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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF NEW YORK,

Respondent,

-against-

NO. 57

MARK WATKINS,

Appellant.

20 Eagle Street
Albany, New York
April 18, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Good afternoon. I wanted to
2 welcome our friend and former colleague, Judge Leslie
3 Stein, who has brought with her schools from the Albany Law
4 School, Chapter of the Historical Society of the New York
5 Courts. Welcome. Glad to see you here.

6 First case on the calendar is People v. Watkins.

7 MS. VASILY: Good afternoon. And may it please
8 the court. Elizabeth Vasily, on behalf of appellant, Mr.
9 Mark Watkins. I'd like to request five minutes for
10 rebuttal.

11 CHIEF JUDGE WILSON: Yes.

12 MS. VASILY: In this rare single witness
13 identification case with absolutely no other corroboration,
14 trial counsel failed to request a cross-race ID charge,
15 which would have informed the jury that people may, quote,
16 have a greater difficulty in accurately identifying members
17 of a different race - - -

18 JUDGE TROUTMAN: At the time of Mr. Watkins
19 trial, had the law been settled that he was, in fact,
20 entitled to the charge?

21 MS. VASILY: Your Honor, Boone had not yet been
22 decided at the time of the trial, but the charge was in the
23 criminal jury instructions, the model instructions, and
24 they had been there for six years prior to the trial. It
25 was also recommended by the ABA, by the New York State Task

1 Force - - -

2 JUDGE GARCIA: So your claim is that even under
3 the law, as it existed at the time, it was ineffective not
4 to at least request the charge?

5 MS. VASILY: Yes, Your Honor.

6 JUDGE RIVERA: Well, you say Boone had not been
7 decided, but Boone had been argued, no?

8 MS. VASILY: It had.

9 JUDGE RIVERA: Hadn't it already been published
10 for re-argument?

11 MS. VASILY: It had, Your Honor.

12 JUDGE RIVERA: Okay.

13 MS. VASILY: And of course, attorneys have a
14 responsibility to keep abreast of developments in the law.
15 But even so, Boone being decided, it merely gold starred or
16 rubber stamped a practice that should have - - -

17 JUDGE HALLIGAN: But Boone doesn't make it
18 mandatory, does it?

19 MS. VASILY: It makes it mandatory upon - - -

20 JUDGE HALLIGAN: Upon request, but it does leave
21 it, as I read Boone - - - tell me if you have a different
22 view - - - up to the choice of defense counsel or perhaps
23 the prosecution to request, yes?

24 MS. VASILY: It does, Your Honor.

25 JUDGE HALLIGAN: And so the point here you're



1 saying is that to not have requested it is ineffective
2 assistance, even though even post Boone defense counsel
3 could make a choice not to request for strategic reasons,
4 yes?

5 MS. VASILY: Yes, Your Honor. In the ineffective
6 assistance of counsel - - -

7 JUDGE RIVERA: What could possibly be strategic
8 reasons?

9 MS. VASILY: There were no - - -

10 JUDGE RIVERA: Reasons in your case.

11 MS. VASILY: There would be no strategic reason,
12 Your Honor, for not requesting such a powerful charge that
13 went directly to the core of the defense theory.

14 JUDGE GARCIA: So then how does Boone, if it were
15 to apply, if we were to say because it was re-argued or
16 argued or accepted for a leave grant, how would the Boone
17 potential decision - - - how would Boone affect that
18 analysis, the ineffectiveness in this case?

19 MS. VASILY: Well, in this case, it would affect
20 the prejudice, for one, given that prejudice is determined
21 now at the time of the effect - - - ineffective assistance
22 of counsel claim. But even so, it would also affect
23 deficient performance, one, in the way that Judge Rivera
24 mentioned - - -

25 JUDGE GARCIA: My - - - my question isn't clear.

1 I apologize. It - - - under Boone, if you ask, you get.
2 Under the law before Boone, it was discretionary call, and
3 in fact, the appellate divisions were upholding the
4 exercise of that discretion.

5 So what would the effect of it not being
6 discretionary upon request be on the ineffective analysis?

7 MS. VASILY: A lot of mistakes that defense
8 counsels make that are found ineffective are failing to ask
9 for discretionary things from trial judges.

10 JUDGE GARCIA: All right.

11 MS. VASILY: And in this case, this was such a
12 powerful charge, even at the time, even pre-Boone. And
13 Boone didn't create some new obscure law that nobody could
14 think would ever come into existence.

15 JUDGE HALLIGAN: So what - - - what cases can you
16 point us to that are most like this one, where there is a
17 discretionary charge to which under the law at the time,
18 the defendant did not have an entitlement. As Judge Garcia
19 said, the appellate division was sustaining the denial of
20 the charge and that the failure to ask for that was deemed
21 ineffective. What cases are most analogous, would you say,
22 from our court to that circumstance?

23 MS. VASILY: It would be any case, such as
24 Debellis or any other cases where a trial counsel was found
25 ineffective for not asking for something that would be in

1 the judge's discretion that would be so powerful.

2 JUDGE SINGAS: And do you think that - - - sorry
3 - - - do you think that this is so clear cut and
4 dispositive that it - - - that Turner would apply on a
5 charge that isn't even mandatory? How - - - what's your
6 argument that it was so clear cut and dispositive?

