TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 29
Number 4 *Annual New York State Constitutional Issue*

Article 18

March 2014

Prearraignment Lineup Procedures: Are Multiple Lineups Unduly Suggestive or Sufficiently Reliable?

Jared R. Artura

Prearraignment Lineup Procedures: Are Multiple Lineups Unduly Suggestive or Sufficiently Reliable?

Cover Page Footnote

29-4

PREARRAIGNMENT LINEUP PROCEDURES: ARE MULTIPLE LINEUPS UNDULY SUGGESTIVE OR SUFFICIENTLY RELIABLE?

SUPREME COURT OF NEW YORK
BRONX COUNTY

People v. Sharp[1]
(decided April 11, 2012)

I. INTRODUCTION

Pretrial identification procedures are critical stages of the criminal prosecution process.[2] In some cases, a defendant's guilt or innocence may rest entirely on an eyewitness's identification.[3] Therefore, it is imperative that criminal defendants are afforded constitutional safeguards, such as the right to counsel and due process of law[4]—to ensure that identification procedures are conducted fairly. This case note will explore concerns raised in the context of suggestive pretrial lineup procedures. More specifically, this case note will address the issue presented in *People v. Sharp*—whether conducting a second lineup, a year after the first one was held, will create an unduly suggestive identification. Case law supports the finding that it is not unduly suggestive to conduct a second lineup in such a scenario.

II. FACTUAL BACKGROUND

Sharp was charged with robbery in the second degree as well

---

[1] 942 N.Y.S.2d 779 (Sup. Ct. 2012).

[2] *See* United States v. Wade, 388 U.S. 218, 236-37 (1967).

[3] *See, e.g.*, *Sharp*, 942 N.Y.S.2d 779 (inferring that the case against the defendant would fall apart without an identification of him); People v. Wilson, 641 N.Y.S.2d 846, 849 (App. Div. 2d Dep't 1996) (explaining how testimony about a lineup was the only evidence linking defendant to the crime).

[4] *See infra* Section IV.

as other related charges.[5] It was alleged that Sharp forcibly stole the complainant's belt and inflicted physical injury upon him in doing so.[6] At the police station the next day, the complainant selected the defendant's photo out of several photos shown to him from the New York City Police Department's photo manager system.[7] Although Sharp's attorney notified the police that he was being represented on the pending matter, a lineup procedure was conducted in his attorney's absence and without her knowledge.[8] Sharp was identified by the complainant in the lineup.[9]

The initial pretrial lineup procedure in this action was constitutionally defective, as it was conducted in violation of the defendant's Sixth Amendment right to counsel.[10] Accordingly, that violation was sufficient to warrant the suppression of the lineup evidence, a notion to which the People conceded.[11] But instead of attempting to establish that the witness had a source, independent from the unlawful lineup, which would have permitted him to make an in-court identification, the People sought to have the defendant appear in a second lineup.[12] Defense counsel, in opposition to the People's request for a second lineup, argued that placing Sharp in another lineup would be unduly suggestive and have a deleterious effect on the reliability of the identification.[13]

The court in *Sharp* acknowledged that pre-arraignment lineups, occurring prior to the initiation of formal prosecutorial proceedings, do not invoke the right to counsel.[14] However, where the police are notified that a defendant has legal representation, that defendant's right to counsel attaches immediately.[15] But here, the violation of Sharp's right to counsel was an issue of minor concern. The real issue turned on whether the first lineup would have any prejudicial effect on ordering a second lineup. Further, the court needed to

---

[5] *Sharp*, 942 N.Y.S.2d at 780.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 781.

[9] *Id.*

[10] *Sharp*, 942 N.Y.S.2d at 781.

[11] *Id.*

[12] *Id.* at 782.

[13] *Id.*

[14] *Id.* at 781 (citing People v. Chipp, 552 N.E.2d 608 (N.Y. 1990)); *see also* People v. Hernandez, 517 N.E.2d 1328, 1330 (N.Y. 1987) ("There is no Federal or State constitutional right to counsel for an accused at a preindictment lineup.").

[15] *Sharp*, 942 N.Y.S.2d at 781.

determine whether the witness had an independent source of identification.[16] Prior to allowing a second lineup, the court ordered that a hearing be conducted to determine whether the first lineup was conducted fairly and whether the complainant had an independent source with which to make a proper identification in the proposed second lineup.[17]

III. THE COURT'S ANALYSIS IN *PEOPLE V. SHARP*

Sharp presents an issue of first impression, in which the People urged the court to place the defendant in a second pretrial lineup rather than simply let the witness make an in-court identification.[18] But as the only ground for suppression of the initial identification procedure was a violation of defendant's right to counsel, the People contended that another lineup—this time in the presence of counsel—would not deprive the defendant of a fair trial.[19] A similar situation, explained in *Sharp*, was presented in *People v. Robinson*.[20] In *Robinson*, the defendant's conviction was reversed on appeal because the identification evidence used at trial was procured from lineup procedures conducted after an unlawful arrest.[21] In the retrial, however, as per the People's request, the court ordered a second set of lineups which yielded the same positive identifications as the former lineups.[22] On the retrial, the People established that the witnesses had an independent source, separate from the lineup, sufficient to identify the defendant.[23] The new identifications were admitted into evidence and the defendant was again found guilty.[24] The First Department upheld the trial court's finding that the new lineups were not unduly suggestive and that the witnesses' observations from the crime established an independent source for their identifications.[25]

The court in *Sharp* pointed out that in *Robinson*, after the se-

---

[16] *Id.*

[17] *Id.* at 785.

[18] *See id.* at 782.

[19] *See id.*

[20] 778 N.Y.S.2d 151 (App. Div. 1st Dep't 2004).

[21] *Sharp*, 942 N.Y.S.2d at 782 (stating that defendant was arrested without probable cause) (citing *People v. Robinson*, 728 N.Y.S.2d 421 (App. Div. 1st Dep't 2001)).

[22] *Id.* (citing *Robinson*, 778 N.Y.S.2d at 152).

[23] *Robinson*, 778 N.Y.S.2d at 152.

