



**TOURO UNIVERSITY**  
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**Touro Law Review**

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Volume 14 | Number 3

Article 14

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1998

## Confrontation Clause, Court of Appeals: People v. Ortiz

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### Recommended Citation

(1998) "Confrontation Clause, Court of Appeals: People v. Ortiz," *Touro Law Review*: Vol. 14: No. 3, Article 14.

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et al.: Confrontation Clause  
**CONFRONTATION CLAUSE**

*U.S. CONST. amend. VI:*

*In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .*

*N.Y. CONST. art. I, § 6:*

*In any trial in any court whatever the party accused shall be allowed to . . . be confronted with the witnesses against him. . . .*

## **COURT OF APPEALS**

People v. Ortiz<sup>1</sup>  
(decided October 21, 1997)

Enrique Ortiz was convicted of attempted murder and illegal weapons possession, after shooting at two New York City police officers.<sup>2</sup> After they were treated at a hospital, the two officers were taken back to the scene, and identified defendant as the assailant.<sup>3</sup> The trial court refused to suppress the identification of the defendant, because the “showup” was “proximate in time and space to the crime and the Appellate Division affirmed.”<sup>4</sup> The Court of Appeals reversed, holding that the People failed to meet their burden of proving that the showup was not unduly suggestive.<sup>5</sup>

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<sup>1</sup> 90 N.Y.2d 533, 686 N.E.2d 1337, 664 N.Y.S.2d 243 (1997).

<sup>2</sup> *Id.* at 534-35, 686 N.E.2d at 1338, 664 N.Y.S.2d at 244.

<sup>3</sup> *Id.* at 535, 686 N.E.2d at 1338, 664 N.Y.S.2d at 244.

<sup>4</sup> *Id.* at 536, 686 N.E.2d at 1339, 664 N.Y.S.2d at 245.

<sup>5</sup> *Id.* at 535, 686 N.E.2d at 1338, 664 N.Y.S.2d at 244. The Court of Appeals held that the prosecution “failed in their threshold responsibility to call any witness who could testify to the circumstances under which defendant was actually identified.” *Id.* at 538, 686 N.E.2d at 1340, 664 N.Y.S.2d at 246. See U.S. CONST. amend. VI. This amendment provides the accused with the right “[i]n all criminal prosecutions . . . to be confronted with the witnesses against him.” *Id.* See also N.Y. CONST. art. I, § 6. This provision permits the accused in “any trial in any court whatever . . . to be confronted with the witnesses against him.” *Id.*

On March 22, 1993, Officer Colon and Officer Sullivan were responding to a radio dispatch to give assistance to an ambulance, when they heard gunshots.<sup>6</sup> They saw a man outside an apartment building, who shot at them when they approached him, and they shot back.<sup>7</sup> After ten seconds of shooting, the man fled.<sup>8</sup>

Soon after this confrontation, Officers Reardon and Almodovar arrived on the scene, and the four policemen searched for the assailant together.<sup>9</sup> Officer Sullivan held one suspect while the other three officers entered the building, observing several male teenagers in the lobby.<sup>10</sup> Officer Almodovar told Officer Reardon he saw "one of the people from the lobby" come from "an apartment down the hall," so Reardon knocked on the door.<sup>11</sup> He questioned the woman who answered regarding any disturbances in the building, and then saw a man run across the apartment to another room.<sup>12</sup> Both officers entered, and discovered the defendant lying on his bed, sweating and breathing hard.<sup>13</sup> They took him out to the lobby and placed him with two other identified male teenagers.<sup>14</sup>

Defendant was handcuffed, and waited with other uniformed officers until Colon and Sullivan were brought back for identification.<sup>15</sup> Reardon did not observe the eventual showup identification by Colon and Sullivan, since he exited the building just as Colon and Sullivan were returning.<sup>16</sup>

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<sup>6</sup> *Ortiz*, 90 N.Y.2d at 535, 686 N.E.2d at 1338, 664 N.Y.S.2d at 244.