7 MS. VASILY: It's certainly clear cut and
8 dispositive, Your Honor, because it was in the model jury
9 instructions. It was recommended. It was widely used by
10 defense attorneys at the time. And it's dispositive
11 because it would have injected doubt and could have easily
12 tipped the scales in the favor of acquittal.

13 JUDGE GARCIA: How do you know you would have
14 gotten it if it was a discretionary call at the time, and
15 they were routinely upholding the exercise of discretion?
16 How can it be dispositive if it's not so clear cut you
17 would have gotten a charge in the first place?

18 MS. VASILY: First of all, Your Honor, the burden
19 is not that we have to prove that the charge would have
20 assuredly been granted. Under the federal standard, it's
21 only a reasonable probability that the charge would have
22 been granted. And New York's even lower than that. If
23 anything, the charge - - - the judge granted the one
24 witness ID charge; it would have every reason to grant the
25 cross-race charge as well.

1 JUDGE TROUTMAN: So are you arguing essentially
2 here that because of the nature of the case where
3 identification was everything, the attorney should have
4 been educated with respect to the issue and possible
5 defenses, and including proper instructions to request of
6 the court whether they be granted or not?

7 MS. VASILY: Absolutely, Your Honor. In this
8 case, with no corroboration to have the jury consider
9 cross-race ID and the unreliability of that in the mix
10 would amplify all these other reasons to doubt - - -

11 JUDGE GARCIA: Why isn't this Blake - - - I
12 think, Blake, we said it couldn't be ineffective assistance
13 of counsel because the entitlement to an adverse inference
14 charge was not conclusively established until 2013. At the
15 time of the defendant's trial, the availability of the
16 charge was discretionary. Why isn't this Blake?

17 MS. VASILY: Blake was very different, Your
18 Honor, because this court determined that on prejudice.
19 And in that case, there were a lot of facts that went
20 directly against that adverse inference charge. In Blake,
21 the defendant tried to bribe police officers into
22 destroying the video that would have been subject to such
23 an adverse inference charge.

24 JUDGE GARCIA: Well, we said if it was a mistake,
25 though, right, even if it was a mistake?

1 MS. VASILY: And this is a lot more powerful to
2 go to the heart of a defense theory. And something in the
3 CJI for 2011, there was no CJI for the adverse inference
4 charges for Rosario.

5 JUDGE HALLIGAN: Can I ask you to go - - - can I
6 ask you to go back to your comment that the charge clearly
7 would have been granted? I thought in Boone, but maybe I'm
8 mistaken, that there, there was an expanded witness charge
9 granted, but the cross-racial ID charge was not granted; is
10 that right?

11 MS. VASILY: That's correct.

12 JUDGE HALLIGAN: Okay. And so the appellate
13 division upheld that. And it's certainly right that the
14 case was before this court at the time of your client's
15 trial. But Boone itself seems to me to be an example of a
16 case where the expanded witness charge was granted, but the
17 cross-racial wasn't. And so why was it so certain that if
18 requested, the result would have been that the charge would
19 have been granted as opposed to what happened in Boone
20 itself, where it was not granted?

21 MS. VASILY: Defense attorneys would still want
22 to request these charges because they start with the CJI.
23 They look at the model instructions. Just because an
24 appellate division decision and Boone decided against
25 granting that charge, you know, courts do that all the

1 time. Courts find no abuse of discretion.

2 JUDGE HALLIGAN: Doesn't it make it hard to say
3 it would have been certainly granted. I guess that's what
4 I'm asking.

5 MS. VASILY: That's not the standard that it be
6 certainly granted. But there's a very high likelihood that
7 the judge, in its discretion, would have granted the
8 charge.

9 JUDGE RIVERA: Isn't the point that leave was
10 granted and it was re-argued, so obviously, the court was
11 going in a particular direction, uncertain, but it could
12 have been in a direction favorable to the defendant. And
13 by not - - - by not requesting the charge, you've
14 potentially, as is argued here, forfeited an appealable
15 issue?

16 MS. VASILY: Absolutely, Your Honor. That was
17 pending as well was very persuasive - - -

18 JUDGE RIVERA: Would it be - - -

19 MS. VASILY: - - - in addition to the fact - - -

20 JUDGE RIVERA: Can I ask you a different kind of
21 question, though? I'm just curious because I see this in
22 the briefing. Boone was very clear that it was only about
23 cross-racial identification, but this involves a Latino
24 witness. So how - - - could you tell me whether or not
25 that at all affects the analysis?

1 MS. VASILY: That what affects it, Your Honor?

2 JUDGE RIVERA: That the witness - - - I'm sorry -
3 - - the victim. The witness testified, but the victim was
4 Latino. Since Latinos apparently can be of any race or no
5 race.

6 MS. VASILY: Your Honor, it's - - - it's
7 undisputed in this case that they were of different races.

8 JUDGE RIVERA: Okay. I'm asking you, how is that
9 undisputed? I couldn't find anything in the trial record
10 about - - - about the victim's race.