[24] *Sharp*, 942 N.Y.S.2d at 782 (citing *Robinson*, 778 N.Y.S.2d at 152).

[25] *Id.* (citing *Robinson*, 778 N.Y.S.2d at 152).

cond trial ended, the defendant claimed that the new identifications were unduly suggestive, that the witnesses remembered him from both the first trial and from the initial lineups conducted prior to it, and therefore, the court should have suppressed the new identifications.[26] But in *Sharp*, the defendant sought to prevent the second lineup from even occurring.[27] Sharp argued that "permitting the complainant to view him again, after seeing his photograph in the computer, and after viewing him in the lineup, would in and of itself be impermissibly suggestive and would undermine the reliability of any resulting identification."[28] The court ultimately affirmed the defendant's conviction in *Robinson* based on two grounds: (1) that the lineup procedures were not suggestive, and (2) that the witnesses had an independent source with which to identify the defendant.[29] The court in *Sharp* relied on these two grounds as necessary requirements for ordering a second lineup. The only notable difference in the two cases is that in *Robinson*, the defendant made no challenge to the trial court's order for a second lineup, whereas in *Sharp*, the defendant directly opposed the People's request for a second lineup.[30] This minor difference was insufficient to distinguish *Robinson* from *Sharp*, and therefore, instead of denying the People's request, the court was correct to order a hearing to determine the fairness of the first lineup and whether the victim had an independent source to make an identification for a second one.

Foster v. California[31] was a United States Supreme Court case involving identifications made by a sole witness to a robbery.[32] The first procedure in *Foster* (a lineup) was suggestive because the two other participants were significantly shorter in height than the defendant was and the defendant was the only one wearing a conspicuous leather jacket, similar to the one worn by the robber.[33] The second procedure was objectionable because it was a one-on-one confrontation.[34] The final procedure was a five-man lineup, in which

---

[26] *Id.* (citing Robinson v. Miller, No. 05 Civ. 4496, 2010 WL 1685552, at *1, *3 (S.D.N.Y. Apr. 26, 2010) (denying petition for writ of *habeas corpus*).

[27] *Id.*

[28] *Id.*

[29] *Sharp*, 942 N.Y.S.2d at 782.

[30] *Id.*

[31] 394 U.S. 440 (1969).

[32] *Sharp*, 942 N.Y.S.2d at 782 (citing *Foster*, 394 U.S. 440).

[33] *Foster*, 394 U.S. at 441.

[34] *Id.*

the defendant was the only person who had appeared in the first lineup.[35] The Court ultimately found the identification procedures conducted in *Foster* to be unduly suggestive.[36]

Foster was cited by defense counsel in *Sharp* to support the proposition that a second lineup would be impermissibly suggestive and undermine reliability of the potential identification.[37] But in *Foster*, there were three separate identification procedures, each of which the court found to be independently suggestive.[38] Moreover, the witness in *Foster* admitted to being uncertain about two out of the three identifications that he made, whereas in *Sharp* there was no indication of any witness uncertainty.[39] *Sharp* made it clear that a court will not find that identification procedures are unduly suggestive simply because more than one of them have been implemented.[40]

The court in *Sharp* also noted that the People have a statutory right to request that the court order a defendant to appear in a lineup.[41] The court ruled that so long as the People can show that the prior lineup was not unduly suggestive and that the witness has an independent source to make an identification in another lineup, then "there is no constitutional rule prohibiting or any policy consideration militating against a second one."[42] The court further explained that a pretrial lineup will make an identification more reliable.[43] Taking into consideration that reliability plays such a major role in identification procedures and evidence in general, the court in *Sharp* was not quick to exclude potentially reliable identification evidence.

Perhaps the most influential case cited in *Sharp* was *People v. Hawkins*.[44] *Hawkins* involved a consolidation of four criminal cases, each of which involved prearraignment lineups held in the absence of

---

[35] *Id.* at 441-42.

[36] *Sharp*, 942 N.Y.S.2d at 782.

[37] *Id.*

[38] *Id.* at 782-83 (citing *Foster*, 394 U.S. at 443).

[39] *Id.* at 783.

[40] *Id.* at 782.

[41] *Sharp*, 942 N.Y.S.2d at 785; *see also* N.Y. CRIM. PROC. LAW § 240.40(2)(b)(i) (McKinney 2012) (providing in pertinent part: "Upon motion of the prosecutor, and subject to constitutional limitation, the court in which an indictment . . . is pending: . . . (b) may order the defendant to provide non-testimonial evidence. Such order may, among other things, require the defendant to: (i) [a]ppear in a line-up . . .").

[42] *Sharp*, 942 N.Y.S.2d at 785.

[43] *Id.*

[44] 435 N.E.2d 376 (N.Y. 1982).

counsel.[45] Defendants in all four cases in *Hawkins* were identified at their respective lineups and the court ruled every identification admissible in court.[46] The underlying rule of law was that the Sixth Amendment right to counsel does not afford protection to a suspect at an investigatory lineup conducted before he is formally charged with a crime.[47] Furthermore, as stated in *Sharp*, the policy behind this rule is clear: "even without counsel present," corporeal lineups generally effectuate reliable identification procedures, so long as no part of the lineup is unduly suggestive.[48] That is to say, absence of counsel at a lineup does not imply suggestiveness per se. The court in *Sharp* even went as far to say that compared to the important role of counsel at a custodial interrogation, counsel's role at a lineup is limited, passive, and "even insignificant."[49] Thus, the court in *Sharp* was correct to further inquire into the fairness of the lineup itself and not to deny a second lineup based solely on a right to counsel violation.

IV. THE UNITED STATES SUPREME COURT DECISIONS

Eyewitness unreliability is a known problem inherent in cases involving identification procedures, as it can often result in misidentification and a potential wrongful conviction.[50] For this reason, many constitutional safeguards exist to militate against the risk of misidentification in criminal proceedings.

---

[45] *Id.* at 378.

[46] *Id.* at 379.

[47] *Id.*

[48] *Sharp*, 942 N.Y.S.2d at 784.

[49] *Id.* at 783 (quoting People v. Hobson, 348 N.E.2d 894 (N.Y. 1976).

