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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 195

KAITY MARSHALL,

Appellant.

20 Eagle Street
Albany, New York 12207
November 17, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: And we're going to
2 start with number 195, People v. Marshall.

3 Counselor, do you want any rebuttal time?

4 MR. JOSELSON: Judge, yes, I'd like one
5 minute in rebuttal, please?

6 CHIEF JUDGE LIPPMAN: One minute, you have
7 it. Go ahead.

8 MR. JOSELSON: Good afternoon, Your Honors.
9 My name is Richard Joselson and I represent appellant
10 Kaity Marshall.

11 Your Honors, in this case, eighteen months
12 after a brief assault on the complainant by a total
13 stranger on a New York City bus, the prosecute - - -

14 CHIEF JUDGE LIPPMAN: Tell us about the - -
15 - the - - - the picture that was presented to the - -
16 - the witness.

17 MR. JOSELSON: Well - - -

18 CHIEF JUDGE LIPPMAN: The - - - the - - -
19 it wasn't an arrest picture. What was it exactly?

20 MR. JOSELSON: Well - - - well, here - - -
21 here's what we know.

22 CHIEF JUDGE LIPPMAN: Yeah.

23 MR. JOSELSON: What we know it was a single
24 photo, and we know - - -

25 CHIEF JUDGE LIPPMAN: Yes.

1 MR. JOSELSON: - - - it was the prisoner
2 movement slip photo.

3 CHIEF JUDGE LIPPMAN: So what's the
4 significance of showing a - - - whatever it's called
5 - - - the movement slip - - - what's the significance
6 in terms of the legal case we have in front of us?

7 MR. JOSELSON: Well, I - - - what - - -
8 what you have - - -

9 CHIEF JUDGE LIPPMAN: Like it - - - why is
10 that fair or unfair to show that picture?

11 MR. JOSELSON: Judge, it's hard to actually
12 imagine a more suggestive scenario. Here you have
13 the prosecutor, who's the chief law enforcement - - -

14 CHIEF JUDGE LIPPMAN: Right.

15 MR. JOSELSON: - - - official in the case,
16 calling the complaining witness into the prosecutor's
17 office and showing what's essentially an arrest
18 photo.

19 CHIEF JUDGE LIPPMAN: What do you think was
20 the - - - the - - - the purpose? What did the
21 prosecutor want to achieve?

22 MR. JOSELSON: Well, what the prosecutor
23 tells us he wanted to achieve was - - - was - - -
24 what the prosecutor's notice is, is well, I wasn't
25 seeking to obtain or make an - - - an identification.

1 What this really was, was trial preparation.

2 CHIEF JUDGE LIPPMAN: Why isn't it just
3 trial prep? What's - - - what's the consequence - -
4 - the negative consequence for the defendant?

5 MR. JOSELSON: The negative consequence for
6 the defendant is whatever is going on in the
7 prosecutor's head, whether it's to obtain an
8 identification or whether he simply pre - - - thinks
9 he's preparing a witness to testify at trial, the
10 result is exactly the same. The witness is being
11 shown - - - and we don't know exactly what, because
12 for some reason, the photo itself was not introduced
13 - - -

14 CHIEF JUDGE LIPPMAN: But don't you do a
15 certain number of things in the normal course in
16 preparation for a trial? I mean, is this such an odd
17 thing to have done? Or is it?

18 MR. JOSELSON: Well, I - - - I mean, look,
19 the prosecutor disclosed it the - - - the very next
20 day. I think it is a fairly unusual thing to - - -
21 to have done. Look, the - - - the - - -

22 JUDGE STEIN: Does it make any difference
23 if there's been a previous identification procedure
24 that's been noticed and tested?

25 MR. JOSELSON: Well, there wasn't in this

1 case.

2 JUDGE STEIN: I - - - I understand that.

3 MR. JOSELSON: In - - - in Herner, which is
4 the case that we're really talking about here, there
5 was. I - - - I don't think it makes a difference in
6 terms of the question that's at issue here, which is
7 whether there should be scrutiny of this subsequent
8 identification - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but what if - -
10 - what if - - -

11 MR. JOSELSON: - - - and - - -

12 CHIEF JUDGE LIPPMAN: But what if, as Judge
13 Stein - - - Stein is saying is, what if there was a -
14 - - a line-up or a - - - or a photo array, or they
15 did a - - - you know, there was some kind of an ID,
16 you know, that was pretty definitive, and then they
17 showed a fuzzy picture? It still doesn't matter?

