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## **Is New York Achieving More Reliable and Just Convictions When the Admissibility of a Suggestive Pretrial Identification is at Issue?**

Matthew Gordon

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## **Is New York Achieving More Reliable and Just Convictions When the Admissibility of a Suggestive Pretrial Identification is at Issue?**

Cover Page Footnote

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**IS NEW YORK ACHIEVING MORE RELIABLE AND JUST  
CONVICTIONS WHEN THE ADMISSIBILITY OF A  
SUGGESTIVE PRETRIAL IDENTIFICATION IS AT ISSUE?**

**COURT OF APPEALS OF NEW YORK**

People v. Delamota<sup>1</sup>  
(decided November 17, 2011)

**I. INTRODUCTION**

In *People v. Delamota*, the New York Court of Appeals held a pretrial photo array was unduly suggestive and therefore in violation of the defendant's due process rights.<sup>2</sup> The court held that the photo array was suggestive because the civilian interpreter used during the identification knew the defendant prior to the pretrial photo array and influenced the victim's identification.<sup>3</sup> The civilian interpreter used was the victim's son, and it only became clear that the victim's son knew the defendant during his testimony at trial.<sup>4</sup> The court granted a new trial because it found that the suggestiveness of the identification procedure was the result of the detective's decision to use the victim's son as the interpreter.<sup>5</sup> The court also held that, before the new trial, the People may attempt to show that the victim had an independent source for his in-court identification;<sup>6</sup> this would allow for a valid conviction of the defendant even withstanding the suppression of the suggestive pretrial identification.<sup>7</sup>

This Note will address the federal and New York State approaches to the issue of suggestive pretrial photo identifications, and analyze which approach results in more reliable and just convictions.

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<sup>1</sup> 960 N.E.2d 383 (N.Y. 2011).

<sup>2</sup> *Id.* at 391.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 386.

<sup>5</sup> *Id.* at 391.

<sup>6</sup> *Delamota*, 960 N.E.2d at 391.

<sup>7</sup> *Id.*

For the most part, New York State has followed federal precedent on this issue except for a minor deviation by the New York Court of Appeals which may make convictions more just.<sup>8</sup> Under the New York approach, if an identification procedure is deemed suggestive, then the pretrial identification is not admissible at trial.<sup>9</sup> This is the deviation from federal precedent that is argued to create a more just result.<sup>10</sup> The federal approach allows for both the admission of the pretrial identification—and subsequent in-court identifications—after a reliability inquiry to determine whether the witness' identification was influenced by the alleged suggestive procedure employed by law enforcement.<sup>11</sup> Although the New York approach allows for subsequent in-court identifications by a witness if the witness has a basis for the identification independent of the suggestive procedure,<sup>12</sup> this relatively low standard makes the deviation from the federal approach insignificant and possibly more detrimental to the pursuit of just convictions.<sup>13</sup>

## II. THE OPINION

This case involved a late night robbery that occurred in October of 2006.<sup>14</sup> The victim, Juan Hernandez, was robbed at knifepoint in an elevator in his apartment building.<sup>15</sup> The victim's son, Juan Jr., placed the 911 call shortly after the robbery because his father did not

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<sup>8</sup> Compare *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (holding that evidence derived from a suggestive pretrial identification is admissible at trial when the identification is found to be reliable under the totality of the circumstances), with *People v. Adams*, 423 N.E.2d 379, 383-84 (N.Y. 1981) (holding that the Due Process Clause of the New York State constitution requires a per se rule of exclusion that renders any pretrial identification evidence derived from that suggestive procedure inadmissible at trial).

<sup>9</sup> *Id.* at 383-84.

<sup>10</sup> See *Adams*, 423 N.E.2d at 383-84 (“Permitting the prosecutor to introduce evidence of a suggestive pretrial identification can only increase the risks of convicting the innocent in cases where it has the desired effect of contributing to a conviction.”).

<sup>11</sup> See *Manson*, 432 U.S. at 114 (“[R]eliability is the linchpin in determining the admissibility of identification testimony.”).

<sup>12</sup> *People v. Chipp*, 552 N.E.2d 608, 613 (N.Y. 1990).

<sup>13</sup> See *People v. Young*, 850 N.E.2d 623, 625 (N.Y. 2006) (holding that the witness had a basis independent from the suggestive pretrial identification procedure when the witness testified that although the perpetrator wore a mask during the crime, she retained a mental image of the defendant's eyes).

<sup>14</sup> *Delamota*, 960 N.E.2d at 385.

<sup>15</sup> *Id.*

speak English.<sup>16</sup> When Detective Koch arrived later that night to interview Hernandez, Juan Jr. was used as an interpreter.<sup>17</sup>

Hernandez described the perpetrator to Detective Koch with the aid of his son.<sup>18</sup> Detective Koch then assembled several photographs of individuals who matched the description of the perpetrator and showed them to Hernandez.<sup>19</sup> Hernandez did not identify any of the individuals in the photographs as his attacker, and the defendant was not one of the individuals portrayed.<sup>20</sup> After the robbery, Hernandez told his therapist that he recognized the man who robbed him.<sup>21</sup>

A few days later, Detective Koch met with Hernandez and his son again.<sup>22</sup> It was at this meeting where Juan Jr. told Detective Koch that based on neighborhood gossip, a man named Sebastian was his father's attacker, and Sebastian had been shot on Elmhurst Avenue earlier in 2006.<sup>23</sup> Detective Koch asked Juan Jr. if he knew Sebastian, and he replied that he did not.<sup>24</sup> Detective Koch located the defendant's photo based on Juan Jr.'s tip, and he assembled a photo array.<sup>25</sup> Again, with Juan Jr. acting as an interpreter, Detective Koch showed the array to Hernandez.<sup>26</sup> This time, Hernandez chose the defendant's photo out of the array.<sup>27</sup> The defendant was arrested and put in a line-up at the precinct.<sup>28</sup> Now, with a Spanish-speaking detective serving as an interpreter, Hernandez identified the defendant as his attacker.<sup>29</sup>

After the defendant was indicted, his defense counsel moved to have the identification evidence suppressed because of the possibility that Juan Jr. knew the defendant prior to the identification pro-

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 385.

<sup>18</sup> *Id.*

<sup>19</sup> *Delamota*, 960 N.E.2d at 385.

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

<sup>21</sup> *Id.* at 386.

<sup>22</sup> *Id.* at 385.

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

<sup>24</sup> *Delamota*, 960 N.E.2d at 385.

<sup>25</sup> *Id.* at 386.

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

<sup>27</sup> *Id.* at 386.

