New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
Web address: http://www.nylj.com
VOLUME 231—NO. 51 WEDNESDAY, MARCH 17, 2004

OUTSIDE COUNSEL

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# *Civil-Arranged Suggestive Identifications*

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When dealing with identifications made under suggestive circumstances not orchestrated by the police, New York courts have overwhelmingly misapplied the law. In the paradigm case of a suggestive identification, a witness picks out an African-American suspect in a police line-up comprised of four whites and one black. "He's the one. I saw him, he did it," the witness will say at the line-up and later to the jury, apparently certain of her identification of the defendant who had been so prominently displayed.

In situations like these, the court has reason to question the reliability of such an identification and try to assuage its impact in the courtroom. This concern prompted the U.S. Supreme Court in *U.S. v. Wade* and its progeny to establish a rule excluding evidence of identifications made under circumstances that are so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."[1]

The New York Court of Appeals followed suit and adopted a more strict version of the *Wade* exclusionary rule, defining its scope in the seminal decision *People v. Adams*, 53 N.Y.2d 241, 250-52 (1981).

## Non-State Actors

The *Wade* and *Adams* rules arose from cases involving suggestive circumstances created by the police — state action that clearly invoked the due process clause. But what happens when a non-state actor prompts a witness to identify a suspect that the witness may not otherwise have been able to identify without the improper suggestion?

For example, what if a group of neighbors apprehends a man and then, while accusing him of a crime, drags him in front of a witness for identification purposes? Or, a store's private security guards ask the cashier-witness of a robbery to identify a man they had detained and claimed was the culprit? What if a witness, after seeing a photograph of a man described as the police's leading crime suspect in a newspaper article or a TV news report, later identifies the same man for the police as the one who committed the crime?

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In all of these examples, unduly suggestive circumstances tainted the witnesses' identifications. If it had been the police — and not private parties — who had created those circumstances, then New York courts would likely have suppressed the evidence of these identifications. But New York courts have repeatedly taken the position that when the suggestion is not caused by the state, the *Adams* exclusionary rule does not apply and the identifications are admissible.[2]

## Competing Constitutions

This position is incorrect for two reasons. First, the state Constitution, unlike the U.S. Constitution, does not require state action for the invocation of due process protection.[3] The *Wade* and *Adams* exclusionary rules find their respective roots in the due process clauses of the federal and New York state constitutions. The "essence of a criminal trial," the Court of Appeals in *Adams* explained, is the "reliable determination of guilt or innocence" and the due process clause of the state Constitution ensures that reliability.

But, the Court noted, the "State constitution affords protections above the bare minimum mandated by Federal law." As it stated in *Sharrock v. Dell Buick-Cadillac, Inc.*, "[i]n contrast to the due process clause of the Fourteenth Amendment, which is phrased in terms of State deprivation of life, liberty or property, section 6 of article I of the New York Constitution guarantees that '[n]o person shall be deprived of life, liberty or property without due process of law.' Conspicuously absent from the State Constitution is any language requiring State action before an individual may find refuge in its protections."

Therefore, the state Constitution protects a defendant's due process rights even if those rights are threatened by private parties. Because the *Adams* exclusionary rule is based on this constitutional provision, it should not matter whether or not the police cause the suggestive circumstances that lead to an identification. Even if the police are not involved, the New York due process clause requires scrutiny of the identification.

Second, the *Adams* exclusionary rule was not established to deter police misconduct but instead to ensure the fairness of the trial. Other exclusionary rules, like those dealing with searches and seizures, may call for the suppression of reliable evidence solely because that evidence was obtained illegally by the police.

These exclusionary rules are meant to

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discourage misconduct by the police and thus their goal, as the Court of Appeals in *Adams* explained, "is collateral and essentially at variance with the truth-finding process."

The Court of Appeals made it clear that the suggestive identification exclusionary rule has no such purpose because it "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."

## Misinterpretation of Rule

Despite the Court of Appeals' clarity, a surprising number of courts have incorrectly interpreted the *Adams* rule as one intended to deter police misconduct and, for this reason, refused to apply it to civilian-arranged suggestive identifications.[4] But given its underlying purpose, the *Adams* rule is not concerned with who or what may have caused the impermissible suggestion; its only concern is whether the suggestiveness actually occurred.

The incorrect position taken by New York courts regarding civilian-arranged suggestiveness is surprising given that the Court of Appeals specifically chose to provide New York defendants more protections than they would find under the federal *Wade* exclusionary rule. Commentators and courts have interpreted the *Adams* decision to stand for the proposition that evidence of a suggestive identification is per se inadmissible if it was formed under suggestive circumstances.[5] This is in stark contrast to the federal *Wade* rule.

In *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977), the Supreme Court refused to adopt the per se approach, instead instructing courts to look to the totality of the circumstances surrounding the identification. Under this test, even if the identification was made under suggestive circumstances, evidence of it may still be admitted if the court finds that the identification was otherwise independently reliable.

On the other hand, in *Adams*, the New York Court of Appeals concluded that the "totality of the circumstances" rule did not go far enough in protecting defendants' due process rights. "We have never held that it is proper to admit evidence of a suggestive pretrial identification," the Court explained. "Indeed it seems to have been understood ... that a pretrial identification would not be admissible if the procedures were unnecessarily suggestive."