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

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* This information came from Officer Reardon, who was the only witness called by the People to testify at the suppression hearing. *Id.*

<sup>10</sup> *Id.* at 535-36, 686 N.E.2d at 1338, 664 N.Y.S.2d at 244.

<sup>11</sup> *Id.* at 536, 686 N.E.2d at 1338, 664 N.Y.S.2d at 244.

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

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

<sup>14</sup> *Id.* Reardon then went back inside the apartment and found a handgun "on the ground outside the window of the room" that defendant had run from. *Id.*

<sup>15</sup> *Id.* The two officers had since been taken to the hospital. *Id.*

<sup>16</sup> *Id.* at 536, 686 N.E.2d at 1338-39, 664 N.Y.S.2d 244-45.

Despite the presence of other witnesses at the identification, none of them testified at the hearing.<sup>17</sup> At the close of this hearing, defendant moved to suppress the on-scene identification, first, because the People did not fulfill “their initial burden of proving that the showup was proper,” and secondly, because there were no witnesses testifying who had actually seen Colon and Sullivan identify defendant.<sup>18</sup> The court denied defendant’s motion, holding that since the showup “was proximate in time and place to the crime,” it was permissible.<sup>19</sup>

The Court of Appeals first rejected the argument that defendant did not preserve his objection.<sup>20</sup> Defendant objected to the prosecution’s failure to meet their burden of proof, and to the absence of proof from any eyewitness to the identification.<sup>21</sup> For the Court of Appeals, this objection was sufficient to bring the issue to the attention of the trial court, and to preserve it for review.<sup>22</sup>

After overcoming that preliminary holding, the Court of Appeals, relying on *People v. Rivera*,<sup>23</sup> explained that showup identifications have not been readily accepted because of their

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<sup>17</sup> *Id.* at 535, 686 N.E.2d at 1338, 664 N.Y.S.2d at 244. Only Officer Reardon testified at the suppression hearing. *Id.* See *supra* note 9.

<sup>18</sup> *Ortiz*, 90 N.Y.2d at 536, 686 N.E.2d at 1339, 644 N.Y.S.2d at 245. The showup is considered proper if the prosecution can prove that the identification was not conducted in an unduly suggestive manner. *Id.* at 537, 686 N.E.2d at 1339, 664 N.Y.S.2d at 245.

<sup>19</sup> *Id.* The Appellate Division, First Department, affirmed the trial court, for the same reasoning stated above. *Id.* at 535, 686 N.E.2d 1338, 644 N.Y.S.2d 244. See *People v. Ortiz*, 232 A.D.2d 180, 648 N.Y.S.2d 75 (1st Dep’t 1996).

<sup>20</sup> *Ortiz*, 90 N.Y.2d at 536, 686 N.E.2d at 1339, 664 N.Y.S.2d at 245.

<sup>21</sup> *Id.* at 537, 686 N.E.2d at 1339, 664 N.Y.S.2d at 245.

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

<sup>23</sup> 22 N.Y.2d 453, 239 N.E.2d 873, 293 N.Y.S.2d 271 (1968). In *Rivera*, two witnesses identified defendant. *Id.* at 454, 239 N.E.2d at 873, 293 N.Y.S.2d at 271. They both identified him when he was brought to the hospital, where one witness had been shot and was undergoing treatment. *Id.* at 454-55, 239 N.E.2d at 873-74, 293 N.Y.S.2d at 272. A 4-3 majority affirmed *Rivera*’s conviction, holding that it was reasonable for the police to take defendant to the hospital to be identified. *Id.* at 455, 239 N.E.2d at 874, 293 N.Y.S.2d at 272.

suggestive nature.<sup>24</sup> However, citing to *People v. Duuvon*,<sup>25</sup> the Court of Appeals recognized that some identifications at the scene of the crime are not “presumptively infirm.”<sup>26</sup> While *Duuvon* stood for the premise that showup identifications close in time and space to the actual crime may be admissible, if found to be reliable and not suggestive,<sup>27</sup> *People v. Adams*<sup>28</sup> established that when no effort is made to provide for “a reliable identification,” and the procedure used gives off the aura of suggestibility, the showup will be suppressed.<sup>29</sup>