<sup>28</sup> *Id.*

<sup>29</sup> *Delamota*, 960 N.E.2d at 386.

cedure while he served as the interpreter.<sup>30</sup> The New York Supreme Court denied the motion, holding that because Juan Jr. admitted to Detective Koch that he did not know the defendant, the photo array and subsequent line-up were not suggestive.<sup>31</sup> However, the court did note that the use of Juan Jr. as an interpreter was “not the best practice.”<sup>32</sup>

At trial, Juan Jr. admitted that he knew the defendant for “[a] long time” prior to the photo array.<sup>33</sup> Defense counsel moved to reopen the *Wade* hearing<sup>34</sup> but the court denied the motion, ruling that the suppression court would have reached the same conclusion if it knew that Juan Jr. was familiar with the defendant before the pretrial identification.<sup>35</sup> At the conclusion of the People’s case, the defense counsel once again moved to dismiss the charges, this time based on insufficient evidence and “numerous discrepancies in the [victim’s] testimony.”<sup>36</sup> The court denied the motion and the defendant was convicted of “first-degree robbery, third-degree weapon possession, and second-degree menacing.”<sup>37</sup>

On appeal, the defendant claimed that the trial court abused its discretion when it refused to reopen the *Wade* hearing.<sup>38</sup> The defendant also argued that the evidence was insufficient to prove guilt beyond a reasonable doubt when there were discrepancies between

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (internal quotation marks omitted)

<sup>34</sup> See, e.g. 32A N.Y. Jur. 2d Criminal Law: Procedure § 1624 (“A *Wade* hearing is a particular type of suppression hearing, the purpose of which is to test identification testimony for taint arising from official suggestion during police-arranged confrontations between a defendant and an eyewitness. When the People serve statutory notice on a defendant that they intend to introduce out-of-court identification testimony at trial, the defendant may choose to respond with a motion to suppress that testimony and, so long as the motion alleges undue suggestiveness, the defendant is generally entitled to a *Wade* hearing.”).

<sup>35</sup> *Delamota*, 960 N.E.2d at 386.

<sup>36</sup> *Id.* Hernandez first described his attacker “as a Hispanic man in his mid-20[’s] who weighed approximately 140 pounds and was about the detective’s height—five feet, six inches. Hernandez also allegedly stated that the perpetrator held the knife in his right hand and took the stolen items with his left hand.” *Id.* at 385. *Delamota* turned out to be significantly taller and did not have the ability to use both arms because of a gunshot injury. *Id.*

<sup>37</sup> *Id.* at 386.

<sup>38</sup> *Delamota*, 960 N.E.2d at 386.

the sole witness' pretrial statements and his testimony in court.<sup>39</sup> However, the Appellate Division affirmed the conviction, holding that the trial court did not abuse its discretion and the conviction was not against the weight of the evidence.<sup>40</sup> The defendant was granted leave to appeal to the Court of Appeals, and he raised the same issues as in his first appeal.<sup>41</sup>

The court first addressed the defendant's claim relating to inconsistencies between the victim's first statement to the police and his testimony at trial.<sup>42</sup> The court dismissed this claim because the standard of review applicable to this particular claim did not warrant a reversal of the conclusion reached by the Appellate Division.<sup>43</sup>

The court then proceeded to address the defendant's second claim regarding the issue of whether the pretrial identification by photo array was unduly suggestive when the detective was aware of the possibility that the civilian interpreter knew the defendant prior to the identification procedure.<sup>44</sup> Ultimately, the Court of Appeals found the identification procedure to be suggestive because the civilian interpreter could have influenced the victim's identification of the defendant.<sup>45</sup> The People argued that the pretrial identification evidence should not be suppressed because Juan Jr., a civilian interpreter, was solely responsible for the suggestive aspect of the procedure.<sup>46</sup> The court rejected this argument when it ruled that the suggestiveness of this procedure is attributed to law enforcement because the detective chose to use Juan Jr. as an interpreter even though the detective was aware of the risk that Juan Jr. knew the defendant.<sup>47</sup> The court ordered a new trial to be preceded by an independent source hearing.<sup>48</sup> If the People could show by clear and convincing

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<sup>39</sup> *Id.* at 387.

<sup>40</sup> *Id.* at 386-87.

<sup>41</sup> *Id.* at 387.

<sup>42</sup> *Id.*

<sup>43</sup> *Delamota*, 960 N.E.2d at 390.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 390-91.

<sup>46</sup> *Id.* at 390. *See also* *People v. Marte*, 912 N.E.2d 37, 38 (N.Y. 2009) (holding that suggestiveness attributed solely to a civilian does not violate a defendant's due process rights under the New York and Federal Constitutions).

<sup>47</sup> *Delamota*, 960 N.E.2d at 391.

<sup>48</sup> *Id.*

evidence that the victim had a basis for his in-court identification independent of the suggestive pretrial identification, then the original conviction would be valid.<sup>49</sup>

### III. THE FEDERAL APPROACH

The issue of pretrial identifications was first addressed by the Supreme Court in *United States v. Wade*.<sup>50</sup> *Wade* involved a defendant who was subjected to a post-indictment line-up without the assistance of counsel.<sup>51</sup> The Court held that pretrial identifications require the assistance of counsel under the Sixth Amendment in order to be admissible at trial.<sup>52</sup> The Court established this rule because it recognized the great potential for undue influence and “prejudice” that may occur during a pretrial identification.<sup>53</sup> The Court acknowledged that the only way to remedy any “prejudice” is to require the presence of counsel because counsel might prevent any unfair identification practices from occurring.<sup>54</sup> The Court also established the rule that an in-court identification following a pretrial identification made without the presence of counsel will only be admissible if the prosecution can establish by clear and convincing evidence that the witness had an independent source for his identification.<sup>55</sup> The Court held that the factors used to decide the issue of independent source includes the opportunity to observe the crime, the accuracy of the description given by the witness, and the length of time between the crime and the identification.<sup>56</sup>

The Supreme Court first held that an unduly suggestive pretrial identification procedure may deny the defendant due process of

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<sup>49</sup> *Id.* See also *Young*, 859 N.E.2d at 625 (holding that the witness had a basis independent from the suggestive pretrial identification procedure when the witness testified that although the perpetrator wore a mask during the crime, she retained a mental image of the defendant’s eyes).

<sup>50</sup> 388 U.S. 218 (1967).

<sup>51</sup> *Id.* at 220.

<sup>52</sup> *Id.* at 236-37. But see *United States v. Ash*, 413 U.S. 300, 321 (1973) (holding that the right to counsel does not extend to pretrial photo identifications because the defendant is not present during the identification).

<sup>53</sup> *Wade*, 388 U.S. at 236.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 240.

