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Evidentiary Use of Photographic Identification: Is It Time for New York to Reevaluate Its Singular Exception?

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EVIDENTIARY USE OF PHOTOGRAPHIC IDENTIFICATION: IS IT TIME FOR NEW YORK TO REEVALUATE ITS SINGULAR EXCEPTION?

SUPREME COURT OF NEW YORK BRONX COUNTY

People v. Stanislous[1]
(decided June 24, 2013)

I. INTRODUCTION

In *People v. Stanislous*, evidence of photographic identifications made by two witnesses prior to trial was held admissible as evidence.[2] The People were permitted to introduce both the testimony of the identifying witnesses and the photos themselves.[3] In granting the People's motion, the court recognized "the issue of the admissibility of evidence of photographic identifications involves an evolving area of law"[4] and found the concerns which ordinarily bar the admission of such evidence were not present in the case before them.[5] The photographs, which were sought for admission at trial, were not unduly suggestive[6] or prejudicial to the defendant, nor were the photographs of poor or uneven quality.[7] Moreover, the court ruled in fa-

[1] 967 N.Y.S.2d 911 (Sup. Ct. 2013).
[2] *Id.* at 912.
[3] *Id.*
[4] *Id.* at 913.
[5] *Id.* at 915.
[6] *See* People v. Dunlap, 780 N.Y.S.2d 171, 172 (App. Div. 2d Dep't 2004) (stating the court must consider whether there was any substantial likelihood the defendant would be singled out for identification in determining whether a photo array is unduly suggestive); *see generally* 31 CARMODY-WAIT 2D §§174:49-174:63; People v. Cooper, 697 N.Y.S.2d 820, 822 (Crim. Ct. 1999) (listing particular factors affecting the suggestiveness of photographic arrays, including "[t]he risk of suggestiveness in police-arranged identification procedures is the potential in a particular procedure for the police to influence the witness in selecting the defendant.").
[7] *Stanislous*, 967 N.Y.S.2d at 915.

vor of admissibility, finding that, given the five year lapse of time since the murder, the exclusion of the pre-trial photographic identification would restrict the prosecution's ability to address the witnesses' ability to identify the defendant in court.[8] The Bronx County Supreme Court's ruling displays a relaxation to the exclusion of pre-trial photographic evidence at trial. The court's holding in *Stanislous* appears to be consistent with evolving case law in New York regarding the admissibility of photographic identification, despite New York's traditional bar of such evidence at trial.[9]

II. FACTUAL BACKGROUND

Stanislous involved the fatal shooting of Richard Tongue on July 26, 2008.[10] At the *Wade* hearing,[11] the assigned detective, Detective Rodriquez, testified to the following accounts of his investigation.[12] Cornelius Barnes, a witness to the shooting, met with Detective Rodriquez and stated "he had observed an individual he knew as 'XL' shoot Tongue."[13] About a month after the shooting, during a subsequent interview with Detective Rodriquez, Barnes accessed, downloaded, and printed a photograph[14] of the defendant, which he identified as the individual he observed shoot the victim.[15]

A few days later, Detective Rodriquez interviewed Glorious

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[8] *Id.* (noting that "[d]uring jury selection, one juror raised the issue of how she could properly evaluate a witness's identification testimony given the passage of so much time.").

[9] *Id.*

[10] *Id.* at 912.

[11] *See* 32A N.Y. JUR. 2D *Criminal Law Procedure* § 1624:

> A Wade hearing is a particular type of suppression hearing, the purpose of which is to test identification testimony for taint arising from official suggestion during police-arranged confrontations between a defendant and an eyewitness. When the People serve statutory notice on a defendant that they intend to introduce out-of-court identification testimony at trial, the defendant may choose to respond with a motion to suppress that testimony and, so long as the motion alleges undue suggestiveness, the defendant is generally entitled to a Wade hearing.

Id.; *see also* N.Y. CRIM PROC § 710.30 (Mckinney 1970) (setting forth the procedure and notice required by the People to the defendant when the People intend to introduce such evidence at trial).

[12] *Stanislous*, 967 N.Y.S.2d at 912.

[13] *Id.*

[14] *See id.* (noting the photograph depicted defendant wearing a t-shirt and jeans, with a backpack strapped over both of his shoulders, and the letters "XL" in purple on the bottom of the photograph).