18 MR. JOSELSON: Look, this would be a
19 different case if there had been a line-up which had
20 been - - -

21 CHIEF JUDGE LIPPMAN: So that would have
22 been okay - - - if there had been a line-up, they
23 identified the defendant, and then in preparation for
24 trial, the prosecutor said, oh, remember, here's the
25 guy - - - here's the - - - the guy, here's a picture

1 of - - -

2 MR. JOSELSON: Yeah, I - - - I still don't
3 think that would have been okay, Judge, because - - -

4 CHIEF JUDGE LIPPMAN: But it would be
5 better, right?

6 MR. JOSELSON: But it would be different
7 from this case, and - - - and - - - and I understand
8 that this court - - - what - - - what we're asking
9 the court to do is to reconsider this whole idea.

10 CHIEF JUDGE LIPPMAN: Yeah, but is your - -
11 - are you seeking a new rule that says - - - and I
12 think this is what Judge Stein was driving at - - -
13 that without a prior ID in a more - - - in a more
14 formal sense, that - - - that you can't just do this
15 kind of a showing the picture in preparation for
16 trial? Is that the - - - what's - - - what are you
17 trying to accomplish? What's - - - how do we look at
18 these situations in the future?

19 MR. JOSELSON: Well, what - - - what I'm
20 trying to accomplish is this - - -

21 CHIEF JUDGE LIPPMAN: Aside from what you
22 want to accomplish for your defendant. I understand
23 that.

24 MR. JOSELSON: Right. Well, this - - -
25 this notion that there is such thing as a trial

1 preparation exception - - -

2 CHIEF JUDGE LIPPMAN: Kind of bogus?

3 MR. JOSELSON: - - - that - - - that - - -

4 I think - - - I think it was A, out of step with this

5 court's identification jurisprudence when it was

6 decided, because the intent - - -

7 CHIEF JUDGE LIPPMAN: So is that case

8 wrong?

9 MR. JOSELSON: I think that case was wrong,

10 and we're asking the - - - the court - - -

11 JUDGE FAHEY: So you - - - you want us to

12 overturn Herner?

13 MR. JOSELSON: Well, I do. And I think the

14 reason I want that to happen is - - -

15 JUDGE RIVERA: Well, what - - - what - - -

16 what you're looking for is for us to say that if the

17 People are going about the business of showing

18 identifying material, pre-trial, that if - - - if you

19 believe it's suggestive, you want an opportunity for

20 a hearing on the suggestiveness question, not what

21 their motive was to show the picture.

22 MR. JOSELSON: Precisely. That's - - -

23 that's where Herner goes wrong. It asks for the

24 wrong question. It doesn't matter to me - - -

25 JUDGE FAHEY: Though I wonder though, is

1 this the right case to do that with? And that's - -
2 - that's one of the - - - maybe Herner should be
3 challenged. I - - - I think it's - - - a legitimate
4 question is whether or not this procedure creates a
5 memory rather than - - - or reinforces a memory
6 improperly, and - - - and that, in and of itself, I
7 think, is a legitimate question.

8 But in this case, you've got a witness or a
9 victim; I - - - I can't remember the lady's name.
10 But anyway, she - - - she said that I didn't identify
11 the person from the photograph - - - the way I
12 understood it - - - and that I couldn't identify them
13 from that photograph. So it didn't establish - - -
14 it didn't establish what would really be, from a
15 policy point of view, the thing that we should be
16 looking for.

17 MR. JOSELSON: Look, I think the problem
18 with the way fact-finding was done in this case, was
19 we have this - - - we didn't have a Wade hearing.
20 What - - -

21 CHIEF JUDGE LIPPMAN: Yeah, yeah, but do
22 you want anything more that we have to make any great
23 rules here? You just want a Wade hearing, right?

24 MR. JOSELSON: I - - - I want a Wade
25 hearing, and let - - - let - - - let me answer - - -

1 CHIEF JUDGE LIPPMAN: What do - - - what do
2 we have to do to get to a Wade hearing?

3 MR. JOSELSON: I - - - I think a Wade
4 hearing asks - - -

5 CHIEF JUDGE LIPPMAN: Do we have to make
6 new law to give you a Wade hearing?

7 MR. JOSELSON: I think you should get rid
8 of this notion of a trial preparation exception. And
9 I - - -

10 JUDGE FAHEY: Well, we're going to have to
11 overturn it, if you're going to get a Wade hearing,
12 right?

13 CHIEF JUDGE LIPPMAN: But do you? Do you -
14 - -

15 MR. JOSELSON: Well, I think - - - you
16 know, I think not exactly. Because I think - - -
17 look, on its facts, Herner is a very different case
18 from my case. In Herner, there was - - - it was a
19 picture of a line-up the witness had already seen.
20 It was tested at a Wade - - -

21 CHIEF JUDGE LIPPMAN: But do we have to
22 eliminate - - - but that's the question I was asking,
23 and I think what Judge Fahey is asking you too - - -
24 do we have to eliminate the distinction that Herner
25 makes in order to give you a Wade hearing?