<sup>56</sup> *Id.* at 241.



law in *Stovall v. Denno*.<sup>57</sup> In *Stovall*, the defendant was accused of stabbing a doctor to death, as well as the stabbing of the doctor's wife, Mrs. Behrendt, though she survived to be a witness.<sup>58</sup> The police arrested the defendant, and they conducted a show-up identification in Mrs. Behrendt's hospital room while the defendant was handcuffed to an officer.<sup>59</sup> The defendant did not have an attorney at this point.<sup>60</sup> The defendant was identified by Mrs. Behrendt after officers asked her if this "was the man."<sup>61</sup> Mrs. Behrendt also made an in-court identification of the defendant later at trial.<sup>62</sup> The defendant was convicted and sentenced to death.<sup>63</sup>

The New York Court of Appeals affirmed the conviction and the defendant sought habeas corpus relief in the District Court for the Southern District of New York.<sup>64</sup> He argued that his Fifth, Sixth, and Fourteenth Amendment rights were violated because he was brought to the hospital room identification without counsel present and the attention of the witness was unfairly focused on him when he was the only person in the room handcuffed to an officer.<sup>65</sup> The District Court dismissed the petition and, on appeal, the Second Circuit upheld the dismissal.<sup>66</sup>

The Supreme Court refused to apply the holding in *Wade* retroactively to the case, but it did contend the defendant's argument that the pretrial identification procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law."<sup>67</sup> The Court held that the proper test to be applied to the issue of whether admission of pretrial identification evidence violates a defendant's due process rights is a totality of the circumstances approach.<sup>68</sup> The Court held that in this case the ex-

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<sup>57</sup> 388 U.S. 293 (1967).

<sup>58</sup> *Id.* at 295.

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

<sup>60</sup> *Id.*

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

<sup>62</sup> *Stovall*, 388 U.S. at 295.

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

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 296.

<sup>66</sup> *Id.*

<sup>67</sup> *Stovall*, 388 U.S. at 302.

<sup>68</sup> *Id.*

igent circumstances dictated that the hospital room identification was the only method of obtaining a proper identification.<sup>69</sup> Mrs. Behrendt was the only witness, and she was badly injured.<sup>70</sup> There was no certainty as to if or when she would recover to make a proper identification in line-up at the police station.<sup>71</sup> Thus, the defendant's due process rights were not violated because, under the totality of the circumstances, the hospital room identification procedure was warranted because of the exigent circumstances which surrounded this particular identification.<sup>72</sup>

The Court specifically addressed the issue of unduly suggestive photo arrays in *Simmons v. United States*.<sup>73</sup> The Court held that convictions based on witness "identification[s] at trial following pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."<sup>74</sup> The Court also held that these types of claims are judged by the totality of the circumstances and on the facts of each particular case.<sup>75</sup>

*Simmons* involved a photographic identification of three men who were arrested as suspects for a bank robbery.<sup>76</sup> The robbery was committed in broad daylight by two men, and neither of the robbers wore masks.<sup>77</sup> The FBI obtained several photographs which portrayed all three defendants.<sup>78</sup> The photos were shown to five bank employees who witnessed the robbery.<sup>79</sup> All five employees identified Simmons as one of the robbers.<sup>80</sup> About a week later, three of the employees identified another defendant, Garrett, as the second robber while the other two employees stated they did not have a clear

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

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Stovall*, 388 U.S. at 302.

<sup>73</sup> 390 U.S. 377 (1968).

<sup>74</sup> *Id.* at 384.

<sup>75</sup> *Id.* at 383.

<sup>76</sup> *Id.* at 380.

<sup>77</sup> *Id.* at 385.

<sup>78</sup> *Simmons*, 390 U.S. at 385.

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

<sup>80</sup> *Id.* at 380.

view of the second robber.<sup>81</sup>

At trial, all five witnesses identified Simmons as one of the robbers, and three identified Garrett as the other robber.<sup>82</sup> All three defendants were convicted.<sup>83</sup> On appeal, the defendant that was not identified by any of the witnesses had his conviction reversed, while the convictions of Simmons and Garrett were affirmed.<sup>84</sup> Certiorari was granted as to Simmons and Garrett.<sup>85</sup> Simmons argued that his pretrial photograph identification “was so unduly prejudicial as fatally to taint his conviction.”<sup>86</sup> Garrett argued his constitutional rights were violated for an unrelated reason, and his conviction was reversed.<sup>87</sup>

The Court reasoned that the pretrial photographic identification was not unnecessarily suggestive because there was little chance that the procedure led to the misidentification of Simmons under the totality of the circumstances.<sup>88</sup> The Court held that the witnesses were able to make a positive identification of Simmons because the robbery occurred in broad daylight and the robbers wore no masks so the witnesses viewed the robbers’ faces for an extended period of time.<sup>89</sup> The Court also held that nothing about the procedure could have led to the misidentification of Simmons as one of the robbers because the FBI displayed photos containing Simmons among several other people, each witness viewed the photos alone, and there was no evidence to demonstrate that the FBI said anything to the witnesses to suggest the photos contained suspects in the robbery.<sup>90</sup> The Court went on to explain that all five witnesses positively identified Simmons in the photos, and the identifications were confirmed at trial by all the witnesses who did not display any doubts that Simmons was

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<sup>81</sup> *Id.* at 380-81.

<sup>82</sup> *Id.* at 381.

<sup>83</sup> *Simmons*, 390 U.S. at 381.

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

<sup>85</sup> *Id.* at 381.

<sup>86</sup> *Id.* at 383.

<sup>87</sup> *Id.* at 390-91. The Court reversed Garret’s conviction because his Fourth Amendment rights were violated when the trial court allowed Garret’s testimony from a pretrial motion to suppress the suitcase and contents to prove his guilt. *Simmons*, 390 U.S. at 390-91.

<sup>88</sup> *Id.* at 385.

<sup>89</sup> *Id.* at 385.

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

the robber.<sup>91</sup> The Court affirmed Simmons' conviction because there was no cause to doubt that the identification of Simmons was correct under the totality of the circumstances.<sup>92</sup>

The Court applied the totality test for in-court identifications from *Stovall* to consider the reliability of evidence derived from suggestive pretrial procedures in *Neil v. Biggers*.<sup>93</sup> In *Neil*, the Supreme Court outlined specific factors to determine the issue of whether a pretrial identification that may have been unduly suggestive could be admitted as evidence at trial.<sup>94</sup> *Neil* involved an abduction and rape of a woman.<sup>95</sup> The woman was attacked in her kitchen at knifepoint, and then she was taken to a desolate location near her home and raped.<sup>96</sup> The victim claimed that she was able to see the perpetrator inside her home even though the lights were off in the kitchen because of the light shining through from the bedroom.<sup>97</sup> She also stated that she got a good look at him during the rape because it was a full moon, and the entire ordeal lasted half an hour.<sup>98</sup> The victim provided a thorough description of the perpetrator including his age, height, weight, build, facial complexion, and voice.<sup>99</sup> The police showed the victim thirty to forty pictures over a seven-month period, but she never identified her attacker.<sup>100</sup>

Police eventually arrested the defendant for a subsequent attack, and they brought in the former victim to potentially identify him as her attacker.<sup>101</sup> The police attempted to perform a line-up, but they were unable to find people resembling the defendant.<sup>102</sup> Instead, they performed a show-up where the victim walked by the defendant, and the police had the defendant say the words used during the attack.<sup>103</sup>

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

<sup>92</sup> *Simmons*, 390 U.S. at 385.

