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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

OTIS BOONE,

Appellant.

No. 55

Westchester County Courthouse
111 Dr. Martin Luther King Jr. Boulevard
White Plains, New York
April 25, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on the
2 calendar is appeal number 55, the People of State of New
3 York v. Otis Boone.

4 Good afternoon, counsel.

5 MS. HULL: Good afternoon. May I reserve two
6 minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: You may.

8 MS. HULL: Leila Hull from Appellate Advocates
9 representing Mr. Boone. Science and common sense shows us
10 that we should educate juries about unreliable - - -

11 JUDGE GARCIA: Counsel, what's the rule you would
12 have us impose?

13 MS. HULL: The rule I would have you impose, at
14 the very bare minimum, is that when - - - a cross-racial
15 identification is undisputed, that the court should give
16 this charge.

17 JUDGE GARCIA: So undisputed meaning what?

18 MS. HULL: Undisputed meaning that when counsel,
19 for example, at this - - - at the charge conference
20 characterized the two parties and characterized their races
21 and the People did not dispute that nor did the court, it
22 should - - - they should - - - you should give the - - -

23 JUDGE GARCIA: If it was disputed, then what
24 would it - - - what would happen?

25 MS. HULL: I think the Massachusetts rule is

1 actually quite a good one in this regard because you would
2 still give the rule unless the parties agree that it's not
3 at issue. If that is not the rule that this court would
4 want to adopt, the best rule would be to have the - - -
5 have the court - - -

6 JUDGE RIVERA: So - - - so that means that if the
7 parties disagree whether or not a cross-racial
8 identification is at issue is a factual determination for
9 the jury?

10 MS. HULL: Yes, Judge. That's precisely what - -
11 -

12 JUDGE RIVERA: What would they need to be able to
13 make that factual determination?

14 MS. HULL: If you look at the - - - the
15 underlying scientific studies that were conducted in these
16 cases, oftentimes, race was determined mostly based on
17 visible distinctions between the individuals involved. And
18 so that - - -

19 JUDGE RIVERA: That might not be so accurate. Do
20 you then get back to - - - to the People's position that if
21 you really want to do this right, we want to educate jurors
22 and we want fairness and we want to avoid wrongful
23 convictions, what you need is an expert to get on the stand
24 to help educate that jury?

25 MS. HULL: No. Because - - -

1 JUDGE RIVERA: Why not?

2 MS. HULL: Because the effect itself is not in
3 dispute, and what you really need here is a jury
4 instruction to alert jurors who are otherwise unaware and
5 uninformed about the - - -

6 JUDGE RIVERA: But again if - - - if the science,
7 as you argue, shows that it is counterintuitive to a
8 juror's belief, their experience, then how does a one or
9 two or even - - - a one-or-two sentence or a paragraph of
10 an instruction going to educate them to be able to overcome
11 that during deliberations?

12 MS. HULL: So we're - - - we - - - our position
13 is that jury instruction can at least alert them to factor,
14 and this jury instruction will - - - will give them the
15 necessary information, which is that you should be aware
16 that people - - - it's commonly understood that people have
17 difficulty identifying a person of a different race. That
18 would - - -

19 JUDGE STEIN: How do we - - - how do we get
20 around our decisions in Knight and Whalen where we said it
21 was a discretionary determination whether to give even the
22 expanded identification charge. How can - - - how can a
23 mandatory charge for this, which is in a way, a further
24 expanded identification charge, how could - - - how could
25 making it mandatory be consistent with that precedent?

1 MS. HULL: Well, I think there's two points to
2 make. One is that because the court gave the expanded
3 identification charge, Whalen and Knight don't necessarily
4 control here. And then - - - but the other one is Whalen
5 and Knight - - -

6 JUDGE STEIN: No. I know the - - - we're not
7 talking about the expanded charge here. But we're talking
8 about the concept - - -

9 MS. HULL: Absolutely.

10 JUDGE STEIN: - - - that that is discretionary.
11 If that is discretionary, why would not this charge be
12 discretionary?

13 MS. HULL: Certainly. I think there's two - - -
14 there's two other reasons. One, the - - - one of the
15 reasons the underlying rationale from Whalen and Knight is
16 that, you know, jurors are probably going to - - - going to
17 understand that lighting and distance and duration, these
18 are sort of common sense under - - - these are common sense
19 factors that a jury would probably think about anyway. But
20 this is not. So this stands in contrast to what was listed
21 in, like, Daniels and - - - and otherwise in the expanded
22 ID charge.

23 JUDGE STEIN: Well, we - - -

24 MS. HULL: And - - -

25 JUDGE STEIN: We don't require a charge for

1 things like child abuse - - - I'm sorry, yes, sex abuse
2 accommodation syndrome or rape trauma syndrome, other kinds
3 of I think scientific, if you will, principles that are
4 pretty well accepted these days. So why is this different?