11 MS. VASILY: In the record, Your Honor, the
12 police officer does talk about the races of the - - -

13 JUDGE RIVERA: Okay.

14 MS. VASILY: - - - the - - - the two - - - of the
15 suspect. I believe it's at A-237 and A-31. They discuss
16 that they're of different races, that - - -

17 JUDGE RIVERA: Based on what? Because he's
18 Latino?

19 MS. VASILY: Based on the pedigree information in
20 the case.

21 JUDGE RIVERA: But does the pedigree information
22 say anything other than Latino?

23 MS. VASILY: It says - - -

24 JUDGE RIVERA: Or Hispanic.

25 MS. VASILY: It says Hispanic. And then there

1 was a debate about whether the defendant or the complainant
2 were black, and they said that the defendant was black, but
3 not - - - the complainant was not black.

4 JUDGE RIVERA: I'm sorry. And that, just to
5 clarify, that's at A-237 and A-31? I can find what you've
6 just described on either or both of those pages?

7 MS. VASILY: What I just said was in the
8 suppression hearing, but it's also in those records as
9 well.

10 JUDGE RIVERA: Thank you.

11 JUDGE HALLIGAN: So I'd appreciate your thoughts
12 on the posture here. So we're on direct appeal, right?
13 And post-Boone, it seems to me that because there is
14 discretion given to trial counsel as to whether to request
15 or not, you would have to figure out what circumstances
16 there would be an ineffective assistance claim that would
17 lie on direct appeal versus on a 440, right? And so
18 setting aside the fact that we're pre-Boone and not post-
19 Boone, how would you have us sort that out? You're arguing
20 here that even pre-Boone, we can resolve this on direct
21 appeal. I'm wondering how we do it post-Boone. Do you
22 have a view on that?

23 MS. VASILY: Either way, Your Honor - - -

24 JUDGE HALLIGAN: On a direct appeal as opposed to
25 440, I mean.

1 MS. VASILY: Either way, Your Honor, because
2 there's no conceivable reason to not request this charge -
3 - -

4 JUDGE HALLIGAN: So probably what we have to do -
5 - - we have to look at the record in a particular case and
6 assess whether we think there is any possible strategic
7 consideration that might be apparent from the record, and
8 that's what determines whether it's direct appeal or 440?

9 MS. VASILY: That's correct, Your Honor. And in
10 the facts of this case, with such a weak ID with no other
11 corroboration, there would be no strategy behind not
12 requesting this charge.

13 CHIEF JUDGE WILSON: Let me ask you - - -

14 MS. VASILY: And so even on direct appeal, that's
15 appropriate.

16 CHIEF JUDGE WILSON: Let me ask you one thing
17 related to that. So do you have a sense pre-Boone in
18 single witness identification cases where there's nothing
19 other than that ID, what the track record for requests for
20 a cross-racial ID was?

21 MS. VASILY: I don't, Your Honor. But it was a
22 practice that was ongoing, and Boone gold-starred it. It
23 rubber-stamped it. It didn't create this new law that a
24 lawyer would have no idea it was going to go into
25 formation. You know, it was months after the fact.

1 JUDGE HALLIGAN: Well, it did - - - it did in the
2 appellate divisions, I think, had been - - - had a
3 different view. I mean, in that regard, it created new law
4 by making it mandatory upon request, right?

5 MS. VASILY: It made it mandatory upon request.
6 So it would be just like if this court decided that a
7 certain Molineux conviction had to be mandatorily precluded
8 today. But that doesn't mean defense attorneys shouldn't
9 have been requesting it for years and years prior, and
10 couldn't be ineffective for failing to ask for something.

11 JUDGE RIVERA: And the time - - - the time of - -
12 - well, actually, by the time Boone is granted leave, there
13 were other jurisdictions that already adopted this charge,
14 including mandatory.

15 MS. VASILY: Yes, Your Honor. It was mandatory
16 in New Jersey, as well as Massachusetts and Hawaii.

17 JUDGE SINGAS: Well, do you think - - - are you
18 concerned at all about the implications of finding an
19 attorney ineffective and all that goes with that in their
20 entire career, at a time when Boone had not even been
21 decided?

22 MS. VASILY: In a case - - -

23 JUDGE SINGAS: Is that something that we should
24 be concerned about?

25 MS. VASILY: Your Honor, in a case that has this



1 much risk for wrongful conviction and misidentification, a
2 lawyer should be asking for that charge. Boone or no
3 Boone, this was in the CJI since 2011. Trial took place in
4 2017. For six years this was common practice. And when
5 you have no other problem - - -

6 JUDGE TROUTMAN: So no other argument that
7 because ID was central to the case, the attorney, in order
8 to be an effective attorney, at a minimum, needed to know
9 at least possible options in order to present a defense at
10 trial and appropriate instructions, that they should be
11 aware of instructions. Is there any indication here that
12 the attorney knew that it was a part of the CJI? Or does
13 it matter?

14 MS. VASILY: That's right, Your Honor. And it
15 doesn't matter because the lawyer should have known that he
16 should have requested it. It was in the CJI. And whether
17 he just made a mistake because it seems almost illogical to
18 request the one witness charge and all those factors and
19 just forget to include the cross race, or whether he had
20 some reason that - - - that doesn't even matter what it is.
21 Either way, nothing could be reasonable, given how
22 problematic this ID was, how weak this - - -

23 JUDGE GARCIA: I want to go back to Judge Singas'
24 question. So if we're going to find an ineffectiveness
25 here with respect to Boone, where would you draw the line?

