because they didn't see
20 dreads. And then, in your summation, tell the jury,
21 that's why you should rule in my favor.

22 Thank you very much.

23 CHIEF JUDGE DIFIORE: Thank you, sir.

24 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Anthony Perkins, No. 202 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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