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Cover Page Footnote
29-4

THE FEDERAL RETREAT FROM PROTECTING DEFENDANTS FROM TAINTED SHOW-UP IDENTIFICATIONS AND THE SUPERIORITY OF NEW YORK'S APPROACH

SUPREME COURT OF NEW YORK
NEW YORK COUNTY

People v. Chuyn[1]
(decided December 13, 2011)

I. INTRODUCTION

Manuel Chuyn, the defendant, was charged with two counts of third degree assault and one count of second degree burglary.[2] The defendant moved to reopen a *Wade* hearing to determine whether three eye witnesses' pretrial show-up identifications of the defendant should be suppressed.[3] The defendant further moved to have each witness testify at the hearing, if reopened.[4] According to the defendant, suggestive statements made by the first witness to the two subsequent witnesses before they identified the defendant tainted the second and third identifications.[5] The defendant further asserted that the purported statements were improperly suggestive, in violation of his due process rights, and all evidence of the identifications should be suppressed.[6] Although a previous *Wade* hearing had been held and decided in the prosecution's favor, the defendant introduced new evidence and claimed it provided grounds to reopen the *Wade* hearing.[7]

The New York Supreme Court granted the defendant's mo-

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[1] No. 2707/2010, 2011 WL 6187150 (N.Y. Sup. Ct., Dec. 13, 2011).
[2] *Id.* at *1.
[3] *Id.*
[4] *Id.*
[5] *Id.* at *2.
[6] *Chuyn*, 2011 WL 6187150, at *1.
[7] *Id.* at *2.

tion, finding the new evidence sufficient to reopen the hearing.[8] The defendant presented notes from the prosecutor's pretrial witness interviews that showed the first witness had in fact spoken with the subsequent witnesses prior to their own identifications.[9] Based on an examination of pertinent case law, the court found that the police directing an identification procedure constituted state action and may be the subject of a *Wade* hearing.[10] An opportunity for improper witness communication at a police-directed identification procedure necessitates a *Wade* hearing.[11] In addition, the court granted the defendant's motion requiring the witnesses to testify at the hearing.[12] The court reasoned that the testimony was materially relevant to the issue of suggestiveness and necessary to resolve the issue.[13] Due to the unique circumstances of the purported improper suggestiveness, the court clearly established a limited scope for the hearing.[14]

This article will review the facts and the court's reasoning in *Chuyn*. In addition, this article will analyze the development of the federal and New York State approaches to the issue of the admissibility of pretrial show up identifications influenced by suggestiveness, focusing on the similar policy considerations of the respective courts. Finally, despite those similarities, this article will show New York's departure from the federal approach, providing broader protection to defendants and better achieving the policy goals of both courts than the federal scheme.

II. THE OPINION: PEOPLE V. CHUYN

The pertinent issue before the court was whether the suggestiveness was based solely on the conduct of the first witness or on police action, and if the latter, whether the identification was tainted such that it must be suppressed.[15] Three eyewitnesses, James, Sandra

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[8] *Id.* at *4, *18.

[9] *Id.* at *4.

[10] *Id.* at *11 (finding conduct of private citizens unable to violate an individual's due process rights, only state actor's conduct).

[11] *Chuyn*, 2011 WL 6187150, at *18.

[12] *Id.* at *6, *18.

[13] *Id.* at *5-6.

[14] *Id.* at *6, *12.

[15] *See id.* at *1 (discussing the relevant issue if the identification was based on police action, the evidence from the second and third witnesses was tainted so as to violate the defendant's due process rights and warrant suppression of the identification).

and Wendy Juliano, collectively the Julianos,[16] identified the defendant at a pretrial show-up identification, directed by the police, forty minutes after the incident took place.[17]

In a previous *Wade* hearing, the defendant's motion to suppress the identifications was denied, as was the defendant's motion to compel the testimony of the eyewitnesses at the hearings.[18] After this prior *Wade* hearing, the defendant discovered new evidence in the form of notes taken by the prosecutor during pre-trial interviews of the witnesses, and he sought to reopen the hearing pursuant to Criminal Procedure Law ("CPL") section 710.40(4).[19] New York law requires the prosecution to provide the defendant with pre-trial witness's statements, known as *Rosario* material, for the purpose of cross examination.[20] The *Rosario* notes revealed that the first witness, Mr. Juliano, spoke to his wife and daughter after he identified the defendant, telling them he had identified the guilty party.[21] The daughter stated that she heard her father say, "You're not going to believe this[,] he's downstairs—come down now."[22] Mr. Juliano's wife claimed that she heard him say, "Come downstairs. I think we have the guy."[23] It is important to note, that the police allowed these communications to occur.[24]

III. THE COURT'S REASONING

In 1967, the Supreme Court held in *United States v. Wade*[25] that pre-trial identifications must conform to constitutional due process rights.[26] Pursuant to *Wade*, hearings are held to determine the

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[16] *Chuyn*, 2011 WL 6187150, at *2. The three witnesses were family members, a father, mother and daughter. *Id.* at *1.

[17] *Id.* at *1, *4.

[18] *Id.* at *1.

[19] *Id.* at *2-*3.

[20] People v. Rosario, 173 N.E.2d 881, 883 (N.Y. 1961) (holding defendant was entitled to witnesses' pre-trial statements in prosecution's possession); People v. Consolazio, 354 N.E.2d 801, 806 (N.Y. 1976) (holding pretrial statements made by prosecution's witnesses must be provided to defendants unless the statements are mere duplicates of those already in defendant's possession).

[21] *Chuyn*, 2011 WL 6187150, at *4.

[22] *Id.*

[23] *Id.*

[24] *Id.* (showing police permitted the first witness to talk to subsequent witnesses).

[25] 388 U.S. 218 (1967).

[26] *Id.* at 226-27 (holding defendant's right to counsel applied to pretrial and trial proceedings, including pretrial identifications).

admissibility of pretrial identification evidence at trial.[27] In order to reopen a previously decided *Wade* hearing, CPL section 710.40(4)[28] provides that a defendant must show pertinent evidence newly discovered, which could not have been located at the time of the prior motion through reasonable efforts.[29] Additional pertinent facts need not establish suggestiveness on their face, but the facts must relate to the issue of suggestiveness such that the outcome of the prior hearing would have been "materially affected."[30] Evidence that either undermines a court's reasoning for previously denying suppression or materially strengthens a defendant's claim of suggestiveness is sufficient to reopen a *Wade* hearing.[31] Once a *Wade* hearing is reopened, evidence that materially supports an improper suggestiveness claim, or is necessary to resolve the issue of suggestiveness, is admissible even if it was previously excluded.[32]

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[27] People v. Dixon, 647 N.E.2d 1321, 1323 (N.Y. 1995) ("The purpose of the *Wade* hearing is to test identification testimony for taint arising from official suggestion during 'police arranged confrontations between a defendant and an eyewitness.' ").

[28] N.Y. CRIM. PROC. Law § 710.40 (McKinney 1977).