1 Would you draw the line when the court grants leave on the
2 issue, would you draw the line when the court hears
3 argument, or would you join the line when it's re-argued?
4 When would a lawyer become ineffective for not realizing
5 the situation with respect to the appeal?

6 MS. VASILY: In any of those situations, Your
7 Honor. But here we don't even need to go there.

8 JUDGE GARCIA: I know. But I would like to know
9 how you think the court, for the next case, should approach
10 this. Should we say once leave is granted, any attorney
11 who's practicing has a one ID case, they should have known.
12 Should we say once it's argued and you can listen to the
13 tape of us asking questions, then the lawyer is ineffective
14 for not doing it. Or should it be it has to be re-argued
15 so they know that there are at least some judges on each
16 side of that issue. What's the - - - and again going to
17 Judge Singas, is when do we label a licensed lawyer
18 ineffective for not doing that?

19 MS. VASILY: When leave has been granted, I
20 believe, in dicta, this court has said that that's
21 something that lawyers should keep track of. But in this
22 case, Your Honor, that's not even - - -

23 JUDGE GARCIA: So the rule, though, that you
24 would ask for would be once leave is granted? You think
25 that's the rule we should apply?

1 MS. VASILY: No, Your Honor. I'm not asking for
2 a rule today. And this court need not adopt a rule to
3 decide, Mr. Watkins' fact specific case.

4 JUDGE HALLIGAN: But whatever we decide will
5 certainly have consequences down the road, right?

6 MS. VASILY: Not necessarily, Your Honor, because
7 here, the cross-race charge had been in the CJI for six
8 years. Boone really is irrelevant at the time because it's
9 something that should have been asked for, Boone or no
10 Boone. So whether leave had been granted in Boone - - -

11 JUDGE TROUTMAN: So are you essentially arguing
12 that it's basic information that a competent attorney
13 should have been aware of?

14 MS. VASILY: Absolutely, Your Honor. It's in the
15 model jury instructions. It's in other nearby states. The
16 ABA is recommending it. It's in the New York State Task
17 Force. It goes to the heart of this defense theory in a
18 case that has a lot of other problems. And so - - -

19 JUDGE RIVERA: Can I ask the - - - the trial
20 attorney, the defense attorney we're talking about, were
21 they a private counsel or were they one of the
22 institutional defense offices' counsel? Do you know?

23 MS. VASILY: 18-B attorney, I believe, Your
24 Honor.

25 JUDGE RIVERA: Thank you.



1 MS. VASILY: And in this case, with no video that
2 you could look - - - see a face, it was blurry. No
3 confessions, no fingerprints, no forensic. There was this
4 perceived familiarity, this risk of unconscious
5 transference. He said he thought he saw Mr. Watkins
6 around. He was hit in the eye with a brick and was dizzy.
7 He was viewing the suspect from fifteen to twenty feet
8 away. All of these factors, if the jury had had a cross-
9 race identification charge, would have amplified each other
10 and would have only made the jury look at all these other
11 reasons to doubt with a cross-race lens as well.

12 And Mr. Watkins was deprived of that charge at
13 his trial and is now serving thirteen years in prison. And
14 for that reason a new trial is required. But I have the
15 rest of my time at rebuttal.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. YETTER: Good afternoon. May it please the
18 court. Michael Yetter, for the people.

19 JUDGE HALLIGAN: Counsel, what's the possible
20 strategic reason for not requesting the charge here?

21 MR. YETTER: Well, first of all, Your Honor, it's
22 not my burden to demonstrate that there is one. It's my
23 opponent's burden to demonstrate that there is none. But I
24 think, you know, counsel raised many issues and got the
25 expanded identification charge. Counsel could have been

1 thinking, I want the jury to focus on a couple of these
2 factors that are known to implicate ID. But I don't want
3 them to get confused. I want them to be focused. And
4 that's certainly as a legitimate or strategic reason not to
5 request a charge.

6 JUDGE HALLIGAN: But nothing tied specifically to
7 the facts as they were presented?

8 MR. YETTER: In this case, Your Honor, here's
9 what we do know. This victim was born in the Dominican
10 Republic and lived there for approximately thirty-eight
11 years. The victim subsequently moved to East Harlem, where
12 the victim lived for twenty-four years. And he had worked
13 on - - - at three buildings on East 103rd Street for
14 approximately eleven years before his - - -

15 JUDGE HALLIGAN: What does that have to do with
16 cross-racial identification?

17 MR. YETTER: Well, one - - - one of the things
18 that the charge talks about is the interactions or
19 opportunities to interact with people of the identified
20 person's race. That's what the 2011 charge talks about.
21 And counsel may have thought that given that background,
22 this victim had ample opportunity to interact with people
23 of the defendant's race, and therefore chose not to - - -

24 JUDGE TROUTMAN: What is in the record that
25 demonstrates that there was that opportunity or actual

1 interaction with persons of the opposite or different
2 races, other than where he lived and worked?

3 MR. YETTER: It's - - - it is the testimony I
4 just described, specifically with respect to this case.
5 You have the additional identification procedures that the
6 police went through - - -

7 JUDGE TROUTMAN: But isn't it true that sometimes
8 people may cursorily interact, but that interaction is not
9 sufficient, that it would alleviate the concerns raised by
10 cross-racial identification?