[15] *Id.*

Landrum, an inmate at Rikers Island, who alleged to have seen the person he believed was the shooter.[16] Landrum told Detective Rodriquez that he recognized the individual from Truman High School, where he and the alleged shooter both attended.[17] Detective Rodriguez then showed Landrum the twenty-eight page Truman High School year book.[18] The detective slowly turned the pages until he reached page forty-nine, at which time Landrum identified the defendant as the individual that he saw run past him with a gun in-hand shortly after hearing shots fired on the night of the murder.[19]

A few days after the interview with Landrum, Detective Rodriguez again interviewed Barnes and presented to him "a photo array consisting of [the] defendant's headshot from the Truman High School yearbook and five other Truman yearbook headshots of young, dark-skinned, black men identically dressed in black tuxedos, white shirts and red bow ties."[20] Barnes identified the defendant's photograph as the individual he witnessed shoot Tongue.[21] Subsequently, the defendant was arrested and taken to the precinct for processing.[22] During processing, prior to having been administered *Miranda* warnings, another detective asked the defendant "if he goes by any nicknames, to which defendant answered, 'XL.' "[23] The court found the statement was admissible under the pedigree exception to *Miranda*.[24] The defendant was later placed in a lineup, without his

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[16] *Id.*

[17] *Stanislous*, 967 N.Y.S.2d at 912.

[18] *See id.* at 912 (consisting of 335 headshot photographs of the senior class; 153 males and 92 of the 153 males were dark-skinned African Americans).

[19] *Id.* at 912-13 ("All of the young men depicted in the yearbook were of the same age, and were wearing black tuxedos, white shirts with black studs and red bow ties. On the page with defendant's photograph, there were 11 other photographs, 4 of which were black males.").

[20] *Id* at 913; *see* N.Y. JUR. 2D *Criminal Law Procedure* § 697, which states:

> There is no requirement that the participants in a photo array be identical in appearance, or that they all have virtually identical characteristics and features. A photo array is not unduly suggestive, where the individuals depicted therein are sufficiently similar in appearance that the viewer's attention is not drawn to any one photograph in such a way as to indicate that the police are urging a particular selection.

Id.

[21] *Id.*

[22] *Stanislous*, 967 N.Y.S.2d at 913.

[23] *Id.*

[24] *Id.*; *see also* 31 N.Y. JUR. 2D *Criminal Law Procedure* § 590:

> Pedigree questions may be asked of a defendant without providing Miranda warnings and are limited in scope to those necessary for pro-

counsel present, and was viewed by Barnes, who ultimately identified the defendant as the individual he observed shoot Tongue.[25] The court found that the defendant's right to counsel at the lineup was not violated because the lineup occurred prior to the defendant's arraignment and before counsel was entered on the defendant's behalf.[26]

The court found that Barnes's identification of the defendant's MySpace photograph was admissible because "it was Barnes and not [Detective] Rodriquez, who had initiated this identification procedure."[27] Further, the court found the procedures employed by Detective Rodriquez in showing the yearbook to Landrum, showing the photo array of the yearbook photos to Barnes, and administering the lineup were not "conducted in any way that could be considered suggestive."[28]

Moreover, after the *Wade* hearing and prior to the commencement of trial, the People sought a ruling on the admissibility of the photographic identifications made by both witnesses.[29] The court initially set aside a decision on this issue; however, after reviewing "the history and evolution of the law regarding the admissibility evidence of photographic identifications," the evidence of the photographic identifications was found admissible.[30] The opinion states, "[a]t trial both Barnes and Landrum testified to their respective photographic identifications of [the] defendant, and both the Truman High School yearbook photograph . . . and the photo array shown to Barnes were received in evidence."[31]

> cessing a defendant or providing for his or her physical needs. The test is not whether the information is inculpatory, but whether the police are trying to inculpate the defendant, or merely processing him or her. Thus, the fact that a statement in response to the pedigree question proves to be inculpatory does not destroy its pedigree status.

[25] *Id.*

[26] *Id.*; *see also* Moore v. Illinois, 434 U.S. 220, 226 (1977) (stating the right to counsel attaches only after a criminal action commences); *see also* People v. Blake, 320 N.E.2d 625, 628 (N.Y. 1974) (holding presence of counsel is not mandated and the state has no obligation to provide counsel at the investigatory lineup if an accusatory instrument has not been filed); *see also* People v. Hernandez, 517 N.E.2d 1328, 1330 (N.Y. 1987) (holding the defendant had no right to have his counsel present at a pre-indictment lineup, even when the police knew the defendant had an unrelated pending case).