[50] *See generally* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE–VOLUME 1: INVESTIGATION 527-32 (Matthew Bender et al. eds., 5th ed. 2010) (discussing police conduct at lineups, wrongful convictions due to misidentification, and the "inherent unreliability of human perception and memory . . ."); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765 (1995) [hereinafter *Eyewitness Identification*] (discussing dangers inherent in lineup procedures and recommendations for averting the problem); Donald P. Judges, *ARTICLE: Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231 (2000).

A Right to Counsel as a Safeguard Against Unfair Identification

The Supreme Court established in *United States v. Wade*[51] that because a pretrial lineup is a "critical stage" of the criminal prosecution, a defendant is entitled to a right to counsel at all post-indictment (or post-arraignment) lineups.[52] Allowing defense counsel to observe the lineup procedure gives him the opportunity, should the need arise, "to reconstruct at trial any unfairness that occurred at the lineup."[53] There is no doubt that within the context of pretrial identification, the possibility of suggestibility is immanent;[54] the Court in *Wade* clarified:

> [E]ven though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness-'that's the man.'[55]

In *Wade*, the Court held that the defendant's right to counsel was violated at the post-indictment lineup, and therefore, vacated his conviction.[56] It was evident from the Court's rationale in *Wade* that the potential suggestiveness of pretrial lineups was an issue of major concern.[57] To militate against unreliable and unfair identifications,

---

[51] 388 U.S. 218 (1967).

[52] *Id.* at 240-41.

[53] *Id.* at 231-32.

[54] *Id.* at 235.

[55] *Id.* at 235-36.

[56] *Wade*, 388 U.S. at 221.

[57] *Id.* at 233 (listing several examples of suggestive procedures which the right to counsel is intended to safeguard against: (1) where all participants in the lineup, but the suspect, were known to the witness; (2) where the other participants are dissimilar in appearance to the suspect; (3) where the suspect was the only person in the lineup required to wear the same

the rule from *Wade* and its companion case, *Gilbert v. California*,[58] (more commonly known as the *Wade-Gilbert* rule) requires the exclusion of identification evidence which was tainted by lineups conducted in the absence of counsel.[59]

Relating back to *People v. Sharp*, where the defendant's right to counsel was violated when the police conducted a lineup in counsel's absence, the evidence from that lineup was rightfully suppressed.[60] But if a second lineup were to take place after the court-ordered *Wade* hearing,[61] then the defendant would have access to counsel, and thus, be safeguarded from any potential unfairness.[62]

B Due Process and Reliability

Along with the right to counsel as a defense against the inherent dangers of identifications, the Due Process Clause also exists as a safeguard for criminal defendants.[63] The protections afforded by the Due Process Clause require exclusion of identification evidence upon the defendant's showing that a procedure was unnecessarily suggestive and that there was a substantial likelihood of irreparable misidentification.[64]

In *Stovall v. Denno*,[65] the Court acknowledged that unnecessarily suggestive identification confrontations are violative of due process, thus requiring suppression.[66] As illustrated in *Neil v.*

---

distinctive clothing allegedly worn by the culprit; (4) where the witness is told by the police that they have caught the culprit just before showing the suspect to the witness; (5) where the police point out the suspect either prior to or during the lineup and; (6) where the other participants wear clothing that fits only the suspect).

[58] 388 U.S. 263 (1967).

[59] *See Wade*, 388 U.S. 218; *Gilbert*, 388 U.S. 263.

[60] *Sharp*, 942 N.Y.S.2d at 781.

[61] *See* People v. Chipp, 552 N.E.2d 608, 614 (N.Y. 1990) ("The purpose and function of a *Wade* hearing is to determine whether a police-arranged pretrial identification procedure such as a lineup, was unduly suggestive.").

[62] *See infra* Section V (discussing a solution to the issues that arise when a witness is said to have remembered a defendant from a previous lineup).

[63] *See Foster*, 394 U.S. 440 (reversing defendant's conviction on the ground that the identification procedure was violative of due process).

[64] *Id.* at 442; *see also* Simmons v. United States, 390 U.S. 377, 384 (1968) (holding that right to due process protects against suggestive identification procedures that create "a very substantial likelihood of misidentification").

[65] 388 U.S. 293 (1967).

[66] *Id.* at 301-02 (holding, however, that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it"). The Court ultimately held that after a fatal stabbing, it was not improper to show the accused

Biggers,[67] pursuant to federal law, even if it is established that an identification procedure was unnecessarily suggestive, such evidence may nevertheless be admissible if it is reliable.[68] Reliability will become an issue of a court's concern, however, only after a defendant has proven that a procedure was unnecessarily suggestive.[69] In other words, admissibility of evidence depends on its reliability.

For instance, the victim in *Biggers* was attacked inside her home and then taken out to the woods at knifepoint and raped.[70] Over the next several months, the victim viewed suspects at her home, at the police station, and in photographs, but did not identify the perpetrator.[71] Seven months after the attack, the police conducted a show-up identification, in which two police officers walked the defendant past the victim.[72] At the pretrial hearing, the victim identified the individual as the man who raped her, expressing that she remembered his face from the night of the crime.[73] This was more than sufficient to establish an independent source, despite the suggestive show-up procedure.[74] In determining whether the show-up was admissible, the Court focused its analysis on reliability as opposed to suggestiveness because, after all, "it is the likelihood of misidentification which violates a defendant's right to due process," and reliable evidence tends to reduce the chance of misidentification.[75] The Court stressed the significance of the witness maintaining a good record for reliability over the course of seven months—after seeing multiple lineups, photographs, and presumably suggestive show-ups, she made

---

to the victim in her hospital room for identification because the show-up was not *un*necessary, but imperative under the circumstances. *Id.* at 302.

[67] 409 U.S. 188 (1972).

[68] *Id.* at 201 (holding that reliable identification evidence may be admissible despite it being unnecessarily suggestive); *but see* People v. Adams, 423 N.E.2d 379, 383-84 (N.Y. 1981) (maintaining that New York State law requires a per se exclusion of all evidence procured from unnecessarily suggestive procedures, regardless of how reliable it is).