11 MR. YETTER: It's possible, Your Honor. But the
12 record was not expanded on this point. So I don't think we
13 can say that the absence of evidence shows that counsel - -
14 -

15 JUDGE TROUTMAN: Should a competent attorney be
16 aware of charges that are available to be considered in a
17 trial, especially identification, when identification is
18 everything?

19 MR. YETTER: Of course, Your Honor. And there's
20 no indication in this record that this attorney was not
21 aware of the availability of this charge.

22 JUDGE CANNATARO: Counsel, are you as certain as
23 your adversary is that the witness and the defendant were
24 of different races?

25 MR. YETTER: We know - - - I think if you looked

1 at the pictures that are in evidence, Your Honor, that they
2 - - - they look different in terms of skin tone. The
3 victim testified that he was born in the Dominican
4 Republic. I believe the defendant's photo is in the
5 appendix. I'm not sure if the victim's photo, but it was
6 entered into evidence at trial. All I can say is I - - -
7 they look different. I don't know.

8 JUDGE TROUTMAN: So do you dispute that the races
9 were different?

10 MR. YETTER: We're not disputing that the charge
11 was available in this case. I - - - you know, and I think
12 if under a Boone regime, I think we would have a hard time
13 convincing a court that - - -

14 CHIEF JUDGE WILSON: So post-Boone, do you have a
15 sense of how frequently defense counsel, in a case where
16 they would be entitled to a cross-racial charge, is not
17 asking for it?

18 MR. YETTER: Like - - - like my counsel, Your
19 Honor, I - - - I don't have statistics on that.

20 CHIEF JUDGE WILSON: Even impressionistically. I
21 mean, have you encountered that at all?

22 MR. YETTER: I haven't personally, Your Honor,
23 but I also haven't tried very many cases, so I don't know
24 for sure.

25 JUDGE HALLIGAN: And do you know the answer to



1 the Chief's question to your adversary about how frequently
2 the appellate divisions were either granting or denying the
3 charge prior to Boone, either anecdotally or statistically,
4 either way?

5 MR. YETTER: Anecdotally, I think they - - - they
6 were evaluating it under the Whalen/Knight standard, which
7 is, yes, it might be recommended, but it's ultimately up to
8 the trial court's discretion. We - - - I believe we cite
9 three cases in our brief where the First Department had
10 upheld and affirmed those exercises of discretion.

11 JUDGE HALLIGAN: Do you agree with opposing
12 counsel that post-Boone, at least some cases can be decided
13 ineffective assistance cases on direct appeal as opposed to
14 a 440? Or do you think that there's always a 440 required
15 to assess if there's a strategic consideration, even if
16 none is apparent on the record?

17 MR. YETTER: I think I would rely on the
18 standard, Your Honor, if the - - - if the direct appeal
19 record conclusively established the merit of the claim,
20 then it does and the 440 wouldn't be required. But here,
21 we - - - first of all, we have no idea what counsel's exact
22 thinking was on this charge. The defendant never moved to
23 expand the record. So you know, he's effectively asking
24 for a per se rule, which is that if there appears to be a
25 cross-racial identification and that's not requested,

1 that's per se error. And I think that's inconsistent with
2 how this court has long evaluated ineffective assistance
3 claims, and it's inconsistent with Boone itself. I mean,
4 in Boone, the court - - -

5 JUDGE TROUTMAN: Does it matter what the nature
6 of this case was, the circumstances that identification was
7 the central issue when you're making that assessment?

8 MR. YETTER: Well, in this situation, I think
9 identification is always at issue. I do disagree with my
10 adversary about the alleged weakness of this
11 identification. I mean, we had a person who was struck in
12 the face with a hard object, but he didn't lose
13 consciousness. He testified that his vision wasn't
14 blurred. The defendant - - -

15 JUDGE TROUTMAN: Wasn't he suffering from some
16 effects of the assault afterwards at the time that he - - -
17 then subsequently, after the first time he thought he saw
18 the person, then he called again. The first person wasn't
19 then identified as a perpetrator. Then he identified the
20 defendant on a subsequent call, correct?

21 MR. YETTER: That's right. He called the police
22 when he was on 103rd Street. I believe it was on October
23 12th.

24 JUDGE TROUTMAN: And at that time, was he
25 suffering from the effects of the assault?

1 MR. YETTER: Your Honor, I think he may have
2 been. He did not go to the hospital until the 14th. So it
3 was the day after the point out. He may have been. I
4 mean, he was ultimately diagnosed with a fractured orbital
5 bone. However, he was given what seems to have been over-
6 the-counter pain medication, and he never followed up with
7 his providers after that hospital visit. But I think, when
8 you go through all of the factors that the charge talks
9 about, all of them, I mean, counsel attacked all of them,
10 but almost all of them support - - -

11 JUDGE TROUTMAN: So again, it says during his
12 confirmatory identification, as you indicated, his orbital
13 bone that affects vision, injury caused him dizziness,
14 headaches, facial swelling, along with forgetting things.

15 Does that have any impact on whether or not the
16 charge should have been requested?

17 MR. YETTER: I don't know if it impacts whether
18 or not the cross-racial ID charge should have been
19 requested. I mean, if counsel had not requested the
20 expanded identification charge, which that question
21 directly addresses, I think he - - - he'd be in a bit of
22 hot water. But he did request it, and he did highlight
23 that.