[27] *Stanislous*, 967 N.Y.S.2d at 913.

[28] *Id.*

[29] *Id.* at 912.

[30] *Id.* at 913.

[31] *Id.*

In addition, the court struck down the defendant's claim that the admission of the photographic identifications improperly bolstered the witnesses' in-court identifications of the defendant because such claims "only apply to the testimony of a third party about a previous identification,"[32] and here "the [c]ourt did not permit any third parties to testify regarding any of the witnesses' pre-trial identifications."[33]

III. THE COURTS ANALYSIS IN *PEOPLE V. STANISLOUS*

In analyzing the admissibility of pre-trial photographic identifications, the court first considered the decision rendered by the Court of Appeals in *People v. Caserta*.[34] In *Caserta*, the Court of Appeals ruled that a previous identification from photographs is inadmissible based on the concerns that "not only is it readily possible to distort pictures as affecting identity, but also where the identification is [made] from [arrest photos] . . . the inference to the jury is obvious that the person has been in trouble with the law before."[35] In *Caserta*, the defendant was convicted of second degree murder in the New York County Supreme Court for the murder of Danny Iglesia, the defendant's former business partner.[36] At trial, several witnesses testified to their observation of the homicide and the details leading up to the murder;[37] however, none of the testimony specifically linked the defendant to the crime.[38] The only evidence that linked the defendant to the murder was the testimony of Police Officer Maimone, who stated that he observed the defendant, shortly after the murder oc-

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[32] *Stanislous*, 967 N.Y.S.2d at 915; *see also* People v. Trowbridge, 113 N.E.2d 841 (N.Y. 1953), superseded by statute as stated in People v. Lagana, 324 N.E.2d 534, 535 (N.Y. 1975) (stating "CPL 60.25 overrules the effect of People v. Trowbridge by permitting the fact of the prior identification to be established by the testimony of another person when the identifying witness is unable to make an identification at trial.").

[33] *Stanislous*, 967 N.Y.S.2d at 915.

[34] 224 N.E.2d 82 (N.Y. 1966).

[35] *Id.* at 83-84.

[36] *Id.* at 84.

[37] *See id.* (stating "[t]he most complete account of this bizarre homicide is given by the witness Ruth Bailey," whose testimony was later supplemented by the testimony of other witnesses).

[38] *Id.* The main witness who testified the most complete account of the murder from her bedroom window stated that "[s]he saw that the man had an object in his hand and that he was pointing it at the fellow who was lying on the street." *Caserta*, 224 N.E.2d at 84. Further, she testified seeing the man walk back to the car and proceed to drive slowly and then speed up hitting the fellow who was lying on the street. *Id.*

curred driving the same type of vehicle that was later identified as the deceased's.[39] The defendant appealed his conviction, and the Appellate Division of the Supreme Court, First Department affirmed.[40] The appeal was then taken to the Court of Appeals, which reversed the lower court's decision and ordered a new trial.[41] The court focused on the question of identity and the admission of the prior photograph identification made by Officer Maimone of the defendant.[42] The court found that the admission of "his previous identification of the defendant from photographs [was] contrary to the rulings in *People v. Cioffi*,"[43] thereby requiring reversal.[44]

The court noted that *Caserta's* bar to the admission of photographic identifications was not absolute,[45] and in addition to the limited exceptions to the *Caserta* rule, the court identified a case similar to the case at issue, which held the evidence of a prior identification made by the complaining witness from a videotape taken by the police admissible.[46] *People v. Edmonson*[47] involved a savage attack on the victim, and a jury subsequently found the defendant guilty of attempted murder in the second degree and assault in the first and second degree for repeatedly assaulting the victim and choking her into unconsciousness, thus causing serious injuries.[48] While the victim

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[39] *Id.* at 85. Officer Maimone's patrol car was standing near the street where the murder occurred when he allegedly observed the defendant in a black 1964 Oldsmobile. At the time of the observation he was not aware that a homicide occurred. The officer testified that he noticed the car because it swerved in front of his patrol car and the driver gave him a "full stare." The police report, however, did not mention that the car swerved in front of the officer's patrol car. *Id.*

[40] *Id.* at 82.

[41] *Caserta*, 224 N.E.2d at 87.

[42] *Id.* at 85.

