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CANNASING "POINT OUTS" AND POLICE SUGGESTION: A COMMENT ON
PEOPLE v. DIXON

Geoffrey T. Raicht†

I. INTRODUCTION

Wade hearings seek to "test identification testimony for taint arising from official suggestion during 'police-arranged confrontations between a defendant and an eyewitness.'" In United States v. Wade,2 the United States Supreme Court noted that one major fac-


2 388 U.S. 218 (1967) (applying Sixth Amendment right to counsel to pretrial lineups). Moreover, the Supreme Court held that the right to counsel applied because of "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup." The Court was concerned about the potential suggestiveness of improper lineup or showup procedures. To protect the defendant from prejudice, the Wade Court recognized that a
tor which contributes to "the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." The Court further noted that "[s]uggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and, thus, his susceptibility to suggestion the greatest." When police officers conduct identification procedures, the possibility of suggestion is no less serious. Often, shortly after a crime has occurred, police will conduct a "show-up" where they present the suspect to a witness for identification. In some instances, a victim or witness will only be in the presence of police, canvassing the area near the scene of the crime, when they point out a perpetrator. Does this situation command a Wade hearing? In February 1995, New York State's highest court ruled that where the police canvass an area of a crime scene with a victim or witness in their car and a perpetrator is "pointed out," the iden-

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Wade, 388 U.S. at 228.

Id. at 229.

Stovall v. Denno, 388 U.S. 293 (1967) (the Court extended due process right to exclude identification testimony that results from unnecessarily suggestive procedures that may lead to an irreparably mistaken identification).


Canvassing of a crime scene in a police van with a witness is akin to "alley confrontations" or "prompt confrontations with the victim or an eyewitness at the scene of the crime." Yale Kamisar et al., Modern Criminal Procedure: Cases, Comments and Questions 669 (8th ed. 1994). This type of identification has been exempted from the right to counsel requirement under the Sixth Amendment. Id. (citing Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969)). However, in pre-arrest and pre-indictment cases

[k]the Due Process Clause of the Fifth and Fourteenth Amendments forbids a line up that is unnecessarily suggestive and conducive to irreparable mistaken identification. When a person has not been formally charged with a criminal offense, Stovall strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime.

Kirby v. Illinois, 406 U.S. 682, 691 (1972) (internal citation omitted).
tification procedure must be subject to a *Wade* hearing. The decision enhances due process and may burden criminal court calendars. However, the New York State Court of Appeals was correct by affording defendants this extra layer of protection.

While this opinion may be viewed as a branding of police procedures as inherently suggestive, such a stark view is unnecessary. While the New York State Court of Appeals’ grant of due process protection was correct, one need not believe that police practices are inherently malicious and in need of constant oversight. That is not to say that police do not, at times, disregard certain individual constitutional protections. However, even the most honest and well-intentioned police officer may unknowingly taint an identification.

II. THE ROBBERY OF HAROLD KNOWINGS AND THE ARREST OF ROBERT DIXON

A group of men robbed Harold Knowings as he exited a grocery store in Brooklyn. Shortly thereafter, transit police officers drove Harold Knowings in a marked van around the streets near where the robbery occurred. During the “canvass,” Knowings "pointed to” Robert Dixon on the street and identified him as one of the men who robbed him earlier. Based on Knowings’ identification, police immediately arrested Dixon and charged him with robbery in the second degree, grand larceny in the fourth degree, and assault in the second and third degrees.

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9 *Dixon*, 647 N.E.2d at 1324.
10 *Id.* at 1326 (Bellacosa, J., dissenting).
11 *Id.* at 1324.
12 *Id.*
13 *Id.*
14 Under New York Penal Law section 160.10, a person is guilty of robbery in the second degree when he forcibly steals property and when:
   1. He is aided by another person actually present; or
   2. In the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime:
      a. Causes physical injury to any person who is not a participant in the crime; or
      b. Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or
   3. The property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law.
   Robbery in the second degree is a class C felony.

