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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF NEW YORK,  
  
Respondent,  
  
-against-  
  
ANTWYNE LUCAS,  
  
Appellant.  
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NO. 58

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: Next case on the calendar is  
2 People v Lucas.

3 MR. NELSON: Good afternoon, Anders Nelson,  
4 Appellate Advocates on behalf of the appellant, Antwyne  
5 Lucas. I'd like to reserve three minutes for rebuttal,  
6 please.

7 CHIEF JUDGE WILSON: Yes.

8 MR. NELSON: Defense counsel committed two  
9 serious errors at Mr. Lucas' trial. Failing to make the  
10 jury aware of prior testimony, casting doubt upon the  
11 complainants all important lineup identification and  
12 consenting to the omission of a jury charge on the  
13 questionable reliability of cross-racial identification.

14 JUDGE TROUTMAN: Are those mistakes impacted or  
15 affected by the defendant testifying and putting himself at  
16 the place?

17 MR. NELSON: No, Your Honor. There - - - this is  
18 not - - -

19 JUDGE TROUTMAN: Why?

20 MR. NELSON: This is not a class - - - so this is  
21 not a classic identification case, as Your Honor is noting.  
22 Mr. Lucas did not say that he was not present during the  
23 incident, during the robbery, as you would have in a normal  
24 identification case. But Mr. Lucas was saying that he was  
25 not the person that the complainant identified him to be.

1 He was not the gunman who committed the robbery. So the  
2 identity matter - - -

3 JUDGE RIVERA: Does that matter for purposes of  
4 the charge - - - not the char - - - I'm sorry - - - the  
5 counts.

6 MR. NELSON: For purpose of - - -

7 JUDGE RIVERA: Does it matter for purposes of the  
8 counts? Did any of the counts turn on who actually held  
9 the gun?

10 MR. NELSON: So the case turned on who actually  
11 held the gun. The People proceeded under two theories, but  
12 they primarily presented the appellant - - - Mr. Lucas as  
13 gunman theory.

14 JUDGE HALLIGAN: But wasn't there also an  
15 accomplice liability theory?

16 MR. NELSON: Yes. Yes. That's - - -

17 JUDGE HALLIGAN: So what do we make of - - - of  
18 that and the impact on the consent to omit the charge?

19 MR. NELSON: So the evidence was vastly different  
20 of culpability between the - - - if Mr. Lucas was  
21 identified as the gunman, rather than the accomplice.

22 JUDGE CANNATARO: So the difference in defense -  
23 - -

24 JUDGE GARCIA: Because that was your defense,  
25 right?

1 JUDGE CANNATARO: - - - was the liability?

2 JUDGE GARCIA: But - - - but your defense, I  
3 thought, was I didn't know what was happening. The  
4 defendant, I didn't know what was happening. This person I  
5 was with took a gun out and shot. A big difference if the  
6 victim identifies him as the shooter or as the other  
7 person, right?

8 MR. NELSON: Precisely, yes.

9 JUDGE GARCIA: Yeah.

10 MR. NELSON: Yes. So - - - so that is the core  
11 of the case and that's what the parties were arguing about.  
12 And if looking at the prosecution's summation as a whole,  
13 the prosecutor says, well, he's - - - he could have been an  
14 accomplice, but really he was the gunman because that's  
15 what the complainant said. And the gunman, of course, was  
16 the one who walked up to the complainant, put a gun to his  
17 side, said, give me your property, took the property and  
18 punched the complainant.

19 The other guy, according to the prosecutor in his  
20 summation, is merely standing around. So he says, Mr.  
21 Lucas was not this guy just standing around. He's the  
22 gunman. That's what the parties are fighting about  
23 throughout the entire case. And that's the primary issue  
24 before the jury.

25 JUDGE GARCIA: Counsel, the argument we just had

1 was a lot of back and forth on, do you have to know what's  
2 in the CJA - - - CJI instructions, right? Well, you have  
3 to know what's in there, the instruction that's in there.  
4 There's no issue in this case that defense counsel knew  
5 this was in there.

6 MR. NELSON: Precisely, because it's clear from  
7 the record that the court handed out a physical copy, a  
8 paper copy of the charges that it was considering at the  
9 charge conference - - -

10 JUDGE GARCIA: Um-hum.

11 MR. NELSON: - - - which is a common practice.  
12 And it's the word - - - the word CJI appears over and over.  
13 They're looking actually at the charges. When the court  
14 refers to this particular charge on cross-racial  
15 identifications, it says at the bottom of page 3, it's very  
16 clear that they're actually looking at this document. The  
17 footnote to that, which - - -

18 JUDGE GARCIA: And then the court says, you're  
19 not entitled to it, right?

20 MR. NELSON: Yes, the court gives its reasoning.  
21 So this is also a different record than in Mr. Watkins'  
22 case. It's the court says there was no expert and it says,  
23 so this wasn't in issue. But both of those - - - both of  
24 those rationales for not giving the charge are directly  
25 contradicted by the footnote to the CJI, which says - - -

1           which the parties had in front of them, and counsel should  
2           have been well aware of, which says an expert is not  
3           required - - -

4                    JUDGE TROUTMAN:  So are you suggesting that he  
5           was aware of the charge, and he didn't take the time to  
6           consider what its import would be?