[43] 133 N.E.2d 703, 705 (N.Y. 1956) (stating "[t]estimony to prior identification from pictures has been held not to be admissible under section 393-b."); *see also* People v. Hagedory, 70 N.Y.S.2d 511, 512 (App. Div. 2d Dep't 1947) (finding that the "court below erroneously received in evidence . . . a photograph of the defendant, in connection with the testimony of a witness that shortly after the alleged robbery he had described to the police the appearance of the robbers and had identified the photograph as that of one of the men who had committed the crime.").

[44] *Caserta*, 224 N.E.2d at 83.

[45] *Stanislous*, 967 N.Y.S.2d at 914 (identifying that "photographic identification evidence has been admitted when the defendant has opened the door to its introduction; when the prosecution has impeached its own, hostile witness; or when defendant has chosen to elicit testimony about a pre-trial identification from photographs.").

[46] *Id.*

[47] 554 N.E.2d 1254 (N.Y. 1990).

[48] *Id.* at 1254.

was hospitalized, she gave a description of the defendant and his whereabouts to the police.[49] The police then made a videotape and presented it to the victim for possible identification of the attacker.[50] The victim identified the man in the video as the one who attacked her, which led to the defendant's arrest.[51] The Court of Appeals in *Edmonson* reinstated the established rule that "suggestive pretrial identifications are to be excluded,"[52] but explicitly concluded that "there is nothing inherently suggestive in the videotaping procedure employed here which should render evidence of the witness's identification inadmissible."[53]

Further, in affirming the admissibility of the prior identification made by the complaining witness, the court distinguished the "fatally flawed show-ups"[54] in previous cases and the "potential prejudice"[55] recognized in traditional photo arrays from the videotape procedure used in this case, where the defendant appeared "among many pedestrians in natural, nonpolice surroundings . . . viewed without any suggestive comment or conduct by police"[56] and without involving the use of a "rogues' gallery of mugshots . . . of poor or uneven quality and easily distorted."[57] The court in *Stanislous* found the reasoning of *Edmonson* analogous to its current analysis, stating:

> [N]either of the concerns raised in *Caserta* concerning photographic identifications, are present. The photographs at issue are from a high school yearbook, were

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[49] *Id.* at 1255.

[50] *Id.*

[51] *Id.*

[52] *Edmonson*, 554 N.E.2d at 1255.

[53] *Id.* at 1256 (noting "defendant was not singled-out, portrayed unfavorably, or in any other manner prejudiced by police conduct or comment or by the setting in which he was taped.").

[54] *Id.* ("In *Riley*, the two suspects identified by the armed robbery victim were the only nonuniformed persons in the station house room and were positioned near a table bearing the stolen property and a weapon; in *Rodriquez*, the two identified suspects were shown handcuffed and in civilian clothes, being escorted into the police barracks by two uniformed officers; and in *Adams* the victims were first informed that the police had the three suspected robbers in custody and then shown the suspects being held, by police officers with their hands behind their backs.") (citing People v. Riley, 517 N.E.2d 520 (N.Y. 1987); People v. Rodriquez, 517 N.E.2d 520 (N.Y. 1987); People v. Adams, 423 N.E.2d 379 (N.Y. 1981)).

[55] *Id*. (noting that the procedure used did not involve showing a witness a "rogues' gallery of mug shots" which as expressed in *Caserta* would likely create an inference that the identified suspect has had previous trouble with the law).

[56] *Id.*

[57] *Edmonson*, 554 N.E.2d at 1256 (citing *Caserta*, 224 N.E.2d at 84).

> clearly made using modern, sophisticated equipment, and are of superior quality. They depict the students looking at their best—they are all dressed in formal attire and many are smiling. In short, as opposed to depicting a gallery of rogues, these photos are more aptly described as depicting a gallery of choir boys; thus, it is hard to see how defendant is prejudiced by their admission.[58]

Moreover, *Stanislous* points to a recent Court of Appeals decision, which further illustrates a relaxation of the *Caserta* bar to the admission of photographic identification as evidence at trial.[59] *People v. Perkins*[60] involved the conviction of a defendant for shooting a store clerk while committing a robbery.[61] Three months later, the defendant was arrested.[62] As a result of the defendant's behavior and his refusal to cooperate in a lineup, an array of photos was made of the intended corporeal lineup participants.[63] The photographs were found to be admissible at trial, and the court found that although New York Criminal Procedure Law § 60.30[64] has been interpreted to exclude the admissibility of testimony of a prior photographic identification,[65] because of the possibility to distort pictures and the possibility of jurors to infer that the defendant has been in trouble with the law before when shown arrest photos in the array, "there is no indication that the Legislature intended to rule out photographic identification evidence in the event a defendant thwarts a lineup."[66] Although the admissibility of the photographic identification in *Perkins* applied to situations where a defendant's behavior prevented a lineup, the court in *Stanislous* interpreted the ruling to suggest that "there is no per se bar to admitting evidence of photographic identifications and that [the] trial courts have discretion to admit such evidence when the

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[58] *Stanislous*, 967 N.Y.S.2d at 915.