[29] *Id.*

> If after a pre-trial determination and denial of the motion the court is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, it may permit him to renew the motion before trial or, if such was not possible owing to the time of the discovery of the alleged new facts, during trial.

Id.

[30] People v. Clark, 670 N.E.2d 980, 981 (N.Y. 1996) (" '[A]dditional pertinent facts' does not require defendant . . . to introduce facts which on their face establish the suggestiveness . . . [but rather] the facts asserted [must] be 'pertinent' to the issue of official suggestiveness such that they would materially affect or have affected the earlier *Wade* determination.").

[31] People v Delamota, 960 N.E.2d 383, 390-91 (N.Y. 2011) ("[T]he trial court erred when it denied defendant's motion to reopen the *Wade* hearing because . . . trial testimony fatally undermined the suppression court's rationale for denying that motion. . . . . The significant revelation to the contrary at trial considerably strengthened defendant's suggestiveness claim.").

[32] *See* People v. Chipp, 552 N.E.2d 608, 614 (N.Y. 1990) (stating "a witness's testimony may be necessary if the evidence presented at the hearing raises substantial issues as to the constitutionality of the lineup, the resolution of which could not be properly resolved without testimony from the identification witness"); *see also* People v. Cherry, 812 N.Y.S.2d 550, 551 (App. Div. 2006) ("[T]his right is generally triggered only when the hearing record raises substantial issues as to the constitutionality of the identification procedure . . . , where the People's evidence is 'notably incomplete . . . ', or where the defendant otherwise establishes a need for the witness's testimony." (quoting People v. Santiago, 696 N.Y.S.2d 472, 473 (App. Div. 1999))).

In *Chuyn*, the court found that the defendant could not have discovered the *Rosario* notes prior to the first hearing, and this provided grounds to reopen the *Wade* hearing.[33] Not only were additional facts provided, but those new facts also related directly to the issue of improper suggestiveness.[34] For the first time, evidence of the witnesses' communications was shown, which significantly undermined the court's prior reasoning based on the assumption that the witnesses never communicated.[35] However, although the defendant had shown that two identifications may have been influenced by the first witness's comments, the court's inquiry was not complete.[36] In response to the prosecution's opposition, the court needed to determine whether the exclusionary rules, arising from due process rights, applied to the conduct of a private citizen, like the first witness commenting to the subsequent witnesses.[37]

In examining various federal and state decisions, the court found that exclusionary rules relating to improper suggestiveness are intended to deter improper state action or police conduct, and that a private citizen's suggestive behavior could not implicate due process protection.[38] Additionally, it found that *Wade* inquiries are designed to encourage conformity of state conduct to constitutional due process rights.[39] Despite this conclusion, the court rejected the prosecu-

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[33] *Chuyn*, 2011 WL 6187150, at *4 ("[T]he notes of the ADA presented by on this motion, provide new evidence not present at the initial *Wade* hearing, and which the defendant could not have discovered before this court's determination of the *Wade* hearing, even with the exercise of due diligence.").

[34] *Id.*

[35] *Id.* ("This court based its suppression decision on its finding . . . that James Juliano made no suggestive statements to his wife or daughter.").

[36] *Id.* ("[The] defendant's claims of suggestiveness have been materially strengthened by the newly discovered evidence of the women's statements."); *id.* at *5 ("[T]he substantial issues raised by the evidence as to the suggestiveness of the police-arranged show up procedure cannot be properly resolved without the testimony . . . the *Wade* hearing must be reopened to hear the testimony of the three eyewitnesses.").

[37] *Chuyn*, 2011 WL 6187150, at *5.

[38] *See* Stovall v. Denno, 388 U.S. 293, 297 (1967) ("Wade and Gilbert fashion exclusionary rules to deter law enforcement authorities from [improper conduct]."); *see also* Manson v. Brathwaite, 432 U.S. 98, 112 (1977) (stating "totality of circumstances" approach was adopted, in part, due to its "influence of police behavior"); People v. Marte, 912 N.E.2d 37, 39 (N.Y. 2009) ("The exclusionary rules were fashioned to deter improper conduct on the part of law enforcement officials which might lead to mistaken identifications." (quoting People v. Logan, 250 N.E.2d 454, 458 (N.Y. 1969))).

[39] *Chuyn*, 2011 WL 6187150, at *8 ("[T]he purpose of inquiry at a *Wade* hearing under federal and New York state constitutional law is to limit the conduct of the state, in conformity with constitutional due process requirements, and that the object of the court's scrutiny are the representatives of the state.").

tion's assertion that the witness's comments, as a private citizen, could not implicate the defendant's due process rights.[40] The court examined state precedent of *People v. Dixon*[41] and *People v. Delamota*,[42] and concluded that police conduct in directing an identification procedure, in itself, may be the subject of a *Wade* hearing.[43] This was shown first in *Dixon* where a *Wade* hearing was granted when the witness identified the defendant while canvassing a neighborhood with a police officer.[44] Although the identification was instantaneous, a *Wade* hearing was proper simply because the confrontation between the witness and defendant was arranged by the police, just as the confrontation was arranged by the police in *Chuyn*.[45] And in *Delamota*, evidence of pretrial photo identification was suppressed when the witness's son, who knew the defendant, translated for the witness at police request, but the evidence was only suppressed because of the police's choice to use the son as translator, not because of any of the son's actions.[46]

Based on these decisions, the court in *Chuyn* determined that the police directed the identification process, which afforded the first witness the opportunity to improperly influence the subsequent identifications.[47] This was grounds for a *Wade* hearing and possible suppression, regardless of the police officers' intent.[48] While directing a pretrial identification procedure, the police must actively prevent and inhibit improper witness suggestiveness from influencing subsequent

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[40] *Id.* at *5, *6.

[41] 647 N.E.2d 1321 (N.Y. 1995).

[42] 960 N.E.2d 383 (N.Y. 2011).

[43] *Chuyn*, 2011 WL 6187150, at *5 ("[T]he hearing would also address . . . the police officers' conduct which may not have been fully explored at the original *Wade* hearing, such as whether the officers took any steps to avoid the risks inherent in deputizing a civilian to assist in the show-up procedure.").

[44] *Dixon*, 647 N.E.2d at 1322.

[45] *Id.* at 1323 (stating that case law indicates a low standard for qualifying state conduct such that a *Wade* hearing is proper "whenever identification procedures . . . come about at the deliberate direction of the state").

[46] *Delamota*, 960 N.E.2d at 391 ("[S]uggestiveness cannot be attributed to the victim's son, but to the detective's decision to utilize him as the interpreter notwithstanding the possible risks that were involved in this practice.").

[47] *Chuyn*, 2011 WL 6187150, at *12.