7                    MR. NELSON:  I - - - my argument is that counsel,  
8           in not asking for the charge, failed to - - - he may have  
9           recognized that the charge - - - I mean, he - - - they  
10          certainly discussed it.  He seemed to recognize that it was  
11          available, but he apparently did not recognize that the  
12          court's rationales for not wanting to give the charge, for  
13          saying it was out, were incorrect and were actually  
14          contradicted by the footnote to this.

15                   JUDGE GARCIA:  But at the time, it's my  
16          understanding and correct me, of course, but I thought the  
17          appellate divisions were upholding judges who declined to  
18          give the charge for those reasons.

19                   MR. NELSON:  Correct, which is why - - - which -  
20          - - I mean, yes.  That's what the appellate division  
21          decision in Boone basically says, and in Dingle and these  
22          other cases that were - - -

23                   JUDGE GARCIA:  So when the judge says  
24          essentially, this is the law and he agrees, the counsel  
25          agrees - - - yeah, you're - - - I'm not entitled to it,

1 accepting the law at the time. So this seems to be a case  
2 where we really have to retroactively apply Boone, in terms  
3 of being an ineffective not to ask, because you should have  
4 gotten it. Because you weren't clearly entitled to it at  
5 the time. In fact, I think counsel is right that under the  
6 law, as it was, he probably wouldn't have gotten it.

7 MR. NELSON: I would disagree that counsel was  
8 right because it, as has been pointed out, leave had been  
9 granted in Boone. The case had been argued and submitted  
10 for - - -

11 JUDGE GARCIA: Okay. I understand that point.  
12 But in Boone - - -

13 MR. NELSON: So - - - so counsel - - - so we have  
14 these cases like Turner, for instance, where Turner - - -  
15 this court acknowledged that there was maybe some contrary  
16 authority, but the standard that the court set forth is  
17 whether a reasonable defense attorney would have thought  
18 the argument not worth making, right? And that's the  
19 standard that should be applied here. Could an attorney -  
20 - -

21 JUDGE RIVERA: Was there expert testimony in  
22 Boone?

23 MR. NELSON: In Boone? In the - - - at the first  
24 trial, I - - - no. I do not believe so.

25 JUDGE GARCIA: But we have to apply Boone.

1 You'd have to say you should have seen Boone coming, right?

2 MR. NELSON: No, Your Honor. Counsel - - -

3 JUDGE GARCIA: So then - - -

4 MR. NELSON: - - - should have read this  
5 footnote. Should have looked at the cases, right?

6 JUDGE GARCIA: But even with that footnote, the  
7 Appellate Divisions were still saying, yes, it's  
8 discretionary and the judge doesn't have to give it to you  
9 for those reasons.

10 MR. NELSON: But if counsel had looked at those  
11 cases, right? Had done the bare bones minimum of going to  
12 onto Westlaw or LexisNexis and seeing if there's any  
13 history to those cases, it would have seen that in Boone  
14 itself, leave had been granted. It had been, argued.  
15 Dingle, right?

16 JUDGE GARCIA: You would have to anticipate Boone  
17 is, I think, the point you're making.

18 MR. NELSON: No, you have to - - - counsel has to  
19 know that there's an argument that's viable, that's  
20 available for him to make, right? There's a viable  
21 argument for him to say, these decisions are not  
22 necessarily the law because the CJI is giving me that  
23 there's no expert required. And that the only thing that  
24 has to be an issue, right - - - counsel is not - - - is not  
25 - - -

1 JUDGE SINGAS: Well, what if he doesn't want to  
2 make that argument? What if he says, I'm not going to  
3 focus on I.D., because I know my guy is going to get on the  
4 stand and say that he was there. So I'm going to go in  
5 another direction and talk about something different. He  
6 can't make that choice?

7 MR. NELSON: I.D. was the primary issue in this  
8 case. Counsel said - - - counsel asked for - - -

9 JUDGE SINGAS: But the defendant placed himself  
10 there. So then it becomes a not - - - it becomes a what  
11 happened, not a who did it.

12 MR. NELSON: I - - - no, Your Honor. This - - -  
13 in this case, counsel convinced the court, and the court  
14 agreed rather willingly, that this was an identification  
15 case. It gave the one witness charge. This identification  
16 had so many problems with it. The identification of Mr.  
17 Lucas as the gunman, which was the critical issue, right?  
18 This a four-second robbery, after which the complainant can  
19 only describe two black men.