15 Under New York Penal Law section 155.30, a person is guilty of grand larceny in the fourth degree when he steals property and when:
   1. The value of the property exceeds one thousand dollars; or
The prosecution notified Dixon that Knowings made a "cor-
poreal non-lineup identification' in the presence of the police."18 Dixon then requested a Wade hearing19 "to challenge 'the propriety of the identification procedures used.'"20 He argued that the police identification procedure was "unfair, creating a substantial likelihood of misidentification."21 The People argued that Dixon was “pointed out” to the police sua sponte by Knowings “during a canvass of the area surrounding the scene of the crime.”22 Therefore, the People argued that Dixon’s identification was not police-arranged and, thus, he was not entitled to a Wade hearing.23 The court agreed and denied Dixon’s motion.24

At trial, Knowings testified to his out-of-court identification of Dixon and further identified him in court as one of the men who robbed him.25 In his defense, Dixon took the stand and claimed that while he was near the scene of the crime, Knowings had mistakenly identified him as one of the perpetrators.26 The jury convicted Dixon of robbery in the second degree.27 The appellate division affirmed both Dixon’s conviction and the court’s denial of a Wade hearing.28

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17 Under New York Penal Law section 120.00, a person is guilty of assault in the third degree when:
1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or
2. He recklessly causes physical injury to another person; or
3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.


18 Dixon, 647 N.E.2d at 1322.

19 Dixon sought omnibus relief, which included his application for a “Wade hearing to challenge 'the propriety of the identification procedures used' to identify him as one of the perpetrators.” Id.

20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id. at 1323; see also People v. Dixon, 609 N.Y.S.2d 807, 808 (N.Y. App. Div. 1994).
III. THE POTENTIAL FOR POLICE SUGGESTION WAS TOO GREAT NOT TO AFFORD DIXON A \textit{Wade} HEARING

In a five to two decision,\textsuperscript{29} the New York State Court of Appeals held that the "canvassing" of the streets near the crime scene, with Knowings in the police van, was "police-arranged" and the identification susceptible to police suggestion. Therefore, according to the majority, Robert Dixon was entitled to a \textit{Wade} hearing.\textsuperscript{30}

The court began with an analysis of New York Criminal Procedure Law section 710.60,\textsuperscript{31} "which governs suppression motions

\begin{itemize}
\item \textsuperscript{29} Dixon, 647 N.E.2d at 1328.
\item \textsuperscript{30} Id. at 1324.
\item \textsuperscript{31} New York Criminal Procedure Law section 710.60, which governs motions to suppress evidence, provides:
\begin{enumerate}
\item A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must state the ground or grounds for the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the defendant or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers.
\item The court must summarily grant the motion if:
\begin{enumerate}
\item The motion papers comply with the requirements of subdivision one and the people concede the truth of allegations of fact therein which support the motion; or
\item The people stipulate that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.
\end{enumerate}
\item The court may summarily deny the motion if:
\begin{enumerate}
\item The motion papers do not allege a ground constituting legal basis for the motion; or
\item The sworn allegations of fact do not as a matter of law support the ground alleged; except that this paragraph does not apply where the motion is based upon the ground specified in subdivision three or six of section 710.20.
\end{enumerate}
\item If the court does not determine the motion pursuant to subdivisions two or three, it must conduct a hearing and make findings of fact essential to the determination thereof. All persons giving factual information at such hearing must testify under oath, except that unsworn evidence pursuant to subdivision two of section 60.20 of this chapter may also be received. Upon such hearing, hearsay evidence is admissible to establish any material fact.
\item A motion to suppress evidence made during trial may be in writing and may be litigated and determined on the basis of motion papers as provided in subdivisions one through four, or it may, instead, be made orally in open court. In the latter event, the court must, where necessary, also conduct a hearing as provided in subdivision four, out of the
\end{enumerate}
\end{itemize}
and their disposition.” The court noted that the standard under this section requires the trial court to “conduct a hearing and make findings of fact in determining the motion.” It also noted that the suppression motion may be “summarily denied ‘if no legal basis for suppression is presented or if the factual predicate for the motion is insufficient as a matter of law.’” The court found that blame could not rest with Dixon for not alleging facts “describing the nature and circumstances of the ‘point-out’ in the police car.”