5 MS. HULL: Because I think one of the - - - one
6 of the things that we are very concerned about is that the
7 jury needs to be educated about issues that are not - - -
8 in terms of how they're going to reliably assess critical
9 evidence in the case. And witness identification evidence,
10 which was - - - which has resulted in juries convicting
11 people wrongly and based on DNA exonerations, have been
12 shown to - - - to undermine the truth-seeking function of
13 our justice system. We have decades of scientific research
14 that shows a clear consensus across populations and age
15 groups that - - -

16 JUDGE RIVERA: Is there - - - is there a
17 scientific research at this point that supports that part
18 of the CJI charge that refers to the jury considering the
19 nature and extent of the witness's contacts with persons -
20 - -

21 MS. HULL: No.

22 JUDGE RIVERA: - - - the defendant's race?

23 MS. HULL: No. There isn't, Your Honor. There
24 is actually - - - this is an important point. There isn't
25 - - - what there - - - the scientific consensus is about

1 the effect. There is no consensus about the causes or what
2 could potentially mitigate, which is why we - - - we also
3 argue that the - - - giving the charge shouldn't be
4 conditional on the defense being required to ask a witness,
5 you know, the degree of their contact. Now it's certainly
6 relevant under the charge and the People or the parties in
7 any given case could ask those questions. But it's not - -
8 - there is no scientific consensus. The People's sources
9 actually support that noting that there only have ever been
10 mixed results. There are competing theories in contrast to
11 cross-racial contact, as well. But - - - and that's also
12 one of the reasons why the Massachusetts Supreme Court - -
13 -

14 JUDGE RIVERA: So - - - so let's say we agree
15 with you and adopt - - - you seem to be promoting the
16 Massachusetts rule, the Massachusetts rule, the People will
17 know in advance because it's mandatory unless - - - unless
18 the parties agree otherwise. And the People want to put on
19 an expert that says exactly this, that - - - that exposure
20 of the witness, in this case, to persons of the defendant's
21 race makes a difference in their ability to remember and
22 discern individuals of a race other than their own. Can
23 they do that? Would that be excluded - - -

24 MS. HULL: I don't - - -

25 JUDGE RIVERA: - - - since you say there's no

1 scientific basis for it.

2 MS. HULL: No. I don't - - - I don't think
3 there's enough scientific - - -

4 JUDGE RIVERA: Do they have to have a Frye
5 hearing on it?

6 MS. HULL: I think they would need to. They
7 would need to go through the same - - - the same
8 requirements that any defense attorney would be required to
9 go through, and then - - -

10 JUDGE RIVERA: Except you're saying that the
11 defendant wouldn't have to put on an expert to get this
12 charge?

13 MS. HULL: Not - - -

14 JUDGE RIVERA: No. They're not going through the
15 hoops of the Frye hearing.

16 MS. HULL: Well, because there's no dispute about
17 the cross-racial effect, and that's the purpose of the
18 charge, to alert a jury to the effect.

19 JUDGE GARCIA: So would we be overruling
20 Alexander? Can a prosecutor now get up and say this is a
21 same race identification and you'll hear if I ask for a
22 discharge and now, you know, this identification,
23 obviously, you can put more faith in?

24 MS. HULL: Alexander is a bit different. I don't
25 think you'd have to overrule it. Alexander is about

1 summation and also the - - - you have to look at what
2 precisely was wrong with that summation comment. In
3 addition to referencing cross-racial - - - like, the fact
4 that it was an interracial ID, the prosecutor characterized
5 it as strong and good. Eye - - - eyewitness, stranger
6 eyewitness identifications, oftentimes, are unreliable.

7 JUDGE GARCIA: But that's argument. I don't
8 think there's a problem with a prosecutor getting up and
9 arguing and saying that was a good ID, that was - - - you
10 saw how strong that ID was. The problem in that case was
11 his saying that this was a same race ID, and it isn't like,
12 you know, everybody knows and we said no, you can't do
13 that. It wasn't because he said it was a good
14 identification.

15 MS. HULL: Well, to the extent that you feel it
16 necessary to overrule Alexander, that is - - - that's
17 something the court can do. I - - - our position is that
18 Alexander, it was - - - it was the prosec - - - it was the
19 prosecutor going a step too far because the absence of one
20 unreliability factor doesn't transform an otherwise
21 unreliable ID into a strong ID.

22 JUDGE GARCIA: So you could say one of the
23 factors that you should consider in this - - - in
24 evaluating this ID is it's a same race ID.

25 MS. HULL: Yeah. And that's very different from

1 what the prosecutor in Alexander did.

2 JUDGE GARCIA: But that would be okay now?

3 MS. HULL: Possibly.

4 JUDGE FAHEY: Can I - - - can I ask two
5 questions? First - - - on two separate issues, first, on
6 you're not asking us at all to address cross-ethnic
7 identification?

8 MS. HULL: No. Because it's not implicated in
9 this case, Your Honor.

10 JUDGE FAHEY: All right. And how about the
11 question of the retroactive application of this rule that
12 you're proposing? Have you given any thought to what you
13 think the effects of that would be?

14 MS. HULL: Okay. So I've - - - I have to dig
15 back and remember Pepper right now. And I would imagine
16 that the best thing for this court to do is to address that
17 question while it's fully briefed. Because I'm recalling
18 Pepper correctly, and I can do that - - -

19 JUDGE FAHEY: Well, that's good. That's good.
20 That's good.

21 MS. HULL: I'm trying. Is that part of the - - -
22 part - - -

23 JUDGE FAHEY: I had to go look it up before I
24 started this case so I - - -

25 MS. HULL: I hope I get this right.

1 JUDGE RIVERA: I'm the minority in the courtroom.
2 Go ahead.

3 MS. HULL: Is that one of the factors, and it is
4 one of them, is to what extent does the rule implicate the
5 truth-seeking function of our justice system. And this, as
6 not only I - - -

7 JUDGE FAHEY: It says what it says "is the heart
8 of a reliable determination of guilt or innocence," and
9 that's the key factor that we have to look at. And it's
10 hard for me to see how identification or misidentification,
11 of course, wouldn't be about "a reliable determination of
12 guilt or innocence."

