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# CANVASSING "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.'"<sup>1</sup> In *United States v. Wade*,<sup>2</sup> the United States Supreme Court noted that one major fac-

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<sup>1</sup> *People v. Dixon*, 647 N.E.2d 1321, 1323 (N.Y. 1995) (quoting *People v. Gisendanner*, 399 N.E.2d 924, 930 (N.Y. 1979)). See YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 659 (8th ed. 1994) (*Wade* hearings seek "to protect the reliability of the identification process and to make available testimony about the conditions under which such process is carried out . . ."); see also Leonard B. Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1 (1972); Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1 (1984); Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141 (1984); Joseph D. Grano, Kirby, Biggers, and Ash: *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717 (1974); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); Yale Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"?* *When Does it Matter?*, 67 GEO. L.J. 1 (1978); Felice J. Levine & June Louin Tapp, *The Psychology of Criminal Identification: The Gap From Wade to Kirby*, 121 U. PA. L. REV. 1079 (1973); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989); Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367 (1992); Charles A. Pulaski, *Neil v. Biggers: The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097 (1974); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984); *Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987*, 76 GEO. L.J. 521 (1988); Jeff Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441 (1978); Cindy J. O'Hagan, Note, *When Seeing is Not Believing: The Case for Eyewitness Expert Testimony*, 81 GEO. L.J. 741 (1993).

<sup>2</sup> 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."<sup>3</sup> 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."<sup>4</sup> When police officers conduct identification procedures, the possibility of suggestion is no less serious.<sup>5</sup> Often, shortly after a crime has occurred, police will conduct a "show-up" where they present the suspect to a witness for identification.<sup>6</sup> 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.<sup>7</sup> Does this situation command a *Wade* hearing?<sup>8</sup> 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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postindictment lineup is a "critical stage" of the criminal proceedings, at which the defendant has a right to counsel. The Court reasoned that the presence of counsel at such a "critical stage" can prevent prejudicial identification procedures and can enable counsel to reconstruct and challenge those procedures at trial.

*Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987*, 76 GEO. L.J. 521, 651 (1988) (internal citations omitted).

<sup>3</sup> *Wade*, 388 U.S. at 228.

<sup>4</sup> *Id.* at 229.

<sup>5</sup> *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).

<sup>6</sup> *See, e.g., People v. Clark*, 649 N.E.2d 1203 (N.Y. 1995).

<sup>7</sup> *See generally People v. Dixon*, 647 N.E.2d 1321 (N.Y. 1995).

<sup>8</sup> 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

[t]he 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.<sup>9</sup> 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,<sup>10</sup> 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.<sup>11</sup> Shortly thereafter, transit police officers drove Harold Knowings in a marked van around the streets near where the robbery occurred.<sup>12</sup> During the "canvass," Knowings "pointed to" Robert Dixon on the street and identified him as one of the men who robbed him earlier.<sup>13</sup> Based on Knowings' identification, police immediately arrested Dixon and charged him with robbery in the second degree,<sup>14</sup> grand larceny in the fourth degree,<sup>15</sup> and assault in the second<sup>16</sup> and third degrees.<sup>17</sup>

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<sup>9</sup> *Dixon*, 647 N.E.2d at 1324.

<sup>10</sup> *Id.* at 1326 (Bellacosa, J., dissenting).

<sup>11</sup> *Id.* at 1324.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> 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.

N.Y. PENAL LAW § 160.10 (McKinney 1988 & Supp. 1996).

<sup>15</sup> 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-

2. The property consists of a public record, writing or instrument kept, filed or deposited according to law with or in the keeping of any public office or public servant; or
3. The property consists of secret scientific material; or
4. The property consists of a credit card or debit card; or
5. The property, regardless of its nature and value, is taken from the person of another; or
6. The property, regardless of its nature and value, is obtained by extortion; or
7. The property consists of one or more firearms, rifles, or guns, as such terms are defined in section 265.00 of this chapter; or
8. The value of the property exceeds one hundred dollars and the property consists of a motor vehicle, as defined in section one hundred twenty-five of the vehicle and traffic law, other than a motorcycle, as defined in section one hundred twenty-three of such law; or
9. The property consists of a scroll, religious vestment, vessel or other item of property having a value of at least one hundred dollars kept for or used in connection with religious worship in any building or structure used as a place of religious worship by a religious corporation, as incorporated under the religious corporations law or the education law.
10. The property consists of an access device which the person intends to use unlawfully to obtain telephone service.