[48] *Id.* ("[A]t the reopened *Wade* hearing, the issue before the court will be whether police action in the course of arranging the show up identification . . . resulted in undue suggestiveness which impermissibly influenced their identifications."); People v. Smalls, 490 N.Y.S.2d 851, 852-53 (App. Div. 1985) (finding police conduct in walking witness passed the defendant's holding cell constituted improper suggestiveness even though it was done unintentionally).

identifications; any inaction on the police's part may result in exclusion of identifications at a *Wade* hearing.[49] Therefore, the court granted the defendant's motion to reopen the *Wade* hearing.[50] In addition, the court held that the witnesses would testify at the reopened hearing because their testimony had the potential of materially strengthening the defendant's claim of improper suggestiveness, and was essential in the resolution of the issue.[51]

However, although the court granted the defendant's motion to reopen the *Wade* hearing and required the witnesses to testify, it did not grant the defendant the complete scope of inquiry he sought.[52] Because the court rejected the defendant's assertion that the use of tainted evidence at trial amounted to a violation of due process rights, and that citizen conduct alone can invoke due process rights, a specific procedure for inquiry was established to focus on the actual police action in directing the identification procedure.[53] First, the court would decide whether the police acted improperly in permitting the communication between the witnesses to occur.[54] Second, only if the police were found to have acted improperly, the court would decide whether the first witness's statements improperly influenced the subsequent identifications.[55]

Having granted the defendant's motion to reopen the *Wade* hearing, and having established the clear and limited scope of inquiry

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[49] *Chuyn*, 2011 WL 6187150, at *12 (stating the "police action or inaction in ensuring [Mr. Juliano] would do nothing to taint the reliability of any identification made by his wife or daughter" will be examined at the hearing).

[50] *Id.* (reopening *Wade* hearing to examine police conduct in directing identification only).

[51] *Id.* at *4 ("[The] defendant's claims of suggestiveness have been materially strengthened by the newly discovered evidence of the women's statements."); *id.* at *5 ("[T]he substantial issues raised by the evidence as to the suggestiveness of the police-arranged show-up procedure cannot be properly resolved without the testimony . . . the *Wade* hearing must be reopened to hear the testimony of the three eye witnesses.").

[52] *Id.* at *11 ("[B]ecause defendant's contention that *Wade* suppression review should entail consideration of procedures which are entirely devoid of governmental action does not reflect current federal or New York State constitutional law, it is rejected.").

[53] *Chuyn*, 2011 WL 6187150, at *10 ("[A]dmission of identification evidence may not be found violative of due process in the absence of a finding of a very substantial likelihood of misidentification . . . attributable to an unduly suggestive procedure by the police." (citing *Marte*, 912 N.E.2d at 40 ("[W]e decline to extend a per se constitutional rule of exclusion to cases where identification results from a suggestive communication by a private citizen.")).

[54] *Id.* *12 ("[I]n the first instance, on whether Mr. Juliano's conduct was attributable to police action or inaction in ensuring that he would do nothing to taint the reliability of any identifications made by his wife or daughter.").

[55] *Id.* ("[Then] the inquiry will focus . . . on the conduct of Mr. Juliano and its effect on the female witnesses' identifications of defendant.").

for that hearing, the court addressed two additional assertions made by the prosecution in opposition.[56] First, the court rejected the prosecution's claim that informal police-directed identifications, such as this show-up identification, deserve less scrutiny than formal procedures, such as police-arranged line-ups.[57] And, second, although unusual, the witnesses' testimony at the reopened hearing is not an improper pretrial examination because the defendant's inquiries will be limited to the topic of the purported suggestiveness, focusing first on the police officer's conduct and then the witnesses' communication.[58]

Finally, the court discussed the governing procedure and possible outcomes of the *Wade* hearing.[59] First, the defendant must make a prima facie showing that the procedure was unduly suggestive based on the totality of the circumstances.[60] If the defendant *does not* meet the burden, both pretrial and in-court identifications are admissible; however, if the defendant *does* meet the burden, an independent source hearing will be held to determine the witnesses' reliability.[61] Then the prosecution must show, by clear and convincing evidence, that the identification was reliably based on the witness's observations of the crime, not the improper identification procedure.[62] An identification's reliability is shown by evidence supporting the identification independent from the improper identification procedure at an independent source hearing.[63]

Discussing this procedure, the court in *Chuyn* pointed out the diversion in approaches of the federal and New York State courts.[64] Although federal cases hold that pretrial and in-court identifications produced from an improperly suggestive procedure found to be reliable are admissible, the New York rule excludes evidence of such pre-

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[56] *Id.* at *6.

[57] *Id.* (showing the New York Court of Appeals treated photo, lineup and show-up identifications the same).

[58] *Chuyn*, 2011 WL 6187150, at * 6.

[59] *Id.* at *8, *9.

[60] *Id.* (citing Neil v. Biggers, 409 U.S. 188, 199-200 (1972)).

[61] *Id.* at *12 (citing People v. Peterkin, 543 N.Y.S.2d 438, 440 (App. Div. 1989) ("[O]nly when the defense has established that a pretrial identification procedure was unduly suggestive, after the prosecution has met its initial burden of going forward to demonstrate reasonableness and the lack of suggestiveness, that evidence concerning an independent source for the in-court identification must be elicited from the complainant." (quoting People v. Tweedy, 521 N.Y.S.2d 92, 92 (App. Div. 1987)))).

[62] *Id.*

[63] *Chuyn*, 2011 WL 6187150, at *12.

[64] *Id.* at *9.

trial identifications; only in-court identifications are admissible if found to be reliable.[65]

Therefore, in C*huyn*, if the identifications in question are found to be the product of improper influence, all evidence of pretrial identifications must be suppressed.[66] An independent source hearing should be held, but only for the purpose of determining the admissibility of in-court identifications.[67] Thus, under this approach, the court in *Chuyn* reopened the *Wade* hearing within a specific and constrained scope, despite the fact that the actual suggestiveness was attributed to a private citizen.

IV. THE FEDERAL APPROACH

To better understand the current federal approach to due process protections and the suppression of pretrial identification evidence, an examination of its origin and development is helpful. On June 12, 1967, the Supreme Court decided a trilogy of landmark cases conclusively establishing that pretrial identifications implicate due process rights.[68]

In the seminal cases of *United States v. Wade*,[69] and its companion *Gilbert v. California*,[70] the Supreme Court held that a defendant's federal due process right to counsel arising from the Sixth Amendment prohibits pretrial identifications without defense counsel.[71] In both cases, the Court excluded all testimony of pretrial identifications, but remanded the cases for determination as to the admis-

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[65] *See id.* ("[U]nder the federal constitutional scheme, pretrial identification evidence resulting from an unnecessarily suggestive police-arranged procedure will not be automatically excluded, but will be evaluated for its reliability under the totality of circumstances standard." (citing *Brathwaite*, 432 U.S. at 114)); *but see id.* ("[U]nder New York law, improper identification procedure and evidence derived from them must be suppressed, but in-court identifications may nevertheless be allowed, where based upon an independent source." (citing *Marte*, 912 N.E.2d at 39)).

[66] *Id.* at *12.

[67] *Id.*

[68] The Supreme Court decided all three cases, United States v. Wade, 388 U.S. 218 (1967), Gilbert v. California, 388 U.S. 263 (1967), and Stovall v. Denno, 388 U.S. 293 (1967) on June 12, 1967.