13 MS. HULL: That's precisely why we believe this
14 issue is of such importance and why jury instructions are
15 critical.

16 JUDGE FAHEY: I accept that. What I'm curious
17 about, though, is the retroactive - - -

18 MS. HULL: Yes.

19 JUDGE FAHEY: - - - retroactivity and its effect
20 on cases that are already in the system.

21 MS. HULL: Okay. I think that this would
22 actually - - -

23 JUDGE RIVERA: Well, but your argument is about
24 the point of social science, right?

25 MS. HULL: No. No. No. No. I'm - - - I'm

1 saying - - -

2 JUDGE FAHEY: I - - -

3 JUDGE RIVERA: I'm sorry. I'm sorry. I
4 interrupted.

5 MS. HULL: I'm saying that social science
6 demonstrates that it implicates the truth-seeking function
7 of our justice system, which I - - -

8 JUDGE FAHEY: So it will be retroactive to some
9 degree but unless - - - only if it's preserved?

10 MS. HULL: I think perh - - - certainly to
11 anything that's on direct appeal, I would encourage it to
12 be - - - to be applied should this court - - - I'm not - -
13 -

14 JUDGE FAHEY: That's a separate question. But -
15 - -

16 MS. HULL: But I do think it's an issue that you
17 probably would want a significant more briefing on because
18 it - - - because it also is weighed against other factors,
19 if I'm recalling Pepper correctly.

20 JUDGE RIVERA: But I thought - - - I thought your
21 argument is driven by what you say is now the consensus in
22 the science?

23 MS. HULL: Yes. Which is why - - -

24 JUDGE RIVERA: And if the consensus in the
25 science is - - - is something we can now realize, why - - -

1 MS. HULL: Thank you so much.

2 CHIEF JUDGE DIFIORE: Counsel.

3 MR. LIEBERMAN: Good afternoon. My name is Seth
4 Lieberman. The People share the defendant's goal of
5 enhancing the probability that the innocent will be
6 acquitted and the guilty will be convicted. And so,
7 obviously, the - - - if the jury is well informed on all
8 the matters that are relevant to the - - - to the
9 determination of the case, that will enhance the
10 probability of the innocent being acquitted and the - - -
11 and the guilty being convicted. Consequently, in the
12 appropriate case, we believe a jury should be informed
13 about the cross-race effect. But the proper way to do that
14 is by means of expert testimony, not a jury charge. Unlike
15 a jury instruction - - -

16 JUDGE STEIN: Well, how - - - we don't require
17 expert testimony when we - - - to give an instruction on
18 accomplice testimony. Isn't there some similarity here?
19 Because we're saying that you need to look at this
20 testimony closely because there's a tendency, you know,
21 maybe not to be as - - - as reliable. And we don't require
22 an expert to come in and say that.

23 MR. LIEBERMAN: That may be a matter of common
24 sense.

25 JUDGE STEIN: Well, but - - -

1 MR. LIEBERMAN: This is a matter of - - -

2 JUDGE STEIN: Isn't that the question here is
3 whether this has become so accepted that - - -

4 MR. LIEBERMAN: Among whom?

5 JUDGE STEIN: Well - - -

6 MR. LIEBERMAN: Among experts, among people who
7 are knowledgeable about the science. The defense and the
8 amici are arguing, and I have no reason to disagree at this
9 point, that people, in general, are unaware of this
10 phenomenon and do not know how to evaluate it. That
11 usually, under New York law, is the subject of expert
12 testimony.

13 JUDGE FAHEY: Well, no.

14 MR. LIEBERMAN: Something that's beyond the - - -

15 JUDGE FAHEY: I mean no. That's not true. You
16 charge people on distance, on lighting, on other factual
17 elements. This would - - - let me finish my thought.

18 MR. LIEBERMAN: Yeah.

19 JUDGE FAHEY: This would just be one more
20 analytical factor that - - - that's being called to their
21 attention. It - - - it doesn't necessarily require expert
22 testimony in the same way that you don't require expert
23 testimony to talk about how fast a car is going when
24 there's an automobile accident could affect how serious the
25 impact is.

1 MR. LIEBERMAN: Your - - - Your Honor - - -

2 JUDGE FAHEY: It's common knowledge.

3 MR. LIEBERMAN: All the - - - all those factors,
4 distance, lighting, are common knowledge.

5 JUDGE FAHEY: Um-hum.

6 MR. LIEBERMAN: That's part of everybody's
7 experience. The defense - - -

8 JUDGE FAHEY: I think what the defense is arguing
9 now is that this is part of everyone's experience.

10 MR. LIEBERMAN: They're not saying that. That's
11 not their argument.

12 JUDGE FAHEY: Okay.

13 MR. LIEBERMAN: If you look at their brief,
14 they're saying that's exactly why they need the instruction
15 because they're not aware of it.

16 JUDGE RIVERA: So - - - so if we agree with you,
17 does that mean that in every prosecution where the
18 defendant believes there's a cross-racial identification
19 issue presented, that every time they have to bring in an
20 expert? So how many times before we get to the point that
21 - - -

22 MR. LIEBERMAN: Because - - -

23 JUDGE RIVERA: - - - that - - - excuse me. The -
24 - - that we've recognized that the science is there and we
25 don't need to keep having experts to get up and say the

1 science has reached consensus on this point.