Grand larceny in the fourth degree is a class E felony.

N.Y. PENAL LAW § 155.30 (McKinney 1988 & Supp. 1996).

<sup>16</sup> Under New York Penal Law section 120.05, a person is guilty of assault in the second degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or
2. With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or
3. With intent to prevent a peace officer, police officer, a fireman, including a fireman acting as a paramedic or emergency medical technician administering first aid in the course of performance of duty as such fireman, or an emergency medical service paramedic or emergency medical service technician, from performing a lawful duty, he causes physical injury to such peace officer, police officer, fireman, paramedic or technician; or
4. He recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
5. For a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to him, without his consent, a drug, substance or preparation capable of producing the same; or
6. In the course of and in furtherance of the commission or attempted commission of a felony, other than a felony defined in article one hundred thirty which requires corroboration for conviction, or of immediate flight therefrom, he, or another participant if there be any, causes physical injury to a person other than one of the participants; or
7. Having been charged with or convicted of a crime and while confined in a correctional facility, as defined in subdivision three of section forty of the correction law, pursuant to such charge or conviction, with

poreal non-lineup identification' in the presence of the police."<sup>18</sup> Dixon then requested a *Wade* hearing<sup>19</sup> "to challenge 'the propriety of the identification procedures used.'"<sup>20</sup> He argued that the police identification procedure was "unfair, creating a substantial likelihood of misidentification."<sup>21</sup> 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."<sup>22</sup> Therefore, the People argued that Dixon's identification was not police-arranged and, thus, he was not entitled to a *Wade* hearing.<sup>23</sup> The court agreed and denied Dixon's motion.<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup> The jury convicted Dixon of robbery in the second degree.<sup>27</sup> The appellate division affirmed both Dixon's conviction and the court's denial of a *Wade* hearing.<sup>28</sup>

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intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

8. Being eighteen years old or more and with intent to cause physical injury to a person less than eleven years old, the defendant recklessly causes serious physical injury to such person.

Assault in the second degree is a class D felony.

N.Y. PENAL LAW § 120.05 (McKinney 1987 & Supp. 1996).

<sup>17</sup> 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.

N.Y. PENAL LAW § 120.00 (McKinney 1987 & Supp. 1996).

<sup>18</sup> *Dixon*, 647 N.E.2d at 1322.

<sup>19</sup> 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.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *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 *WADE* HEARING

In a five to two decision,<sup>29</sup> 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 *Wade* hearing.<sup>30</sup>

The court began with an analysis of New York Criminal Procedure Law section 710.60,<sup>31</sup> "which governs suppression motions

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<sup>29</sup> *Dixon*, 647 N.E.2d at 1328.

<sup>30</sup> *Id.* at 1324.

<sup>31</sup> New York Criminal Procedure Law section 710.60, which governs motions to suppress evidence, provides:

1. 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 deponent 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.

2. The court must summarily grant the motion if:

a. 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

b. 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.

3. The court may summarily deny the motion if:

a. The motion papers do not allege a ground constituting legal basis for the motion; or

b. 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.

4. 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.

5. 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

and their disposition.”<sup>32</sup> 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.”<sup>33</sup> 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.’”<sup>34</sup> 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.”<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

The court then turned to the issue of Dixon’s entitlement to a *Wade* hearing.<sup>38</sup> 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.’”<sup>39</sup>

Central to the court’s decision, it announced adherence to “precedent” and utilization of a nonrestrictive definition of “‘police-arranged’ procedures.”<sup>40</sup> 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.”<sup>41</sup> A wit-

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presence of the jury if any, and make findings of fact essential to the determination of the motion.

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).

