**Combating the Suggestiveness of First-Time, In-Court Identification with *People v Perdue*.**

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On December 14, 2023, the Court of Appeals decided *People v Perdue* (\_NY3d\_, 2023 NY Slip Op 06404 [2023]). The case represents a major development concerning *in-court identifications* and the methods for combating their potential suggestiveness.

**Background.**

Most attorneys are well-acquainted with *Wade* hearings and the notion that unduly suggestive *pre-trial identification* procedures violate due process. As such, the latter are not admissible to determine guilt or innocence (see generally *United States v Wade*, 388 U.S. 218 [1967]; *People v Chipp*, 75 NY2d 327 [1990]). Though the process has proven ponderous, courts are now increasingly cognizant of the central role that misidentification plays in wrongful convictions. “Wrongful convictions based on mistaken eyewitness identifications pose a serious danger to defendants and the integrity of our justice system” (*People v Marshall*, 26 NY3d 495, 502 [2015]). By extension, courts now also recognize the equally central role undue suggestiveness plays in misidentification. “Apart from the uncertainty of human memory, suggestive identification procedures increase the dangers inhering from eyewitness identification” (*Id*., at 502).

Perhaps less familiar, however, are the ideas that (1) *in-court identifications* can be unduly suggestive, and (2) counsel is not without recourse in seeking to alleviate that suggestiveness.

***Williams* and *Archibald*.**

In *United States v Williams* (436 F.2d 1166 [9th Cir 1970]), the defendant was charged with bank robbery. It was alleged that he passed a teller a note reading, “hand me your money. I am not kidding. I have a bottle of nitroglycerin.” He left the bank with a paper sack containing $308. At trial, two tellers were -- with varying degrees of confidence -- able to identify him. The defendant’s neighbor also testified to admissions he had made about how he had robbed the bank in question.

Prior to trial, the defendant asked the trial court to conduct an in-court lineup. The request was denied. On appeal, the defendant claimed that denial was error. The Ninth Circuit rejected the claim and affirmed. They noted, however, that in cases hinging on the strength of in-court identification evidence, “the identification procedure should be as lacking in inherent suggestiveness as possible” (*Williams*, at 1168). The Ninth Circuit also observed that some trial courts had seated the defendant in the gallery or conducted an in-court lineup -- calling these “desirable efforts to ensure a fair trial” (*Id*., at 1168). The Court stopped short of requiring such procedures, because it could find no legal support for the proposition. Instead, the Court left it to the discretion of the trial courts.

In *United States v Archibald* (734 F.2d 938 [2nd Cir 1984]), the defendant and two other men were accused of robbing a bank. Unlike his co-defendant’s -- who were promptly arrested, charged, and pleaded guilty -- the defendant was not identified as one of the robbers for nearly a year and a half following the crime. Ultimately, three bank employees were able to identify him in photo arrays.

Prior to trial, recognizing that his in-court identification was likely inevitable, the defense made a *Williams*-like request. Specifically, at his client’s insistence, counsel requested that during the bank employees’ testimony, the defendant -- an African American male -- be seated with five or six other African American males in the gallery. The trial court declined, saying, “this is not a lineup. This is a trial. And that request is just absolutely inappropriate” (*Archibald*, 941). The defendant was identified by all three witnesses and subsequently convicted.

On appeal, he argued that the in-court identification was suggestive and that the trial court was wrong to deny his request. The Second Circuit said that while common, in-court identifications can still be suggestive and here it was, “so clearly suggestive as to be impermissible” (*Archibald*, at 942-943). “There was no obligation to stage a lineup, but there was, however, an obligation to ensure that the in-court procedure here did not simply ‘amount to a show up’” (*Id*., at 941). With only minimal effort and delay, the courtroom could have been rearranged and the defendant seated elsewhere. Accordingly, *Archibald* said that the request “should not have been dismissed so quickly or absolutely by the trial court” (*Id*., at 942). The Court ultimately found the error was harmless given the strength of additional identification evidence.

Of course, neither *Williams* nor *Archibald* involve a first-time, in-court identification. They were concerned simply with the trials court’s willingness to indulge a request for a special identification procedure. Inasmuch as *Williams* held no such right exists, and *Archibald* held the error was harmless, whether the identification was occurring for the first time or the tenth would likely not have changed the outcome.

**New York Treatment**

Since *Archibald*, New York Courts have not gone out of their way to indulge these kinds of procedures (nor does it appear that they are requested with much frequency). Courts have noted that, even in the case of a first-time identification, there is no constitutional right to a lineup (*People v Bradley*,154 AD2d 609 [2nd Dept 1989]; *Williams*, at 1168). Like *Archibald* itself, they have also deemed requests made during trial to be untimely (*Bradley*, at 609). Most frequently, they have said that a first-time in-court identification is permissible because counsel can explore its reliability on cross-examination (*Bradley*, at 609, *People v Farrow*, 216 AD3d 996, 998 [2nd Dept 2023]; *People v Madison*, 8 AD3d 956 [4th Dept 2004). Ultimately, the only real source of reversible error occurs when a trial court believed that it had no discretion whatsoever to conduct an *Archibald*-like procedure (*Louime*, at 1039, citing *People v Cronin*, 60 NY2d 430 [1983]).