The court further noted that the 1986 amendments to New York State Criminal Procedure Law section 710.60(3)(b) no longer burden a defendant with having to allege facts to support a motion to suppress an out-of-court identification. Indeed, the court found that nowhere is such a rule more valuable than here, where no one but the witness and police are privy to the exact circumstances of the identification.

The court then turned to the issue of Dixon’s entitlement to a Wade hearing. The court based its decision on the principle that “the purpose of the Wade hearing is to test identification testimony for taint arising from official suggestion during ‘police-arranged confrontations between a defendant and an eyewitness.’”

Central to the court’s decision, it announced adherence to “precedent” and utilization of a nonrestrictive definition of “police-arranged procedures.” The court, therefore, did not believe that it was announcing a new rule, but a natural outgrowth of precedent. The court rejected the People’s argument that “the fact that [Knowings] ‘spontaneously’ pointed out [Dixon] removed the identification procedure—here, the canvassing—from the category of police-sponsored viewings that warrant a Wade hearing.” A wit-

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6. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its finding of fact, its conclusions of law and the reasons for its determination.

N.Y. CRIM. PROC. LAW § 710.60 (McKinney 1995) (internal footnote omitted).
ness identification may be "spontaneous," yet may nonetheless be prompted by a police-arranged procedure. The court narrowly defined an identification as truly spontaneous where "a complainant flags down a police officer and then points to the attackers on the street less than two blocks away." The court found it unmistakable that the canvassing of the crime area in a marked police car was done "at the 'deliberate direction of the State.'"

Moreover, the instant identification did not fall into the two recognized exceptions to the Wade requirement. The court recognized that an exception to the Wade requirement may be made when either (1) the prior identification is merely "confirmatory," or (2) the identifying witness and suspect are known to each other. In either circumstance, the possibility of misidentification is extremely low. Implicitly, there is no room for police suggestion in either exception.

The court further reasoned that "[w]ithout the benefit of a Wade hearing, the courts below could not conclude as a matter of law that [Knowings'] identification of [Dixon] from the police van was spontaneous and not subject to any degree of police suggestion." The court noted that the mere claim that Knowings "pointed out" Dixon supports the possibility that the identification was indeed preceded by police prompting. Accordingly, "a Wade hearing was required to enable the parties to explore the true nature of the facts surrounding the particular identification—circumstances not ascertainable in the absence of a hearing."