<sup>93</sup> 409 U.S. 188 (1972).

<sup>94</sup> *Id.* at 199-200.

<sup>95</sup> *Id.* at 193.

<sup>96</sup> *Id.* at 193-94.

<sup>97</sup> *Id.* at 194.

<sup>98</sup> *Neil*, 409 U.S. at 194.

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

<sup>100</sup> *Id.* at 194-95.

<sup>101</sup> *Id.* at 195.

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

<sup>103</sup> *Neil*, 409 U.S. at 195.

The victim in the present case identified the defendant as her attacker, and she later testified that she could never have forgotten his face.<sup>104</sup>

At trial the defendant was convicted of rape, and he sought habeas corpus relief.<sup>105</sup> The district court held that the show-up was unduly suggestive in violation of the defendant's due process rights, and the court reversed the guilty verdict.<sup>106</sup> The district court relied on the fact that police did not make a better effort to perform a line-up, and the show-up itself was unduly suggestive requiring a reversal of the verdict.<sup>107</sup>

The Supreme Court disagreed with the lower court's decision, holding that even though the show-up was unduly suggestive, the identification was reliable under the totality of the circumstances.<sup>108</sup> The Court explained that a show-up is not in itself a violation of due process, demonstrated by the hospital room show-up in *Stovall*.<sup>109</sup> The Court held that admission of the pretrial identification turns on several factors to determine whether it is reliable:<sup>110</sup>

[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.<sup>111</sup>

The Court held that in applying these factors to the case at hand, the pretrial identification was reliable and admissible:<sup>112</sup> the victim viewed the defendant for a half hour under adequate lighting in her home and outside under the light of a full moon;<sup>113</sup> the victim's

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

<sup>105</sup> *Id.* at 196.

<sup>106</sup> *Id.* at 200.

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

<sup>108</sup> *Neil*, 409 U.S. at 200.

<sup>109</sup> *Id.* at 200-01.

<sup>110</sup> *Id.* at 199-200.

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

<sup>112</sup> *Id.* at 200.

<sup>113</sup> *Neil*, 409 U.S. at 200-01.

attention was only on the defendant as this was an intimate and serious crime;<sup>114</sup> and the victim provided an accurate description of her attacker after the crime, and the victim testified that there was no doubt as to the identity of her attacker.<sup>115</sup> The Court dismissed the seven-month period between the crime and identification because the victim was shown at least thirty photos of potential attackers, but she never identified anybody before she identified the defendant.<sup>116</sup> The Court held that the victim's identification contained no substantial likelihood of misidentification, and the evidence was properly allowed to go to the jury.<sup>117</sup>

In *Manson v. Brathwaite*,<sup>118</sup> the Supreme Court applied the factors used in *Neil* to pretrial photographic identifications as well.<sup>119</sup> *Brathwaite* involved an undercover narcotics sting in which an officer purchased heroin from a seller in a well-lit hallway outside the seller's apartment.<sup>120</sup> The undercover officer described the seller to another officer moments later as a "colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of a heavy build."<sup>121</sup> The other officer believed he knew the seller as the defendant in this case, and he left a picture of the defendant on the desk of the undercover officer.<sup>122</sup> The undercover officer confirmed that the defendant was the seller, and the defendant was later arrested and convicted of possession and sale of heroin.<sup>123</sup>

The undercover officer testified at trial that there was no doubt that the picture was of the defendant, and he made a positive in-court identification of the defendant as the seller.<sup>124</sup> The defendant sought habeas corpus relief, but the district court dismissed the peti-

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 200-01.

<sup>118</sup> 432 U.S. 98 (1977).

<sup>119</sup> *Id.* at 114.

<sup>120</sup> *Id.* at 99-100.

<sup>121</sup> *Id.* at 101.

<sup>122</sup> *Id.*

<sup>123</sup> *Manson*, 432 U.S. at 101-02.

<sup>124</sup> *Id.* at 102.

tion.<sup>125</sup> The Court of Appeals reversed, holding that the pretrial identification by photo should have been excluded from evidence because the use of a single photo is unduly suggestive regardless of reliability.<sup>126</sup>

The Court reversed the lower courts' decisions because, under the totality of the circumstances, the officer's positive identification of the photo of the defendant as the seller was reliable and therefore admissible regardless of suggestiveness.<sup>127</sup> The Court specifically rejected the *per se* approach utilized by the lower court that would exclude an unduly suggestive pretrial identification without regard to reliability.<sup>128</sup> The Court held that the factors set forth in *Neil* also apply to pretrial identifications by photograph.<sup>129</sup> The Court explained that the use of a single photograph was unduly suggestive, but upon application of the factors comprising the totality of the circumstances, the officer's identification of the defendant did not possess a "substantial likelihood of irreparable misidentification."<sup>130</sup> The Court held the identification by a single photo to be reliable because: the witness was a trained police officer; he had sufficient opportunity to view the seller in a well-lit hallway; he accurately described the seller; he positively identified the defendant's photo as the seller two days after the crime; and he positively identified the defendant in court with confidence upon cross-examination.<sup>131</sup> The Court made it clear in this holding that a reliable identification trumps an unduly suggestive pretrial identification procedure utilizing a single photo.<sup>132</sup>

After expressly applying the totality of the circumstances test to pretrial photo identifications, the Court finally addressed suggestive practices attributed solely to civilians. In *Perry v. New Hampshire*,<sup>133</sup> the Court addressed the issue of whether an inquiry into the reliability of a witness' pretrial identification is required when the al-

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<sup>125</sup> *Id.* at 103.

<sup>126</sup> *Id.* at 103-04.

<sup>127</sup> *Id.* at 117.

<sup>128</sup> *Manson*, 432 U.S. at 113.

<sup>129</sup> *Id.* at 114.

<sup>130</sup> *Id.* at 116.

<sup>131</sup> *Id.* at 114-16.

<sup>132</sup> *Id.* at 111-13.