2 MR. LIEBERMAN: But - - -

3 JUDGE RIVERA: Not that this witness wasn't able
4 to recognize it, but just this general scientific
5 conclusion?

6 MR. LIEBERMAN: Yeah. But that's - - - but
7 that's true of all scientific conclusions that are beyond
8 the ken of a jury. The - - - the law in New York is that
9 that evidence - - - that's an evidentiary matter that is
10 presented through expert testimony, and the judge is
11 ordinarily not in the role of being an expert witness under
12 the guise of giving an instruction. And this is a
13 complicated phenomenon - - -

14 JUDGE GARCIA: But wouldn't that really go to the
15 type of instruction that you give? Because if you're
16 vouching for the science, then I think you have a good
17 point. But if the instruction, and I believe there's one
18 in the - - - in the taskforce report that is it may be your
19 experience or - - - isn't that different than giving an
20 instruction that says this is how it is? You know, you may
21 consider this if it is your experience.

22 MR. LIEBERMAN: But - - -

23 JUDGE GARCIA: So why would you need expert
24 testimony for that?

25 MR. LIEBERMAN: Okay. Is it common - - - is it

1 common experience or is everybody aware of this? They
2 cited statistics saying that over fifty percent of people
3 were unaware of this, did not how to analyze it.

4 JUDGE GARCIA: So then it won't be their
5 experience if you give that instruction.

6 MR. LIEBERMAN: Then I don't understand what the
7 jury's supposed to do with it.

8 JUDGE FAHEY: Well - - -

9 MR. LIEBERMAN: What - - - don't we want - - - we
10 want to educate jurors in a way that they can come to the
11 right decision.

12 JUDGE FAHEY: It's a - - - you make a good point.
13 It's kind of an epistemological problem. It's when do we
14 acquire the knowledge that we acquire to make - - - to
15 allow us to make these decisions. And in the process of
16 acquiring, when does it become knowledge in the general
17 human community? At one point, everybody thought the world
18 was flat. At some point, it became generally accepted - -
19 - it's that kind of a question. We appear societally to be
20 at a moment where we're transitioning from this on this
21 particular point where nobody knew about it to more people
22 know about it. The - - - the question is, though, can the
23 charge be crafted that respects both sides of that
24 transition? I'm not sure of the answer to that.

25 MR. LIEBERMAN: I - - -

1 JUDGE FAHEY: But - - -

2 MR. LIEBERMAN: Your Honor, the - - -

3 JUDGE FAHEY: Go ahead.

4 MR. LIEBERMAN: Juries should be educated about
5 complicated scientific matters, which this is one of them,
6 by expert scientists - - -

7 JUDGE FAHEY: I guess that's a question. Let - -
8 - let me - - -

9 MR. LIEBERMAN: - - - not by a simple - - -

10 JUDGE FAHEY: Let me stop you a second. Is this
11 a complicated scientific event?

12 MR. LIEBERMAN: Absolutely. Absolutely.

13 JUDGE FAHEY: Really? Tell me why.

14 MR. LIEBERMAN: For several reasons.

15 JUDGE FAHEY: Yeah.

16 MR. LIEBERMAN: One is the whole issue of
17 contact. Okay. There's disagreement among the expert
18 about not the notion that contact plays a role, because
19 obviously it does, but what kind of contact? Juries have
20 no clue about that. Or a lot of jurors might not have a
21 clue about that. Second - - -

22 JUDGE RIVERA: But then doesn't leave you free to
23 present - - - isn't that my point to - - - to your
24 adversary? Doesn't that leave you free to bring up - - -

25 MR. LIEBERMAN: No. But - - -

1 JUDGE RIVERA: - - - in an expert?

2 MR. LIEBERMAN: No. But the thing is you want to
3 give an instruction to the jury that is not misleading,
4 that gives them the tools to be able to make a
5 determination of whether this particular witness had the
6 ability to identify the perpetrator and how the cross-race
7 effect might have affected that ability. You want to give
8 the jury the tools to do that in a well-informed fashion,
9 not with a simplistic superficial instruction that does not
10 explain to them how to evaluate the cross-race effect in
11 the context of the - - - of the particular facts of the
12 case.

13 JUDGE STEIN: But then don't we do exactly what
14 we don't want to have happen with expert testimony in this
15 particular area where the - - - the general proposition is
16 apparently well understood in the scientific community.
17 But then the - - - some of the specifics of it, as you say,
18 what - - - what kind of contact and that sort of things,
19 doesn't that then get us into a battle of the experts and -
20 - - and distract from the main trial?

21 MR. LIEBERMAN: No. Not necessarily. But what
22 do you - - - what do you - - -

23 JUDGE RIVERA: Wasn't it likely - - - isn't it
24 likely you won't because most defendants, indigent
25 defendants, can't afford the experts?

1 MR. LIEBERMAN: No, no, no.

2 JUDGE RIVERA: You've basically left them in a
3 position where they won't be able to present the evidence
4 that they say is so obviously available and science has
5 come to this conclusion because you want to keep
6 relitigating the science.

7 MR. LIEBERMAN: Not at all. I don't - - - the
8 cross-race effect - - -

9 JUDGE RIVERA: Right.

10 MR. LIEBERMAN: - - - we are saying is an
11 accepted proposition but it's - - - you have to be able to
12 understand whether it's in play in the particular case.
13 And as far as whether a defendant can afford it, indigent -
14 - -

15 JUDGE RIVERA: But isn't that true for - - - for
16 the eyewitness reliability instruction as a general course,
17 anyway?