20 And in the complainant's testimony, when he's  
21 saying - - - when they're asking how light was it, you  
22 know? Could you see? This was kind of dawn. He says, I  
23 could identify their ethnicity, right? This is - - - there  
24 are - - - there are clues throughout this record that the  
25 complainant, in fact, saw the race of the def - - - of the

1 two individuals who approached him. And those were the  
2 only things he could distinguish. In fact, in his 911 call  
3 right after the incident, he says, two black men. That's  
4 all I can describe.

5 The gunman, the complainant says throughout, was  
6 wearing a white shirt. Mr. Lucas was wearing a blue shirt,  
7 right? This is undisputed. There were so many issues with  
8 this identification. The complainant focused on the gun.  
9 He described it as black - - - flat and black, not a  
10 revolver, right? This is a four second robbery. So he has  
11 no time to perceive what is going on during this robbery.  
12 He says, oh, this other guy made me feel - - -

13 JUDGE SINGAS: But that wasn't his defense  
14 though. He decided to defend it otherwise. He decided to  
15 say that he was at the scene. So all of those might - - -  
16 might have been a legitimate defense if he had said, you  
17 got the wrong guy. But that's - - -

18 MR. NELSON: He did say you got the wrong guy,  
19 because he said the complainant's testimony, that he  
20 identified the gunman in a lineup, was mistaken. That when  
21 the complainant allegedly looked at that lineup and said,  
22 that's the gunman, that was a mistaken identification,  
23 right? And so that's why this testimony by - - -

24 JUDGE HALLIGAN: Couldn't - - -

25 MR. NELSON: - - - the - - - the detective - - -

1 I'm sorry, just - - -

2 JUDGE HALLIGAN: Go ahead, finish.

3 MR. NELSON: - - - by the detective that the  
4 complainant wasn't too sure that he had identified the  
5 gunman in the lineup, which was never brought before the  
6 jury, was so meaningful and impactful.

7 JUDGE HALLIGAN: But couldn't the jury have  
8 concluded that even if your client was not the gunman, that  
9 he nonetheless was a willing accomplice. As opposed to, I  
10 think he testified he just, you know, went along, and did  
11 not anticipate that the robbery was going to take place.  
12 So wasn't there an alternative basis for liability, even if  
13 the identification of your client as the gunman had been  
14 rejected by the jury, which I assume is what the charge  
15 would go to?

16 MR. NELSON: Yes. Yes, but it was - - - it was  
17 vastly different quantity of and quality of evidence,  
18 right? That Mr. - - -

19 CHIEF JUDGE WILSON: Your point, I think, is what  
20 Judge Garcia articulated a minute ago, which is that if he  
21 was the gunman, then your client's defense could not be  
22 believed.

23 MR. NELSON: Correct. Yes, exactly. So if he's  
24 the gunman, he is guilty. There is no question about that,  
25 right? But the - - - so that is why it's so important for

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CHIEF JUDGE WILSON: Why the identification matters to you.

MR. NELSON: Why the identification matters. Right. So when this court and other courts dealing with ineffectiveness have talked about, you know, the fairness of a trial, right? That's what we're really looking at. We're looking at whether there was a reliable adversarial testing process here. Whether - - - whether the jury's truth-seeking function was facilitated by the presentation of the evidence.

And the jury was told that this complainant said - - - that - - - by the complainant, I sat in the lineup. I saw the gunman. They were told by the detective, he sat in the lineup. He saw the gunman and that was Mr. Lucas. And they were never told that he said he wasn't sure if he was the gunman. I mean, it's the core - - - the most central issue in the case. And it certainly dev - - - was devastating to his defense, as well as the failure to give this charge.

JUDGE GARCIA: Counsel, to go back to something we were talking about earlier where you said, you know, Boone is up there. And there are these other signals. At what point in Boone's journey, or is it before, would you think that counsel has now the professional obligation to

1 ask for the charge, in anticipation of the law perhaps  
2 changing?

3 MR. NELSON: I think leave being granted is  
4 certainly a signal that this court is considering changing  
5 the law, or advancing the law, or at least giving more  
6 clarity to the law, right? But counsel here had everything  
7 he needed before him, because the CJI said, you don't need  
8 an expert. And the court said, well, there's no expert, so  
9 I'm not giving it. And the CJI said, well, these other  
10 courts have said it should be given, if identification is  
11 an issue. And identification was an issue. The court  
12 agreed and said this is an identification case. It said,  
13 you know, that the identification is the primary disputed  
14 issue here, and it's what the parties were really  
15 contesting throughout.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. PEZZOLI: Good afternoon. May it please the  
18 court, Tim Pezzoli for the People. Defendant's case did  
19 not support the cross-racial identification instruction  
20 under the law in the Second Department at the time of  
21 trial. Nor would it support it under the law announced by  
22 this court in Boone. Additionally, a review of the record  
23 does not support defendant's claims of error and prejudice,  
24 but shows a competent trial attorney, who provided  
25 defendant with meaningful representation.