IV. THE MAJORITY'S RULE CREATES A PER SE ENTITLEMENT

In his dissent, Judge Bellacosa, joined by Judge Levine, would

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42 The court exemplified "spontaneous" as when a victim "points out" a defendant by reflex while viewing a police supplied video tape. While the "point out" may be "spontaneous," it would be difficult to deny that the viewing was police-arranged. See id. at 1324 (citing People v. Edmonson, 554 N.E.2d 1254 (N.Y. 1990)).
43 Id. at 1323-24.
44 Id. at 1324 (citing People v. Rios, 548 N.Y.S.2d 348, 349 (N.Y. App. Div. 1989)).
45 Id. (citing People v. Berkowitz, 406 N.E.2d 783 (N.Y. 1980)).
46 Id.
47 Id. (citing People v. Wharton, 549 N.E.2d 462 (N.Y. 1989)).
48 Id. (citing People v. Gissendanner, 399 N.E.2d 924 (N.Y. 1979)).
49 Id.
50 Id.
51 Id.
52 Id.
53 Id. at 1325.
have affirmed the denial of the suppression hearing, because the defendant failed to show any "'legal basis [or cognizable theory] for suppression . . .' and no sufficient 'factual predicate for the motion' to suppress, as a matter of law, [was] advanced."\textsuperscript{54} The dissenting judges were most concerned with the majority's creation of a "virtual per se pretrial hearing entitlement, contrary to [New York Criminal Procedure Law section 710.60]'s express limitations and prescriptions."\textsuperscript{55} The dissenting judges warned that "[e]very noncustodial street canvass by police with crime victims will hereafter be preemptively treated as 'police-arranged' and the identification as suggestive by its nature."\textsuperscript{56} Moreover, the dissenting judges cautioned that the "[u]nnecessary, layered hearings, not constitutionally or statutorily required in fairness, merely provide for indirect discovery, complexity and tactical delay and unjust results."\textsuperscript{57} They further argued that the identification of Dixon was not police-arranged. Dixon's identification, the dissenting judges wrote, "drives the phrase 'police-arranged' inexorably and inappropriately beyond its categorical, functional and particularized purpose."\textsuperscript{58} "The law enforcement authorities did not initiate or exert this effort with prior knowledge about this or any targeted perpetrator. They were simply responding immediately to a civilian crime victim's complaint."\textsuperscript{59} This, the dissenting judges asserted, "is not a situation instinct with suggestibility . . . ."\textsuperscript{60}

V. \textit{Wade} Hearings Afford Defendants Necessary Protections Against Taint of Identification

The New York State Court of Appeals correctly found that the lower courts erred by failing to conduct a suppression hearing. Whenever there is the possibility of undue suggestion, either by law enforcement or prosecutors, suppression hearings should be granted. While the court's decision may add another layer upon an already burdened criminal justice system, the court simultaneously prevented a potential miscarriage of justice where misidentification was possible.

\textsuperscript{54} Id. (citing N.Y. CRIM. PROC. LAW § 710.60 (McKinney 1995); People v. Mendoza, 624 N.E.2d 1017 (N.Y. 1993); People v. Rodriguez, 593 N.E.2d 268 (N.Y. 1992)).
\textsuperscript{56} Dixon, 647 N.E.2d at 1325.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 1327.
\textsuperscript{59} Id. at 1326.
\textsuperscript{60} Id.
VI. The Role of Police Suggestion in Canvassing "Point Outs"

Dixon represents a classic contrast in philosophical beliefs. The debate may seem to turn on the question of whether police manipulate and influence witnesses at every opportunity. The five member majority found, in effect, that they do.61 However, such polarized views are not necessary to resolve this issue. Even an honest and well-intentioned police officer may create undue suggestion or taint in identification.

In Dixon, the majority believed that no amount of time was too short for a witness to be alone with the police before undue suggestion may occur. The majority did not in its recitation of the facts make any reference to how long the canvassing lasted.62 Thus, whether the victim or witness is alone with police canvassing the area for two hours or two minutes, the potential for police suggestion exists and such an identification must be subject to a Wade hearing. The court stated that the only true spontaneous "point out" would be where a complainant flagged down a police officer and pointed to the perpetrators on the street only a couple of blocks away.63 Accordingly, in New York State, Wade hearings are likely to be granted in all similar situations.64

While the record is devoid of any direct accusations of police misconduct,65 nothing suggests that it is a routine police procedure to coach or coax witnesses into making identifications. It would be counter-productive for police officers to routinely encourage false identifications since most would be unlikely to result in convictions at trial.66 However, it appears accepted by the Dixon majority and by the United States Supreme Court67 that such practices do rou-
tinely exist. The pervasiveness of this practice is, however, unquantifiable.

The effect of Dixon is an extra layer of protection against possible misidentification. Indeed, it is an important layer. In fact, contrary to the general tone of this decision, one need not find themselves on one side of the crime control-due process fence to recognize it as such. Suggestiveness, resulting in taint of witness identification, need not take the form of malicious police practice. Even the police officer who in no way means to engage in a suggestive practice may taint an identification.