24 JUDGE TROUTMAN: Did he ask questions about that
25 during - - -



1 CHIEF JUDGE WILSON: By a bit of hot water, do
2 you mean that would be ineffective?

3 MR. YETTER: No. I don't - - - I don't want to
4 concede that it would have been ineffective, but it would
5 have been problematic given that he - - - if he - - - this
6 was a single witness case, if he had not requested the
7 charge, I think it would have been - - - we would have been
8 in a harder position.

9 JUDGE HALLIGAN: So why not also ineffective? I
10 understand you're not conceding. It would have been
11 problematic, whatever word you want to use. But why is it
12 not equally problematic not to request the cross-racial
13 charge? If it's problematic - - - it would have been
14 problematic to not request expand a witness?

15 MR. YETTER: Well one, it wasn't his theory of
16 the case is one thing. Two, I think the evidence - - -

17 JUDGE HALLIGAN: How - - - how do we - - - well,
18 his theory was - - - was, I think, honest but mistaken ID,
19 yes?

20 MR. YETTER: Yes.

21 JUDGE HALLIGAN: And I would think that the
22 challenges in cross-racial IDs that are laid out in the
23 instruction, eventually in Boone, would be relevant to the
24 risk of an honest but mistaken ID, no?

25 MR. YETTER: No, they could be. I'm not saying

1 it's inconsistent. But his focus was directed at the other
2 components of the one witness identification charge, and as
3 I - - -

4 JUDGE RIVERA: Why wouldn't - - - why wouldn't
5 the cross-racial ID charge boost his position with respect
6 to the other factors?

7 MR. YETTER: Well, I don't know that it would
8 boost it at all. It's a permissive instruction at the
9 time, at least in 2011, that said the jury may consider the
10 difference in race and whether it affected - - -

11 JUDGE RIVERA: The point of the charge is to let
12 the jurors know that for some people, cross-racial
13 identifications are more challenging, makes it more
14 difficult for them to be able to make those identifications
15 when it's someone of a different race from their own.

16 MR. YETTER: Of course. And I think in this
17 case, given - - -

18 JUDGE RIVERA: Why would that, arguing everything
19 else, simply make the argument stronger from the
20 defendant's perspective, that here, this is a
21 misidentification?

22 MR. YETTER: Well, I think in this case, counsel
23 may have thought that it wouldn't have, given the
24 circumstances that were presented with that I've been
25 talking about in terms of the background of the witness and

1 the identification procedures and attempts to locate the
2 perpetrator that the witness went through. And counsel - -
3 -

4 JUDGE RIVERA: So is that - - - what should be
5 factored into these IAC cases regarding the impact of
6 Boone, whether or not a counsel would think, by their own
7 assessment, that the witness, whether it's a victim or some
8 other witness, has enough exposure in early childhood to
9 the race of which the defendant - - - defendant happens to
10 be, that they would not be subject to the kinds of
11 inabilities that is pointed out in the scientific
12 literature?

13 MR. YETTER: I think those are the - - - among
14 the circumstances that counsel can consider in whether or
15 not they want to pursue the cross-racial identification
16 charge and further, to not just request it, but to
17 highlight it, develop proof on it, things of that nature.

18 JUDGE HALLIGAN: I want to make sure I understand
19 what point of differentiation you see between the expanded
20 witness charge and the cross-racial charge. So I take it
21 from your responses that you think that it would have been
22 more concerning, more problematic, to not request the
23 expanded witness charge than the cross-racial. Is that
24 because then there would be nothing that gets at the theory
25 of the defense at all? Is it because there's some evidence

1 in the record that's relevant to one but not the other?
2 Could you tell me a little more why?

3 MR. YETTER: I guess, by way of analogy to
4 Debellis, you know, counsel made a lot of arguments about
5 factors in the cross-racial identification or - - - sorry,
6 excuse me. Not the cross-racial identification charge, the
7 expanded witness charge. And by way of analogy, if he had
8 not requested expanded identification, the jury may not
9 have known what to do with that. I don't think this case
10 is at all, like Debellis like my opponent because there it
11 seemed like counsel's error, this court found counsel's
12 error, deprived the jury of the opportunity to consider the
13 defense. Counsel requested the wrong defense, and
14 therefore, the jury could not acquit if it believed the
15 defendant's testimony and the theory that that defense
16 counsel had developed.

17 JUDGE RIVERA: Could I ask you as I asked the
18 other side, does it matter that the single witness' victim
19 is Latino? Does it matter? Does it affect the analysis in
20 any way?

21 MR. YETTER: It could in a case where there's, I
22 think, a dispute of whether or not there was a cross-racial
23 identification at all. But we're not on this record
24 disputing that the identification was.

25 JUDGE RIVERA: No, no. You're not. I guess, in

1 part, my question is whether or not that that could be a
2 reason for not requesting it. If counsel was not certain
3 that this was actually a cross-racial case.

4 MR. YETTER: I think that would be a legitimate
5 position for counsel to take. If they - - - if they
6 weren't certain. I suppose that would be reviewable to the
7 extent the record bore out those things.