18 MR. LIEBERMAN: No, no, no, no. But - - -

19 JUDGE RIVERA: That's true anyway.

20 MR. LIEBERMAN: But that's - - - that's a common
21 sense proposition that everybody has that experience. The
22 - - - you - - -

23 JUDGE RIVERA: No. It's counterintuitive, too,
24 to many jurors, right, to believe that an eyewitness may
25 have made a mistake? That eyewitness testimony is not

1 necessarily reliable, depends on the circumstances.

2 MR. LIEBERMAN: That's not counterintuitive. We
3 have - - - we, in our own individual experience, all the
4 time know that we have - - - are not able to identify
5 certain people at a long distance - - -

6 JUDGE RIVERA: And yet - - - and yet a majority
7 of wrongful convictions are based on eyewitness
8 misidentification where the eyewitness is certain, of
9 course, as they would be - - -

10 MR. LIEBERMAN: Well, that's why - - -

11 JUDGE RIVERA: - - - that they chose the right -
12 - -

13 MR. LIEBERMAN: That's why - - -

14 JUDGE RIVERA: - - - person.

15 MR. LIEBERMAN: That's why we want to educate
16 jurors about it in the proper fashion. Not in a way that's
17 going to lead to misinformed decisions. They should know
18 everything about it. And as far as cost is concerned, for
19 the indigent defendant, the State will pay for it. Okay.
20 I don't know how many cases there will be for people who
21 can afford experts that they would need to present the
22 expert because I don't know whether the cross-race effect
23 would be at play in those particular cases. But we don't -
24 - - we want to do this right. Okay. We don't want a
25 simplistic instruction that's going to leave out important

1 information that's going to lead to incorrect decisions.
2 We want the jury to be informed in the best way possible.

3 JUDGE RIVERA: Well, what - - - what will the
4 State do, even if it's willing to pay for the experts,
5 there's a small - - -

6 MR. LIEBERMAN: I'm sorry, Your Honor?

7 JUDGE RIVERA: What will the State do when, even
8 though it's willing to pay for the experts - - - I don't
9 know if that's true, but we'll go with what you say,
10 there's a small pool of experts available for these cases -
11 - -

12 MR. LIEBERMAN: What - - -

13 JUDGE RIVERA: - - - making it particular
14 difficult - - -

15 MR. LIEBERMAN: What - - - what - - -

16 JUDGE RIVERA: - - - for a defendant to be able
17 to present a defense.

18 MR. LIEBERMAN: What - - - the - - -

19 JUDGE RIVERA: It sounds to me like you're
20 creating a constitutional - - -

21 MR. LIEBERMAN: What's the evidence for that?

22 You know - - - you know what they rely on to say that it's
23 a small pool of experts? It's a 2008 American Bar Associ -
24 - - American Bar Association report that relied on a
25 statement of one lawyer saying - - - talking about Los

1 Angeles and rural areas. A jury would not even say that
2 this proving a - - - a paucity of experts. That is a
3 factual matter. This is an extremely important issue. We
4 should not just have a quick fix, which will lead to
5 perhaps unintended consequences. And by the way, looking
6 at the actual language here, what kind of guidance does
7 this language give to a jury? It says some people. It
8 doesn't give the jury any indication of how persuasive this
9 phenomenon is, then talks about the nature and extent of
10 contact, but it says nothing about how much contact or what
11 nature will affect the cross-race - - -

12 JUDGE STEIN: Let me ask you a question about - -
13 - about this case. Do - - - do you think that the trial
14 judge here made the ruling not to - - - to decline the
15 charge as a matter of discretion, or do you think that the
16 - - - that that ruling was made under the belief that
17 without expert testimony it could not be given?

18 MR. LIEBERMAN: I'm not exactly clear what was in
19 the - - - the judge's mind. You can only look at - - - at
20 the language.

21 JUDGE STEIN: Well, you can look at - - - yes.
22 Well, and you can - - - you can look at the - - - the
23 colloquy - - -

24 MR. LIEBERMAN: Right.

25 JUDGE STEIN: - - - that took place there.

1 MR. LIEBERMAN: Well, the - - - it's not like the
2 defense attorney gave the judge much help. The defense
3 attorney barely made an argument. The - - - the judge - -
4 - I'm not sure what the judge would have said if expert
5 testimony had been given, okay, you get the instruction.
6 I'm not - - - I'm - - - I don't know if that - - - the
7 particular instruction that's supposedly at issue here,
8 which is the CJI instruction, really helps defendants all
9 that much because it provides no guidance to juries that
10 had - - - to how to come to a determination of whether the
11 cross-race effect had an impact on any particular case.

12 JUDGE RIVERA: Well, the defendant has reached a
13 conclusion that, in this case, this defendant thought it
14 would be useful and helpful.

15 MR. LIEBERMAN: I'd be - - - obviously, he made a
16 request for it for perhaps strategic reasons. And that's
17 the - - - that's the other thing that in - - - in many
18 cases, the defense might just have the instruction
19 believing that's going to create a reasonable doubt. But
20 knowing that if expert testimony is provided, that expert
21 testimony is going to show that the cross-race effect
22 really didn't have an impact because - - - and this is also
23 where - - -

24 JUDGE RIVERA: But - - - but you could put on
25 that expert testimony, correct?

1 MR. LIEBERMAN: Right. But why - - -

2 JUDGE RIVERA: And if we agreed - - - I'm just
3 saying if we agreed with the defendant here, you're not
4 foreclosed from putting on testimony.