<sup>133</sup> 132 S. Ct. 716 (2012).

legedly suggestive procedure is not arranged by law enforcement.<sup>134</sup> Previous Circuit Court of Appeals cases held that an inquiry into the reliability is required even when the suggestive circumstances are arranged by civilians.<sup>135</sup> In *Perry*, the Court expressly abrogated these previous Circuit Court of Appeals cases when the Court held that the Due Process Clause does not require an inquiry into the reliability of the pretrial identification when the suggestive circumstances were created by civilians.<sup>136</sup>

In *Perry*, New Hampshire police were called because Nubia Blandon saw a man attempting to break into various cars on her block.<sup>137</sup> When the police were interviewing Blandon, the officer asked her to describe the man she saw.<sup>138</sup> In response, Blandon pointed out her window and said the man she saw breaking into cars was standing in the parking lot next to another police officer.<sup>139</sup> The defendant was arrested following this identification.<sup>140</sup> At trial, the defendant moved to suppress the identification on the grounds that it was unduly suggestive.<sup>141</sup> The court denied the motion because it found that the police did not create the allegedly suggestive circumstances.<sup>142</sup> The defendant was convicted, and he appealed all the way up to the Supreme Court.<sup>143</sup>

The defendant argued that reliability is paramount to the admissibility of a suggestive pretrial identification procedure, and it does not matter whether the police or a civilian created the suggestive circumstances.<sup>144</sup> The Court expressly rejected this argument because the due process check for reliability is designed to deter improper police identification procedures.<sup>145</sup> The Court held that the of-

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<sup>134</sup> *Id.* at 720-21.

<sup>135</sup> *See, e.g.,* Bouthot v. U.S., 878 F.2d 1506 (1st Cir. 1989); Dunnigan v. Keane, 137 F.3d 117 (2d Cir. 1998) (holding that suggestiveness attributed to civilians violates the defendant's due process rights).

<sup>136</sup> *Perry*, 132 S. Ct. at 730.

<sup>137</sup> *Id.* at 721.

<sup>138</sup> *Id.* at 722.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Perry*, 132 S. Ct. at 722.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 722-23.

<sup>144</sup> *Id.* at 725.

<sup>145</sup> *Id.*



ficer did nothing to create a suggestive circumstance, and there is no requirement under the Due Process Clause to check for reliability when the suggestive circumstance is not attributable to law enforcement.<sup>146</sup>

#### IV. THE STATE APPROACH

Under the New York State Constitution, the New York Court of Appeals interpreted the Due Process Clause to require a per se approach to the admissibility of pretrial identifications by photographic array, which is in direct conflict with the Supreme Court's interpretation of the Due Process Clause of the United States Constitution. In *People v. Adams*,<sup>147</sup> the Court of Appeals held that any unduly suggestive pretrial identification procedure requires the exclusion of that pretrial identification from evidence regardless of reliability.<sup>148</sup> However, the court held that the impermissibly suggestive pretrial identification procedure did not warrant reversal because there were two other witnesses who were not present at the suggestive pretrial identification, and the tainted witnesses had an independent basis for their in court identification.<sup>149</sup>

*Adams* involved a robbery of a stationery store by three men.<sup>150</sup> The men entered the store and announced a robbery to three witnesses who worked in the store.<sup>151</sup> The men took forty-two dollars from the cash register and then proceeded to flee on foot while being chased by two witnesses.<sup>152</sup> A security guard and police officer witnessed the chase and joined in.<sup>153</sup> The security guard apprehended one man with the money and a gun while the other two men escaped.<sup>154</sup> The man who was arrested provided information that led to the arrest of the other two men, Gatson and Adams.<sup>155</sup> That evening,

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<sup>146</sup> *Perry*, 132 S. Ct. at 726.

<sup>147</sup> 423 N.E.2d 379, 383-84 (N.Y. 1981).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 384.

<sup>150</sup> *Id.* at 380.

<sup>151</sup> *Id.*

<sup>152</sup> *Adams*, 423 N.E.2d at 380.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 381.

the three witnesses were called to the station house to identify the three suspects.<sup>156</sup> The witnesses were told by an officer that they had the suspects in custody.<sup>157</sup> The three suspects were shown together to the three witnesses at the same time.<sup>158</sup> They were sure the three men were the robbers.<sup>159</sup>

The man arrested at the scene pled guilty, and the other two were later convicted at trial.<sup>160</sup> At trial, defense moved to suppress the pretrial identification and subsequent in-court identification on the basis that the procedure was unduly suggestive when the officer stated to the eyewitnesses that they had the suspects in custody.<sup>161</sup> The court denied the motion because it found that even if the pretrial identification was unduly suggestive, the witnesses had an independent basis for an in-court identification.<sup>162</sup> The security guard and the officer at the scene also identified Adams as one of the robbers at trial.<sup>163</sup> The defendant appealed, but the Appellate Division affirmed the conviction.<sup>164</sup> Adams appealed to the Court of Appeals.<sup>165</sup>

The Court of Appeals held that the evidence of the pretrial identification at the station house was unduly suggestive and should not have been admitted at trial.<sup>166</sup> This case established a per se rule of exclusion of any identification evidence produced by a suggestive pretrial identification procedure.<sup>167</sup> The court reasoned that the pretrial identification at the station was unduly suggestive because an officer told the victims that they had the suspects in custody and all victims viewed all three robbers at the same time.<sup>168</sup> However, the court also held that in-court identifications are still admissible when there is an independent source of the identification.<sup>169</sup> The court held that

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<sup>156</sup> *Id.*

<sup>157</sup> *Adams*, 423 N.E.2d at 381.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Adams*, 423 N.E.2d at 381.

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

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 382-83.

<sup>167</sup> *Adams*, 423 N.E.2d at 382-83.

<sup>168</sup> *Id.* at 382.

<sup>169</sup> *Id.* at 384.

the exclusion of the pretrial identification would not require reversal of the conviction because of the in-court identifications by the security guard and officer who were not present at the station house show-up.<sup>170</sup> The Court of Appeals was also persuaded by the trial court's express finding of an independent source of the in-court identifications by the three victims who viewed the robbers' faces throughout the robbery.<sup>171</sup>

After holding that pretrial identification evidence derived from a suggestive procedure is per se inadmissible, the Court of Appeals outlined the procedure to address a defendant's challenge that an identification procedure was suggestive in *People v. Chipp*.<sup>172</sup> When a pretrial identification procedure is challenged, the People have the "initial burden of going forward to establish the reasonableness of the police conduct and the lack of any undue suggestiveness."<sup>173</sup> Once the People meet this burden, the defendant must go on to prove that the identification procedure was unduly suggestive.<sup>174</sup> A procedure is deemed suggestive if there is a "substantial likelihood that the defendant would be singled out for identification."<sup>175</sup> If suggestiveness is shown, the evidence derived from the pretrial identification is inadmissible, and the People must go on to show by clear and convincing evidence that the witness had an independent source for the in-court identification.<sup>176</sup>

In *Chipp*, the defendant argued that he had satisfied his burden of demonstrating that the identification procedure was suggestive because he was the only person in a line-up with a complexion similar to the one described by the witness.<sup>177</sup> However, the court held that the difference in skin tone of the men in the line-up does not sufficiently demonstrate that the procedure was unduly suggestive.<sup>178</sup> Therefore, the defendant did not meet his burden of showing that the identification procedure created a "substantial likelihood that the de-

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> 552 N.E.2d 608 (N.Y. 1990).