[69] *Biggers*, 409 U.S. at 202 ("[I]dentification obtained as a result of an unnecessarily suggestive [procedure] may still be introduced in evidence if, under the 'totality of the circumstances', the identification retains strong indicia of reliability."); *see also* Perry v. New Hampshire, 132 S. Ct. 716, 719 (2012) (stating that "[t]he due process check for reliability . . . comes into play only after the defendant establishes improper police conduct").

[70] *Biggers*, 409 U.S. at 193-94.

[71] *Id.* at 194-95.

[72] *Id.* at 195.

[73] *Id.* at 195-96.

[74] *Id.* at 200.

[75] *Biggers*, 409 U.S. at 198, 201 (holding that because there was "no substantial likelihood of misidentification . . . the evidence was properly allowed to go to the jury").

no incorrect identification.[76] The very first identification, albeit under suggestive circumstances, was made during the witness's encounter with the defendant at the police station.[77] The Court found persuasive the fact that this witness did not succumb to any of the prior inherently suggestive procedures, and ultimately it held that evidence of the defendant's identification was reliable and properly allowed to go to the jury.[78]

Using this "totality of the circumstances" analysis in *Biggers*, the Supreme Court found the identification "reliable even though the confrontation procedure was suggestive."[79] The five factors applied by the Court to evaluate the likelihood of misidentification, known as the *Biggers* factors, are:

> [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.[80]

It is noteworthy however, that the federal "totality of the circumstances" approach provides for less stringent boundaries than those applied in New York State with respect to admissibility of identification evidence.[81]

The Supreme Court explained in *Manson v. Brathwaite*[82] that, "reliability is the linchpin in determining the admissibility of identifi-

---

[76] *Id.* at 201.

[77] *Id.*

[78] *Id.* at 200-01 (stating that the victim saw her assailant for a considerable period of time under adequate light and provided the police with a detailed description of him months before the show-up).

[79] *Id.* at 199.

[80] *Biggers*, 409 U.S. at 199-200.

[81] *Compare Biggers*, 409 U.S. at 199 (utilizing the totality of the circumstances approach to allow reliable identification evidence procured from a suggestive procedure), *with* People v. Racine, No. 4132-09, 2010 N.Y. Misc. LEXIS 3843, at *1, *17-18 (Sup. Ct. Aug. 17, 2010) (excluding identification evidence that was procured from an unnecessarily suggestive procedure, despite its reliability). Due process protection in New York, discussed in further detail below, is more restrictive and requires a per se exclusion of evidence procured from an unnecessarily suggestive procedure. *See id.* Reliability of evidence, therefore, has more weight in terms of admissibility in federal court than in New York State court. *See id.*

[82] 432 U.S. 98 (1977).

cation testimony."[83] In *Brathwaite*, after an undercover policeman purchased drugs from the defendant, he went back to the station and gave a physical description of the dealer to another police officer.[84] A few days later, the undercover officer identified the defendant by looking at the single photograph of him, which was left on his desk by the other officer.[85] Although this was a highly suggestive alternative to the preferred method of photographic identification—a photo array consisting of multiple photos[86]—the Court held the identification admissible after evaluating the *Biggers* factors.[87] In *Brathwaite*, the Court's profound reluctance to exclude reliable and relevant evidence, despite its suggestive nature, was just as evident in *Biggers*, and thus, demonstrated the less stringent boundaries to admissibility in federal court with respect to identification procedures. The Supreme Court recently upheld the standard that the ability of a witness to make an accurate identification must be outweighed by the corrupting effect of the challenged identification in order to ensure its exclusion from evidence.[88]

Perry v. New Hampshire[89] was a recent Supreme Court case that ruled on the issue of whether the Due Process Clause requires a preliminary judicial inquiry into the reliability of an unnecessarily suggestive eyewitness identification when suggestive circumstances were not arranged by the police.[90] The Court explained that when the police use suggestive conduct during an identification procedure, the court must screen the evidence for reliability before trial.[91] If the court finds that the likelihood of misidentification is high, then it must exclude the evidence.[92] If, however, reliability is found to "outweigh the corrupting effect of the police-arranged suggestive cir-

---

[83] *Id.* at 114.

[84] *Id.* at 100, 101.

[85] *Id.* at 101.

[86] *Id.* at 117.

[87] *Brathwaite*, 432 U.S. at 114-16 (analyzing each factor: (1) the officer had ample opportunity to view the defendant; (2) the officer's paid close attention to detail, as he was specially trained to do so; (3) the description was accurate as to every physical characteristic described; (4) the witness was absolutely certain that the person in the photograph was the drug dealer; and (5) the description of the dealer was given just minutes after the crime and the photographic identification happened only two days later).

[88] *See Perry*, 132 S. Ct. at 725.

[89] 132 S. Ct. 716.

[90] *Id.*

[91] *Id.* at 720.

[92] *Id.*

cumstances, the identification evidence . . . will be admitted, and the jury will ultimately determine its worth."[93]

In *Perry*, the defendant was charged with theft by unauthorized taking and criminal mischief.[94] He had allegedly broken into a vehicle in the parking lot of an apartment complex and stole two car stereo amplifiers.[95] An eye-witness had watched this happen from the kitchen window of her fourth floor apartment and alerted the authorities.[96] While one police officer went inside to speak to the witness, another officer remained in the parking lot with the defendant.[97] When the officer upstairs asked the witness for a specific description of the man, she pointed out of her window and identified the thief as the man standing outside next to the other police officer.[98] The Court ultimately held that because the suggestive nature of the witness' identification was not actually manufactured by the police, a prescreening for reliability was not required.[99] Relying heavily on *Brathwaite*, the Court here reiterated that the policy behind the rule excluding evidence from suggestive identification procedures is to "deter law enforcement use of improper lineups, show-ups, and photo arrays."[100] Logically, if the police did not use improper conduct, then enforcing the rule here would defeat its purpose.[101]

An important underlying premise in *Biggers*, *Brathwaite*, and *Perry* is that in each case the Court gave due deference to a historical canon of our system of jurisprudence—allowing the jury to weigh the reliability of evidence, and not the judge.[102] While in some situations it may be proper for a judge to perform a pretrial screen of evidence

---

[93] *Id.*; *see* United States *ex rel.* Moore v. Illinois, 577 F.2d 411, 413-14 (7th Cir. 1978) (explaining that a witness's identification that was made under suggestive circumstances cannot be suppressed without further inquiry into the corrupting effect of the confrontation weighed against indicia of its reliability).