1 MR. JOSELSON: I think I could get a Wade
2 hearing even under Herner, I guess, maybe is what the
3 - - -

4 CHIEF JUDGE LIPPMAN: And what would be our
5 - - - yeah?

6 MR. JOSELSON: Be - - - because there was
7 no prior - - -

8 CHIEF JUDGE LIPPMAN: You think even under
9 Herner you should get a - - - a Wade hearing.

10 MR. JOSELSON: Right, but I - - - but I do
11 think Herner - - -

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. JOSELSON: - - - Herner is very
14 problematic, and I don't think the complainant's
15 testimony at this Herner hearing really disposes of
16 the issue here, because - - -

17 JUDGE FAHEY: You don't think so? It's
18 just - - - because they don't rely on the ID, that's
19 why I'm asking the question.

20 MR. JOSELSON: Well, but I mean, she's
21 testifying six months after she has this meeting with
22 the prosecutor, and her testimony, it's vague, it's
23 incomplete, and - - - and significantly, it is
24 inconsistent with the prosecutor's own pre-trial
25 disclosures about what occurred at this proceeding.

1 JUDGE PIGOTT: Let me ask you about that.
2 I - - - this - - - this photograph was not disclosed
3 as part of a 710.30, right?

4 MR. JOSELSON: It was not.

5 JUDGE PIGOTT: But it also was never
6 invented - - - never introduced into evidence - - -

7 MR. JOSELSON: It was not.

8 JUDGE PIGOTT: - - - and I notice it's not
9 in the record.

10 MR. JOSELSON: It is not.

11 JUDGE PIGOTT: Why is not Brady?

12 MR. JOSELSON: Well, if in fact, there had
13 been no identification, it - - - it probably would be
14 Brady. But I think the problem here is, there was -
15 - - there wasn't no identification. What the
16 prosecutor said when he made this disclosure, he
17 said, look, I brought the complainant into my office.
18 She was giving me - - -

19 JUDGE PIGOTT: Can I back you up? Because
20 I think we know the facts. When you say there was no
21 identification, I think that's Brady. It seems to me
22 if the - - - if the - - - if the People show a
23 picture to somebody saying, isn't this the person who
24 assaulted you and the picture is of the defendant,
25 and they say I don't know, why is that not Brady?

1 MR. JOSELSON: It would be, but I don't
2 think that's what happened here, Judge. What I think
3 happened here - - -

4 JUDGE RIVERA: Didn't she say I don't - - -
5 I've not seen the picture?

6 MR. JOSELSON: She didn't real - - -

7 JUDGE RIVERA: Isn't that the point? I
8 haven't seen the picture.

9 MR. JOSELSON: She didn't really say that.
10 Her - - - her testimony is really confused. And what
11 the prosecutor said - - - and this is the point that
12 I want to make. He said, look, I brought her in, she
13 was giving me descriptions of the person on the date
14 of the incident, on the defendant, on the date of her
15 arrest. I was confused about the hairstyle, so I
16 showed her the picture to resolve that issue.

17 And then he says, on page A-49 of the
18 appendix - - - on page A-49 he said, the witness
19 instructed me about the appearance of the defendant.
20 Now that's completely different from the witness
21 saying, oh, it was blurry; I didn't look at it.
22 That's a - - - that's a whole different story. And
23 look, the defense got at this below. They said, we
24 have to bring in the prosecutor here. And of course,
25 there was no earthly reason not to bring in the

1 prosecutor here.

2 JUDGE RIVERA: So what - - - what you're
3 looking for is the Wade hearing with - - - with ADA
4 Shook or - - -

5 MR. JOELSON: Shook.

6 JUDGE RIVERA: - - - I can't remember his
7 name, to be also be called, and - - -

8 MR. JOELSON: A normal Wade - - -

9 JUDGE RIVERA: - - - and - - - and this
10 photo.

11 MR. JOELSON: Exactly. A normal Wade
12 hearing where everyone knows the rules. Not a - - -
13 not a - - - this mysterious hearing - - -

14 CHIEF JUDGE LIPPMAN: Okay, counsel.

15 MR. JOELSON: Thank you.

16 CHIEF JUDGE LIPPMAN: Let's hear from your
17 adversary and - - -

18 MR. JOELSON: Thank you.

19 CHIEF JUDGE LIPPMAN: - - - then you'll
20 have your rebuttal.

21 Counsel, why don't we give him a Wade
22 hearing?

23 MS. GILLESPIE: Camille Gillespie for the
24 respondent.

25 CHIEF JUDGE LIPPMAN: Why is it not

1 appropriate in this case to give - - - give them a
2 Wade hearing?