[69] 388 U.S. 218 (1967).

[70] 388 U.S. 263 (1967).

[71] *See Wade*, 388 U.S. at 226, 237 (holding due process rights entitle defendants to have defense present at pretrial identifications); *see also Gilbert*, 388 U.S. at 272 (holding the defendant's due process rights have been violated by the pretrial lineup held in the absence of defense counsel).

sibility of subsequent in-court identifications.[72]

The third decision, *Stovall v. Denno*,[73] established due process rights protection from pretrial identifications influenced by improper suggestiveness by stating that if "the confrontation . . . was so unnecessarily suggestive and *conducive* to irreparable mistaken identification [then the defendant] was denied due process of law."[74] In *Stovall*, the police brought the defendant, who was suspected of murder, to the hospital alone and handcuffed, where the only living eyewitness identified him as the perpetrator.[75] The defendant's motion to suppress based on suggestiveness was denied, as the Court applied a "totality of circumstances" test, and found that exigent circumstances justified the identification procedure.[76] Even though the Court did not suppress the identification, the S*tovall* decision was groundbreaking because for the first time federal due process rights were held to protect against pretrial identifications influenced by suggestiveness.[77] This effectively shifted review of certain testimony from the purview of the jury in determining credibility to the court to determine suggestiveness and reliability.[78]

Despite its importance, the *Stovall* decision created confusion. First, in discussing suggestiveness, the Court indicated admissibility was couched in reliability, but admitted evidence of the identification

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[72] *Wade*, 388 U.S. at 240 ("Where, as here, the admissibility of evidence of the lineup identification itself is not involved, a *per se* rule of exclusion of court room identification would be unjustified."); *Gilbert*, 388 U.S. at 272-73 (holding only a per se rule of exclusion for pretrial identifications will properly operate as a deterrent to improper police conduct, but "the State [has] the opportunity to establish that the in-court identifications had an independent source").

[73] 388 U.S. 293 (1967).

[74] *Id.* at 301-02 (emphasis added).

[75] *Id.* at 295.

[76] *Id.* at 302 ("[A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of circumstances surrounding it, and the record in the present case reveals that the showing of Stovall to [the witness] in an immediate hospital confrontation was imperative."). The Court also denied the defendant's motion on *Wade* and *Gilbert* grounds, despite defense counsel's absence, because the Court refused to apply the rule retroactively. *Id.* at 300 ("[R]etroactive application of Wade and Gilbert would seriously disrupt the administration of our criminal laws.").

[77] Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 263 (1991) (identifying that prior to 1967 the Supreme Court had not considered whether a defendant's due process rights could be implicated in a pretrial identification procedure).

[78] *Stovall*, 388 U.S. at 299-300 ("The overwhelming majority of American courts have always treated the evidence question not as one of admissibility but as one of credibility for the jury.").

based on exigent circumstances, unrelated to reliability.[79] The identification was termed "imperative," because it was unclear whether the witness would survive to make a formal identification after being stabbed eleven times.[80] Despite characterizing its analysis as a "totality of circumstances" approach, confusion over the proper factors to be considered resulted because the Court gave no guidance on what to consider.[81]

Second, unlike the *Wade* and *Gilbert* decisions, the Court did not explicitly address pretrial and in-court identifications separately.[82] This created a split among the lower courts, in which some courts used a single test where reliability established both pretrial and in-court identifications as being admissible,[83] while other courts required a dual test where pretrial identifications influenced by improper suggestiveness were per se inadmissible but in-court identifications were admissible upon a finding of reliability.[84] Nonetheless, the Supreme Court found that due process rights, arising from the United

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[79] *Id.* at 298 ("*Wade* and *Gilbert* rules also are aimed at avoiding unfairness at trial by enhancing the reliability of the fact-finding process in the area of identification evidence."); *id.* at 302 ("[The witness] was the only person . . . who could possibly exonerate Stovall . . . . No one knew how long [the witness] might live . . . the police followed the only feasible procedure.").

[80] *Id.*

[81] *See* People v. Adams, 423 N.E.2d 379, 382 (N.Y. 1981) (finding show up identifications to be suggestive when a police officer told the witnesses that he believed the police had arrested the guilty party prior to the witnesses' identification of the defendant); *but see* Johnson v. Dugger, 817 F.2d 726, 729 (11th Cir. 1987) (finding show ups to be suggestive only when police influence an identification). *Compare* People v. Owens, 541 N.E.2d 400, 400 (N.Y. 1989) (finding defendant's unique jacket suggestive), *with* State v. Haymon, 639 S.W.2d 843, 845 (Mo. Ct. App. 1982) (finding lineup not suggestive despite defendant's unique scarred face).

[82] *See generally Stovall*, 388 U.S. 293 (remaining silent on the distinction of pretrial show up identification and in court identifications).

[83] *See* United States *ex rel.* Rutherford v. Deegan, 406 F.2d 217, 219, 220 (2d Cir. 1969) (holding evidence of single person show up identification admissible despite being procedurally suggestive because the witness testified to studying the criminal's face to positively identify him such that the totality of circumstances did not show likelihood of misidentification); Gregory v. United States, 410 F.2d 1016, 1024 (D.C. Cir. 1969) (holding both identifications to be admissible, despite a showing of suggestiveness, because a number of factors indicated reliability of the identification and the jury would have the opportunity to consider the reliability of the testimony).

[84] *But see* Smith v. Coiner, 473 F.2d 877, 881 (4th Cir. 1973) (suppressing pretrial identification evidence because the "confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification," without examining reliability); Rudd v. Florida, 477 F.2d 805, 809 (5th Cir. 1973) (excluding testimony of pretrial identifications influenced by official suggestiveness, but stating a showing of exigent circumstances or reliability may justify admission of in court identification).

States Constitution, protected against pretrial identifications influenced by suggestiveness, and may constitute grounds for the suppression of such evidence.[85]

In subsequent decisions, the Supreme Court consistently limited and eroded the federal due process rights established in *Stovall*. In *Simmons v. United States*,[86] the Court for the first time applied the *Stovall* holding.[87] An in-court identification was deemed proper, despite the fact that police showed the witness photographs of the defendant before trial.[88] The Court examined the "totality of the circumstances," considering factors such as the seriousness of the crime, the evasiveness of the perpetrators, and the low amount of additional evidence.[89] However, these factors were different from those that controlled the *Stovall* decision, the necessity of the identification, due to the concern that the only witness would not survive to make a proper identification, and the focus on reliability.[90] In *Simmons*, the Court ignored factors regarding the preservation of evidence or the witness's reliability, and focused instead on broader factors, greatly weakening due process protections from improper suggestiveness.[91]

In further erosion of *Stovall* protections, the Court in *Simmons* heightened the standard for establishing improper suggestiveness stating that "a pretrial identification . . . will be set aside on that ground only if the . . . identification procedure was so impermissibly suggestive as to give rise to a *very substantial likelihood* of irreparable misidentification."[92] The standard established in *Stovall*, a procedure "conducive" to misidentification, was rejected in favor of the heightened standard of a "very substantial likelihood" of misidentification.[93]

Despite the Court's hesitancy to exclude the pretrial identification in *Stovall* and the Court's relaxation of protection in *Simmons*, in *Foster v. California*,[94] the Supreme Court reversed a conviction on

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

[86] 390 U.S. 377 (1968).