1 JUDGE TROUTMAN: Why wasn't he entitled to the  
2 charge?

3 MR. PEZZOLI: Because, Your Honor - - - well,  
4 legally or factually?

5 JUDGE TROUTMAN: Factually.

6 MR. PEZZOLI: Factually, he wasn't entitled to it  
7 because this wasn't a - - - an identification issue in the  
8 sense of mistaken identity. The threshold issue here is  
9 how we look at the identification issue, because that will  
10 dictate what legal principles apply. The difference in  
11 identity issues was laid out by this court in People  
12 against Agina.

13 There in the context of an identity Molineux  
14 exception, where the defendant testified he was on scene  
15 but had not committed the acts he was accused of, this  
16 court held that the identity issue that was relevant was  
17 who did what, not whether defendant was on scene. And  
18 because defendant denied committing the acts, this court  
19 held that though there was no possibility of mistaken  
20 identity - - - but - - - but it was identity as far as who  
21 did what and was still at issue. And then so the Molineux  
22 evidence was properly - - -

23 CHIEF JUDGE WILSON: Well, let me - - - let's  
24 back up a little bit. So that - - - and stop me at any  
25 point you disagree with me. The purpose of the cross-

1 racial identification instruction is based on science that  
2 says people have - - - witnesses - - - percipient witnesses  
3 have a difficulty identifying people of a different race.

4 MR. PEZZOLI: Correct.

5 CHIEF JUDGE WILSON: Okay. So here, the witness  
6 is of a different race than the two assailants.

7 MR. PEZZOLI: Yeah. Yes.

8 CHIEF JUDGE WILSON: Right?

9 MR. PEZZOLI: Yeah.

10 CHIEF JUDGE WILSON: So presumably, he might have  
11 difficulty identifying one or the other, right?

12 MR. PEZZOLI: Potentially.

13 CHIEF JUDGE WILSON: And so - - - well, that's  
14 what the instruction is about - - -

15 MR. PEZZOLI: Right. Yes. That's - - - yeah.

16 CHIEF JUDGE WILSON: - - - right? And the  
17 question here is, which one of them had the gun.

18 MR. PEZZOLI: That is only part of the question -  
19 - -

20 CHIEF JUDGE WILSON: Okay.

21 MR. PEZZOLI: - - - Your Honor.

22 CHIEF JUDGE WILSON: But - - - but do - - - well,  
23 do you agree with the proposition that the defendant here  
24 has no defense if he had the gun?

25 MR. PEZZOLI: I - - - I do. Yes.

1 CHIEF JUDGE WILSON: Okay. And he has a defense.  
2 He might not win it, but he has a defense, if he doesn't  
3 have the gun.

4 MR. PEZZOLI: He has a defense. But yes - - -

5 CHIEF JUDGE WILSON: Okay.

6 MR. PEZZOLI: - - - but so - - -

7 CHIEF JUDGE WILSON: So then the ability to  
8 distinguish between which of two people of a different race  
9 has the gun, doesn't that depend on your ability to  
10 recognize the person of the different race?

11 MR. PEZZOLI: I - - - it could, but it also - - -

12 CHIEF JUDGE WILSON: But then why wouldn't you be  
13 entitled to - - - not entitled legally, why wouldn't you be  
14 - - - why wouldn't you be able to ask for that instruction?

15 MR. PEZZOLI: You wouldn't be - - - well, because  
16 the identity issue that we have here is that after  
17 defendant testified, there was no longer a question about  
18 whether Fisol - - - Father Roselli was robbed, whether  
19 defendant was present, whether a gun was used, whether Pack  
20 participated in the robbery, that the two men took the car  
21 - - -

22 CHIEF JUDGE WILSON: Right. But we need to know  
23 which one of the two black men had the gun. It makes a  
24 material difference - - -

25 MR. PEZZOLI: Well - - -

1 CHIEF JUDGE WILSON: - - - to the defense.

2 MR. PEZZOLI: We don't need to know that, because  
3 the identification issue here is who did what. And - - -

4 CHIEF JUDGE WILSON: But wait - - - let me - - -

5 MR. PEZZOLI: - - - the victim was saying that  
6 both men - - -

7 CHIEF JUDGE WILSON: - - - let me back - - - let  
8 me back up a second. We need to know that because one way  
9 he doesn't have a defense at all, and the other way he has  
10 a potential defense.

11 MR. PEZZOLI: But the people's - - - we need to  
12 know that we - - - it was - - - defense that the - - - that  
13 Pack robbed the victim and defendant did not, but the issue  
14 here is the credibility evaluation. It's not necessarily  
15 just the gun; it's a credibility evaluation.

16 CHIEF JUDGE WILSON: One way you don't have to  
17 evaluate the credibility at all that is, if he has no  
18 defense, you don't have to evaluate the credibility at all.