<sup>173</sup> *Id.* at 613.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Chipp*, 552 N.E.2d at 613.

<sup>178</sup> *Id.*

fendant would be singled out for identification.”<sup>179</sup>

Once the court firmly established that evidence derived from suggestive pretrial identification procedures arranged by law enforcement is per se inadmissible, the court addressed the issue of when the suggestive aspect of the procedure is created by a civilian in *People v. Marte*.<sup>180</sup> In *Marte*, a minor referred to as Peter L. was robbed and shot in the chest on the block where he lived.<sup>181</sup> After looking through hundreds of photos, Peter was unable to identify his attacker.<sup>182</sup> After giving up on identifying the shooter, Peter’s sister Margaret found out that the defendant was the shooter when the defendant told Margaret that he had recently shot somebody on her block.<sup>183</sup> Margaret showed Peter a picture of the defendant, and after encouragement from his sister, Peter went to the police and named the defendant as his attacker.<sup>184</sup> Peter proceeded to pick the defendant out from a line-up.<sup>185</sup> The defendant was convicted, and on appeal the Court of Appeals affirmed.<sup>186</sup>

The court held that the rule of exclusion regarding suggestive pretrial identifications does not apply when suggestiveness is created by a civilian.<sup>187</sup> The court found that the police were not aware of Margaret’s involvement in the identification at the time.<sup>188</sup> The court reasoned that the rule excluding evidence derived from a suggestive pretrial identification should not be extended to include suggestive practices by civilians because the rule is in place to prevent mistaken identifications caused by faulty police procedures.<sup>189</sup> The court held that the purpose of the rule is to affect police procedures, and the family and friends of a victim are not likely to change their behavior based on rules of law.<sup>190</sup>

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<sup>179</sup> *Id.*

<sup>180</sup> *Marte*, 912 N.E.2d 37.

<sup>181</sup> *Id.* at 38.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Marte*, 912 N.E.2d at 38.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 41.

<sup>189</sup> *Id.* at 39.

<sup>190</sup> *Marte*, 912 N.E.2d at 39.

After the court held that suggestive practices attributed to civilians does not violate due process, the court in *People v. McBride*<sup>191</sup> demonstrated the standard of review applicable in cases where there is a challenge to the admissibility of pretrial identification. In *McBride*, the victim described his attacker as a man wearing a grey jacket among other articles of clothing.<sup>192</sup> At the lineup, the defendant was wearing a grey jacket, but he was not wearing any of the other specific articles of clothing described by the victim. The victim chose the defendant, and he was convicted.<sup>193</sup> On appeal, the defendant argued that there was a substantial likelihood of misidentification because he was the only person wearing a grey jacket.<sup>194</sup>

The court held that there was sufficient record support for the lower court's determination that the pretrial identification was not unduly suggestive because the grey jacket was not unusual, and all the other factors including race, height, and age were constant among the individuals in the lineup.<sup>195</sup> The mere coincidence that the defendant was wearing an article of clothing similar to the type described by the victim does not render the pretrial identification suggestive when that article of clothing is not distinctive in any way.<sup>196</sup>

The court in *Delamota* cited *People v. Wilson*<sup>197</sup> in support of its determination that the new trial be preceded by a hearing to allow the People to show by clear and convincing evidence that there was an independent basis for Hernandez's in-court identification.<sup>198</sup> *Wilson* also supports the proposition that the trial court should go through the full analysis when a pretrial identification procedure is challenged so the appellate courts have all the facts necessary to make a proper determination.<sup>199</sup>

In *Wilson*, the trial court held that the pretrial identification was not suggestive where the witness was shown a photo of the de-

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<sup>191</sup> 928 N.E.2d 1027.

<sup>192</sup> *Id.* at 1032.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 1033.

<sup>196</sup> *McBride*, 928 N.E.2d at 1033.

<sup>197</sup> 835 N.E.2d 1220 (N.Y. 2005).

<sup>198</sup> *Delamota*, 960 N.E.2d at 391.

<sup>199</sup> *Wilson*, 835 N.E.2d at 1221.

fendant immediately preceding the lineup.<sup>200</sup> However, the trial court did not proceed to determine if there was an independent source for the witness' in-court identification.<sup>201</sup> The Court of Appeals subsequently held that the pretrial identification was suggestive, and it ordered a new trial to be preceded by a hearing to determine if there was an independent basis for the witness' in-court identification.<sup>202</sup> The court noted that the trial courts should always determine if there is an independent source for the witness' in-court identification, even if they find that the pretrial identification procedure was not suggestive.<sup>203</sup>

After the court in *Delamota* addressed the need for lower courts to address the independent source requirement even when it did not find the procedure to be suggestive, the court also cited *People v. Young*<sup>204</sup> to demonstrate the independent basis requirement for the admissibility of an in-court identification.<sup>205</sup> In *Young*, the trial court found the pretrial identification to be unduly suggestive and inadmissible.<sup>206</sup> The trial court subsequently held that the victim had an independent basis for the in-court identification because the victim testified that although the defendant's face was covered with a mask, she retained a mental image of the defendant's eyes from the crime that lasted approximately five to seven minutes.<sup>207</sup> On appeal, the Court of Appeals refused to disturb this finding of fact.<sup>208</sup> The finding was held to meet the clear and convincing requirement to show that there was an independent basis for an in-court identification.<sup>209</sup>

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> 859 N.E.2d 623 (N.Y. 2006).

<sup>205</sup> *Delamota*, 960 N.E.2d at 391.

<sup>206</sup> *Young*, 859 N.E.2d at 625.

<sup>207</sup> *Id.* at 624-25.

<sup>208</sup> *Id.* at 625.

<sup>209</sup> *Id.* See also *People v. Hall*, 870 N.Y.S.2d 508, 511 (App. Div. 3d Dep't 2008) (holding that the witness had an independent source for the identification because the witness had a face-to-face conversation with the defendant for several minutes, and the witness gave an accurate description of the defendant shortly after the crime occurred).