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<sup>24</sup> *Id.* at 455, 239 N.E.2d at 874, 293 N.Y.S.2d at 272 (Fuld, C.J., dissenting) (arguing that presenting the defendant to the “two witnesses in a hospital is precisely the sort of ‘grossly and unnecessarily suggestive’ identification technique which this court has condemned.”). The majority held that the witnesses had “ample opportunity to observe defendant during commission of the crime,” and that since police were not sure the wounded witness would recover, there was no time for a line-up. *Id.* Additionally, the *Rivera* majority held that there was no “uncertainty and lack of . . . opportunity to see and remember, as to render the hospital identification . . . suggestive.” *Id.* However, the dissent argued that the three minutes in which the witnesses claimed to see the defendant at the scene of the crime was not enough to warrant that their testimony was not tainted by the misleading circumstances of the hospital showup. *Id.* at 456, 239 N.E.2d at 874, 293 N.Y.S.2d at 273 (Fuld, C.J., dissenting). Unlike *Ortiz*, the same witnesses who saw defendant during the act in question, and at the hospital identification, testified at trial. *Rivera*, 22 N.Y.2d at 454, 239 N.E.2d at 873, 293 N.Y.S.2d at 271.

<sup>25</sup> 77 N.Y.2d 541, 571 N.E.2d 654, 569 N.Y.S.2d 346 (1991).

<sup>26</sup> *Id.* at 543, 571 N.E.2d at 655, 569 N.Y.S.2d at 347 (holding that searches must be “scrutinized very carefully for unacceptable suggestiveness and unreliability,” but the “apprehension of the perpetrator very near the crime scene, coupled with the temporal proximity to the commission of the crime, withstands this scrutiny.”). *Duuvon* involved another robbery attempt, where the owner of a dry cleaner identified defendant as he was being placed under arrest minutes after the robbery. *Id.* at 543, 571 N.E.2d at 655-56, 569 N.Y.S.2d at 347-48. After his arrest, the police brought defendant back to the dry cleaners, where a witness/employee identified him. *Id.* at 543, 571 N.E.2d at 656, 569 N.Y.S.2d at 348.

<sup>27</sup> *Id.* at 543, 571 N.E.2d at 655, 569 N.Y.S.2d at 347.

<sup>28</sup> 53 N.Y.2d 241, 423 N.E.2d 379, 440 N.Y.S.2d 902 (1981)

<sup>29</sup> *Id.* at 249, 423 N.E.2d at 382-83, 440 N.Y.S.2d at 905. In yet another robbery case, the eyewitnesses identified defendants at the police station approximately 2-2½ hours after the robbery occurred, rather than soon after

Next, the *Ortiz* court discussed the burdens that the parties must bear in determining the admissibility of a showup identification.<sup>30</sup> It cited to *People v. Chipp*<sup>31</sup> for the rule that while defendant has the burden of proving undue suggestiveness, the People have the initial burden of validating the admission of the showup.<sup>32</sup> Usually, evidence that the showup was conducted in proximate time and space to the crime will satisfy this initial burden under

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the occurrence. *Id.* at 245-46, 423 N.E.2d at 380-81, 440 N.Y.S.2d 903-04. The prosecution argued that the witness' ability to make in-court identifications should also allow proof of the suggestive showup they participated in. *Id.* at 249, 423 N.E.2d 383, 440 N.Y.S.2d 905. They cited to a Supreme Court case, *Manson v. Braithwaite*, 432 U.S. 98 (1980), which held that there was no federal due process right to exclude evidence of a suggestive pre-trial search, but the Court of Appeals held that it could use the New York State Constitution to provide additional due process protections. *Id.* at 249-50, 423 N.E.2d at 383, 440 N.Y.S.2d at 905-06. The *Adams* court also held that the exclusionary rule against suggestive showups was different from the exclusionary rule governing confessions and Fourth Amendment violations, because those two rules interfere with the fact-finding process, while the showup rule "bears directly on guilt or innocence." *Id.* at 250-51, 423 N.E.2d at 383, 440 N.Y.S.2d at 906. Nevertheless, this identification was deemed to be harmless error, because in-court identification was still allowed, and the five other pretrial viewing that were correctly performed could still be admissible. *Id.* at 251, 423 N.E.2d at 384, 440 N.Y.S.2d at 907.