19 MR. PEZZOLI: Well, that's true.

20 CHIEF JUDGE WILSON: Right.

21 MR. PEZZOLI: And so in the - - - in - - - but  
22 where he does have a defense it's still a credibility - - -

23 CHIEF JUDGE WILSON: Sure.

24 MR. PEZZOLI: - - - evaluation. It's you had two  
25 different version of events - - - you had the victim's and

1           you had the - - -

2                       JUDGE HALLIGAN: But that's what - - -

3                       MR. PEZZOLI: - - - defense's.

4                       JUDGE HALLIGAN: - - - the charge goes to, right?

5           The charge goes to helping the jury understand some of the

6           challenges in making cross-racial identifications, which -

7           - - which will bear on how much you credit an

8           identification, right?

9                       MR. PEZZOLI: But once defendant put himself on  
10          scene, it became - - - it was no longer a mistaken  
11          identity. It was who did what, because the victim had said  
12          repeatedly - - -

13                      JUDGE HALLIGAN: Well, to the Chief's point - - -

14                      MR. PEZZOLI: - - - both men robbed me.

15                      JUDGE HALLIGAN: - - - perhaps it's - - - it - -  
16          - it still is relevant because it - - - it determines  
17          whether there is this defense available, that I was not a  
18          willing participant or not. But let me ask you, if I can,  
19          about the other error that defense counsel raises. What  
20          reason could there have been not to cross Det. Morales with  
21          his prior inconsistent statement, that the victim wasn't  
22          sure if the defendant was the gunman?

23                      MR. PEZZOLI: Well, I think there's two  
24          potential. I think, in response to that testimony, the - -  
25          - the attorney cross-examined the detective and brought out

1 that the victim had told him that the person in the white  
2 shirt was the gunman, and that on the defense case, he made  
3 clear that defendant was not the person in the white shirt.  
4 So I believe he maybe went that route instead.

5 And then if counsel did cross-examine Det.  
6 Morales on whether he was certain - - - the victim was  
7 certain that the defendant possessed the firearm, a simple  
8 redirect from the people could address the matter with some  
9 simple questions. Like, how many people did the victim say  
10 did rob him? And was one of the - - - was the defendant  
11 one of those people? How certain was the victim that both  
12 men participated in the robbery? And this would give the  
13 people a powerful last word on the matter and reinforce how  
14 certain the victim was that he was robbed by both men. And  
15 one of those men was the defendant.

16 And as far as the law under the cross-racial  
17 identification at the time in the Second Department, the  
18 Second Department routinely upheld these convictions in the  
19 absence of the instruction, because the reliability had not  
20 been put at issue and - - -

21 CHIEF JUDGE WILSON: In - - - in single witness -  
22 - - oh, sorry. Yours isn't a single witness case. Never  
23 mind.

24 MR. PEZZOLI: - - - and the most reliable way to  
25 put that matter at issue under the case law was either

1 through expert testimony of the reliability of  
2 identification, or through cross-examination of the witness  
3 as to their background and experience, neither of which  
4 were present during defendant's trial. It - - - and it  
5 wasn't so much that the court just said there was no expert  
6 testimony here, so you're not getting it. He went on to  
7 say that the difference in race was not at issue during the  
8 trial. So he was saying that it wasn't an issue during the  
9 trial, so you wouldn't get this instruction.

10 I know that the CJI is instructive on the issue,  
11 but the case law around in the Second Department at that  
12 time still bound the trial court. And to the extent a  
13 model instruction differs with binding precedent, it can't  
14 be ineffective for following the binding precedent over a  
15 model instruction. And counsel also says in the brief that  
16 we should ignore the 2011 cases, but - - - the pre-2011  
17 cases in the Second Department - - - but the - - - those  
18 were the cases that the post-2011 cases were citing and the  
19 law that they were applying.

20 And as for the - - - I - - - the contention that  
21 proper trial preparation requires consideration of a  
22 pending leave grant, would require the court - - - the  
23 counsel to predict the outcome of the pending case,  
24 considering a novel question of law. And it's not so much  
25 novel that the CJ - - - that the cross-racial

1 identification instruction was in issue, but which way this  
2 court would come out on the issue because there were  
3 multiple states - - -

4 JUDGE RIVERA: It was already set for re-  
5 argument. So you know - - -

6 MR. PEZZOLI: - - - it was - - -

7 JUDGE RIVERA: - - - you know your split, so you  
8 got a 50/50 chance that it's going to come out favorably to  
9 the defendant.