## V. DOES THE NEW YORK APPROACH RESULT IN MORE RELIABLE CONVICTIONS?

The majority in *People v. Adams* established the per se rule of exclusion of identification evidence derived from suggestive pretrial identification procedures.<sup>210</sup> The very same rule was contemplated by the Court in *Manson v. Brathwaite*, but was rejected in favor of a less rigid totality of the circumstances approach.<sup>211</sup> In *Manson*, the Court found the per se approach to prevent reliable and relevant identification evidence from reaching the jury while serving the same deterrent effect as the totality rule.<sup>212</sup> The majority in *Adams* expressly rejected the Court's reasoning in *Brathwaite* because it felt that the admission of pretrial identifications derived from suggestive procedures would increase the number of wrongful convictions.<sup>213</sup> The concurrence in *Adams* disagreed with the majority's adoption of the per se rule of exclusion, stating the rule "lacks legal, logical[,] and analytical validity."<sup>214</sup>

On its face, a per se rule of exclusion reduces the risk of wrongful convictions. The strongest argument in favor of a per se rule is the deterrent effect. An absolute rule excluding identification evidence derived from suggestive procedures ensures that law enforcement will take the necessary precautions to conduct pretrial identifications in a proper manner.<sup>215</sup> As with other exclusionary rules, the main purpose is to affect the procedures and practices of

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<sup>210</sup> *Adams*, 423 N.E.2d at 383-84.

<sup>211</sup> *Manson*, 432 U.S. 111-13. The Court laid out three factors that a proper rule should address. Those factors are the problem of unreliable eyewitness identification, the deterrent effect, and the proper administration of justice. *Id.* The Court held that the per se approach is too extreme a solution to protect these interests. *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Adams*, 423 N.E.2d at 384 ("However, if the jury finds the in-court identification not entirely convincing it should not be permitted to resolve its doubts by relying on the fact that the witness had identified the defendant on a prior occasion if that identification was made under inherently suggestive circumstances. Similarly, if the witness is unable to identify the defendant at trial the defendant's conviction should not rest solely upon evidence of a pretrial identification made under circumstances which were likely to produce an unreliable result.").

<sup>214</sup> *Id.* (Cooke, J., concurring) (arguing that the totality rule adopted by the Court in *Manson* sufficiently addresses the due process concerns inherent with suggestive pretrial identification procedures).

<sup>215</sup> *Manson*, 432 U.S. at 125 (Marshall, J., dissenting).

law enforcement.<sup>216</sup> A totality approach in this circumstance does not give law enforcement the necessary encouragement to alter their procedures because of the extreme flexibility of the rule.<sup>217</sup> Under the totality approach, even the most suggestive procedures may result in admission of the pretrial identification evidence.<sup>218</sup> Deterrence is a key aspect in prevention of wrongful convictions.<sup>219</sup>

However, the per se rule of exclusion adopted by the New York Court of Appeals does not serve the purpose of limiting wrongful convictions when in-court identifications are permissible under the lenient independent source rule.<sup>220</sup> Under the federal approach, as laid down in *Simmons*, an in-court identification following a suggestive pretrial procedure is subjected to a more rigorous standard to determine whether the suggestive procedure produced “a very substantial likelihood of irreparable misidentification.”<sup>221</sup>

The risk of a wrongful conviction in a case where the pretrial identification was gained under a suggestive procedure is increased under the New York independent source rule.<sup>222</sup> In *Delamota*, the court held that the validity of the conviction rested on whether the People could show that there was an independent source for the witness’ in-court identification.<sup>223</sup> The standard for evaluating whether a witness has a source independent of the suggestive procedure to identify the defendant in court has deteriorated in New York. The standard used in *Delamota*, the clear and convincing evidence requirement demonstrated by *Young*, is very lenient because the witness was only able to see the criminal’s eyes for five to seven minutes.<sup>224</sup> This standard falls short of the standard pronounced in *Simmons*.<sup>225</sup>

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Adams*, 423 N.E.2d at 383.

<sup>220</sup> *See Young*, 859 N.E.2d at 624-25 (holding that a mental image of the defendant’s eyes will satisfy the independent source requirement).

<sup>221</sup> *Simmons*, 390 U.S. at 384. *See also Neil*, 409 U.S. at 199-200 (applying the same standard for determining whether in-court identifications are reliable to determine whether pretrial identifications are admissible).

<sup>222</sup> *See Young*, 859 N.E.2d at 624-25 (holding that a mental image of the defendant’s eyes will satisfy the independent source requirement).

<sup>223</sup> *Delamota*, 960 N.E.2d at 391.

<sup>224</sup> *Young*, 859 N.E.2d at 624-25.

<sup>225</sup> *Simmons*, 390 U.S. at 385.



As in *Young*, the victim in *Delamota* may easily provide an independent basis for his in-court identification because he claimed to have recognized his attacker before the suggestive procedure occurred. The People may argue that the victim had an independent basis for his in-court identification because the victim told a therapist that he had previously seen his attacker in the apartment complex.<sup>226</sup> This conversation with the therapist occurred before the suggestive identification procedure occurred.<sup>227</sup> The court may find this conversation to be clear and convincing evidence of an independent source when judged against the standard from *Young*.

Under the federal approach, the standard for evaluating whether an in-court identification following a suggestive pretrial procedure is from an independent source has been interpreted to be identical to the standard for determining whether identification evidence derived from suggestive pretrial procedures is admissible.<sup>228</sup> The factors considered by the Court in *Neil* to determine the admissibility of suggestive pretrial identification evidence guides our analysis of whether an in-court identification is permissible following a suggestive pretrial procedure.<sup>229</sup> In applying these factors to *Delamota*, it can be determined whether the federal approach affords more protection from wrongful convictions.

The first factor the Court considers in the evaluation of in-court identifications following a suggestive pretrial procedure is the opportunity to view the criminal at the time of the crime.<sup>230</sup> In *Delamota*, the People might argue that the victim had sufficient opportunity to view the criminal because Hernandez was face to face with the defendant during the robbery that occurred in an elevator.<sup>231</sup> Furthermore, Hernandez told his therapist that he recognized the man who robbed him from a previous encounter in his apartment complex.<sup>232</sup> The defendant might argue that Hernandez did not have sufficient opportunity to view the criminal at the time because the rob-

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<sup>226</sup> *Delamota*, 960 N.E.2d at 386.

<sup>227</sup> *Id.*

<sup>228</sup> *Manson*, 432 U.S. at 123-24 (Marshall, J., dissenting).

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

<sup>230</sup> *Id.* at 114.

<sup>231</sup> *Delamota*, 960 N.E.2d at 385.