<sup>32</sup> *Dixon*, 647 N.E.2d at 1323.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (citing *People v. Rodriguez*, 593 N.E.2d 268, 273 (N.Y. 1992)).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (quoting *People v. Gissendanner*, 399 N.E.2d 924, 930 (N.Y. 1979)).

<sup>40</sup> *Id.* (citing *id.* at 1327 (Bellacosa, J., dissenting)).

<sup>41</sup> *Id.*



ness identification may be "spontaneous,"<sup>42</sup> yet may nonetheless be prompted by a police-arranged procedure.<sup>43</sup> 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."<sup>44</sup> 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.'"<sup>45</sup>

Moreover, the instant identification did not fall into the two recognized exceptions to the *Wade* requirement.<sup>46</sup> The court recognized that an exception to the *Wade* requirement may be made when either (1) the prior identification is merely "confirmatory,"<sup>47</sup> or (2) the identifying witness and suspect are known to each other.<sup>48</sup> In either circumstance, the possibility of misidentification is extremely low.<sup>49</sup> 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."<sup>50</sup> The court noted that the mere claim that Knowings "pointed out" Dixon supports the possibility that the identification was indeed preceded by police prompting.<sup>51</sup> The court found the circumstances of the canvassing to be no different than a traditional lineup.<sup>52</sup> 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."<sup>53</sup>

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

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

<sup>42</sup> 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)).

<sup>43</sup> *Id.* at 1323-24.

<sup>44</sup> *Id.* at 1324 (citing *People v. Rios*, 548 N.Y.S.2d 348, 349 (N.Y. App. Div. 1989)).

<sup>45</sup> *Id.* (citing *People v. Berkowitz*, 406 N.E.2d 783 (N.Y. 1980)).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (citing *People v. Wharton*, 549 N.E.2d 462 (N.Y. 1989)).

<sup>48</sup> *Id.* (citing *People v. Gissendanner*, 399 N.E.2d 924 (N.Y. 1979)).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *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.”<sup>54</sup> 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.”<sup>55</sup> 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.”<sup>56</sup> 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.”<sup>57</sup> 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.”<sup>58</sup> “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.”<sup>59</sup> This, the dissenting judges asserted, “is not a situation instinct with suggestibility . . . .”<sup>60</sup>

#### V. WADE HEARINGS AFFORD DEFENDANTS NECESSARY PROTECTIONS AGAINST TAIN 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.

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<sup>54</sup> *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)).

<sup>55</sup> *Id.*; see Timothy B. Lennon, *Joseph W. Bellacosa: Cardozo’s Knight-Errant?*, 59 ALB. L. REV. 1827 (1996) (discussing *Dixon* to illustrate Judge Bellacosa’s conservatism).

<sup>56</sup> *Dixon*, 647 N.E.2d at 1325.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1327.

<sup>59</sup> *Id.* at 1326.

<sup>60</sup> *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.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> Accordingly, in New York State, *Wade* hearings are likely to be granted in all similar situations.<sup>64</sup>

While the record is devoid of any direct accusations of police misconduct,<sup>65</sup> 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.<sup>66</sup> However, it appears accepted by the *Dixon* majority and by the United States Supreme Court<sup>67</sup> that such practices do rou-

<sup>61</sup> *Id.* at 1324.

<sup>62</sup> *Id.* at 1322.

<sup>63</sup> *Id.* at 1324.

<sup>64</sup> *Id.* at 1325 (Bellacosa, J., dissenting).

<sup>65</sup> See generally *id.*

<sup>66</sup> A trial may reveal alibi defenses and general inconsistencies that would be unlikely to result in convictions.

<sup>67</sup> In *United States v. Wade*, 388 U.S. 218 (1967), the Court gave a long explanation of the possibility of police suggestion in identification procedures.

But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. . . . A commentator has observed that "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than

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

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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."<sup>68</sup> 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."<sup>69</sup> 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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<sup>68</sup> *Dixon*, 647 N.E.2d at 1326 (citing *id.* at 1322).