[94] *Perry*, 132 S. Ct. at 722.

[95] *Id.* at 721.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 722.

[99] *Perry*, 132 S. Ct. at 722.

[100] *Id.* at 726.

[101] *Id.* (stating that the deterrence rationale is inapposite in this case and cases like it, where the police do not engage in improper conduct).

[102] *Id.* at 723, 728-29; *Brathwaite*, 432 U.S. at 116 ("We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.").

to ensure that it is reliable,[103] such a procedure is inappropriate when the jury is presented with evidence that the authorities did not themselves corrupt, as the jury can make a proper determination on its own.[104]

V. NEW YORK STATE: SUGGESTIVE PROCEDURES

New York State courts take a slightly different approach than the federal courts with respect to suggestive identification procedures. While the People must first establish that police conduct during a procedure is reasonable and that it lacked suggestiveness,[105] the ultimate burden of proof lies on the defendant to demonstrate that the procedure was unduly suggestive.[106] Unnecessarily suggestive procedures in New York are likely to taint subsequent identifications, and on that basis such procedures are excluded per se, regardless of the reliability of the identification.[107] This state approach departs from the precedent set forth in *Brathwaite*, much to the dismay of some New York judges, but sometimes may yield the same result.[108] The New York per se exclusion approach makes it quite difficult for the prosecution to get potentially reliable identifications admitted into evidence. However, New York courts have always maintained this standard for admissibility, despite the more lenient approach pursuant to federal constitutional standards such as the ones applied in *Biggers* and *Brathwaite*.[109]

---

[103] *See, e.g.*, *Foster*, 394 U.S. at 443 (excluding evidence from police-conducted identification procedures that offended due process).

[104] *Perry*, 132 S. Ct. at 728 (holding that "[t]he fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness").

[105] People v. Jackson, 780 N.E.2d 162, 165 (N.Y. 2002).

[106] *Chipp*, 552 N.E.2d at 613; *see also* People v. Delamota, 960 N.E.2d 383, 390 (N.Y. 2011) (stating that the defendant must prove that a police-arranged procedure was unnecessarily suggestive).

[107] *Adams*, 423 N.E.2d at 383-84; *see also Racine*, 2010 N.Y. Misc. LEXIS 3843, at *17-18 (excluding evidence procured from an unnecessarily suggestive show-up procedure, despite its potential reliability).

[108] *Adams*, 423 N.E.2d at 384 (Cooke, J., concurring) (stating that the adoption of a per se exclusionary rule is contradictory if the court will still allow admission of evidence based on a harmless error analysis).

[109] *See* People v. Marte, 912 N.E.2d 37, 39 (N.Y. 2009) (stating that although the federal rule is different from the rule in New York, both rules share a common purpose—"to assure that '[t]he police will guard against unnecessarily suggestive procedures . . . for fear that their actions will lead to the exclusion of identifications as unreliable' ") (citing *Brathwaite*,

In *People v. Riley*,[110] the New York Court of Appeals advised that:

> The complex psychological interplay and dependency of erroneously induced identification evidence via show-ups, lineups, various bolsterings and the like must be vigilantly guarded against because this kind of error drives right into the heart of the adjudicative guilt or innocence process affecting the person accused and identified. Thus, constitutional, statutory and decisional safeguards have been erected essentially to insure reliability of this most potent evidence.[111]

The New York Court of Appeals places substantial weight on the idea that erroneous identifications lead to convictions of the innocent, thus the trial courts strenuously try to avoid this result.[112]

In the matter of *People v. Sharp*, the court noted that corporeal lineups generally produce reliable identifications, with or without the presence of counsel.[113] The defendant in *Sharp* contended that appearing in a second lineup would be suggestive, insofar as the witness would remember him from the last lineup.[114] Case law, however, would support a contrary contention. For instance, in *People v. Racine*[115] the court held that a nine week interval between a suggestive identification and a subsequent, fairly conducted lineup was sufficient to "attenuate the taint" of the suggestive identification.[116]

In *Racine*, an off-duty police officer witnessed the defendant, along with three young men, running down the street while firing a handgun.[117] The witness distinctly remembered the race, height, and attire of the four men.[118] Surveillance cameras caught them running down the street and into the elevator of an apartment building.[119]

---

432 U.S. at 112).

[110] 517 N.E.2d 520 (N.Y. 1987).

[111] *Id.* at 524 (citing *Wade*, 388 U.S. at 229).

[112] *Id.*

[113] *Sharp*, 942 N.Y.S.2d at 784.

[114] *Id.* at 782.

[115] No. 4132-09, 2010 N.Y. Misc. LEXIS 3843, at *1 (Sup. Ct. Aug. 17, 2010).

[116] *Id.* at *26; *see generally* Joseph G. Casaccio, *Illegally Acquired Information, Consent Searches, and Tainted Fruit*, 87 COLUM. L. REV. 842, 845-46 (defining and explaining the effect of the attenuation principle).

[117] *Racine*, 2010 LEXIS 3843, at *3.

[118] *Id.* at *5, *7.

[119] *Id.* at *7-*8.