<sup>30</sup> *People v. Ortiz*, 90 N.Y.2d 533, 537, 686 N.E.2d 1337, 1339, 664 N.Y.S.2d 243, 245 (1997).

<sup>31</sup> 75 N.Y.2d 327, 552 N.E.2d 608, 553 N.Y.S.2d 72 (1990).

<sup>32</sup> *Ortiz*, 90 N.Y.2d at 537, 696 N.E.2d at 1339, 664 N.Y.S.2d at 245 (citing *Chipp*, 75 N.Y.2d at 335, 552 N.E.2d at 613, 553 N.Y.S.2d at 77). However, the *Chipp* court's rule was stated differently than how the *Ortiz* court applied it:

While the People have the initial burden of going forward to establish the reasonableness of the police conduct, and the lack of any undue suggestiveness in a pretrial identification procedure, it is the defendant who bears the ultimate burden of proving that the procedure was unduly suggestive. Where suggestiveness is shown, it is the People's burden to demonstrate the existence of an independent source by clear and convincing evidence. Absent some showing of impermissible suggestion, however, there is no burden upon the People . . . .

*Id.*

*Duuvon*.<sup>33</sup> However, the People still must produce evidence that their identification was *not* unduly suggestive.<sup>34</sup>

The *Ortiz* court supported their holding with criminal procedure statutes.<sup>35</sup> Section 710.60 of the Criminal Procedure Law normally requires a defendant to support the ground alleged with specific facts, but the defendant is exempt from that burden here, because he would not know the facts surrounding the identification procedure.<sup>36</sup> This is partly due to the fact that the

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<sup>33</sup> *Ortiz*, 90 N.Y.2d at 537, 686 N.E.2d at 1339, 664 N.Y.S.2d at 245. See *supra* notes 25-27 and accompanying text.

<sup>34</sup> *Ortiz*, 90 N.Y.2d at 537, 686 N.E.2d at 1339, 664 N.Y.S.2d at 245. See *supra* note 32.

<sup>35</sup> *Ortiz*, 90 N.Y.2d at 537-38, 686 N.E.2d at 1339, 664 N.Y.S.2d at 245 (citing N.Y. CRIM. PROC. LAW § 710.60(3)(b) (McKinney 1986)). Criminal Procedure Law § 710.60(3)(b) provides:

The court may summarily deny the motion (to suppress evidence) if . . . [t]he sworn allegations of fact do not as a matter of law support the ground alleged; except that this paragraph does not apply where the motion is based upon the ground specified in subdivision . . . six of section 710.20.

*Id.* See N.Y. CRIM. PROC. LAW § 710.20(6) (McKinney 1992). Section 710.20(6) states:

Upon motion of a defendant who . . . claims that improper identification testimony may be offered against him in a criminal action, a court may . . . order such evidence be suppressed or excluded upon the ground that it . . . [c]onsists of potential testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, which potential testimony would not be admissible upon the prospective trial of such charge owing to an improperly made previous identification of the defendant by the prospective witness.