[87] *Id*. at 384 ("This standard accords with our resolution of a similar issue in *Stovall v. Denno*.").

[88] *Id.* at 384-85.

[89] *Id.* (considering factors other than reliability or exigency determination).

[90] *Stovall*, 388 U.S. at 302 (considering exigent circumstances).

[91] *Simmons*, 390 U.S. at 384-85.

[92] *Id*. at 384 (emphasis added).

[93] *Id.*

[94] 394 U.S. 440 (1969).

due process grounds due to a pretrial identification procedure.[95] The witness could not identify the defendant at the two lineups, despite the defendant's conspicuous appearance in the lineup as the tallest individual and the only one wearing a leather jacket.[96] The witness then spoke to the defendant before identifying him at a third lineup in which he was the only individual from the previous lineup.[97] The Court spoke of the jury's role, indicating some circumstances are beyond the jury's latitude to determine credibility.[98] It stated that a pretrial identification "may be so defective as to make the identification constitutionally inadmissible as a matter of law."[99] However, factors for determining the admissibility of pretrial identifications remained unclear. In addition, although the Court remanded the case for retrial, it was silent as to whether both the pretrial and in-court identifications were inadmissible or simply the pretrial identification.[100]

Hesitancy to exclude pretrial identification evidence due to suggestiveness, and confusion among the lower courts, persisted when the Court decided *Coleman v. Alabama*.[101] In *Coleman*, the Court found that the lineup identification was suggestive yet not fatally tainted, despite the defendant being the only member of the lineup to wear a hat like the attacker.[102] The Court permitted the identification into evidence because "the [trial] court *could find* . . . [the] identifications were entirely based upon observations at the time of the assault and not at all induced by the conduct of the lineup."[103] The Court essentially downplayed the importance of pretrial identifications to a defendant's ability to assert an effective defense, eroding the *Wade* decision's characterization of pretrial identifications as a "critical stage" in trials.[104] And, unlike the defendant's jacket in *Foster*, it was held that the wearing of the hat by the defendant did not

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[95] *Id.* at 443 ("The suggestive elements in this identification procedure made it all but inevitable that [the witness] would identify petitioner whether or not he was in fact 'the man.' . . . [t]his procedure so undermined the reliability of the eyewitness identification as to violate due process.").

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

[97] *Id.*

[98] *Id.* at 447.

[99] *Foster*, 394 U.S. at 442 n.2.

[100] *Id.* at 444.

[101] 399 U.S. 1 (1970).

[102] *Id.* at 6.

[103] *Id.* at 5-6 (emphasis added).

[104] *Wade*, 388 U.S. at 236-37 ("[T]here can be little doubt that for Wade the post-indictment lineup was a *critical stage* of the prosecution.") (emphasis added).

violate his due process rights because the police were not responsible for his wearing it.[105]

In 1972, the Supreme Court began explaining the unanswered questions in *Neil v. Biggers*.[106] First, the Court, focusing on the probability of misidentification, defined the applicable test for finding improper suggestiveness in terms of the outcome of an identification procedure, instead of the identification procedure itself.[107] The Court stated that a defendant is protected against suggestiveness influencing identifications because it is the "likelihood of misidentification" that violates a defendant's due process rights.[108]

Second, having shed some light on suggestiveness, the Court explained the role of a finding of reliability by explicitly rejecting a per se exclusionary rule for tainted pretrial identification.[109] The Court held identifications arising from suggestive procedures admissible upon a finding of reliability.[110] Therefore, suppression is proper only when a pretrial identification procedure is improperly suggestive *and* the identification produced therefrom is not reliable.[111]

In further clarification, the Court enumerated five factors to be considered in evaluating the reliability of an identification:

> [T]he 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.[112]

Extending *Biggers*, the Court applied that decision in *Manson*

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[105] *See Coleman*, 399 U.S. at 6 ("[N]othing in the record shows that [defendant] was required to [wear the hat]"); *but see Foster*, 394 U.S. at 443 (taking defendant's leather jacket into consideration).

[106] 409 U.S. 188 (1972).

[107] *Id.* at 198 ("It is the likelihood of misidentification which violates a defendant's right to due process. . . . [s]uggestive confrontations are disapproved because they increase the likelihood of misidentification.").

[108] *Id.*

[109] *Id.* at 198-99.

[110] *Id.* at 201 (holding that the witness's "record for reliability was thus a good one . . . [and] [w]eighing all the factors, [the Court found] no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury").

[111] *Biggers*, 408 U.S. at 201.

[112] *Id.* at 199-200.

v. Brathwaite[113] to federal due process protections in state courts, arising from the Fourteenth Amendment.[114] Pretrial identifications made in the presence of improper suggestiveness were found to be admissible upon a reliability showing, and the five reliability factors enumerated in *Biggers* were adopted.[115]

The Court emphatically reiterated the importance of the focus on reliability: "[R]eliability is the linchpin in determining the admissibility of identification testimony."[116] However, the Court's dicta in *Brathwaite* alluded to additional factors that the court had previously considered: "[T]he second factor is deterrence . . . [as] [t]he police will guard against unnecessarily suggestive procedures . . . [and] [t]he third factor is the effect on the administration of justice."[117]

In sum, since the Supreme Court established that pretrial proceedings invoke federal due process rights and protect defendants from identifications arising from improperly suggestive proceedings, the Court has been hesitant to suppress evidence or overturn convictions on those terms.[118] Further, subsequent decisions have only eroded and limited this protection.

V. THE NEW YORK APPROACH

The New York State Constitution contains a due process clause[119] essentially identical in language to that of the United States Constitution.[120] As a result, the New York approach is quite similar

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[113] 432 U.S. 98 (1977).

[114] *Id.* at 110 ("[A] per se approach is not mandated by the Due Process Clause of the Fourteenth Amendment.").

[115] *Id*. at 114 ("The factors to be considered are set out in *Biggers*.").

[116] *Id.*

[117] *Id.* at 112. Interestingly, the court in *Chuyn* examined *Brathwaite* in determining that *Wade* hearings may only inquire as to the conduct of state actors.

[118] In fact, the Supreme Court has only reversed one conviction on these grounds. *See Foster*, 394 U.S. 440 (reversing a conviction based on testimony of a pretrial show up identification influenced by improper suggestiveness).

[119] N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law.").