A hypothetical examination of the conduct of two different fictional police officers demonstrates this very point. Police Officer Alpha ("Alpha") is a defendant's worst nightmare and the very type of police officer from whom the majority seeks to protect would-be defendants. Alpha is the classic dishonest police officer who does not exercise care in safeguarding a defendant's due process rights. He wants to make arrests and does not care how he gets them. For Alpha, it is irrelevant whether the arrestee is culpable for the crime. In Alpha's mind, the arrestee is probably guilty of something.

Alpha responds to a mugging call outside a grocery store. When he arrives in his police van, the victim is outside the store. Alpha places the victim in the van and they proceed to drive around the neighborhood canvassing the area attempting to spot one of the perpetrators. Alpha could say a variety of things to incite the victim into making an identification (e.g., "he looks guilty of something" or "doesn't he fit your description"). Indeed, Alpha may not even direct his comments toward a particular individual. Rather, he may say things to encourage the witness to pick anyone, such as "guys that rob are scum and should be locked away." The victim then wants to make an identification merely to vindicate himself or perhaps believing he is doing the right thing. It is this type of police officer that strikes fear in the Dixon majority and in those in the wrong place at the wrong time.

Police Officer Omega ("Omega") is the antithesis of Alpha. He is not interested in making arrests at any cost. In fact, Omega is

any other single factor—perhaps it is responsible for more such errors than all other factors combined." Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Id. at 228-29 (internal citations omitted).
generally good-willed, honest and concerned with the health and safety of those victimized by crime. When Omega responds to the mugging call, he finds the victim in front of the market and inquires if any medical assistance is needed. After seeing that the victim does not require medical assistance, the victim and Omega get into the police van and canvass the neighborhood looking for one of the perpetrators. Omega does not try to incite the victim, but generally tries to be helpful. Based on a description supplied to him by the victim, he may suggest persons on the street. While he is trying to be helpful, he has tainted the identification.

Omega may not say anything about the crime and still taint the identification. Suppose the victim gives Omega a description of the perpetrators. Omega and the victim then canvass the neighborhood. Omega and the victim could discuss anything. By chance, Omega stops the conversation because he thinks he sees someone resembling the description. The victim's attention is drawn there and the resulting identification would then be considered tainted. The only way to avoid any type of taint is for the police officers not to engage in any conversation either amongst other officers or with the victims. Unfortunately, it is impossible to safeguard against such happenings.

The dissenting judges were incorrect when they challenged the majority's characterization of the canvassing as "conducted for the purpose of obtaining an identification." They argued that "[n]o one could have known that one of the perpetrators was still at or near the crime scene when the normal investigative canvass was undertaken." The dissenting judges missed the point. First, what other reason would the police officer and the victim get into the van were it not to attempt to secure an identification? Second, the mere fact that the police did not "arrange" potential suspects does not remove this identification from the category of police-arranged. The dissenting judges focused on presentation of the perpetrators, akin to a lineup or a photo array. Its view appeared to be that it is not police-arranged if the police did not physically assemble the suspects. The majority saw potential for taint on the other side of the two-way glass. While it is true that the police did not arrange for Robert Dixon to be on the street at that time, the police may have said or portrayed something in a certain light to taint. It is this that cannot be checked without a Wade hearing. The dissenting judges further argued that:

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68 Dixon, 647 N.E.2d at 1326 (citing id. at 1322).
69 Id.
The law enforcement action here was limited to responding promptly and appropriately to a crime victim's exigent report of a crime committed proximately in time and place. The action is different in kind from the identification techniques, practices and categories that have previously been curtailed or condemned or made subject to per se suppression.\textsuperscript{70} However, surely the same arguments were made when protections were afforded for lineups,\textsuperscript{71} true show-ups,\textsuperscript{72} and photo identifications.\textsuperscript{73}