5 MR. LIEBERMAN: Why are we - - - why are we
6 putting - - - being put in a position of having to put on
7 an expert - - -

8 JUDGE RIVERA: That's your burden.

9 MR. LIEBERMAN: - - - to correct - - - to correct
10 an instruction that doesn't provide sufficient evidence?
11 So let me give you an example. If - - - if I go to a
12 doctor's office and I - - - I ask about the flu vaccine and
13 the doctor tells me, you know, some people die from taking
14 the flu vaccine and that's all the information he gives me,
15 what am I supposed to do?

16 JUDGE STEIN: Well, he doesn't have to tell you,
17 however, that you're going to die from getting it.

18 MR. LIEBERMAN: Correct.

19 JUDGE STEIN: Which is how - - - how I hear, to
20 some extent, the - - - the People's position that - - -
21 that somehow there has to be proof that in this particular
22 case given this particular person's contacts with - - -
23 with people of - - - with members of another race is likely
24 or presumed or somehow - - -

25 MR. LIEBERMAN: Well, it's a matter or

1 probabilities.

2 JUDGE STEIN: Well - - -

3 MR. LIEBERMAN: It's a matter of probabilities.

4 And so if - - - if all you're telling me the - - - me some

5 people die from getting a vaccine - - -

6 JUDGE FAHEY: Well, you understand our purpose

7 here is to reduce the probability. You understand that.

8 MR. LIEBERMAN: And I - - - and that's - - -

9 JUDGE FAHEY: Yeah. Okay.

10 MR. LIEBERMAN: And that's - - - and I want to -

11 - -

12 JUDGE FAHEY: So take the vaccine is what I'm

13 telling you, Mr. Lieberman.

14 MR. LIEBERMAN: Right. But that's - - -

15 JUDGE FAHEY: Right.

16 MR. LIEBERMAN: But you're - - - you're talking

17 about the decision maker. What knowledge did the - - -

18 does the decision maker need to make an informed decision.

19 This instruction doesn't do the job. We want - - -

20 JUDGE FAHEY: So let me ask you this. Are you

21 opposed to any instruction or are you opposed to this

22 particular instruction?

23 MR. LIEBERMAN: We're - - - we're opposed to any

24 instruction because - - -

25 JUDGE FAHEY: Okay.

1 MR. LIEBERMAN: - - - there's going to be
2 problems with any instruction.

3 JUDGE FAHEY: All right.

4 MR. LIEBERMAN: And - - - and can I just go - - -

5 JUDGE FAHEY: Sure. Go ahead.

6 MR. LIEBERMAN: - - - give the reasons for that?

7 JUDGE FAHEY: Go ahead.

8 MR. LIEBERMAN: You can't fashion an instruction
9 that's going to be - - - that's going to address the
10 particular facts of the case because all those particular
11 facts are different.

12 JUDGE FAHEY: No. I - - - I get those points.

13 MR. LIEBERMAN: You can't construction - - - you
14 can't come up with an instruction that's going to provide
15 all the relevant information in any particular case.

16 JUDGE STEIN: Do we ever require that of an - - -

17 MR. LIEBERMAN: Excuse me?

18 JUDGE STEIN: Do we ever require that of an
19 instruction?

20 MR. LIEBERMAN: No. But we're talking about
21 scientific knowledge. And you're - - - what instruction -
22 - -

23 JUDGE STEIN: But is it - - -

24 MR. LIEBERMAN: What - - -

25 JUDGE STEIN: How about our general instruction

1 on identification, on - - - on eyewitness identification?

2 MR. LIEBERMAN: Right.

3 JUDGE STEIN: Isn't that, if we go back some
4 years, is it - - - wasn't that new science - - -

5 MR. LIEBERMAN: No.

6 JUDGE STEIN: - - - at some point?

7 MR. LIEBERMAN: No. Lighting - - - look at the
8 factors. Lighting, distance - - -

9 JUDGE STEIN: No. But the - - -

10 MR. LIEBERMAN: We all have that experience.
11 That's - - - that's - - -

12 JUDGE STEIN: No.

13 MR. LIEBERMAN: - - - in our human nature.

14 JUDGE STEIN: But the fact that - - - because I
15 think there was a belief at - - - and may still be a
16 belief, that eyewitness identification is extremely
17 persuasive. That if somebody says with a lot of confidence
18 that this is what I saw and I'm sure it was him - - -

19 MR. LIEBERMAN: Okay.

20 JUDGE STEIN: And - - - and so our instruction
21 says - - -

22 MR. LIEBERMAN: I understand - - -

23 JUDGE STEIN: - - - that may not be the case.

24 MR. LIEBERMAN: Okay. But that - - - we're
25 talking about a general problem about how people assess

1 eyewitness identification. And the question is how do we
2 best serve the jurors - - -

3 JUDGE STEIN: But do we talk about the
4 probabilities of how dark was it and is one minute of
5 viewing the - - - the defendant enough or is five minutes -
6 - -

7 MR. LIEBERMAN: Well, the - - -

8 JUDGE STEIN: - - - viewing the defendant enough?
9 I mean it seems to me that we're sort of getting into the
10 weeds here and - - -