[120] *See* U.S. CONST. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the

to the federal scheme of applying due process rights to pretrial identifications influenced by suggestiveness. However, because the United States Constitution and the rules arising from it dictate only minimum protections that states may not infringe upon, some state constitutions provide greater protection.[121] In *Chuyn*, the court recognized New York's broader protection and applied it.[122]

Following the Supreme Court's trilogy of decisions in 1967, New York courts began holding *Wade* hearings to determine the admissibility of improperly produced pretrial identifications.[123] In *People v. Ballot*,[124] the New York Court of Appeals, confronting its first major issue regarding pretrial identifications influenced by suggestiveness,[125] stated, "[the] pretrial identification procedure, even though not violative of the defendant's right to counsel or his privilege against self-incrimination, may be so unfair as to amount to a denial of due process of law."[126] Applying this theory, a police station identification made one year after the crime, when the defendant was alone in a room and forced to wear a hat and jacket like the perpetrator, was held to be "grossly and unnecessarily suggestive" and was excluded.[127] However, a per se exclusionary rule was not explicitly adopted.[128] Similar to the federal approach, the court in *Ballot* held in-court identifications reliably based on observations of the crime, not the identification procedure, were admissible.[129]

Assistance of Counsel for his defense.

Id.; U.S. CONST. amend. XIV § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.").

[121] *Adams*, 423 N.E.2d at 383 ("[T]he State Constitution affords additional protections above the bare minimum mandated by Federal law.").

[122] *Chuyn*, 2011 WL 6187150, at *11 ("This court is bound to apply the New York Court of Appeals' holding.").

[123] *See* People v. Brown, 229 N.E.2d 192, 194 (N.Y. 1967) (discussing *Wade*).

[124] 233 N.E.2d 103 (N.Y. 1967).

[125] *Id.* at 105 (deciding whether to suppress evidence of an identification made at a police station).

[126] *Id.* at 106.

[127] *Id.* at 107.

[128] *See generally Ballot*, 233 N.E.2d 103 (remaining silent on whether the court had adopted a per se exclusionary rule). This can also be seen by the fact that New York courts post-*Ballot* did not consistently apply a per se rule of exclusion. *See* People v. Walker, 411 N.Y.S.2d 156, 158 (Crim. Ct. 1978) (finding no per se exclusionary rule, instead, if the on-the-scene showup "confrontation is thus deemed under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, it should be admissible at trial").

[129] *Ballot*, 233 N.E.2d at 107.

In *People v. Rahming*,[130] decided in 1970, the Court of Appeals showed a greater tendency to enforce state due process rights regarding pretrial identifications than the federal approach. The court excluded both pretrial and in-court identifications when the witness identified the defendant in police photographs, leading to his arrest that day and the witness's lineup identification the following day.[131] This decision, rooted in New York State's Constitution, excluded identifications made after the witnesses had been shown photographs of the defendant even though the Supreme Court refused to suppress an identification made in the same circumstances two years earlier in *Simmons*.[132] Despite the similar facts and the same burden of proof on the prosecution, that of clear and convincing evidence, the Supreme Court's and the New York Court of Appeals' decisions were contradictory.[133]

New York's trend of providing broader protection, despite failing to expressly depart from the federal approach, was also visible in the lower courts. In *People v. Lebron*,[134] the defendant was identified by a witness at a pretrial lineup in which he was the only Hispanic, as all other line up members were Caucasian.[135] Not only did the court exclude the evidence of the lineup identification, but at an independent hearing any possible in-court identifications were also excluded for lack of independent source evidence.[136] Interestingly, the court focused its analysis only on the actual lineup procedure, not the mitigating factors such as exigent circumstances or reliability based on supporting evidence, as the federal courts had done.[137] Similarly, in *People v. Johnson*,[138] the court focused almost exclusively on the

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[130] 259 N.E.2d 727 (N.Y. 1970).

[131] *Id.* at 730-31.

[132] *Compare Simmons*, 390 U.S. at 384 (holding, only two years prior to *Rahming*, suggestive photos shown to the witness prior to identification insufficient to require exclusion), *with* People v. Wilson, 835 N.E.2d 1220, 1221 (N.Y. 2005) (holding witness viewing defendant's photo prior to the identification constituted improper suggestiveness).

[133] *Rahming*, 259 N.E.2d at 730 ("[R]equiring the prosecution to establish by 'clear and convincing evidence' that it was neither the product of, nor affected by, the improper pretrial showup.").

[134] 360 N.Y.S.2d 468 (App. Div. 1974).

[135] *Id.* at 471.

[136] *Id.* ("[I]t 'became incumbent upon the People to establish by clear and convincing evidence that the identification was based upon visual observation' by [the witness] at the time of the incident . . . we find the People failed to do [so].").

[137] *See generally* People v. Lebron, 360 N.Y.S.2d 468 (App. Div. 1974) (discussing only the lineup procedure, but ignoring evidence of reliability or exigent circumstances).

[138] 433 N.Y.S.2d 477 (App. Div. 1980).

pretrial identification procedure, rather than the identification it produced, and excluded evidence of the pretrial identification.[139] In addition, because the prosecution showed independent source evidence supporting the witness's identification, a subsequent in-court identification was allowed.[140] This decision indicated support for the adoption of a per se exclusionary rule because the court had sufficient evidence to admit the pretrial identification as reliable, as shown by the fact that the in court identification was allowed, but instead chose to exclude it.[141] As a result, the case had the same decision as if a per se exclusionary rule had governed.

In *People v. Adams*,[142] New York's trend of interpreting greater protection under the state constitution culminated by the Court of Appeals expressly departing from the federal approach, instead adopting a per se exclusionary rule for pretrial identifications influenced by improper suggestiveness.[143] Although the pretrial show-up identifications were found reliable,[144] only in-court identifications were admissible.[145] In deciding *Adams*, the court rejected the federal approach,[146] yet it echoed the Supreme Court's focus on reliability: "The rule for excluding improper pretrial identifications . . . is designed to reduce the risk that the wrong person will be convicted."[147] However, the court also acknowledged the exclusionary rule's deterrence on improper police conduct, but its significance was diminished in favor of a view focusing on the preservation of "a reliable determination of guilt or innocence," just as the Supreme Court had espoused.[148] The court further reasoned that a per se rule was not

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[139] *Id.* at 479 (holding evidence of pretrial identification must be suppressed due to the unnecessarily suggestive lineup procedure in which the defendant was the only person on the lineup wearing the same jacket as the witness's description).

[140] *Id*. ("[T]he observations of the witness . . . provided an independent basis for the in-court identification. Accordingly . . . the witness will not be precluded from identifying the perpetrator at any trial.").

[141] *Id.*

[142] 423 N.E.2d 379 (N.Y. 1981).

[143] *Id.* at 383 ("After the Supreme Court condemned the practice of police arranged showups and established minimum standards for pretrial identifications this court found that additional protections were needed under the State Constitution."); *id*. at 384 ("[A] pretrial identification would not be admissible if the procedures were unnecessarily suggestive.").

[144] *Id.* (stating the identifications were supported by evidence, and corroborated by the in-court identifications of other witnesses).

[145] *Id.*

[146] *See Brathwaite*, 432 U.S. at 114 (rejecting a per se exclusionary rule).

[147] *Adams*, 423 N.E.2d at 383.