3 MS. GILLESPIE: It's not appropriate
4 because I'd ask the court to keep in mind two very
5 important factors here. The first one is, the
6 complainant initially made a spontaneous
7 identification of the defendant, involving no police
8 arranged procedure at all, at the hospital. And - -
9 - and therefore, there was no Wade hearing required
10 with respect to that spontaneous, not at all police
11 arranged ID.

12 JUDGE STEIN: But isn't that the point?
13 There was never any - - -

14 MS. GILLESPIE: And there - - -

15 JUDGE STEIN: - - - testing of any
16 identification in this case.

17 MS. GILLESPIE: But - - - but the Wade
18 hearing - - - a Wade hearing is to test police
19 suggestiveness. There was no issue with police
20 suggestiveness - - -

21 CHIEF JUDGE LIPPMAN: Why couldn't - - -
22 why couldn't it be argued - - -

23 MS. GILLESPIE: - - - with respect to that
24 initial ID.

25 CHIEF JUDGE LIPPMAN: - - - that this is

1 suggestive?

2 MS. GILLESPIE: Excuse me; I'm sorry.

3 CHIEF JUDGE LIPPMAN: Why - - - what could
4 be more suggestive?

5 MS. GILLESPIE: The spontaneous initial
6 identification was not at all police rend - - -

7 JUDGE STEIN: This one.

8 JUDGE FAHEY: No, but that's - - - that's
9 not it. It's the showing of the photograph. Is that
10 - - - is that a - - - is that a prosecutorial
11 procedure where a defendant is identified?

12 MS. GILLESPIE: It was a display at which
13 the witness did not make an identification. She said
14 she barely glanced at it.

15 JUDGE FAHEY: Well, let me - - - let me get
16 - - - let me - - - let me back you up a - - -

17 JUDGE RIVERA: But that's - - - that's
18 what, he argues, is not clear.

19 JUDGE FAHEY: Let me - - - let me back you
20 up a second. If somebody doesn't make an
21 identification, we're back to Judge Pigott's point,
22 which is that that's just as important as what - - -
23 as they - - - as if they did make an identification.
24 So - - -

25 MS. GILLESPIE: Well - - -

1 JUDGE FAHEY: Let me finish - - -

2 MS. GILLESPIE: Sorry.

3 JUDGE FAHEY: - - - and then I'll get you -
4 - - then you get to it. So the procedure is - - - is
5 you got an identification. Do you know this person
6 based on this hairstyle? I don't know; I can't tell
7 from that blurry photograph. Then is - - - the next
8 day you turn it over - - - that should all be turned
9 over and shouldn't that be subject to a hearing?

10 MS. GILLESPIE: But not under 710.30 and
11 not under Wade, beca - - -

12 JUDGE PIGOTT: Why not?

13 MS. GILLESPIE: - - - under - - - because
14 if you don't have an identification, under Trammel,
15 there's no identification that is - - - is subject to
16 - - - going to be subject to 710.30 and the Wade
17 hearing. And - - - and - - - and second of all, and
18 as far as the Brady concern here, in this case, there
19 is no Brady concern, because the dis - - - the
20 display of the photograph and the nonidentification,
21 it - - - these were matters that were known to the
22 defense at - - -

23 JUDGE PIGOTT: But wait a minute. Wait a
24 minute.

25 MS. GILLESPIE: - - - well before trial.

1 JUDGE PIGOTT: The picture - - -

2 MS. GILLESPIE: And - - -

3 JUDGE PIGOTT: - - - the picture's not in
4 the record. I don't - - - I don't - - -

5 MS. GILLESPIE: The pic - - -

6 JUDGE PIGOTT: Hold on. I'm almost done.

7 MS. GILLESPIE: Sorry.

8 JUDGE PIGOTT: And somebody said it's
9 blurry. Apparently the witness said it was blurry.
10 I don't know if it was blurry. I don't know - - -
11 the judge at the trial level doesn't know if it's
12 blurry, because the only one that says it's blurry is
13 the DA who says I showed it to her and she said it
14 was blurry. Maybe it's not blurry. Maybe she's
15 blurry. Maybe - - - maybe it's not so blurry that it
16 couldn't have been used by the defense to show that
17 there was a mistake.

18 I - - - I just get very nervous about the
19 People having evidence that they make a judgment on
20 and then don't - - - don't disclose it, and then - -
21 - and then say, well, you know, it's not Brady, it's
22 not Wade, it's nothing. Where - - - where did I go
23 wrong in my analysis?