[59] *Id.* at 914.

[60] 932 N.E.2d 879 (N.Y. 2010).

[61] *Id.* at 880.

[62] *Id.*

[63] *Id.* (noting the victim identified the defendant from an array of photographs taken the day a lineup was scheduled).

[64] N.Y. CRIM. PROC. § 60.30 derives from N.Y. Criminal Code of Criminal Procedure § 393-b.

[65] *Perkins*, 932 N.E.2d 879 at 882.

[66] *Id.*

situation warrants it."[67]

IV. FEDERAL APPROACH

The evidentiary use of photographic identification relates back to the United States Supreme Court's seminal case, *United States v. Wade*.[68] Particularly pertinent to this case note is the Supreme Court's discussion of the critical importance of fair identification procedure because of the "high incidence of miscarriage of justice from mistaken identification."[69] Identification by photograph has been used widely and effectively in federal courts despite the hazards of misidentifications.[70] The admissibility of pretrial photographic identification followed by in-court identification at trial is determined on a case-by-case analysis, as stated in *Simmons v. United States.*[71] The standard requires the exclusion of the photograph "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[72] Therefore, the appropriate inquiry for the court is whether the procedures followed were impermissibly suggestive, and then whether, being impermissibly suggestive, they created a substantial risk of misidentification.[73]

Although the United States Supreme Court acknowledged the danger that may result from the use of photographic identifications,[74]

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[67] *Stanislous*, 967 N.Y.S.2d at 914 (citing *Perkins*, 932 N.E.2d 879).

[68] 388 U.S. 218 (1967).

[69] *Id*. at 228.

[70] Simmons v. United States, 390 U.S. 377, 384 (1968) (stating this procedure is effective in criminal law enforcement "from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs.").

[71] *Id.*

[72] *Id*. at 384; *see also* Stovall v. Denno, 388 U.S. 293, 301-02 (1967) (settling a similar issue on the question of identification by photograph).

[73] *See* United States v. Smith, 546 F.2d 1275, 1279 (5th Cir. 1977). This is the proper test when a motion is made to exclude a photographic identification alleging that the array used was impermissibly suggestive. The court notes "[t]o make these determinations, the [ ] courts . . . are to conduct in camera hearings to inquire into the circumstances of the challenged identification procedures." *Id.* However, the granting of the evidentiary hearing lies within the sound discretion of the court. *Id.*

[74] *Simmons*, 390 U.S. at 383 (noting "[t]his danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one

the Court was "unwilling to prohibit its employment, either in the exercise of our supervisory power, or still less, as a matter of constitutional requirement."[75] In *Simmons*, the defendant was convicted of armed robbery of a federally insured savings bank.[76] Photographs of the defendant were shown to five employees of the bank who witnessed the robbery, all of whom identified the defendant as the robber.[77] The defendant challenged his conviction in the Supreme Court and asserted that the pretrial identification procedure was "so unduly prejudicial as fatally to taint his conviction."[78] The Court responded that the claim asserted by the defendant "must be evaluated in light of the totality of surrounding circumstances."[79]

Applying the standard set forth by the Court in *Stovall v. Denno*,[80] the Court concluded the defendant's claim must fail due to the circumstances surrounding the procedure taken by the FBI and the photographs themselves "leave little room for doubt that the identification of [the defendant] was correct, even though the identification procedure employed may have in some respects fallen short of the ideal."[81] Although the Court recognized potential flaws in the identification procedure, under the totality of surrounding circumstances, the Court found the photographic identification of the defendant by all five witness's "was not such as to deny [the defendant's] due process of law."[82]

The United States Supreme Court was faced with similar issues regarding the admissibility of identifications at trial in *Neil v.*

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of the persons pictured committed the crime.").

[75] *Id*. at 384.

[76] *Id*. at 379.

[77] *Id.* at 381.

[78] *Id*. at 383.

[79] *Simmons*, 390 U.S. at 383 (citing *Stovall*, 388 U.S. 293 at 302).