10 MR. PEZZOLI: That's correct, Your Honor. But  
11 then also, the judge just said, well, you're not getting  
12 it. So at that point, if you think that the - - - it - - -  
13 the law - - -

14 JUDGE RIVERA: Well, does - - - does - - -

15 MR. PEZZOLI: - - - if you're familiar with the  
16 case law - - -

17 JUDGE RIVERA: - - - doesn't counsel object  
18 anyway? Doesn't counsel, all the time, when a - - - when a  
19 court holds against them on a request - - -

20 MR. PEZZOLI: They can.

21 JUDGE RIVERA: - - - can I take an exception or  
22 the court may even say your exception is noted for the - -  
23 -

24 MR. PEZZOLI: They - - -

25 JUDGE RIVERA: - - - record and move on?

1 MR. PEZZOLI: - - - they do and they are - - -  
2 and they and sometimes - - -

3 JUDGE RIVERA: Well, you don't raise it - - -

4 MR. PEZZOLI: - - - they don't.

5 JUDGE RIVERA: - - - you've lost potentially your  
6 appealable issue, no?

7 MR. PEZZOLI: Potentially. But it's - - - it's  
8 still - - - if he's familiar with the case law, he knows  
9 that he's not entitled - - -

10 JUDGE TROUTMAN: So are you - - -

11 MR. PEZZOLI: - - - to it.

12 JUDGE TROUTMAN: - - - saying that although the  
13 charge was in the CJJ as something that an attorney could  
14 request, because there was discretion for the court to deny  
15 the charge, defense doesn't have to ask for it no matter  
16 what?

17 MR. PEZZOLI: I don't know about no - - - I'm not  
18 saying, it no matter what, but I'm saying in this case, it  
19 was not ineffective not to ask for it or not to push back  
20 on the trial judge, because the defendant - - -

21 JUDGE TROUTMAN: Is that the credibility claim -  
22 - - the credibility claim?

23 MR. PEZZOLI: No. That - - - that's the  
24 instruction claim.

25 JUDGE TROUTMAN: No. Because you - - - you were

1 saying that he put himself there - - -

2 MR. PEZZOLI: Yes.

3 JUDGE TROUTMAN: So cred - - -

4 MR. PEZZOLI: - - - that's correct, Your Honor.

5 JUDGE TROUTMAN: Okay.

6 MR. PEZZOLI: So it - - - cred - - - it becomes  
7 an issue of credibility. And that was the point of the  
8 people's submission was basically that it was a credibility  
9 contest. The prosecutor said, I'm not saying it doesn't -  
10 - - what I'm saying is, is it doesn't matter if you believe  
11 the guy had the gun or even if Pack had the gun, because  
12 we've proven our case both ways and that's on page 8631.

13 So the - - - it wasn't just a throw away, hey.  
14 It was absolutely from the beginning of the case until the  
15 end of the case, the prosecution's theory of liability was  
16 the theory of accessorial liability. And I think the  
17 defendant's argument rests on the assumption that the  
18 cross-racial identification instruction applies to all  
19 identity issues, including non-misidentification issues  
20 like we have here, so long as the witness is of a different  
21 race than the - - -

22 JUDGE HALLIGAN: So - - -

23 MR. PEZZOLI: - - - defendant.

24 JUDGE HALLIGAN: - - - does this court's decision  
25 in Boone make any difference to your position?

1 MR. PEZZOLI: No. It doesn't, Your Honor,  
2 because once the defendant testified, it took the issue of  
3 mis identity - - -

4 JUDGE HALLIGAN: So your view - - -

5 MR. PEZZOLI: - - - away.

6 JUDGE HALLIGAN: is that even post Boone, there  
7 would not be a more robust, ineffective assistance claim?

8 MR. PEZZOLI: It may be more robust, but I don't  
9 think he would be ineffective. I think - - - I don't think  
10 it would be ineffective.

11 JUDGE HALLIGAN: And that's because of your view  
12 about whether identification is really an issue or for - -  
13 - for some other reason?

14 MR. PEZZOLI: Whether misidentification - - -

15 JUDGE HALLIGAN: Yes. That's what I mean.

16 MR. PEZZOLI: - - - is an issue. Yes. It's - -  
17 - and all the people's evidence supported the theory that  
18 the people put forward from the very beginning and  
19 defendant's argument - - -

20 JUDGE RIVERA: So - - - if you're - - - a charge  
21 that might allow the jury to view the evidence as perhaps  
22 not reasonable - - - the providing the lack of reasonable -  
23 - - or I'm sorry - - - establishing reasonable doubt, that  
24 the witness may be wrong about who was holding the gun and  
25 therefore perhaps deciding the defendant's version. You

1 think that was not the kind of charge that defense counsel  
2 should have requested?

3 MR. PEZZOLI: I don't think it would have helped  
4 the situation here because it became about credibility.  
5 Because it became that the defendant's story didn't - - -  
6 was not credible versus the victim's story. The  
7 defendant's story that he - - -

8 JUDGE RIVERA: Well, yes. But the - - - yes the  
9 point of that is, the victim saying this is the person who  
10 held the gun.

11 MR. PEZZOLI: Right. And then - - - but then the  
12 defendant - - -

13 JUDGE RIVERA: All right. He's trying to suggest  
14 to the jury, or through the charge perhaps, suggesting to  
15 the jury that the witness may absolutely believe that, but  
16 they may be mistaken.