As of this writing, the New York State Court of Appeals has twice relied upon its holding in Dixon.\textsuperscript{74} In People v. Brown,\textsuperscript{75} the court remanded\textsuperscript{76} the proceeding so that a Wade hearing could be conducted.\textsuperscript{77} In Brown, the perpetrator robbed the victim of jewelry "allegedly" at gunpoint.\textsuperscript{78} The victim and his sister informed police officers, stationed nearby, of the robbery.\textsuperscript{79} In a marked police car, the victim, his sister and police officers "canvassed" the adjacent block for the perpetrator.\textsuperscript{80} The victim "pointed out the person he thought was the robber, and upon the approach by the police in the marked car, the suspected robber ran off."\textsuperscript{81} Chased by police, the suspected robber ran into an apartment building.\textsuperscript{82} Police apprehended the suspect in the building stairwell.\textsuperscript{83} Police presented the suspected robber to the victim in the ground floor stairwell handcuffed and surrounded by police officers.\textsuperscript{84} The victim then identified the suspect as the person who robbed him.\textsuperscript{85} No jewelry or guns were recovered from the suspect.\textsuperscript{86} The court ordered a Wade hearing to ensure that the identification was free

\textsuperscript{70} See id. at 1927.
\textsuperscript{71} See United States v. Wade, 388 U.S. 218 (1967); see also People v. Chipp, 552 N.E.2d 608 (N.Y. 1990).
\textsuperscript{72} See People v. Riley, 517 N.E.2d 520 (N.Y. 1987).
\textsuperscript{73} See People v. Rodriguez, 593 N.E.2d 268 (N.Y. 1992).
\textsuperscript{74} See People v. Brown, 655 N.E.2d 162 (N.Y. 1995); see also People v. Clark, 649 N.E.2d 1203 (N.Y. 1995).
\textsuperscript{75} 655 N.E.2d 162 (N.Y. 1995).
\textsuperscript{76} Id. at 163.
\textsuperscript{77} Id. at 162.
\textsuperscript{78} Id. at 163.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id. (emphasis added).
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
from police suggestion. The court stated that "[a]lthough the victim initiated the police chase once he pointed out his alleged assailant, the resultant showup does not fit into the category of confirmatory identifications that are recognized as exceptions to the general requirement of a Wade hearing." 

In People v. Clark, one of two robbery victims observed the perpetrator in a neighborhood market, asked the manager for his address, and then contacted the police with this information. Police escorted the victims to that address and identified their assailant as he opened the door to his apartment. The court unanimously found that the procedure was not suggestive and the identification spontaneous.

However, in Clark, the court affirmed People v. Williams. The court, confronted with a similar situation, found the identification to be mere "happenstance" and upheld the denial of a Wade hearing. In that case, the perpetrator raped and sodomized a woman in the lobby of her building. Two weeks later, a man contacted the woman claiming to have her passport and identification cards, which were stolen from her apartment twelve days after her rape. The man approached the woman's neighbor in an attempt to locate her. The neighbor described the man to the victim. Based on that description, the woman believed him to be her attacker. After conferring with the police, the woman agreed to meet the man outside of a subway station in order to return her property. The police, in an unmarked police car, escorted the woman to the subway station. "After canvassing the area several times, the detectives spotted an individual, who matched the complainant's prior descriptions, standing by himself atop the stairs leading down

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87 Id.
88 Id. (citing People v. Dixon, 647 N.E.2d 1321 (N.Y. 1995); People v. Wharton, 549 N.E.2d 462 (N.Y. 1989); People v. Gissendanner, 399 N.E.2d 924 (N.Y. 1979)).
90 Id. at 1204.
91 Id.
92 Id. (citing People v. Dixon, 647 N.E.2d 1321 (N.Y. 1995)).
94 Clark, 649 N.E.2d at 1204.
95 Id.
96 Id.
97 Id.
98 Id.
99 Id.
100 Id.
101 Id.
to the subway." The police instructed the woman to remain in the car and followed the suspect into the subway station. After a scuffle, police arrested the suspect, searched his person, and recovered the woman's passport and identification cards. An unrelated commotion in the subway station forced the police to remove the suspect to street level. "The [woman] observed the detectives emerge from the station with the defendant, and immediately recognized and identified him to the detectives as her attacker." The woman positively identified the suspect as her attacker by his distinguished crooked teeth, which she had previously and repeatedly attributed to her attacker.