<sup>69</sup> *Id.*

[T]he 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.<sup>70</sup>

However, surely the same arguments were made when protections were afforded for lineups,<sup>71</sup> true show-ups,<sup>72</sup> and photo identifications.<sup>73</sup>

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

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<sup>70</sup> See *id.* at 1327.

<sup>71</sup> See *United States v. Wade*, 388 U.S. 218 (1967); see also *People v. Chipp*, 552 N.E.2d 608 (N.Y. 1990).

<sup>72</sup> See *People v. Riley*, 517 N.E.2d 520 (N.Y. 1987).

<sup>73</sup> See *People v. Rodriguez*, 593 N.E.2d 268 (N.Y. 1992).

<sup>74</sup> 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).

<sup>75</sup> 655 N.E.2d 162 (N.Y. 1995).

<sup>76</sup> *Id.* at 163.

<sup>77</sup> *Id.* at 162.

<sup>78</sup> *Id.* at 163.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* (emphasis added).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

from police suggestion.<sup>87</sup> 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.”<sup>88</sup>

In *People v. Clark*,<sup>89</sup> “[o]ne 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.”<sup>90</sup> Police escorted the victims to that address and identified their assailant as he opened the door to his apartment.<sup>91</sup> The court unanimously found that the procedure was not suggestive and the identification spontaneous.<sup>92</sup>

However, in *Clark*, the court affirmed *People v. Williams*.<sup>93</sup> The court, confronted with a similar situation, found the identification to be mere “happenstance”<sup>94</sup> and upheld the denial of a *Wade* hearing. In that case, the perpetrator raped and sodomized a woman in the lobby of her building.<sup>95</sup> 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.<sup>96</sup> The man approached the woman’s neighbor in an attempt to locate her.<sup>97</sup> The neighbor described the man to the victim.<sup>98</sup> Based on that description, the woman believed him to be her attacker.<sup>99</sup> After conferring with the police, the woman agreed to meet the man outside of a subway station in order to return her property.<sup>100</sup> The police, in an unmarked police car, escorted the woman to the subway station.<sup>101</sup> “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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<sup>87</sup> *Id.*

<sup>88</sup> *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)).

<sup>89</sup> 649 N.E.2d 1203 (N.Y. 1995).

<sup>90</sup> *Id.* at 1204.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (citing *People v. Dixon*, 647 N.E.2d 1321 (N.Y. 1995)).

<sup>93</sup> 609 N.Y.S.2d 596 (N.Y. App. Div. 1994), *aff'd*, *People v. Clark*, 649 N.E.2d 1203 (N.Y. 1995) (*Williams* was consolidated with *Clark*).

<sup>94</sup> *Clark*, 649 N.E.2d at 1204.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

to the subway."<sup>102</sup> The police instructed the woman to remain in the car and followed the suspect into the subway station.<sup>103</sup> After a scuffle, police arrested the suspect, searched his person, and recovered the woman's passport and identification cards.<sup>104</sup> An unrelated commotion in the subway station forced the police to remove the suspect to street level.<sup>105</sup> "The [woman] observed the detectives emerge from the station with the defendant, and immediately recognized and identified him to the detectives as her attacker."<sup>106</sup> The woman positively identified the suspect as her attacker by his distinguished crooked teeth, which she had previously and repeatedly attributed to her attacker.<sup>107</sup>

While on their face these facts appear closely analogous to *Dixon*,<sup>108</sup> 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."<sup>109</sup>

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.<sup>110</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 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.

<sup>109</sup> See *Clark*, 649 N.E.2d at 1204 (citing *People v. Dixon*, 647 N.E.2d 1321 (N.Y. 1995)).

<sup>110</sup> LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 55 (1993).



Professor Friedman's observation is correct. The State possesses "raw and awesome power."<sup>111</sup> 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 *Dixon* argued that allowing this extra layer of protection would result in delay and unjust results.<sup>112</sup>

## 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:

[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 . . . .<sup>113</sup>

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

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<sup>111</sup> *Id.*

<sup>112</sup> *Dixon*, 647 N.E.2d at 1325 (Bellacosa, J., dissenting).

<sup>113</sup> 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.