24 MS. GILLESPIE: Well, first of all, with
25 respect to the photo, there's no issue of unfairness

1 with respect to the photo - - - well, we know that the
2 - - - the photo was shown to the court. And the
3 court - - - that the court that made the
4 determination. This is the court that decided - - -

5 JUDGE PIGOTT: Was it shown to the
6 defendant?

7 MS. GILLESPIE: - - - the Herner hearing
8 issue.

9 JUDGE PIGOTT: Was it set - - - shown to
10 the defendant?

11 MS. GILLESPIE: That was in the record.

12 JUDGE PIGOTT: Was it shown to the
13 defendant?

14 MS. GILLESPIE: That it was - - - it was
15 shown to the court.

16 JUDGE PIGOTT: Was it shown to the
17 defendant?

18 MS. GILLESPIE: I can't say that that's
19 what it says in the record.

20 JUDGE PIGOTT: Would it - - - would it seem
21 odd if - - - let's as - - - would it seem odd that
22 you would have a photo of the perp and you would show
23 it to the court, but you wouldn't show it to the
24 defendant?

25 MS. GILLESPIE: Very odd.

1 JUDGE PIGOTT: Okay.

2 MS. GILLESPIE: It would be very odd indeed
3 and defendant never claimed that the photo was not
4 shown, even though it was spread on the papers that
5 the People submitted that the cou - - - the sh - - -
6 the court had been shown the prisoner movement slip
7 photo.

8 JUDGE PIGOTT: I get the - - - I got the
9 impression that this was almost by accident that the
10 - - - that word got out that there was this photo,
11 you know, that was shown. I'm almost done.

12 Mr. Joselson wants to do away with Herner.
13 Does that make sense to you?

14 MS. GILLESPIE: He wants to do a Herner?

15 JUDGE PIGOTT: Do away with Herner.

16 MS. GILLESPIE: Oh, do away with Herner.

17 Well, it doesn't make sense to me and in - - - in
18 this case, there's no occasion or reason to go - - -
19 go that far, because - - -

20 JUDGE FAHEY: Isn't it your argument too
21 that we would have to overturn Trammel too to get at
22 this case?

23 MS. GILLESPIE: Yes, exactly, and - - - and

24 - - -

25 JUDGE STEIN: What's the point of having a

1 Herner and why not just have a full Wade at that
2 point?

3 MS. GILLESPIE: Well, in - - - in this case
4 - - -

5 JUDGE STEIN: If you're going to have one,
6 why not just do the whole thing and just save a step?

7 MS. GILLESPIE: In part, because - - -
8 because what you had in this situation was, you had a
9 prior identification that was completely
10 nonsuggestive. It was a spontaneous identification
11 initially. And then later on when the prosecutor is
12 meeting, as in Herner, makes a dis - - - a brief
13 display of this photograph - - -

14 JUDGE STEIN: Well, I - - - I understand
15 the distinction you're making.

16 MS. GILLESPIE: Yeah.

17 JUDGE STEIN: My question is, is if you're
18 going to have a hearing, why not just give a Wade
19 hearing?

20 MS. GILLESPIE: Berceuse the issue isn't -
21 - - it - - - because this court's - - -

22 JUDGE STEIN: The issue of?

23 MS. GILLESPIE: - - - this court's
24 precedents say a hearing is not required. And in
25 this case - - -

1 CHIEF JUDGE LIPPMAN: Why is this not an
2 artificial distinction, this - - - this Wade versus
3 Herner? What - - - what is that all about? Why does
4 that make any sense?

5 MS. GILLESPIE: Well, because the ID that
6 counts is the initial ID. And - - - and - - -

7 JUDGE PIGOTT: You keep saying that, but
8 you know, I - - - I've had clients that have
9 confessed that they committed a crime and it wasn't
10 them. But - - - and in - - - and in that situation,
11 you'd be saying, they confessed; what difference does
12 it make that they didn't make an ID? They confessed.
13 What difference does it make that the - - - that the
14 - - - that they were shown the picture and said it's
15 not him?

16 MS. GILLESPIE: Well, but Herner only
17 applies in the situation where there is a prior ID.

18 JUDGE PIGOTT: I know. But what you're - -
19 - you want to say because she positively identified
20 this person at the hospital - - -

21 MS. GILLESPIE: Yes.

22 JUDGE PIGOTT: - - - it doesn't make any
23 difference if we showed her fifty pictures. It
24 doesn't make any difference what we did, we had a
25 positive ID. This case is over. We're going to - -

1 - we're going to put her on. She's going to say
2 that's the person and we're finished.

3 MS. GILLESPIE: Because there's no police
4 suggestiveness involved. That's for trial.

5 JUDGE PIGOTT: I understand that. I
6 understand that. But what I'm saying is, you're
7 saying this case is over; we can do what we want. It
8 doesn't make any difference.