Later that evening, after ascertaining the defendant's identity, the lead investigator had the witness view the videos of the men.[120] Showing the witness the videos was unnecessarily suggestive because he was able to recognize the men from the same conspicuous clothing and accessories that they were wearing just hours ago—the investigator could and should have first shown the witness the non-suggestive photo array instead of the videos. But it was not until after the unnecessarily suggestive identification that the investigator displayed to the witness a non-suggestive photo array, in which he identified the defendant.[121]

About nine weeks later, the defendant voluntarily came to the station, where he was placed in a fairly conducted lineup, in which he was identified by the witness again.[122] The defendant moved to have the witness's testimony about the lineup identification suppressed, arguing that "the unnecessarily suggestive video surveillance identification tainted the immediately following photographic identification, which, in-turn, tainted the lineup identification, which, in-turn would taint the prospective in-court identification at trial."[123] This argument failed however, as the court observed, "evidence may be admitted at trial if the causal connection between the identification evidence and the previously occurring unnecessarily suggestive . . . procedure has been so attenuated that the taint of the initial misconduct has been dissipated."[124] The court held that a time period of nine weeks was sufficient to attenuate the taint of video surveillance identification.[125]

If just a nine week time period was sufficient to attenuate the taint of a prior *suggestive* identification procedure, then a period of an entire year should certainly be sufficient to attenuate any taint created by viewing a lineup that was *not* suggestive to begin with.[126] As

---

[120] *Id.* at *8-*9.

[121] *Id.* at *14-*16 (stating that the investigator had a separate photograph of the defendant, in which he was wearing entirely different clothing).

[122] *Racine*, 2010 LEXIS 3843, at *19-*20.

[123] *Id.* at *20.

[124] *Id.* at *21 (citing Wong Sun v. United States, 371 U.S. 471, 487 (1963); Nardone v. United States, 308 U.S. 338, 341 (1939)).

[125] *Racine*, 2010 LEXIS 3843, at *26; s*ee also* People v. Sebok, 680 N.Y.S.2d 195, 195 (App. Div. 1st Dep't 1996) (noting that a second lineup occurring three and a half months after the first lineup was allowed even though, as in *Sharp*, the first lineup had minor irregularities).

[126] *See Sharp*, 942 N.Y.S.2d 779. Defense counsel mentioned in her motion papers that the witness had seen the defendant on a wanted poster and that the police had told him that

there have been many cases in New York in which additional lineups were directed by the court, claiming that a second lineup would create undue suggestiveness would be a rather difficult argument to prove.[127]

In *People v. Collado*,[128] on appeal from conviction, defendant claimed that a lineup was unduly suggestive because the witness anticipated his appearance in the lineup that took place after a photographic identification.[129] The court acknowledged that most witnesses "intuitively anticipate that the lineup will include [the person that was previously identified]."[130] As long as a witness is not informed by authorities that the suspect would be participating in the lineup, the court held that the lineup itself was not unduly suggestive.[131] If such a lineup would undermine reliability or offend due process, it would not have been admissible.[132] Further, the Second Department has held that authorities may use more than one pretrial identification procedure, as long as all of them are fairly conducted and non-suggestive.[133]

Apart from the per se exclusionary rule in New York, pretrial lineups generally follow the same standards set forth by the federal approach. In cases where identification evidence was ruled inadmissible due to suggestiveness, such as in *People v. Allah*,[134] the suggestive conduct or behavior is usually blatantly obvious and rightfully suppressed.[135] In *Allah*, the defendant was placed in a lineup, in

---

he had chosen the right guy after each identification; however, it seems that counsel lacks factual basis to support these claims. *Id.* at 782 n.3. The court expressed doubt that the defendant's claim would have any merit. *See also* People v. Wallace, 706 N.Y.S.2d 539 (App. Div. 4th Dep't) (noting that it is permissible for the same witness who viewed a photo array to view a subsequent lineup; a lineup held five months after the photo array "is sufficiently attenuated in time to nullify any taint even if the photo array was suggestive").

[127] *See, e.g.*, People v. Hammonds, 768 N.Y.S.2d 166 (Sup. Ct. 2003) (holding that a witness who has been shown a photo array may subsequently identify the defendant from a line up).

[128] 794 N.Y.S.2d 560 (App. Term 2005).

[129] *Id.* at 563.

[130] *Id.*

[131] *Id.*

[132] *Cf.* DRESSLER & MICHAELS, *supra* note 50, at 538 (stating that it is rare for trial courts to find that an identification procedure offended due process; usually both pretrial and in-court identifications are permitted).

[133] *See* People v. Carter, 482 N.Y.S.2d 911, 914 (App. Div. 2d Dep't 1984) (holding that a witness's viewing of two photographic arrays did not taint a subsequent lineup and none of the procedures were unduly suggestive).

[134] 646 N.Y.S.2d 1013 (Nassau Cnty. Ct. 1996).

[135] *Id.* at 1014 (holding that use of one conspicuously colored placard, held by defendant,

which he selected to stand as participant number two.[136] At the *Wade* hearing, it was determined that defendant's placard was orange while the placards held by the other five fillers were all light yellow.[137] The hearing court held this to be highly suggestive and suppressed the resulting identifications.[138] Notwithstanding the court's ruling, the People moved to have the defendant appear in a second lineup.[139] Based on the fact that it would allow the People to "circumvent" the court's ruling and gain an opportunity to re-litigate an issue that was already tried and decided upon, the court denied the People's application for a second lineup.[140]

In New York State, any evidence obtained from suggestive identification procedures must be suppressed.[141] In addition to *Racine* and *Allah*, there are a multitude of cases that involve the suppression of identification evidence derived from suggestive procedures.[142] But none of those cases, nor any other cases in New York, have ever held that it would be suggestive for a witness to view a defendant in a second lineup solely on the basis that that witness identified him in a prior procedure.

---

as opposed to a different color from the other placards was highly suggestive); *see also* People v. Breitenbach, 687 N.Y.S.2d 437, 438 (App. Div. 2d Dep't 1999) (holding that a lineup was unduly suggestive when a thin, blond haired suspect was placed in a lineup with five fillers who had dark hair and hefty builds).

[136] *Allah*, 646 N.Y.S.2d at 1014.

[137] *Id.*

[138] *Id.* It was further determined by the court that the placards placed in evidence by the People were different from the ones actually used at the lineup, thus demonstrating that the People attempted to cover up the suggestive conduct. *Id.* at 1015-16.

[139] *Id.* at 1014.

[140] *Allah*, 646 N.Y.S.2d at 1016.

[141] *Adams*, 423 N.E.2d at 384 (N.Y. 1981) (holding that suggestive pretrial identifications have never been admissible).