[80] *Stovall*, 388 U.S. 293; *see* cases cited *supra* note 72.

[81] *Simmons*, 967 N.Y.S.2d at 385-86. The Court in *Simmons* noted that the:

> [W]itnesses were shown the photographs only a day later, while their memories were still fresh. At least six photographs were displayed to each witness. Apparently, these consisted primarily of group photographs, with [both defendants] appearing several times in the series . . . . There is no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that the FBI agents in any other way suggested which persons in the pictures were under suspicion.

Id.

[82] *Id.* at 386.

Biggers[83] and *Mason v. Braithwaite*.[84] The Court provided various "factors to be weighed against the [potential] corrupting effect of the suggestive procedure in assessing reliability";[85] such factors included the "opportunity [of the witness] to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."[86] These factors, reflecting the "totality of the circumstances" approach adopted in *Simmons*, are taken into consideration to determine whether "a very substantial likelihood of irreparable misidentification"[87] existed at the time of the identification. Absent this showing, the pre-trial identification will be admissible at trial.[88]

V. NEW YORK STATE APPROACH

New York has adopted additional precautionary measures, not seen in the federal courts, regarding the admissibility of pre-trial identifications in an attempt to protect against the dangers of misidentification.[89] The Court of Appeals has traditionally found photographic identifications made prior to trial inadmissible as evidence at trial.[90] In reaching this determination, the court looked to Section 393-b of the New York Code of Criminal Procedure,[91] superseded by New York Criminal Procedure Law § 60.25 and § 60.30, which state "[w]hen identification of any person is in issue, a witness who has on a previous occasion identified such person may testify to such previ-

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[83] 409 U.S. 188 (1972).

[84] 432 U.S. 98 (1977).

[85] *Id.* at 98.

[86] *Id*. at 98-99.

[87] *Simmons*, 390 U.S. at 384.

[88] *Id.*

[89] *See Adams*, 423 N.E.2d at 383-84 (adopting a *per se* exclusion of the admission of suggestive pre-trial identifications; "the rule excluding improper pretrial identifications bears directly on guilt or innocence. It is designed to reduce the risk that the wrong person will be convicted as a result of suggestive identification procedures employed by the police.").

[90] *Cioffi*, 133 N.E.2d at 705; *Hagedorny*, 70 N.Y.S.2d at 512; *see also* People v. Linsday, 364 N.E.2d 1302, 1303 (N.Y. 1977) (confirming "[i]t is settled however that a witness may not testify regarding a photographic identification of the defendant, nor may he refer to a composite sketch.").

[91] *See* N.Y. Code of Criminal Procedure §393-b, as added by L 1927, ch 336 in 1927 (the objective of this amendment was to permit prior testimony of a prior identification however the critical phrase "identified such person" was not defined in the statute).

ous identification."[92] The critical language, "identified such person," was interpreted to require the previous identification to have been made of the defendant in the flesh in order to be admissible.[93]

This interpretation of section 393-b of the New York Code of Criminal Procedure was first illustrated by the Second Department in *People v. Hagedorny.*[94] The defendant in *Hagedorny* was on trial for robbery in the first degree.[95] During trial, the People introduced into evidence a photograph that the testifying witness had previously identified as the defendant shortly after the robbery took place.[96] Further, the People called a second witness, who testified to statements made to him by the first witness pertaining to the photograph identification.[97] The trial court convicted the defendant of first degree robbery, and the defendant appealed his conviction.[98]

On appeal, the Second Department reversed the lower court's judgment, finding "the court below erroneously received in evidence, during the People's case, a photograph of the defendant, in connection with the testimony of a witness."[99] The court reasoned that although the evidence "tended to identify the defendant, it was not evidence that the witness had on a previous occasion identified 'such person,' [as stated in] Code of Criminal Procedure § 393-b, and was, at this stage of the trial, at least, inadmissible."[100] Thus, the Second Department interpreted the language in the statute as requiring the previous identification to be made of the defendant in person and not through the use of photographs.[101] The court found the previous identification of the defendant in a photograph was not permissible for the purpose of supporting the testifying witness's credibility of identifying the defendant in-court.[102]

The Court of Appeals affirmed the interpretation adopted in

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[92] N.Y. Code of Criminal Procedure §393-b.

[93] *Cioffi*, 133 N.E.2d at 705; *Hagedorny*, 70 N.Y.S.2d at 512.