9 MS. GILLESPIE: No, I'm not say - - - I'm
10 not suggesting that. In fact, the court has
11 discretion. Here there was disclosure. The
12 defendant was - - - there - - - there was no
13 unfairness to the defendant here, because he got very
14 prompt disclosure, well in advance of trial, and
15 there was an evidentiary hearing.

16 CHIEF JUDGE LIPPMAN: So what's the - - -
17 what's the rule? It's the Herner rule?

18 MS. GILLESPIE: Well, it is the Herner
19 rule, but in this case, this is - - -

20 CHIEF JUDGE LIPPMAN: Why is that something
21 that makes sense going forward?

22 MS. GILLESPIE: Let me just point out
23 though, again, that this was - - - this was a
24 nonidentification and if the procedure was so - - -

25 JUDGE STEIN: Well, but - - - but wouldn't

1 this - - - if - - - if we apply Herner to this
2 situation, wouldn't it then encourage the police and
3 - - - and the prosecutor not to hold an
4 identification procedure in - - - in the first place,
5 and just wait and say, oh, this is just trial
6 preparation. Then they don't have to go through a
7 Wade hearing.

8 MS. GILLESPIE: But - - - but I guess the
9 purpose of - - - of this - - - the pur - - - there
10 was no purpose to identify the perpetrator in showing
11 this photograph.

12 JUDGE PIGOTT: Well, I think there was.
13 You - - - I think what you're arguing is harmless
14 error. You want to say, you know, they - - - there
15 was - - - there was a proper ID a while ago and it
16 was clear and that was that. The problem is that if
17 that was true, then the DA would not have had this
18 picture taken of her in transport and shown it to the
19 defendant. There must have been a purpose there.

20 MS. GILLESPIE: Well, the purpose he said
21 was to - - - he was discussing the hairstyle - - -

22 JUDGE PIGOTT: Well, the purpose - - -

23 MS. GILLESPIE: - - - or trying to
24 understand what the complainant was saying about the
25 hairstyle of the - - -

1 JUDGE PIGOTT: Yeah, but wasn't - - -

2 MS. GILLESPIE: - - - of the defendant.

3 JUDGE PIGOTT: - - - but wasn't that
4 purpose was to firm up her ID, because you're going
5 to trial?

6 MS. GILLESPIE: Well, it - - - the purpose
7 was trial preparation, yes, but - - -

8 JUDGE PIGOTT: Well, nine months - - - nine
9 months before you're going to trial.

10 MS. GILLESPIE: But - - -

11 JUDGE PIGOTT: I wish I had that kind of
12 time.

13 MS. GILLESPIE: But - - - but it wasn't
14 clear at that point that - - - that he had - - -
15 there - - - the trial was nine months down the road.

16 JUDGE STEIN: That - - -

17 JUDGE PIGOTT: Judge Stein asked a bit ago,
18 it makes sense to say it's trial prep if - - - as - -
19 - as happened in the real Herner where there was - -
20 - there was a line-up of four, and now you're - - -
21 now you're getting ready for trial and you say, this
22 is the line-up that - - - that you - - - that you
23 identified the defendant. And that's - - - to me,
24 sounds like to trial prep.

25 When there is no picture before, and this

1 is the first time the - - - the person is - - - is
2 seeing the picture, that seems to be more along the
3 lines of a Wade issue than - - - than trial prep.
4 Wouldn't you agree?

5 MS. GILLESPIE: Well, but not in this
6 situation where there was a prior, spontaneous, not
7 police arranged identification. That's the criti - -
8 - critical identification. And this - - - and the -
9 - - and at the time - - -

10 JUDGE PIGOTT: I'm missing that. Let - - -
11 let's assume that that's all true and that - - - and
12 that - - - I forget how much time was - - - had
13 elapsed between the - - - the initial ID and now;
14 there would be no reason for the DA to ask her to
15 look at this picture unless he was concerned about
16 the fact that when she went to trial, when she was
17 going to testify at the trial, she may screw up the -
18 - - the spontaneous ID that she did a year ago - - -
19 or at nine months ago, or whatever it was.

20 MS. GILLESPIE: Well, I think that may be
21 reading a lot more into it than is there. I - - - I
22 would simply emphasize that the - - - that there was
23 no police - - - that doesn't - - - the fact that
24 there was no police arranged line-up initially
25 doesn't make it worse, it makes it better, that this

1 identification is stronger. It has - - - involved -
2 - - there's no question of police suggestiveness.

3 JUDGE PIGOTT: But wasn't the concern - - -
4 suppose she gets into the court and there's the
5 defendant sitting over there, and says, is that the
6 defendant? I don't remember.