8 JUDGE RIVERA: Do you agree with appellate
9 defense counsel - - - defense appellate counsel, that the
10 record that the trial level bears out, that the parties
11 were in agreement that the victim was indeed a nonblack - -
12 - nonblack Hispanic? I think that's the way she referred
13 to it.

14 MR. YETTER: I don't think it was - - - the
15 record shows any dispute about that.

16 JUDGE RIVERA: No. But does it show an agreement
17 about that?

18 MR. YETTER: I don't - - - not in an affirmative
19 sense, Your Honor. I think it's unclear on that regard.

20 JUDGE HALLIGAN: What's your - - - what's your
21 view about how CJI charges should inform our
22 ineffectiveness analysis? Opposing counsel says if it's in
23 - - - if it's in there, it's your obligation to, you know,
24 essentially to ask for it, I think, if it - - - if it bears
25 on the defense. What about you?

1 MR. YETTER: I'm unaware of this court or
2 appellate division or any court really finding that counsel
3 was ineffective solely for failing to pursue a CJI charge
4 that's available. So I don't think that's - - -

5 JUDGE HALLIGAN: Well, if it was the only charge
6 that was out there relevant to your defense, then it might
7 be, as you say. I think that's how you characterize
8 Debellis. Might be more like Debellis in that regard, no?

9 MR. YETTER: It - - - it could be, if I'm
10 understanding Your Honor's question correctly. But I guess
11 the point is, just because it's in the CJI and it's an
12 option, not the only option, but an option, I don't think
13 that alone establishes that counsel performed efficiently.

14 JUDGE RIVERA: But do you agree that a reasonable
15 lawyer acting on their professional duties and obligations,
16 whether it's defense counsel or the prosecution, should
17 know what the charges are in the CJI, at least with respect
18 to the charges related to the case that they're working on?

19 MR. YETTER: Of course, I agree with that, Your
20 Honor. But my dispute is that this record does not
21 establish that this lawyer did not know that. And that's
22 why one of our arguments is that a 440 should be brought to
23 bear that out. Perhaps he didn't, but on this record, I
24 don't think this court could make that finding. I know my
25 light's on, Your Honor, if I may just - - -

1 JUDGE RIVERA: So - - - so if they knew, would it
2 - - - would he have been - - - would counsel have been
3 ineffective if they knew? I didn't think that was your
4 position. But you seem to be suggesting that now.

5 MR. YETTER: No. I'm not saying that - - - that
6 he would be ineffective because that's - - - that would be
7 going towards Prong I only. The last point I did want to
8 make was that under Blake - - - and I think this case is
9 very much like Blake in the sense that even if it was a
10 mistake not to request the charge, it wasn't, you know, a
11 clear cut and completely dispositive - - -

12 JUDGE RIVERA: Could you, perhaps, address the
13 distinctions counsel was drawing with respect to Blake and
14 why she's wrong?

15 MR. YETTER: Yes. Well, I think, like Blake, at
16 the time of the trial, it was not clear that the charge
17 would have been given upon request. And I think more
18 towards the prejudice component, there's no reasonable
19 probability that had the charge been granted, the jury
20 would have drawn the permissive inference that the charge
21 allows. And so I don't think - - - or our position is you
22 can't establish prejudice on this record just like you
23 couldn't establish prejudice in Blake.

24 CHIEF JUDGE WILSON: Thank you.

25 MR. YETTER: If there's no further questions, I



1 ask you to affirm.

2 JUDGE SINGAS: Counsel, before you begin, do you
3 think an attorney could have decided on this record after
4 the victim had looked through hundreds of mug shots and was
5 in a situation where they were brought someone and they
6 said, nope, that's not the person. And then only on the
7 second time, they said yes, that an attorney might decide,
8 you know, this person seems to have no problem in
9 identification. And maybe it's something along the lines
10 of what Judge Rivera was getting to. I don't want to
11 highlight cross race or cross ethnic identifications,
12 because I think it's clear that this person is pretty
13 discerning. And instead I'm going to focus on normal
14 identification, expanded ID, light, distance. I don't want
15 to insult any of the jurors. I don't want them to suggest
16 that I don't think someone from the Dominican Republic can
17 identify someone who's African American. I've looked at
18 this jury. I see what they look like. I've seen my - - -
19 the victim testify and I'd rather go with maybe he was
20 disoriented at the time that the ID was made. Is that not
21 a trial strategy that at least we should explore on a 440?

22 MS. VASILY: The mug shots, Your Honor, are no
23 rational reason to not request the charge. Simply not
24 picking out someone from the photos is irrelevant as to
25 whether they were affected by the cross-race effect at the

1 time of the in-person street encounter ID of Mr. Watkins.

2 No one can ever say that the cross-race effect
3 causes people to always misidentify every single person of
4 a different race placed before them for ID. That's just
5 not how it works. It's more of a complex inquiry that
6 could absolutely have come into play when Mr. Watkins was
7 standing on the street and the complainant saw him in
8 person. His height, something about that, combined with
9 the cross-race effect, could have absolutely triggered a
10 misidentification.

11 JUDGE CANNATARO: So it wouldn't even permit,
12 say, an inference that this witness has a very fixed idea
13 of who his assailant was in terms of the way they looked?