Perhaps most troublingly, Courts have said that to obtain a special identification procedure, counsel must first, “sufficiently cast doubt on the witnesses’ identification” (*People v Brown*, 28 NY3d 392 [2016], *People v Louime*, 209 AD3d 1038, 1039 [2nd Dept 2022]). Identity is an element which the People bear the burden of proving beyond a reasonable doubt. Reliability is at the heart of satisfying that burden. It seems rather counterintuitive to suggest that the defense has an affirmative obligation to place reliability in question. Moreover, it is unclear how counsel would accomplish this since her first opportunity to do so would, presumably, be on cross-examination -- after the in-court identification has been made.

**Enter *Perdue*.**

Following a jury trial, the defendant was convicted of assault in the second degree and two counts of criminal possession of a weapon in the second degree in connection with a one-on-one shooting that occurred at a house party. The People's identification evidence consisted of the victim -- who subsequently participated in a police-arranged identification procedure -- and the 911 caller -- who did not.

At trial, the 911 caller was asked if she could identify the defendant, she answered, "of course," and proceeded to do so. Noting that the witness had not previously identified his client, counsel objected and sought preclusion of the in-court identification. The trial court overruled the objection and insisted that the defendant's remedy was to cross-examine the witness concerning the reliability of her identification.  The Appellate Division affirmed (*People v Perdue*, 203 AD3d 1638 [4th Dept 2022]).

The Court of Appeals also affirmed. But, in so doing, it significantly altered the landscape of identification evidence and the notice that must accompany it.

First, the Court held that whenever a witness *may* make a first-time, in-court identification the People must make the defense aware *as soon as practicable* so that the defense can request an alternative identification procedure. In so doing, the Court created a broad, common-law rule of notice/discovery. It appears to apply to every eyewitness who has even the potential of providing identification evidence and has not already participated in a pre-trial identification procedure (which would be covered by more traditional mechanisms [CPL 710.30, 245.20(1)(c), (k), (v), and (vi)]). This rule, though not a codified component of CPL 245, appears to demand a similarly diligent effort by the People to provide notice. And, though the Court notes that cross-examination may still be a valuable tactic, it has no tendency to make an in-court identification -- where the witness is being asked to point to the guy sitting next to the lawyer -- any less suggestive.

It is important to note that though the People gave no such notice here -- as no rule yet existed requiring them to -- the Court affirmed because (1) counsel should have anticipated the possibility, as pre-trial discovery materials made it clear that the 911 caller would likely be able to identify the defendant (she told law enforcement that she could on body camera, and described him with exactitude in the 911 call), and (2) counsel did not seek a special, *Archibald*-type procedure -- he went straight for preclusion. In the future, where the People fail to provide notice, trial courts can look to (1) the reason for the failure, and (2) the extent of the resulting prejudice.

Second, *Perdue* reaffirms, if not encourages, trial courts’ discretion to mitigate the suggestiveness of first-time, in-court identifications. Specifically, the Court said that the defense, “should be afforded meaningful opportunity to request additional procedures.” Such mechanisms could come in the form of (1) an adjournment for a non-suggestive out-of-court procedure (see *United States v Brown*, 699 F.2d 585 [2nd Cir 1983]), or in-court procedure as contemplated by *Archibald* (734 F.2d 938)(*Perdue*, at 6). These procedures would likely be conducted with counsel present, and potentially with judicial oversight, and thus are far less prone to suggestiveness. *Perdue* stressed that a trial court’s “*obligation* to take any action regarding a first-time, in-court identification is dependent upon a *timely request made by the defendant*” (*Id*., at 7). This undoubtedly means that where there is no request, or a late request, trial courts will be back in *Williams* territory -- where these kinds of procedures are nice, but not necessary.

Finally, *Perdue* is not unmindful of the role misidentification plays in wrongful convictions, and, as such, vests with the trial court the ultimate obligation of weighing the probative value of in-court identification against the prospect of misidentification and the discretion to admit or preclude such testimony. If a trial court concludes that based on the results of a special procedure, in-court identification evidence is too unreliable, it has the authority to preclude it.

 Attorneys with cases where identification is at issue are encouraged to read *Perdue* (<https://www.nycourts.gov/ctapps/Decisions/2023/Dec23/28opn23-Decision.pdf>). And, where discovery materials indicate the possibility of first-time, in-court identification evidence, insist -- in the absence of prompt notice (or *Perdue*-like constructive notice) -- on preclusion. Alternatively, where prompt notice is given, counsel should weigh the tactical benefits of making use of an *Archibald*-type procedure versus simply cross-examining the witness.  Where a special procedure is conducted, counsel can and should argue -- where the facts support the claim -- that the in-court identification is not sufficiently reliable and, therefore, inadmissible. And, no matter what path counsel elects, the CJI’s charge on identification (<https://www.nycourts.gov/judges/cji/1-General/ALPHA_TOC.shtml>) should always be consulted and used.