7 MS. GILLESPIE: Then it's possible for - - -
8 - there was additional identification testimony.
9 There'd be possible to bring in her identification of
10 the - - - of the spontaneous identification at the
11 time of the incident, so - - -

12 JUDGE PIGOTT: But wouldn't it help - - -
13 wouldn't it help if you showed her a picture - - -

14 MS. GILLESPIE: I mean, I'm sorry - - - at
15 the time of the arrest.

16 JUDGE PIGOTT: Wouldn't - - - wouldn't it
17 help if you showed her a picture while she was in
18 transport, and have - - - have the victim say, yeah,
19 that's the one?

20 MS. GILLESPIE: Nobody's suggesting that
21 that should be the procedure, but - - - but that's -
22 - -

23 JUDGE PIGOTT: That might be - - - that
24 might be tomorrow's case, I guess is my point.

25 MS. GILLESPIE: Well, but - - - and again

1 to discuss, I mean, just in terms of harmless error,
2 there's - - - even - - - there - - - there's no
3 reasonable possibility in this situation that given
4 that there was no identification procedure that - - -
5 that - - - that a court would find that it - - - it's
6 unduly suggestive - - -

7 JUDGE RIVERA: Well, I think you're missing
8 the - - - the point of why he's arguing against
9 Herner. You're - - - you're saying, look, the
10 defendant picked - - - picked - - - oh, excuse me - -
11 - the victim picked the defendant out without any
12 police officer around, went out on her own and called
13 the police, and said, that's the person who attacked
14 me.

15 MS. GILLESPIE: Yes.

16 JUDGE RIVERA: Right, so you say so police
17 is not involved, that's a good identification, we - -
18 - the - - - the People don't have to worry about it.

19 But his point, as I understand it is, yes,
20 but then you have the ADA showing this picture, and
21 in fact - - - even if the ADA is not thinking about
22 it, even if the victim is not thinking about it, that
23 is having an impact on her memory and what she
24 recalls about the victim and - - - excuse me, about
25 the defendant. And that's what he's worried about.

1 And that's what he wants an opportunity to get to in
2 a Wade hearing; what has gone on with this photo with
3 respect to what she now may be understanding is the
4 identification of the defendant?

5 MS. GILLESPIE: Yes.

6 JUDGE RIVERA: Why - - - why does that not
7 make some, not only logical sense in - - - in the way
8 our jurisprudence has played itself out, but why
9 isn't that irrational and say, wait a minute, why - -
10 - you're showing a picture the night before. There's
11 been months - - - it has to affect this woman.

12 MS. GILLESPIE: Well, the night before - -
13 - that's actually what happened in Herner as - - -
14 there was the - - - the viewing of the - - - of the
15 line-up photograph on the - - - the night before and
16 - - - and the morning of. We don't even have that
17 situation. It's just - - -

18 JUDGE RIVERA: Well, you had it the day
19 before the hearing. Obviously, the ADA thinks he's
20 got to say something. I know he's a new ADA, but he
21 comes in and immediately puts this on the record.
22 And that's when you have counsel saying, I want a
23 hearing. Right then he submits an omnibus motion. I
24 want a hearing on this. It could be suggestive. We
25 want to be able to call the ADA. Isn't that the

1 whole point?

2 MS. GILLESPIE: And there is a hearing - -
3 -

4 JUDGE RIVERA: And that's triggered because
5 of the ADA saying the day of a scheduled hearing?

6 MS. GILLESPIE: Well, I'm not sure it was a
7 day of a scheduled hearing, but - - - but - - -

8 JUDGE RIVERA: Well, he's - - - he's in
9 court for something on that day.

10 MS. GILLESPIE: He's, yes, in court for a
11 court appearance.

12 JUDGE RIVERA: Okay.

13 MS. GILLESPIE: And then the actual Herner
14 hearing doesn't take place until months later.

15 JUDGE RIVERA: Sure - - -

16 MS. GILLESPIE: So - - - so - - -

17 JUDGE RIVERA: - - - because you have
18 defense counsel - - -

19 MS. GILLESPIE: So - - -

20 JUDGE RIVERA: - - - filing the motion and
21 preparing, both of you.

22 MS. GILLESPIE: But I just want to stress
23 as well that the record shows that there was
24 independent source and - - - and that - - -

25 JUDGE STEIN: Aren't you putting

1 independent source before the suggestiveness
2 question? Don't you have to do suggestiveness first?

3 MS. GILLESPIE: There's no requirement that
4 that be the case. And what Herner recognizes is that
5 the - - - the court has the opportunity to craft an
6 appropriate solution.