*Id.*

<sup>36</sup> *Ortiz*, 90 N.Y.2d 538, 686 N.E.2d at 1339, 664 N.Y.S.2d at 245 (citing *People v. Dixon*, 85 N.Y.2d 218, 647 N.E.2d 1321, 623 N.Y.S.2d 813, 815 (1995)). The *Dixon* court held that:

Alleging facts to support a motion to suppress testimony concerning an out-of-court identification is a burden that a defendant no longer carries on a motion for a *Wade* hearing (see CPL 710.60(3)(b) (1995)). As this Court has previously explained, the 1986 amendments to CPL 710.60(3)(b)

defendant is dependent upon the People's evidence of suggestiveness,<sup>37</sup> since a defendant "does not have an absolute right of compulsory process at such hearings."<sup>38</sup> Therefore, if the prosecution did not have the burden of presenting such evidence, criminal defendants would be unfairly prejudiced in establishing that an identification was unduly suggestive.<sup>39</sup>

The Court of Appeals concluded that although the People met its initial burden, and proved that the showup was "reasonable under the circumstances,"<sup>40</sup> they called no witnesses that could testify as to the circumstances of the actual identification proceeding.<sup>41</sup> From the scant testimony that was presented, there was no evidence that the identification procedure was conducted properly or improperly.<sup>42</sup> Although this burden is minimal, the People failed to meet it, and thereby failed to produce evidence of suggestiveness of an on-site identification.<sup>43</sup>

Both the federal and state constitutions have a confrontation clause, requiring that a criminal defendant tried in any court must be allowed the opportunity to "confront[] . . . the witnesses against him."<sup>44</sup> In order for a witness to be competent to testify,

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relieved a defendant of the obligation to plead facts concerning a "previous identification of the defendant by the prospective witness" (CPL 710.20(6)), likely for the reason that in many instances a defendant simply does not know the facts surrounding a pretrial identification procedure and thus cannot make specific factual allegations.

*Dixon*, 85 N.Y.2d at 222, 647 N.E.2d at 1323, 623 N.Y.S.2d at 815.

<sup>37</sup> *Ortiz*, 90 N.Y.2d at 538, 686 N.E.2d at 1339-40, 664 N.Y.S.2d at 245-46.

<sup>38</sup> *Id.* at 538, 686 N.E.2d at 1340, 664 N.Y.S.2d at 246. There is no due process requirement for an identification hearing to be conducted ex parte, because any inconsistencies in pretrial identifications can be exposed in cross-examination and enunciated upon in summation. *People v. Chipp*, 75 N.Y.2d 327, 338-39, 552 N.E.2d 608, 615, 553 N.Y.S.2d 72, 79 (1990).

<sup>39</sup> *Ortiz*, 90 N.Y.2d at 538, 686 N.E.2d at 1340, 664 N.Y.S.2d at 246.

<sup>40</sup> *Id.*

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

<sup>42</sup> *Ortiz*, 90 N.Y.2d at 538, 686 N.E.2d at 1340, 664 N.Y.S.2d at 246.

<sup>43</sup> *Id.*

<sup>44</sup> See U.S. CONST. amend. VI; N.Y. CONST. art. I, § 6.

he or she must possess “personal knowledge.”<sup>45</sup> While the Supreme Court has refused to establish a “brightline rule” to exclude identifications where the People cannot bring forth sufficient evidence that the showup was not unduly suggestive, the Court of Appeals has found one under the New York State Constitution.<sup>46</sup> New York State requires the People to provide witnesses with personal knowledge to testify as to the procedure of the identification, to establish a lack of suggestiveness, and completely relieves the defendant of most of his burden to prove suggestiveness.<sup>47</sup> In so holding, the Court of Appeals allows defendants to be “confronted with the witnesses against him”<sup>48</sup> by rejecting testimony from those who do not possess personal knowledge, thus upholding the Confrontation Clause of the New York State Constitution.<sup>49</sup>

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<sup>45</sup> See FED. R. EVID. 602 (requiring witnesses to possess personal knowledge before they can testify under oath).

<sup>46</sup> See *supra* note 29 and accompanying text.

<sup>47</sup> See *supra* note 32 and accompanying text.

<sup>48</sup> N.Y. CONST. art. I, § 6.

<sup>49</sup> *People v. Adams*, 53 N.Y.2d 241, 249-50, 423 N.E.2d 379, 383, 440 N.Y.S.2d 902, 905-06 (1981). See *supra* note 29 and accompanying text.