Although the *Wade* rule is less defendant-friendly than its New York counterpart, many federal courts have nonetheless held that civilian-arranged suggestiveness can warrant the exclusion of identification evidence. These federal courts have concluded that the criminal trial, "a proceeding initiated and conducted by the State itself," is sufficient state action to warrant invocation of the federal due process clause and thus application of the *Wade* exclusionary rule.[6]

In *Dunnigan v. Keane*, 137 F.3d 117, 125 (2d Cir.), cert. denied, 525 U.S. 840 (1998), for example, the U.S. Court of Appeals for the Second Circuit concluded that "federal courts should scrutinize all suggestive identification procedures, not just those orchestrated by the police, to determine if they would sufficiently taint the trial so as to deprive the defendant of due process. The linchpin of admissibility," it explained, "is not whether the identification testimony was procured by law enforcement officers, as contrasted with civilians, but whether the identification is reliable."

The First, Sixth and Ninth circuits also have decided to apply the *Wade* rule to identifications made under suggestive circumstances that have not been orchestrated by the police.[7] For instance, in the First Circuit case *U.S. v. Bouthot*, a witness, after failing to identify the defendant in a police-arranged photo array, saw the defendant in a state courtroom facing criminal charges and, based on that accidental encounter, was later able to identify the defendant for purposes of a federal indictment. The First Circuit applied the *Wade* rule to the identification although the police had not been involved in the courtroom confrontation, and ultimately concluded that the identification should have been suppressed.

In some sense, the flexibility of the *Wade* rule may be the reason the federal courts can take this more liberal approach to citizen-caused suggestive identifications. As the Supreme Court explained in *Braithwaite*, the per se rule "goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant."

## Conclusion

Unlike the per se *Adams* rule, the *Wade* rule (as modified by *Braithwaite*) allows federal courts to apply the exclusionary standard broadly to all situations — whether the suggestiveness is civilian or state-induced — without requiring the courts to suppress evidence every time undue suggestion exists. So when a witness makes an otherwise independently reliable identification of a defendant because she saw him in a newspaper article or happened to see him in court by happenstance, for example, a federal court may admit the identification evidence although suggestive circumstances may have prompted her identification. Yet, under the *Adams* rule, a New York state court does not have that kind of freedom, and this may explain the reluctance of New York courts to apply the rule properly to situations involving civilian-caused suggestion.

But New York courts have chosen the more strict standard, and they need to stand by that decision. Only a handful of New York courts appear to have appreciated that the reasoning underlying the *Adams* rule requires courts to scrutinize civilian-arranged suggestive identifications.[8] But no court — not even that handful — has recognized that the state Constitution mandates this scrutiny as well.

The bright-line rule adopted by the Court of Appeals in *Adams* is meant to be more protective than the corollary *Wade* rule and gives courts little room to equivocate. As such, New York courts simply do not have the liberty to limit their scrutiny of suggestive identification evidence only to cases where the suggestiveness is caused by the state.

(1) *Simmons v. U.S.*, 390 U.S. 377, 384 (1968); see also *U.S. v. Wade*, 388 U.S. 218, 228 (1967).

(2) See, e.g., *People v. Thornton*, 550 N.Y.S.2d 52, 53 (2d Dept. 1990); *People v. Taylor*, 507 N.Y.S.2d 668, 669 (2d Dept. 1986); *People v. Brown*, 553 N.Y.S.2d 322, 323 (1st Dept. 1990).

(3) See *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 160 (N.Y. 1978); N.Y. Const. art. I, §6.

(4) See, e.g., *People v. Lopez*, 500 N.Y.S.2d 359, 361 (2d Dept. 1986) (citing pre-*Adams* case *People v. Logan*, 303 N.Y.S.2d 353, 360 (N.Y. 1969), cert. denied, 396 U.S. 1020 (1970)); *People v. Marshall*, 456 N.Y.S.2d 826, 828 (2d Dept. 1982), overruled on other grounds, *People v. Smith*, 508 N.Y.S.2d 460 (2d Dept. 1986), lv. denied, 512 N.Y.S.2d 1055 (N.Y. 1987).

(5) See, e.g., *People v. Riley*, 522 N.Y.S.2d 842, 845-46 (N.Y. 1987); *People v. Blackman*, 449 N.Y.S.2d 842, 843 (Sup. Ct. Bronx Cty. 1982), aff'd, 488 N.Y.S.2d 395 (1st Dept. 1985); David Paseltiner, Twenty-Years of Diminishing Protection: A Proposal to Return to the Wade Trilogy's Standards, 15 Hofstra L. Rev. 583, 604 (1987).

(6) *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980); see *Dunnigan v. Keane*, 137 F.3d 117, 125 (2d Cir.), cert. denied, 525 U.S. 840 (1998); *U.S. v. Bouthot*, 878 F.2d 1506, 1515 (1st Cir. 1989).

(7) *Bouthot*, 878 F.2d at 1515; *Thigpen v. Cory*, 804 F.2d 893, 895 (6th Cir. 1986), cert. denied, 482 U.S. 918 (1987); *Green v. Loggins*, 614 F.2d 219, 222 (9th Cir. 1980).

(8) *People v. Walker*, 411 N.Y.S.2d 156, 159 (Cty. Ct. West. Cty. 1978); *People v. Moore*, 466 N.Y.S.2d 456, 457 (2d Dept. 1983); see also *People v. McLoughlin*, 427 N.Y.S.2d 398, 401-02 (Crim. Ct. N.Y. Cty. 1980); *People v. Blackman*, 488 N.Y.S.2d 395, 396 (1st Dept. 1985).