17 MR. PEZZOLI: And but that also describes a - - -

18 JUDGE RIVERA: Which is a different kind of  
19 credibility issue. It's not that you find the witness  
20 incredible, that they're not credible. It's just that they  
21 are mistaken.

22 MR. PEZZOLI: But that only - - - that only pays  
23 attention to defendant saying I was not the one who had the  
24 gun. He then went on to say, I wrestled with Pack who had  
25 the gun.

1 JUDGE RIVERA: Yes.

2 MR. PEZZOLI: I wrestled him off. And then I was  
3 forced at gunpoint into the car. And then I forced him to  
4 pull the car over. And then it also requires the - - - to  
5 ignore the facts of the mishap - - - the apprehension, and  
6 the flight there from, and the video that showed them in no  
7 apparent disharmony as they walked through the streets.

8 JUDGE RIVERA: Well, those all may be wonderful  
9 points to make to the jury, right, about why they shouldn't  
10 believe his version. Which is different from whether or  
11 not you should have the charge, so that the jury can factor  
12 in about whether or not they should or shouldn't believe  
13 his version. The fact that the victim may be incorrect.  
14 Believe it, but may be incorrect that defendant was holding  
15 the gun. Because if they believed the defendant wasn't  
16 holding the gun, or at least it's not the reasonable doubt  
17 that the defendant was holding the gun, maybe the rest of  
18 the story now looks a little bit more believable. Let me  
19 put it that way.

20 MR. PEZZOLI: I don't think that that - - - I  
21 don't think the cross-racial identification instruction  
22 cures the issue in this case. And I don't think it would  
23 have done that here.

24 CHIEF JUDGE WILSON: Yeah. I thought I  
25 understood your position at the very beginning, which I



1 don't think you budged from, is that if this case were  
2 being tried today and counsel had asked for the cross-  
3 racial identification charge, he would not be entitled to  
4 get it.

5 MR. PEZZOLI: He would not be - - - he - - -  
6 well, he would be under Boone, just because he asked for  
7 it. But the facts of it would - - - it would not be - - -

8 CHIEF JUDGE WILSON: Oh. But you don't - - - but  
9 I thought even under Boone you only get it when  
10 identification is at issue.

11 MR. PEZZOLI: I - - -

12 CHIEF JUDGE WILSON: I mean, you don't get it in  
13 a case where it's not.

14 MR. PEZZOLI: That's - - - well, yeah. Well,  
15 then yes. Then that's correct, Your Honor. Yes. And I  
16 misspoke.

17 CHIEF JUDGE WILSON: I thought that was how you  
18 started your argument, actually - - -

19 MR. PEZZOLI: Correct. And I - - - I - - -

20 CHIEF JUDGE WILSON: - - - is that he's not  
21 entitled to the charge - - -

22 MR. PEZZOLI: - - - you're right.

23 CHIEF JUDGE WILSON: - - - even today.

24 MR. PEZZOLI: You're right. He would not be  
25 entitled to the charge factually. He would not be entitled

1 to the charge today, because he did not put  
2 misidentification at issue. It was not the issue that the  
3 jury was evaluating in determining the ultimate decision in  
4 this case, of whether or not the defendant participated in  
5 the robbery of the priest - - - of the victim.

6 Defendant's claims don't withstand scrutiny  
7 because his trial counsel properly assessed the facts of  
8 the case and presented a well-tailored defense with a valid  
9 litigation strategy. And because counsel's actions were  
10 not error and present no prejudice, if there are no further  
11 questions, the respondent respectfully asks that the  
12 judgment be affirmed.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. NELSON: Just getting back to this issue of,  
15 you know, was this an identification case and how did I - -  
16 - how did identification play in here, given that Mr. Lucas  
17 put himself on the scene. An identification is always a  
18 confluence of two things, or at least two things. It's a  
19 recognition of another person, but then they don't say, who  
20 do you recognize? And then stop at that. They say, where  
21 do you recognize them from? And in this case, they asked -  
22 - - specifically, the complainant was asked what - - -  
23 which one was he, right? So it wasn't just that he said, I  
24 recognize him from being - - -

25 JUDGE RIVERA: So - - -

1 MR. NELSON: - - - there.

2 JUDGE RIVERA: - - - fair enough. But perhaps,  
3 once Boone was granted, that that was not an obvious  
4 nuance; is that possible?