[148] *Id.*; *Brathwaite*, 432 U.S. at 112 (considering the exclusionary rules deterrence on im-

a change in law but merely the formal establishment of an already developed law,[149] and that this was fairest because the prosecution could still present in-court identifications when reliable[150] and presentation of both identifications could lead the jury to incorrectly attribute credibility as each identification would bolster credibility of the other.[151]

Thus, the court in *Adams* created a drastic change from the federal approach by providing greater due process protection, and in doing so it formed the modern New York State approach. Now, in New York courts, defendants are protected from pretrial identifications produced from a police directed identification procedure, influenced by improper suggestiveness, regardless of reliability.[152]

VI. THE SUPERIORITY OF NEW YORK'S BROADER PROTECTION

In granting the defendant's motion, the court in *Chuyn* in large part applied both federal and state law.[153] Due to the large degree of similarity between the laws, most issues did not require distinguishing the applicable law for resolution.[154] However, the court relied on New York law at times because of the one significant distinction between the approaches. New York has a per se rule of exclusion, but the Supreme Court of the United States has rejected a per

proper police conduct, but focusing on reliability).

[149] *See Ballot*, 233 N.E.2d at 106 (applying a per se exclusionary rule without expressly adopting it).

[150] *Adams*, 423 N.E.2d at 384 ("Excluding evidence of a suggestive show-up does not deprive the prosecutor of reliable evidence of guilt. The witness would still be permitted to identify the defendant in-court if that identification is based on an independent source.").

[151] *Id.* ("[I]f 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.").

[152] *See* People v. Sapp, 469 N.Y.S.2d 803, 804 (App. Div. 1983) (applying the per se exclusionary rule to exclude evidence of a pretrial identification, despite the prosecution's showing of reliability); *see also* People v. Tatum, 492 N.Y.S.2d 999, 1009 (Sup. Ct. 1985) (allowing an in court identification but suppressing evidence of a pretrial identification influenced by improper suggestiveness regardless of a finding of reliability due to per se exclusionary rule); 33 N.Y. Jur. 2d Criminal Law: Procedure § 2070 (2012) ("[E]vidence of a pretrial identification is per se inadmissible if the procedures were unnecessarily suggestive.").

[153] *See generally Chuyn*, 2011 WL 6187150, at *18.

[154] *See, e.g.*, *id.* at *8 ("[T]he purpose of inquiry at a *Wade* hearing under federal and New York state constitutional law is to limit the conduct of the state."); *id.* at *11 (stating that "because defendant's contention that *Wade* suppression review should entail consideration of procedures which are entirely devoid of governmental action does not reflect current federal or New York State constitutional law, it is rejected").

se rule of exclusion.[155] Although the New York and federal approaches are similar and based on constitutions containing nearly identical language, the New York approach affords defendants greater due process protection with respect to pretrial identifications.[156]

Upon evaluation of applicable New York case law, it appears, the New York approach, as applied, is superior to the federal approach. This is because it better achieves the policy considerations both approaches have been structured upon: the reliability of the identification, the deterrence of improper police conduct, and the administration of justice.[157] In other words, the various policy considerations essentially amount to an interest in providing a fair trial and deterring police misconduct; New York's approach does both more effectively than the federal approach.[158]

First, both approaches are concerned with the reliability of identifications because misidentification increases the chance of an improper conviction. [159] Inherently in the difference in the rules, it can be seen that the federal rejection of a per se exclusionary rule risks a larger category of cases that may admit unreliable identification evidence in federal courts: all cases in which identifications are

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[155] *See Brathwaite*, 432 U.S. at 112 (rejecting per se exclusion rule); *but see Adams*, 423 N.E.2d at 384 (adopting per se exclusionary rule).

[156] *See Brathwaite*, 432 U.S. at 112; *but see Adams*, 423 N.E.2d at 384.

[157] *Biggers*, 409 U.S. at 199-201 (discussing the importance of reliable testimony, and the exclusionary rules deterrent effect on improper police conduct); *Brathwaite*, 432 U.S. at 112, 114 (stating expressly that the first policy consideration is the preservation of reliable evidence, the second consideration is the deterrent effect on police conduct, and the third factor is the exclusionary rules effect on the administration of justice); *Adams*, 423 N.E.2d at 382-84 (discussing the reasoning for adopting a per se exclusionary rule is based on the interest of preserving reliable testimony, and the rule's inconsequential effect on the administration of justice).

[158] *Brathwaite*, 432 U.S. at 114 ("The standard, after all, is that of fairness as required by the Due Process of the Fourteenth Amendment."); *Wade*, 388 U.S. at 228 (emphasizing the fact that exclusionary rules are intended to preserve reliable evidence for the purpose of providing a fair trial); *Stovall*, 388 U.S. at 298 ("[T]he *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence."); David E. Paseltiner, *Note: Twenty-Years Of Diminishing Protection: A Proposal To Return To The Wade Trilogy's Standards*, 15 HOFSTRA L. REV. 583, 607 (1987) ("[A] standard similar to the one used in New York [meets] the goals of the *Wade* trilogy, namely sanctions on police misconduct and a fair trial for defendants.").

[159] *See Biggers*, 409 U.S. at 198 ("[The] likelihood of misidentification . . . violates a defendant's right to due process . . . suggestive confrontations are disapproved because they increase the likelihood of misidentification."); *see also Brathwaite*, 432 U.S. at 114 ("[R]eliability is the linchpin in determining the admissibility of identification testimony."); *see also Adams*, 423 N.E.2d at 383 ("[T]he rule excluding improper pretrial identifications . . . is designed to reduce the risk that the wrong person will be convicted.").

found to be improperly influenced but also *incorrectly* reliable. New York's only risk is that an identification will not be found to have been improperly influenced in error. In fact, empirical evidence shows that despite mounting criticism, the federal courts continue to admit almost all pretrial and in court identifications even if improper suggestiveness is found.[160]

Further, the federal test for establishing the reliability of an identification is subjective in nature, which may result in inconsistent holdings among cases with similar facts.[161] Whereas New York's bright line per se exclusionary rule lessens the subjectivity, only requiring a subjective finding of suggestiveness, not reliability as well, it thus provides greater consistency. In addition, such subjectivity may result in a judge, who has already been privy to evidence of the defendant's guilt, admitting evidence based on his or her own assumption of the defendant's guilt.[162]

Second, the Supreme Court's rejection of a per se exclusionary rule weakens due process deterrence of improper state action because the police know influenced identifications may still be admitted at trial, not necessarily excluded.[163] In fact, it appears that police de-

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[160] Nicholas A. Kahn-Fogel, *Manson and Its Progeny: An Empirical Analysis of American Eyewitness Law*, 3 ALA. C.R. & C.L.L. REV. 175, 224-25 (2012) ("The data from the 1,471 federal cases thus show that Manson has been an inadequate mechanism for protecting against the admission of unreliable eyewitness evidence . . . . [The current rule] is an inadequate tool for protecting against the admission of tainted procedures and unreliable evidence.").