[94] 70 N.Y.S.2d 511 (1947).

[95] *Id.* at 512.

[96] *Id.* (noting the photograph "was received [into evidence] on direct . . . and before there had been any attempt on the part of the defendant to impeach him.").

[97] *Id.* (testifying over defendant's objection).

[98] *Id.*

[99] *Hagedorny*, 70 N.Y.S.2d at 512 (noting the court also found that it was error to admit the second witness's testimony concerning the photo identification of the defendant); People v. Jung Hing, 106 N.E. 105 (N.Y. 1914).

[100] *Hagedorny*, 70 N.Y.S.2d at 512.

[101] *Id.*

[102] *Id.*

Hagedorny in *Cioffi.*[103] In *Cioffi*, the defendant was charged and convicted with assaulting two young girls.[104] Although the defendant was tried for the alleged assault of both girls, the court only had jurisdiction to entertain the defendant's appeal from his conviction of assaulting one of the girls.[105] The charge was brought against the defendant for allegedly placing his hands on the girl's body, without removing her clothing, to which the defendant denied.[106] The defendant's conviction rested on the testimony of the two girls, their schoolmates, and the detective.[107] The two girls identified the defendant as the man who had molested them, and two of their schoolmates and the detective were permitted to testify to the previous identification made of the defendant by the one girl from photographs.[108] Citing *Hagedorny*, the court stated "[t]estimony to prior identification from pictures has been held not to be admissible under section 393-b [of the New York Code of Criminal Procedure]."[109] The court interpreted the statute as carving out a single exception to the inadmissibility of prior identification at trial only when the previous identification was made of the defendant in-person.[110] Thus, the Court of Appeals reversed the defendant's conviction and ordered a new trial.[111]

Subsequent case law follows the interpretation laid out by the Court of Appeals and the Second Department regarding the admissibility of a previous photographic identification at trial.[112] In *Caserta*, the Court of Appeals explained its justification for the exclusion of photographic identifications.[113] After *Caserta*, courts continued to

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[103] *Cioffi*, 133 N.E.2d at 704.

[104] *Id*. (noting one of the girls was eleven and the other was twelve years old).

[105] *Id*. (discussing why the court lacked jurisdiction as to the fourth count of the indictment).

[106] *Id.*

[107] *Id.* at 704-05.

[108] *Cioffi*, 133 N.E.2d at 704-05.

[109] *Id.* at 705 ("The reception of this testimony was duly objected to at trial.").

[110] *Id.* ("It is not to be confused with identification of a defendant by a witness in open court.").

[111] *Id.*

[112] *Caserta*, 224 N.E.2d 82; *see also* People v. Griffin, 272 N.E.2d 477, 478 (N.Y. 1971) (extending the rationale for excluding pre-trial photographic identification to exclude the use of a composite sketch into evidence).

[113] *Caserta*, 224 N.E.2d at 83-84 (stating the two main concerns associated with identifications made through photographs: it is "readily possible to distort pictures as affecting identity[,]" and when the identification is from arrest photos "the inference to the jury is obvious that the person has been in trouble with the law before.").

interpret New York Criminal Procedure Law § 60.25 and § 60.30, the same way they interpreted Criminal Code of Procedure § 393-b; thus, excluding prior identification of a defendant made in person through photographs, and only permitting prior identification of the defendant if it was made by the testifying witness.[114]

VI. DOES NEW YORK'S TRADITIONAL EXCLUSION OF PRE-TRIAL PHOTOGRAPHIC IDENTIFICATIONS STILL SERVE THE PURPOSE IT INTENDED?

When the courts were presented with the issue regarding the admissibility of prior photographic identifications, the courts concerns, which guided their decision to exclude such evidence, reflected the current status of technology.[115] Because the two justifications for the exclusion of photographic evidence were to prevent prejudice to defendants, which is obvious when the prior identification was made from photo arrays consisting of prior arrest photos, and the concern that the photos may be easily distorted, it cannot be said that now, almost forty years later, all types of photographs or other prior identifications are prohibited, especially if the circumstances do not prejudice the defendant due to our advances in technology.[116] In 2005, the court noted:

> [i]n the intervening years, technological advances have not only made photographs unfailingly accurate, but advances in computer technology, barely in its in-

[114] *See* N.Y. CRIM. PROC. § 60.25 (1)(a)(ii) (providing that in a criminal proceeding a witness may testify "[o]n a subsequent occasion he observed . . . *a person* whom he recognized as the same person whom he had observed on the first or incriminating occasion") (emphasis added); *see also* N.Y. CRIM. PROC. § 60.30(c) (providing the same language as §60.25). This section was amended in 1977 and although a number of letters in the Bill Jacket use the term "in-person" identification, the term adopted was "a person." *Id.* The Court still interpreted the language to mean "in-person" consistent with their previous interpretation.