14 MS. VASILY: No, Your Honor. He gave a very bare
15 bones description to the police officers. He only - - -

16 JUDGE CANNATARO: No, no, no. I mean the fact
17 that he looked at 462 other faces and said, nope, not them.
18 That - - - that doesn't suggest that he's fairly certain
19 that he knows who he's looking for?

20 MS. VASILY: No, Your Honor. If anything, it
21 could suggest an inability to be able to discern between
22 faces of a different race and to be more susceptible by the
23 cross-race effect because these photos all look the same to
24 him, and he can't pick anybody out. And that's what social
25 scientists have said.

1 JUDGE GARCIA: Counsel, to the other part of
2 Judge Singas' question, couldn't this lawyer have looked at
3 this witness and looked at this jury, especially given, as
4 Judge Rivera is saying, the background of this particular
5 witness and said, I don't want to do this. I don't think
6 this jury, this makeup is going to react well to that.
7 Isn't that valid?

8 MS. VASILY: The CJI only says that you may
9 consider whether there is a difference in race between the
10 complainant and the defendant. So this is a fact for the
11 jury to decide. And that - - -

12 JUDGE GARCIA: But let's say, the lawyer in that
13 courtroom reads this jury and says maybe there are many
14 with a similar background to this witness - - - this
15 victim. I don't want to ask for this charge. I think it's
16 offensive here. Maybe they're going to find it that way.
17 Can a defense lawyer read the jury that way?

18 MS. VASILY: As this court articulated in Boone,
19 a trepidation to talk about race is no excuse.

20 JUDGE GARCIA: It's not a trepidation to talk
21 about race. It's that I'm looking at this jury, and I'm
22 saying, this jury, I don't think is going to be
23 particularly receptive to this charge with this victim
24 witness.

25 MS. VASILY: Regardless of the races of jurors or

1 anyone, this is an important tool that was kept from the
2 jury in assessing - - -

3 JUDGE GARCIA: So then it would be mandatory
4 under Boone, right, and we didn't say that. We said that
5 you, the lawyer, has discretion whether to ask for it,
6 which seems to be somewhat eroded in your argument. But so
7 where is the discretion then, when would you ever not under
8 your theory?

9 MS. VASILY: Well, Your Honor, if
10 misidentification is not the defense theory, then of course
11 the lawyer's not going to want - - -

12 JUDGE GARCIA: Any time you're saying it isn't my
13 guy, then you have to ask for this?

14 MS. VASILY: Yes, Your Honor.

15 JUDGE GARCIA: Okay.

16 MS. VASILY: Yes. For the most part. I mean,
17 it's not a per se rule necessarily, but in this fact
18 specific - - - in cases like this, where there's - - -

19 JUDGE HALLIGAN: But it is very clear. It's - -
20 - I mean, what I'm grappling with is it seems to me Boone
21 is clear that it's discretionary. And I'm not sure that
22 Boone is saying it's discretionary if your defense is not
23 mistaken ID, but it's not discretionary if your defense is
24 mistaken ID. So given - - - if I'm reading Boone
25 correctly, and Boone holds that it's discretionary even

1 when your defense is mistaken ID, then there have to be, I
2 would think, some circumstances where defense counsel could
3 permissibly decide not to request the charge.

4 MS. VASILY: Certainly, Your Honor. It's just
5 not this case. In this case, it would not have been
6 appropriate. And in cases similar to this, possibly, it
7 would also not be appropriate to decline to request that
8 charge. And this court giving - - -

9 JUDGE RIVERA: Well, under Boone, the charge is
10 not available if identification is not at issue, and it's
11 not available because Boone is limited to cross-racial ID
12 if - - - if the witness and the defendant are not of
13 different races, so that is the only time that Boone has
14 identified that the charge is available to the defendant
15 for its request, and then the court does have to give the
16 charge.

17 Does it matter that the court - - - that it's a
18 charge? Is the court giving the charge? The lawyer need
19 not get up and refer to it.

20 MS. VASILY: Absolutely, Your Honor. For the
21 judge to mouth those words and for the jury to hear this
22 coming from the judge gives them that perspective to
23 analyze this case and to doubt the identification even
24 more. And in Boone, this court said that forty-seven
25 percent of jurors don't know about the cross-race - - -

1 JUDGE GARCIA: Say there's a 440 and this defense
2 lawyer gets up and says, under oath, I looked at this jury.
3 I looked at the background of this witness, and I thought
4 this would not be a productive charge for me in getting my
5 client off to ask for that charge. That is per se
6 ineffective. He can't think that?

7 MS. VASILY: Your Honor, I don't know all the
8 specific facts of that case. It would not necessarily be
9 per se.

10 JUDGE GARCIA: We don't know because we don't
11 know what the defense lawyer in this case would say.

12 But let's say the defense lawyer in this case, in
13 a 440, gets up and says, I looked at this jury. I looked
14 at this witness. I looked at the cross-racial ID charge,
15 and I thought, it's going to do more harm than good for me
16 with this jury, and I decided I didn't want to ask for it.
17 That would still be ineffective?

18 MS. VASILY: That would be, Your Honor.

19 JUDGE GARCIA: Okay.

20 CHIEF JUDGE WILSON: Thank you.

21 (Court is adjourned)

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

I, Deborah Pawlin, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of New York v. Mark Watkins, No. 57 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.


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