[161] In addition to issues of subjectivity, the reliability test has been criticized because the five factors set out in *Biggers* are devoid of any scientific basis, and in fact, have been disproved as effective means of evaluating reliability in certain studies. *See* Kahn-Fogel, *supra* note 160, at 176 (explaining study which found reliability factors inconsistent with actual reliability)*; see also* Rosenberg, *supra* note 77, at 276 ("Psychological studies demonstrate that each of the factors identified by the Court, and subsequently applied by the inferior federal and state courts, is either unsupported as a scientific matter or dangerously incomplete."); *see also* Jessica Lee, Note: *No Exigency, No Consent: Protecting Innocent Suspects From The Consequences of Non-Exigent Show-Ups*, 36 COLUM. HUM. RTS. L. REV. 755, 769-70 (2005) (discussing a study, which showed many admitted identifications were actually incorrect).

[162] Lee, *supra* note 161, at 789 ("Thus, if the judge, performing the role of the jury before either side has appropriately presented its case, determines that a defendant is probably guilty anyway, the testimony is likely to be admitted."); *Brathwaite*, 432 U.S. at 118 (Stevens, J., concurring) ("[I]n evaluating the admissibility of particular identification testimony it is sometimes difficult to put other evidence of guilt entirely to one side.").

[163] *See Brathwaite*, 432 U.S. at 125 (Marshall, J., dissenting) (expressing concern that police would not be deterred unless a per se exclusionary rule was adopted); *see also* Lee, *supra* note 161, at 796 (arguing for courts to take affirmative steps to put the police on notice of possible evidence exclusion to encourage proper conduct); *see also* Evan J. Mandery, *Legal Development: Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV.

partments across the nation still utilize show up identifications, instead of more reliable procedures, such as lineups.[164] In contrast, New York's harsh penalty of absolute exclusion increases the deterrent effect because the police are on notice that they must make all possible steps to direct a neutral identification, and that failure to do so may result in lost evidence or, ultimately, a lost conviction.[165] This additional notice, in turn, increases the reliability of identifications because police will monitor identifications more closely, thus lending additional support to the reliability policy as well.[166] The more the reliable the evidence used, the fairer a trial will be.

Third, consideration of the administration of justice is also better served by New York's approach. This is because it consistently limits the admissibility of pretrial show up identifications to situations where the identification provides greater probative value than prejudicial effect. Unlike the federal approach, New York's approach preserves the jury's ability to accurately assess a testimony's credibility because jurors will not consider both identifications, in court and pretrial, which support each other despite arising from a single observation, thus it does not prejudice the defendant.[167]

In addition, it does not prejudice the prosecution because even if evidence from a pretrial identification is excluded, the prosecution may present an in-court identification upon a showing that the identi-

389, 421 (1996) (arguing rejection of a per se exclusionary rule for in-court identification provides *no* deterrence) (emphasis added); *see also* Paseltiner, *supra* note 158, at 606 ("As a deterrent to suggestive police practices, the federal standard is quite weak.").

[164] Lee, *supra* note 161, at 768 ("The method [show up identification] is still routinely used in the field and in the stationhouse.").

[165] *See Adams*, 423 N.E.2d at 383 (stating per se exclusionary has greater weight as deterrent); *see also Sapp*, 469 N.Y.S.2d at 804 (suppressing pretrial identification evidence based solely on police misconduct); *Tatum*, 492 N.Y.S.2d at 1009 (allowing an in court identification because independent source evidence supported identification, but suppressing evidence of a pretrial identification due to police misconduct); *see also* Paseltiner, *supra* note 158, at 606 ("In New York, however, a state which has expressly declined to follow *Brathwaite*, court decisions have put greater pressure on the police.").

[166] Lee, *supra* note 161, at 796.

[167] *Adams*, 423 N.E.2d at 384 ("[I]f 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."); *id.* (noting concern over a jury's ability to determine credibility when one identification may be used to support the other identification); *Brathwaite*, 432 U.S. at 127 (Marshall, J., dissenting) ("The evidence of an additional, properly conducted confrontation will be more persuasive to a jury, thereby increasing the chance of a justified conviction where a reliable identification was tainted by a suggestive confrontation.").

fication is reliable.[168] As such, the court examines all evidence and only that evidence found unreliable is excluded; that is no more prejudicial than the exclusion of any other tainted evidence, which is an essential element to a fair trial.[169] Therefore, in comparison, the federal approach may prejudice the defendant when either an unreliable identification is mistakenly admitted or the jury incorrectly assesses credibility due to the mutual support in court and pretrial identifications offer each other. But, under the New York approach, neither the prosecution nor the defendant is prejudiced.

VII. CONCLUSION

In New York, unlike the federal system, testimony of pretrial identifications produced from an improperly suggestive procedure is per se inadmissible.[170] This rule more strongly encourages proper police conduct because the greater penalty for improper conduct acts as a stronger incentive to act appropriately.[171] Additionally, New York's per se rule decreases prejudice to the defendant, as fewer unreliable identifications will be used, thus decreasing improper convictions.[172] And when the identification is reliable, the prosecution will still be afforded the right to present an in-court identification.[173] In contrast, under the federal approach the admission of improperly tainted identifications might occur, prejudicing the defendant.[174] Defendants can only present evidence to the jury of the purported suggestiveness while the prosecution has the benefit of the identifica-

[168] *Adams*, 423 N.E.2d at 384 ("Excluding evidence of a suggestive showup does not deprive the prosecutor of reliable evidence of guilt. The witness would still be permitted to identify the defendant in court if that identification is based on an independent source.").

[169] *Brathwaite*, 432 U.S. at 127 (Marshall, J., dissenting) (stating concern over reliable evidence should not dictate whether a per se rule exclusionary rule is adopted or not because other types of evidence are similarly excluded on a regular basis).

[170] *See Brathwaite*, 432 U.S. at 112 (majority opinion) (rejecting per se exclusion rule); *but see Adams*, 423 N.E.2d at 384 (adopting per se exclusionary rule).

[171] Paseltiner, *supra* note 158, at 606 ("As a deterrent to suggestive police practices, the federal standard is quite weak . . . . In New York, however, a state which has expressly declined to follow *Brathwaite*, court decisions have put greater pressure on the police.").

[172] *Adams*, 423 N.E.2d at 383-84 (discussing per se rules advantages in decreasing improper convictions); Lee, *supra* note 161, at 799 ("Mistaken identifications punish the innocent, leave the guilty free, and the system's mandate unfulfilled.").

[173] *Adams*, 423 N.E.2d at 384 (stating the prosecution may present in court identifications found to be reliable).

[174] *Id.*

tions supporting the other.[175] Therefore, New York's superior preservation of reliable evidence, deterrence of police misconduct, and administration of justice have resulted in a rule that encourages fairer trials and proper police conduct.

In conclusion, the court in *Chuyn* accurately and correctly applied New York law in granting defendant's motion to reopen a previously held *Wade* hearing. Further, examining the New York approach utilized by the court in *Chuyn*, and comparing it to the federal approach, clearly shows broader protection and superior consideration of the controlling policies.

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[175] *Id.*

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