5 MR. NELSON: Not under this record that we have  
6 here, when counsel said this is an I.D. case. Asked for  
7 the - - - first, he asked for the one witness charge, but  
8 then he - - - the you know, when the court said I'll give  
9 the witness plus, he didn't object to that. So - - -

10 JUDGE SINGAS: Under the acting in concert  
11 charge, if a jury, and we presume the jury follows the  
12 charge, does it matter who was holding the gun - - -

13 MR. NELSON: No.

14 JUDGE SINGAS: - - - if the jury follows the  
15 judge's instruction on that, the CJJ instruction?

16 MR. NELSON: No. The jury would have had to have  
17 found that Mr. Lucas shared the Mr. Pack's intent and that  
18 he, you know, there's a long list - - -

19 JUDGE SINGAS: Right.

20 MR. NELSON: - - - importuned, aided, et cetera.

21 JUDGE SINGAS: So again, I guess, I go back to  
22 the question that I asked in the earlier argument that  
23 troubles me, that we're going to call someone ineffective  
24 and mark them as ineffective for their entire career, based  
25 on a trial strategy. Maybe we don't know. Why isn't it

1 better to just allow the defense attorney to come in and  
2 tell us what he or she was thinking? Maybe they wanted to  
3 focus on the accessorial liability, you know, not the  
4 identification. They're the ones who are in the best  
5 position, viewing the jury, looking at the witnesses. I'm  
6 just a little loathe to say that someone's ineffective,  
7 especially when Boone wasn't even decided yet.

8 MR. NELSON: This court - - -

9 JUDGE SINGAS: And especially in a case like this  
10 where he does place himself at the scene.

11 MR. NELSON: So the entire defense from beginning  
12 to end was, he was there, but he didn't do it. He didn't  
13 have the gun. So I don't see how it's strategic to not  
14 tell the jury, and not cross-examine, and impeach when the  
15 prosecution presents a case. He said he had the gun and  
16 you have, in the hearing minutes, him saying, well, he  
17 wasn't sure that - - -

18 JUDGE SINGAS: You're still - - -

19 MR. NELSON: - - - that he had the gun.

20 JUDGE SINGAS: - - - you're still - - - you can  
21 still argue the identification factors. Here, we're  
22 talking about the cross-racial identification.

23 MR. NELSON: Right. So - - -

24 JUDGE SINGAS: So you know, you can still explore  
25 that. And they did explore that.

1 MR. NELSON: The - - - there would have been a  
2 particular - - - particularly easy way to argue the cross-  
3 racial identification issue here, given that, number one,  
4 as I've already noted, there was this racialized kind of  
5 element to the description. It was two black men, and he  
6 said I could identify their ethnicity, right?

7 JUDGE SINGAS: No. I'll give you it would have  
8 been better for them, but I'm just saying, does it rise to  
9 the level of being ineffective?

10 MR. NELSON: Yes, because the question is, can  
11 you identify a strategy? The people, for the first time  
12 standing up here saying, maybe he would have gone with the  
13 white shirt. I believe that's say - - - pointing to the  
14 fact one of the many, many at issues here with the I.D.,  
15 that Mr. Lucas was wearing a white shirt, which was a key  
16 factor of the description during the lineup. They said,  
17 well, it was covered with a sheet, that was in dispute.  
18 That would have played - - - the testimony that - - - the  
19 impeachment testimony that was not brought out would have  
20 played perfectly with that defense. It would have  
21 harmonized it, as would the cross-racial identification  
22 charge.

23 Counsel could have gotten up and said, look,  
24 you're going to hear that some people have more difficulty  
25 making an identification, when someone is of a different

1 race. And this idea that this was a credibility contest is  
2 just - - - it's not correct. It's not a correct way of  
3 looking at this case. Counsel said, this was - - - he was  
4 mistaken. He said, I'm not accusing him of lying.

5 He's not accusing a priest of lying. That didn't  
6 - - - that wouldn't make any sense. He's saying that he -  
7 - - that he was mistaken. And he - - - and when you have a  
8 four-second robbery that's on video that the guy gives the  
9 wrong, allegedly the wrong shirt color, right? That he's  
10 focused on the gun, that he - - - he's saying, I'm so  
11 stressed out. He can't remember whether they have hats on  
12 or not. He can't remember anything but two black men, one  
13 wearing a white shirt. You have a perfect case, you have a  
14 perfect scenario to argue all these identification factors,  
15 say he mixed these two men up, right? He couldn't - - - he  
16 was limited in his ability to perceive the cross-race  
17 effect - - -

18 JUDGE RIVERA: And all of that goes to the  
19 defense. Not only that, I didn't have the gun, but I am  
20 not a willing participant in this robbery.

21 MR. NELSON: Precisely.

22 JUDGE RIVERA: It's not just about I didn't have  
23 the gun.

24 MR. NELSON: Precisely. Counsel had a great  
25 argument to make.

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JUDGE RIVERA: The fact of not having the gun is to support the actual defense, which is - - -

MR. NELSON: Yes.

JUDGE RIVERA: - - - I was not a willing participant.

MR. NELSON: The Complainant has four seconds in which to perceive the actions of the other man, who again, the prosecutor said just standing around during the incident, right? And said, that's not Mr. Lucas.

CHIEF JUDGE WILSON: Thank you, Counsel.

(Court is adjourned)

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

I, Stephanie Huppert, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of New York v. Antwyne Lucas, No. 58 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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