<sup>232</sup> *Id.* at 386.

bery could not have lasted more than a couple minutes.<sup>233</sup>

The second factor considered by the Court is the witness' degree of attention at the time of the crime.<sup>234</sup> The People might next argue that Hernandez exhibited a great deal of attention because the robbery occurred in such a small space.<sup>235</sup> It may be further argued that Hernandez was the target of the attack, and as the victim, he had a personal stake in observing the man who perpetrated the crime.<sup>236</sup> The defendant might counter that Hernandez did not exhibit the appropriate degree of attention because victims often do not concentrate on the face of his or her attacker.

The next factor considered by the Court is the accuracy of the description given by the witness.<sup>237</sup> The People's argument is weak because Hernandez's first description of his attacker was very inaccurate.<sup>238</sup> His description was only accurate in that he labeled his attacker as a Hispanic male, but the age and height were inaccurate.<sup>239</sup> The defendant might argue that Hernandez's initial description was inaccurate because Hernandez stated that his attacker used both arms during the robbery while this was impossible for the defendant due to a bullet wound.<sup>240</sup> The People might then argue that Hernandez never said that the robber used both of his arms, and the detective's recollection of Hernandez's description was inaccurate when he testified at trial.<sup>241</sup>

The fourth factor is the witness' degree of certainty when testifying at trial.<sup>242</sup> The People might argue that Hernandez was certain about the identity of his attacker at trial when he gave various explanations for the discrepancies in his description to rebut the assertion that he was mistaken about the identity of his attacker.<sup>243</sup> The defendant might then argue that Hernandez could not have been certain

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<sup>233</sup> *Id.* at 385.

<sup>234</sup> *Manson*, 432 U.S. at 115.

<sup>235</sup> *Delamota*, 960 N.E.2d at 385.

<sup>236</sup> *Id.*

<sup>237</sup> *Manson*, 432 U.S. at 115.

<sup>238</sup> *Delamota*, 960 N.E.2d at 385.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Manson*, 432 U.S. at 115.

<sup>243</sup> *Delamota*, 960 N.E.2d at 386.

about the identity of his attacker because of the various discrepancies in the description of his attacker.<sup>244</sup> Hernandez's explanations should not amount to certainty after the defendant was already deemed guilty by the civilian interpreter.<sup>245</sup>

The final factor considered by the Court under the totality approach is the time between the confrontation and the crime.<sup>246</sup> The People might likely argue that no significant amount of time passed between the crime and confrontation because it only occurred a few days after the robbery.<sup>247</sup> The defendant does not have a valid argument considering that a few days cannot be considered a significant amount of time.

Under the totality of the circumstances, the Court may find that the discrepancies between Hernandez's initial description and the defendant render his in-court identification unreliable when judged against the corrupting effect of the procedure utilized. The procedure in this case was very corruptive because the civilian interpreter used by law enforcement may have influenced the victim's identification when the interpreter thought the defendant was responsible before the identification occurred. The fact that Hernandez told his therapist that he recognized the man who attacked him has no weight because Hernandez's initial description was completely inaccurate. If he recognized his attacker, then his description should have been more accurate.

Based on the above analysis, with the limited facts available to the court in *Delamota*, the federal independent source rule seems to be more protective against wrongful convictions. The federal totality test used to determine whether an in-court identification following a suggestive pretrial identification procedure uses all available facts to determine the issue in a concrete fashion. The standard used in New York seems to have deteriorated over time based on the decision in *Young*. The New York independent source standard requires careful consideration by the courts to determine if this is the best rule for guarding against wrongful convictions.

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<sup>244</sup> *Id.* at 385.

<sup>245</sup> *Id.*

<sup>246</sup> *Manson*, 432 U.S. at 115-16.

<sup>247</sup> *Delamota*, 960 N.E.2d at 385.

## VI. CONCLUSION

The two approaches laid out in this Note are only applicable to suggestiveness resulting from identification procedures employed by law enforcement.<sup>248</sup> This was a central issue in *Delamota*.<sup>249</sup> The court could have decided this issue either way because the extent of Juan Jr.'s familiarity with the defendant was unknown by anyone, including the detective, until Juan Jr.'s testimony at trial.<sup>250</sup> However, the detective should not have trusted a civilian with the important task of interpreting an interview with a police officer.<sup>251</sup> The court made an example of the detective by condemning this practice when it held that the procedure was unduly suggestive.<sup>252</sup> The court made the right choice because this decision will inform law enforcement of the importance associated with proper pretrial identification procedures and convictions at trial.

Under the Federal and New York approaches, the concern regarding suggestive pretrial identifications is focused on the general reliability of the witness' identification. The procedures employed by the police are the secondary concern because both approaches allow for an identification in some form or another regardless of the suggestiveness of the procedure employed by law enforcement.<sup>253</sup> This is a major concern for the due process rights of defendants because law enforcement can employ a wide range of suggestive procedures

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<sup>248</sup> Compare *Marte*, 912 N.E.2d at 39 (holding that suggestiveness attributed solely to a civilian does not violate a defendant's due process rights under the New York State Constitution), with *Perry*, 132 S. Ct. at 730 (holding that suggestiveness created by civilians does not require a reliability analysis).

<sup>249</sup> *Delamota*, 960 N.E.2d at 391.

<sup>250</sup> *Id.* at 386.

<sup>251</sup> *Id.* at 391 (holding that there was no record support for the lower court's finding that the photo array was not unduly suggestive because the lower court knew that Juan Jr. was familiar with the defendant, Detective Koch had reason to believe that Juan Jr. was familiar with the defendant, the Detective acted on unspecified neighborhood gossip, there was no reason for the Detective to use Juan Jr. as an interpreter instead of an impartial translator, and the Detective could not be reasonably sure that Juan Jr. would accurately translate the conversation).

<sup>252</sup> *Id.*

<sup>253</sup> Compare *Chipp*, 552 N.E.2d at 613 (holding that an in-court identification may be made when there is a basis for the witness' identification independent of the suggestive procedure), with *Manson*, 432 U.S. at 117 (holding that under the totality of the circumstances the officer's positive identification of the photo of the defendant as the seller was reliable and therefore admissible regardless of suggestiveness).

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that may result in misidentifications. A witness' memory is a fragile resource that may seem reliable even when it is generally accepted that witness testimony is almost always suspect. Convictions based on witness identifications and testimony should be closely regulated by the courts, and further protection should be afforded to defendants in the form of stricter rules of suppression when pretrial identifications procedures are deemed unduly suggestive.

*Matthew Gordon*<sup>\*</sup>

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<sup>\*</sup> J.D. Candidate 2014, Touro College Jacob D. Fuchsberg Law Center; B.A. 2011, Stony Brook University. I would like to thank the Editors and Staff of the Touro Law Review for guiding me through the publication process. And most importantly, I would like to thank Kerrie and my family because without them, I would not be where I am today.