[142] *See, e.g.*, People v. Tatum, 492 N.Y.S.2d 999, 1005 (Sup. Ct. 1985) (holding lineup unduly suggestive when defendant was the only participant with a glass eye); People v. Gaddy, 496 N.Y.S.2d 495, 496-97 (App. Div. 2d Dep't 1985) (suppressing lineup where defendant was visibly dissimilar in age and appearance); People v. Tindal, 418 N.Y.S.2d 815, 816 (App. Div. 4th Dep't 1979) (suppressing lineup identification due to prior suggestive photo identification); People v. Burwell, 258 N.E.2d 714, 715-16 (N.Y. 1970) (suppressing lineup when the suspect was placed only with fillers twice his age); *cf.* People v. Washington, 837 N.Y.S.2d 272, 273 (App. Div. 2d Dep't 2007) (denying motion to suppress a lineup where fillers were similar in appearance to the defendant).

VI. *PEOPLE V. SHARP*: THE *WADE* HEARING

A. Suggestiveness

To reiterate, the court in *Sharp* ordered a *Wade*/independent source hearing to take place in order to determine whether the initial lineup procedure was unduly suggestive and whether the witness had an independent source to identify the defendant in the proposed second lineup.[143] This is common practice in New York because it sets the stage for a more reliable in-court identification at trial; whenever the fairness of an identification procedure is called into question, it is customary to hold a *Wade* hearing prior to trial to determine whether there is an independent source.[144] Should the hearing court in *Sharp* find that the former lineup procedure was fairly conducted and that the witness has an independent source, then the court should grant the People's application for a second lineup.[145] The new lineup must be conducted in a fashion that is consistent with constitutional standards.[146] As is always the case with evidence, relevancy is a prerequisite to admissibility, and therefore, identification evidence is subject to the court's balancing test to determine whether its probative value is outweighed by its prejudicial effect.[147] In *Sharp*, it would appear

---

[143] *Sharp*, 942 N.Y.S.2d at 785.

[144] People v. Burts, 574 N.E.2d 1024, 1026 (N.Y. 1991) (citing People v. Dodt, 462 N.E.2d 1159, 1165 (N.Y. 1984) (holding that an eye-witness's independent source to make an in-court identification must be determined pretrial and not post-trial)).

[145] *Sharp*, 942 N.Y.S.2d at 780.

[146] *See Chipp*, 552 N.E.2d at 612-13, *cert. denied*, 498 U.S. 833 (1990) (holding that while show-up procedures are strongly disfavored, corporeal lineups are reliable and sufficient, as long as there is no undue suggestiveness). The court did not, however, specify which type of corporeal lineup to use. *See id.* The traditional procedure is the simultaneous lineup, in which all participants are shown together and side-by-side; however, newer procedures have been implemented such as the sequential lineup, in which each participant is viewed separately, one at a time. *See Hammonds*, 768 N.Y.S.2d at 170 (discussing the benefits of double-blind lineup procedures); *see generally* Wells, *supra* note 50, at 772 (comparing the effects of sequential lineups with those of simultaneous lineups).

[147] *See* People v. Davis, 371 N.E.2d 456, 460 (N.Y. 1977)

> Relevance, however, is not always enough, since 'even if the evidence is proximately relevant, it may be rejected if its probative value is outweighed by the danger that its admission would prolong the trial to an unreasonable extent without any corresponding advantage; or would confuse the main issue and mislead the jury; or unfairly surprise a party; or create substantial danger of undue prejudice to one of the parties'.

Id. New York State has not adopted the Federal Rules of Evidence—it still uses the com-

that no prejudicial effect outweighs the probative value of straightforward eye-witness testimony offered to prove the identity of the defendant.

As discussed in the above sections, there are many circumstances in which an identification procedure may be deemed suggestive, but none of those cases involve a situation like the one in *Sharp*. The Supreme Court has firmly held that to warrant suppression, a lineup procedure must be "so unnecessarily suggestive and conducive to irreparable mistaken identification" that it deprived the defendant of due process of law.[148] The defendant in *Sharp* sought to preclude a second lineup procedure on the grounds that it *could* be unnecessarily suggestive; however, nothing about the second lineup—which has yet to occur—can be said to have violated due process.

B. Independent Source

There must be a phase at the pending *Wade* hearing, during which the court will assess the reliability of the witness's identification to determine whether he had an independent source, separate and distinct from the lineup encounter.[149] The prosecution in *Sharp*, as the court pointed out, has taken a risk by requesting that their witness view another lineup because if he is unable to identify the defendant, then there can be no in-court identification at all.[150] Normally if a lineup is suppressed due to a violation of the right to counsel, the witness may still be permitted to make an in-court identification of the defendant.[151] In this situation, a witness may only identify a defendant in court if the identification is supported by an independent source.[152] Here, however, if no identification is made at the proposed

---

mon law as authority for evidentiary matters. The Federal Rules of Evidence counterpart here would be the rules on relevancy. *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

[148] *Stovall*, 388 U.S. at 301-02.

[149] *See* People v. Foster, 613 N.Y.S.2d 616, 619 (App. Div. 1st Dep't 1994) (holding that it is essential to assess the reliability of a witness's identification to make an independent source finding).

[150] *Sharp*, 942 N.Y.S.2d at 784.

[151] *See generally* People v. Bouchereau, 681 N.Y.S.2d 50 (App. Div. 2d Dep't 1998) (holding that witness's in-court identification was admissible despite the suppression of the lineup evidence).

[152] *Id.* (citing *Brathwaite*, 432 U.S. at 119 ("[I]n-court identification following an uncounseled lineup was allowable only if the prosecution could clearly and convincingly demon-

second lineup, the People will likely be estopped from making an independent source argument.[153] In other words, if the witness fails to identify the defendant in a lineup, then that same witness could not possibly claim that he remembers his assailant from the crime. The People also could have avoided a second lineup altogether and used only the witness's independent source for an in-court identification—a strategy which would have eliminated lineup evidence entirely and most definitely weakened their case.