While on their face these facts appear closely analogous to Dixon, in this case the court of appeals upheld the denial of the protection of a Wade hearing. The court stated that "[g]iven the erratic circumstances of the detectives' encounter with the defendant, the resulting 'showup' identification procedure was unavoidable, the product of a fast-paced, uncontrollable situation." The necessity for the protection of due process is well stated by Professor Lawrence M. Friedman of Stanford University School of Law:

In criminal trials, some one man or woman stands in the dock, facing the raw and awesome power of the state. A democratic system acknowledges this fact, and is committed to some kind of balance. 'Due process' is a basic concept of American law. It has many meanings. One of them, however, relates strongly to criminal justice. The scales must not tilt too much toward government. Arrests must be fair; trials must be fair; punishments must be fair. These are ideals (reality is another matter). The opposite of a democratic society is a police state. This is a state where the other side, the police side, the government side, always has the upper hand.

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102 Id.
103 Id.
104 Id.
105 Id.
106 Id.
107 Id.
108 See People v. Dixon, 647 N.E.2d 1321, 1322-23 (N.Y. 1995). In Dixon and Williams, the police canvassed the area near the crime scene. The fact that the canvass took place shortly after the crime in Dixon and several weeks after the crime in Williams did not factor into the court's analysis. Accordingly, for comparison purposes, these cases remain factually analogous.
109 See Clark, 649 N.E.2d at 1204 (citing People v. Dixon, 647 N.E.2d 1321 (N.Y. 1995)).
Professor Friedman's observation is correct. The State possesses "raw and awesome power."\textsuperscript{111} Identifications made solely in the presence of police officers, where there exists opportunity for intended or unintended taint or suggestion, is too much power to remain unchecked. To protect due process, it is necessary to add another layer of protection. Certainly, a major drawback is that courts will be forced to conduct additional hearings. The result is that potential misidentifications will be thwarted. When balanced, barring extraordinary circumstances, due process must always outweigh burdens on the judiciary. The dissent in \textit{Dixon} argued that allowing this extra layer of protection would result in delay and unjust results.\textsuperscript{112}

VII. Conclusion

The New York State Court of Appeals has protected those identifications made in the presence of police that are not truly spontaneous. The majority and dissent based their decision on whether there existed the opportunity for police suggestion. The correctness of the opinion can be reached whether or not one believes that police officers manipulate witnesses with malicious intent.

In a scathing critique of the criminal justice system, the exclusionary rule, and the Fourth Amendment, New York State Supreme Court Justice Harold J. Rothwax noted:

\begin{quote}
[T]he law is so muddy that the police can't find out what they are allowed to do even if they wanted to. If a street cop took a sabbatical and holed himself up in a library for six months doing nothing but studying the law on search and seizure, he wouldn't know any more than he did before he started. The law is totally confusing, yet we expect cops to always know at every moment what the proper action is. It's no wonder that police officers are somewhat edgy . . . . \textsuperscript{113}
\end{quote}

While Justice Rothwax's comments are directed toward a different amendment to the Constitution than those governing \textit{Wade} hearings, his observations of the complexity of the law and its impact on police officers is no less true. Most likely, \textit{Dixon} will have little effect on police practices. However, \textit{Wade} hearings will likely be conducted more often than before. Simultaneously, misiden-

\textsuperscript{111} Id.
\textsuperscript{112} \textit{Dixon}, 647 N.E.2d at 1325 (Bellacosa, J., dissenting).
\textsuperscript{113} \textsc{Judge Harold J. Rothwax, Guilty: The Collapse of the Criminal Justice System} 41 (1996).
tifications will likely decrease. As a result, due process will be protected and identifications that survive *Wade* hearings will be reliable.