11 MR. LIEBERMAN: No. But the - - -

12 JUDGE STEIN: - - - we don't do that with other -
13 - -

14 MR. LIEBERMAN: But the - - -

15 JUDGE STEIN: - - - issues.

16 MR. LIEBERMAN: Okay. We - - - all of us have
17 enough experience on a day-to-day basis to have some better
18 understanding of how lighting affects our ability to
19 perceive, how the amount of time has the ability to affect
20 our ability to remember. But the cross-race effect is an
21 entirely different beast. Okay. It - - - there's a matter
22 of social exposure. That's - - - that has nothing to do
23 with lighting. That has nothing to do with the amount of
24 time that's passed. It's a matter of categorization. If -
25 - - if you believe X about somebody's particular race as

1 opposed to another race, that could change your ability to
2 make a subsequent identification merely on your conclusion
3 about what race that person may be. That's the science.
4 Also, there's the whole issue that the cross-race effect
5 can simply disappear if you have a sufficiently extended
6 period of time to perceive the person and if the time
7 between the initial viewing and the identification
8 procedure is not that great.

9 JUDGE RIVERA: You see the problem - - -

10 MR. LIEBERMAN: But the - - -

11 JUDGE RIVERA: But - - - may I say - - - part - -
12 - what I'm seeing is a problem with part of this argument
13 is you're saying don't give the instruction because the
14 science is so complex. And the science is so complex
15 because science tell us the science is so complex.

16 MR. LIEBERMAN: That's not true at all.

17 JUDGE RIVERA: And I - - - so then I've
18 misunderstood your argument because I thought your point
19 was - - -

20 MR. LIEBERMAN: I - - -

21 JUDGE RIVERA: - - - that it's not a common
22 understanding.

23 MR. LIEBERMAN: It isn't.

24 JUDGE RIVERA: That's it's really difficult to -
25 - -

1 MR. LIEBERMAN: Well - - -

2 JUDGE RIVERA: - - - appreciate this.

3 MR. LIEBERMAN: It is but the - - - the science
4 isn't - - - scientists are saying it's a complex
5 phenomenon. You - - - if you look at the - - - if you look
6 at those individual studies, you - - - you see those
7 complications. And - - -

8 JUDGE RIVERA: Well, what's complex, apparently,
9 is the reason for it. There's a consensus that this - - -
10 this is what occurs.

11 MR. LIEBERMAN: No. But the reason - - -

12 JUDGE RIVERA: That it is difficult.

13 MR. LIEBERMAN: But the reason - - -

14 JUDGE RIVERA: Not impossible - - -

15 MR. LIEBERMAN: But - - -

16 JUDGE RIVERA: - - - but difficult.

17 MR. LIEBERMAN: But the reasons themselves have
18 something to do with the evaluation of whether the cross-
19 race effect plays a particular role. So for example, the
20 contact is one of the reasons why there is - - -

21 (Part of audio obscured due to interference with
22 microphone)

23 MR. LIEBERMAN: - - - but the jury knows nothing
24 about that. And again, it - - - the devil is in the
25 details, and you don't want your - - - you want your

1 children to be educated by people who understand science if
2 they're learning science. You want - - - you don't want
3 them to be educated by - - -

4 JUDGE RIVERA: Um-hum.

5 MR. LIEBERMAN: - - - a committee of lawyers who
6 come up with a sentence which - - - and then come up with
7 language that hasn't even been vetted by an expert
8 scientist. I - - - this is so important because we want to
9 get it right. Let - - - let's stop just trying to get a
10 quick fix. Let's let expert education juries about a
11 complicate phenomenon so they can make the right decision.

12 CHIEF JUDGE DIFIORE: Thank you, Mr. Lieberman.
13 Ms. Hull.

14 MS. HULL: The New York State Taskforce which
15 actually drafted the instruction that was ultimately
16 slightly adapted by the CJI was not just - - - was not - -
17 - did not do a simplistic instruction, and they consulted
18 with experts. This wasn't a panel of lawyers who acted in
19 a vacuum.

20 JUDGE GARCIA: Counsel, just - - - there's not a
21 lot of time, but under - - - under your rule and the
22 Massachusetts rule, I'm trying to understand what
23 discretion would be left with the trial judge. So in a
24 given case where the defense lawyer asks for a cross-racial
25 identification charge and the judge says you're talking

1 about your ex-spouse, I'm not giving it?

2 MS. HULL: That's not a stranger identification.

3 I think that's what distinguishes it. I - - -

4 JUDGE GARCIA: Okay.

5 MS. HULL: This would apply - - -

6 JUDGE GARCIA: Kidnapped two days.

7 MS. HULL: Sorry?

8 JUDGE GARCIA: The person is kidnapped but spends
9 two days with the kidnapper.

10 MS. HULL: Right. I think that type of error
11 would be subject to harmless error because even if I argue
12 that that - - -

13 JUDGE GARCIA: But aren't you doing harmless
14 error in lieu of discretion because what you're really
15 saying in a harmless error analysis then is the judge had
16 discretion not to give this.

17 MS. HULL: Okay. Let me ask - - - can I just
18 take the analogy and - - - and try and answer it
19 differently then?

20 JUDGE GARCIA: Um-hum.

21 MS. HULL: Okay. You've got somebody who's - - -
22 who was exposed to their kidnapper for two days. And so
23 definitely duration is something that's an overriding
24 factor, so even in the court should and we want to make it
25 a standard policy that courts instruct juries about this

1 critical factor, that you have amicus writing to you
2 saying, you know, in one voice that it should be instructed
3 on, ultimately, in that case, it's just not going to matter
4 as much because you're not going to have - - -

5 JUDGE GARCIA: But one of the amicus says it
6 wouldn't apply to confirmatory IDs.

7 MS. HULL: Right. So that's a different - - -
8 again, that's a - - - that's a circumstance where you're
9 looking at less - - - like you're not dealing with a
10 stranger ID, which is where the real risk of
11 misidentification exists.