The applicable New York state precedent demonstrates that after showing a lack of suggestiveness, the People normally need not prove anything else at a *Wade* hearing.[154] If, however, a procedure is deemed unduly suggestive, the People must then prove by "clear and convincing evidence" that the witness has an independent source—a showing of which would permit only an in-court identification, not additional identification evidence such as that from a lineup.[155] The *Wade* hearing in *Sharp* will be slightly different because the court ordered the hearing for the purpose of determining both the fairness of the lineup and whether the witness had an independent source, regardless of whether suggestiveness is shown.[156] The court, in ordering a hearing to resolve each of these issues, appropriately admonished the government for not following proper procedure the first time around.[157]

One of Sharp's main arguments is that a second lineup would undermine the reliability of any resulting identification.[158] The New York Court of Appeals, however, has previously ruled on this particular issue of reliability in *People v. Bolden*,[159] stating that

> As a general proposition, negative identification evidence will be relevant in certain circumstances. When the reliability of an eyewitness identification is at is-

strate that it was not tainted by the constitutional violation.")); *see generally Neil v. Biggers*, 409 U.S. 188 (recognizing the independent source as the victim's recollection of the assault).

153 *Sharp*, 942 N.Y.S.2d at 784.

154 *Chipp*, 552 N.E.2d at 613.

155 *Id.*

156 *Sharp*, 942 N.Y.S.2d at 785.

157 *See, e.g.*, People v. Johnson, 621 N.Y.S.2d 372, 373 (App. Div. 2d Dep't 1995) ("It is well settled that even where an identification procedure is the product of a suggestive pretrial identification procedure, a witness will nonetheless be permitted to identify a defendant in court if that identification is based on an independent source.").

158 *Sharp*, 942 N.Y.S.2d at 782.

159 445 N.E.2d 198, 199 (N.Y. 1982) (Gabrielli, J., concurring).

> sue, negative identification evidence can tend to prove that the eyewitness possessed the ability to distinguish the particular features of the perpetrator. Furthermore, it may also be useful in demonstrating that the *eyewitness was unwilling simply to select anyone offered to him by the police*. The common lineup, a fundamental part of the criminal identification process, unquestionably involves a form of negative identification evidence inasmuch as the *selection by the eyewitness is evaluated in conjunction with his failure to identify the other participants in the lineup*.[160]

In *Bolden*, a police officer was permitted to testify about how he displayed to the eyewitness a "blank" photo array, in which the defendant was not pictured.[161] He explained that despite the blank photo array, the eyewitness did not mistakenly identify any of the fillers.[162] The court essentially defined this *non*-identification as "negative identification evidence."[163] The court explained that negative identification evidence is relevant and often reliable evidence, which tends to demonstrate the eyewitness's "ability to distinguish the particular features of the perpetrator" from the other lineup participants.[164] By making a positive identification of the suspect, the witness also demonstrates his initiative to not just select anybody that is placed in front of him.[165] This is analogous to the identification made in *Biggers*, in which the witness refrained from identifying anyone in the photos and show-ups for seven months before selecting the right man.[166] The Court in *Biggers*, along with the court in *Bolden*, held that the identifications were reliable, and therefore admissible.[167]

In *Sharp*, the victim of the robbery, as the sole eyewitness,

---

[160] *Id.* at 200 (emphasis added).

[161] *Id.*

[162] *Id.* at 201.

[163] *Id.* at 200.

[164] *Bolden*, 445 N.E.2d at 200.

[165] *Id.*

[166] *Biggers*, 409 U.S. at 194-95.

[167] *Id.* at 200-01; *Bolden*, 445 N.E.2d at 199 (majority opinion). The defendant's conviction in *Bolden* was affirmed on different grounds, but the concurring opinion discussed the negative identification issue. *Id.* at 200 (concurring opinion). The Court of Appeals did not adopt the concurrence at that time; however, lower courts presented with negative identification issues have adopted the concurring opinion in *Bolden*. *Id.*; *see, e.g.*, People v. White, 572 N.Y.S.2d 840, 842-43 (Sup. Ct. 1991) (holding negative identification evidence admissible where it "bears directly upon the credibility of the affirmative identification defense").

identified the defendant out of several pictures shown to him by the police from the New York City Police Department's photo manager system.[168] Furthermore, he identified the defendant in a (presumably) non-suggestive lineup, which took place one day after the photo array and eleven days after the actual robbery.[169] The fact that the witness in *Sharp* made no incorrect identification lends ample support for the proposition that he was certain about the identity of the defendant, a certainty comparable to that of the witnesses in *Biggers* and *Bolden*. The more certain a witness is about an identification, the more credible he becomes as a witness and the more reliable the resulting evidence will be.[170]

VII. CONCLUSION

People v. Sharp presents an issue of first impression in New York as to whether a proposed second lineup would create undue suggestiveness in and of itself. Both federal and state case law offer persuasive authority to support the proposition that it would not be unduly suggestive. The absence of counsel at the first lineup in no way affected the reliability of the witness. To further safeguard the defendant's constitutional rights, a hearing was ordered to determine whether the complainant had an independent source with which to make a proper identification. Assuming, arguendo, that the People can sustain their burden at the hearing, the court's allowance of a second lineup is equitable and in accordance with case authority as well as the statutory predicate.

Jared R. Artura[*]

---

[168] *Sharp*, 942 N.Y.S.2d at 780. The number of photos viewed by the witness is unknown, but will presumably be brought to light at the *Wade* hearing.

[169] *Id.* at 780-81.

[170] *See generally Biggers*, 409 U.S. 188 (holding reliable evidence to be admissible); *Sharp*, 942 N.Y.S.2d at 785 (stating that a pretrial lineup will make an identification more reliable).

[*] J.D. Candidate 2014, Touro College Jacob D. Fuchsberg Law Center; Farmingdale State College, B.A. (2011). Special thanks to Professor Gary Shaw for all of his guidance and assistance. Additionally, I would like to thank Danielle Hansen and the talented members of the *Touro Law Review* for editing this casenote. Thank you to my mother, father, and brother for their unconditional support during law school. I must thank my father especially for his selfless devotion to my success, his patience and understanding, and the countless hours he has spent mentoring me.