[115] *See* People v. Woolcock, 729 N.Y.S.2d 804, 814 (Sup. Ct. 2005) (explaining that in the years in which *Caserta* and *Griffin* were decided, the Court of Appeals "expressed its concern that photographs were subject to distortion and manipulation and, further, that by permitting the jury to hear that the police were in possession of the defendant's photographs, they would likely conclude that the defendant had a prior police record, resulting in severe prejudice to the defendant.").

[116] *See* People v. Huertas, 553 N.E.2d 992, 996 (N.Y. 1990) (stating "the background of CPL 60.25 and 60.30 indicates that the Legislature intended by adoption of those statutory 'exceptions' only to eliminate a technical bar to the receipt of probative evidence of identification, not to preclude *all* use of similar testimony."); *see also Edmonson*, 554 N.E.2d at 1256 (reasoning that "the videotaping used in this case does not suffer the potential prejudice we have recognized in photo arrays.").

> fancy in [the 1970's], when *Griffin* [and *Caserta* were] decided, ha[ve] reached a level of speed and sophistication so as to permit the rapid search of enormous data banks and the generation of photographs of striking similarity to the suspect.[117]

Advances in technology allow courts to reevaluate the concerns expressed in *Caserta.* Upholding New York's exclusion of photographic identifications for concerns that are no longer relevant do not serve the purpose for which the exclusion intended. If the photographs used for prior identification are not found to be prejudicial to the defendant, the overriding concern for its exclusion, misidentification leading to wrongful convictions is not apparent, and there is no reason to exclude the prior photographic identifications.

In those instances, the admission of such prior identification will aid the trier of fact in evaluating the witness's in-court identification, thus resulting in more reliable convictions. Provided the photographs themselves and the means of obtaining the photograph identification do not prejudice the defendant, there is no reason for their exclusion. New York should reevaluate the reasoning for its original exclusion and adopt a modern test to determine the admissibility of pre-trial photographic identifications to allow their admission when the long-standing concerns of prejudice and misidentification are not present.

A shift in this direction would result in the admission of photographic identifications in situations that will aid the trier of fact in weighing the evidence and assessing the witness's ability to identify the defendant at trial, and this shift would still exclude such evidence where the concerns of distortion and prejudicial inference are present. Revising the existing rule and adopting a test that coincides with the advances in technology will allow evidence of pre-trial photographic identification of the defendant and, thus, will result in more reliable and just convictions. Excluding such evidence when the photographs are not suggestive or prejudicial to the defendant is adverse to rendering reliable convictions.

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[117] *Woolcock*, 729 N.Y.S.2d at 814.

VII. CONCLUSION

The holding in *People v. Stanislous*[118] displayed a deviation from New York's traditional approach to the issue of the evidentiary use of photographic identifications at trial.[119] The court recognized that the rationale underlying the precedent of excluding the evidentiary use of photographic identifications was not present in the case before them. The photographs of the defendant, taken from a high school yearbook,[120] would not allow the inference to be drawn that the defendant had a prior criminal record. On the contrary, an inference could be drawn that the defendant did not have an arrest record because the police used a high school yearbook photo for identifications purposes. Further, the manner in which the photo depicted the defendant, in a tuxedo and bow tie, allowed the court to eliminate the concerns that originally excluded the admission of photographic identification at trial. Neither the photo in the year book or the array, which consisted of several year book photos, presented any factors that would indicate they were unduly suggestive.[121]

Although it may appear New York's exclusion of photographic identification made prior to trial is enforced as a safeguard against misidentification, the reasoning for the exclusion is not always apparent. Therefore, the inadmissibility of such evidence may actually be working against justice. Excluding this identification evidence, in the absence of prejudice, deprives the jury of evidence that would aid them in evaluating a testifying witness's ability to identify the defendant in-court.

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[118] *Stanislous*, 967 N.Y.S.2d at 911.

[119] *Id.*

[120] *Stanislous*, 967 N.Y.S.2d at 915; *see supra* note 19.

[121] *Id.*; *see* cases cited *supra* notes 19-20.

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