12 JUDGE STEIN: But under our extended eyewitness
13 ID instruction in our case law, we've said it's
14 discretionary and you look at all the factors. You look
15 at, you know, what there was to corroborate the
16 identification. You look at the circumstances of the
17 identification and all of these things. Why isn't that
18 equally as appropriate in the - - - in the context of
19 cross-racial identification?

20 MS. HULL: Well, I'm going to - - - I'm going to
21 just quickly note that even under a discretionary standard,
22 our argument is that this case should still be reversed
23 because you don't have those corroborating factors and you
24 don't have - - - because these are - - - this is - - - each
25 conviction rests on a single cross-racial identification.

1 But the expanded identification charge for when there is
2 corroboration, there's two. There's one for - - - sorry,
3 you guys know exactly what I'm talking about. But there's
4 a second one where there's corroborating evidence, and this
5 is included in that charge too. So our position is it's
6 still important to include that. And corroboration is
7 really a factor that bears on the admission of expert
8 testimony rather than whether or not you still want to make
9 sure the jury is thinking about identification because even
10 when you have something that may corroborate the
11 identification so to not - - - not require the added
12 process of having an expert, it may still be something the
13 jury should take into account when they're deciding how
14 much weight to afford that corroboration. The other - - -
15 the other thing that I want to mention is actually to - - -
16 sorry.

17 JUDGE GARCIA: No. I just had one question to
18 follow up on your - - - as applied to this case, an abuse
19 of discretion standard. Should it make a difference, the
20 presentation that the defense counsel made here, which was
21 there's really no indication that any charge was ever
22 provided. And then after the break there is do you have
23 any further, you know, support for your position? No. And
24 now we see studies and all this, you know, volumes of
25 support for the position. I mean, really, the judge at the

1 time is making a decision and exercising that judge's
2 discretion based on the presentation made by that defense
3 counsel.

4 MS. HULL: Well, I would say that all of that
5 support and all of the information that you've been
6 provided was basically the exact same information that led
7 - - - led to these exist - - - to the creation of the
8 charge in the first place. So that's why counsel doesn't
9 have to specifically marshal that. And this issue is
10 preserved, if that's part of the question because all - - -
11 in terms of asking for a charge - - -

12 JUDGE GARCIA: Agreed.

13 MS. HULL: - - - this court's case law is - - -
14 okay - - - is quite clear in that regard. And there was no
15 - - - I mean when he was asked do you have any additional
16 case law to provide, he didn't because none exists. That's
17 why I'm here. And part of the reason why the amicus is
18 helpful, I think, in this case because it reiterates what
19 not only the Massachusetts Supreme Court has looked at the,
20 New Jersey Supreme Court has looked, but frankly, also,
21 what the New York State Taskforce looked at, I believe, in
22 drafting this charge. So that has actually been part of
23 the process already. And the court's failure to give the
24 charge because there was no expert testimony or didn't - -
25 - he didn't think there was a sufficient record, that's

1 undermined by the language that's in the recommendation for
2 the New York - - - by the New York State Taskforce which
3 says give this regardless of whether an expert testifies.
4 And I'm here to tell you let experts testify. I'm - - -
5 I'm all in favor of that. But I don't think that we need -
6 - - we need to require and condition a defendant's ability
7 to have a jury be educated on such a critical component
8 when there is no dispute as to the effect, and that's
9 really where - - -

10 JUDGE RIVERA: Well, let's say we agree with you.

11 MS. HULL: Okay.

12 JUDGE RIVERA: We agree also - - - and I see you
13 smiling, happy about that.

14 MS. HULL: Oh, sorry.

15 JUDGE RIVERA: But let's say we agree with you,
16 let's say we even adopt the Massachusetts rule. Let's say
17 we even agree, of course, that it's up to the parties and
18 the judge whether or not a request to have expert testimony
19 from the defendant is allowed up. If - - - if counsel
20 decides not to call an expert, is that going to be
21 ineffective assistance? Are we going to see the 4410
22 saying you should have called the expert? I - - - even
23 though I got the charge, I still needed the expert for all
24 of the reasons the ADA has argued today? The jury still
25 could not understand this and you undermined my defense by

1 not calling the expert?

2 MS. HULL: No. Because oftentimes, there could
3 be a strategic reason not to call an expert or the - - - an
4 expert wouldn't have met the threshold of - - - for - - -
5 under this court's precedent under corroboration.

6 JUDGE STEIN: Can I ask the same question I asked
7 your adversary? In this particular case, do you think that
8 the trial judge was actually exercising discretion or do
9 you think that the record indicates that - - - that the
10 charge was denied because there was no expert testimony?

11 MS. HULL: I think the latter, Your Honor. I
12 don't think the court was exercising discretion. I think
13 the court was simply saying just the - - - just the fact
14 that there's a cross-racial identification isn't enough
15 here. And our position is no, no, it is, especially when
16 there's no other evidence supporting the convictions in
17 this case.

18 CHIEF JUDGE DIFIORE: Thank you, Ms. Hull.

19 MS. HULL: Thank you very much.

20 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Otis Boone, No. 55 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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