7 CHIEF JUDGE LIPPMAN: Should that be - - -

8 MS. GILLESPIE: It doesn't require an
9 evidentiary hearing.

10 CHIEF JUDGE LIPPMAN: Should that be what
11 we require, that there be an independent source
12 before?

13 MS. GILLESPIE: Should it be required?

14 CHIEF JUDGE LIPPMAN: Yeah.

15 MS. GILLESPIE: No, I would say it should
16 not. I shi - - - I think it should be left to the
17 court's - - -

18 CHIEF JUDGE LIPPMAN: In terms of fairness,
19 why is it not a better way to proceed?

20 MS. GILLESPIE: Well, because in - - - in -
21 - - it depends on the circumstances. It could be
22 that it - - - it could be shown that there was no - -
23 - that the procedure was not, as in this one, a
24 significant - - - perceived as a significant display
25 where the complainant didn't recognize the - - - the

1 defendant in the photograph.

2 And also, because the - - - where you don't
3 recognize the photograph, then that's proof that
4 there wasn't any undue suggestion by the State, and
5 that's what's at issue.

6 JUDGE RIVERA: Well, he says that's
7 contradictory to - - - to what the ADA said. Why
8 isn't he - - - why isn't he at least entitled to be
9 able to call the ADA, which apparently had - - - the
10 person had been switched out the day before?

11 MS. GILLESPIE: Well, following Herner, in
12 - - - in that court's - - - in the case, where the
13 disclosure takes place in the middle of the trial,
14 not - - - not - - - not months ahead of time.

15 JUDGE RIVERA: Yeah, but you have a Wade
16 hearing and then you get to trial, in that particular
17 case.

18 MS. GILLESPIE: Yeah, there had been a Wade
19 - - -

20 JUDGE RIVERA: You already had a Wade
21 hearing.

22 MS. GILLESPIE: There had been a Wade
23 hearing with respect to the line-up photograph, but
24 with respect to the procedure - - -

25 JUDGE RIVERA: What - - -

1 MS. GILLESPIE: - - - it comes out at
2 trial. And here it comes out well in advance - - -

3 JUDGE RIVERA: Is he - - - is he - - -

4 MS. GILLESPIE: - - - and that's why it's
5 fair here.

6 JUDGE RIVERA: Is he entitled to some kind
7 of hearing on the independent source or is that
8 completely undisputed?

9 MS. GILLESPIE: I - - - I would say in this
10 case, that was demonstrated in this record and the
11 court - - -

12 JUDGE RIVERA: At the Herner hearing?

13 MS. GILLESPIE: At the Herner hearing. And
14 the court - - - the court - - -

15 JUDGE STEIN: But the court said it wasn't
16 - - -

17 MS. GILLESPIE: - - - considered whether
18 there would - - - there was any taint of the in-court
19 identification. That's specifically a finding by the
20 - - - by the court in this case, so that's an
21 implicit finding of independent source - - -

22 JUDGE STEIN: I thought the court said it
23 wasn't going to independent source? Unless - - -

24 MS. GILLESPIE: No - - -

25 JUDGE STEIN: Unless it held a Wade

1 hearing.

2 MS. GILLESPIE: No, no, and the court
3 didn't actually say, well, this is an independent
4 source finding, but the court found that it did not
5 taint - - - there was no finding of taint of the in-
6 court identification, both in the court below - - -
7 both in the - - - at - - - at trial, and also by the
8 Appellate Term in this case. So - - - so you also a
9 finding by the trial court that the photograph was
10 blurry - - -

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MS. GILLESPIE: - - - so - - -

13 CHIEF JUDGE LIPPMAN: Thanks, appreciate
14 it.

15 MS. GILLESPIE: Thank you.

16 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

17 MR. JOSELSON: First of all, there - - -
18 there was no finding of independent source in this
19 case, implicit or otherwise, and it would have been
20 terribly unfair for there - - -

21 JUDGE PIGOTT: If you go back, 710.30 talks
22 in terms of identifications that they intend to
23 introduce at trial. So if they don't intend to
24 introduce it, they don't have to tell you.

25 MR. JOSELSON: Well, they intend - - -

1 JUDGE PIGOTT: Well, hold on. And of
2 course, they would - - - you had the hospital ID that
3 was go - - - that was going to - - - that was going
4 to happen. If he had never said anything about this
5 photo, you would not have known about it, and it
6 would not have affected the trial, right?

7 MR. JOSELSON: Well, I think it do - - - it
8 does affect it. We don't know without a Wade hearing
9 to determine what the effect of this single photo
10 show-up of an arrest photo was. It's a real problem
11 with Herner, that there's a - - - could be a thinking
12 that notice of this wouldn't be required. It's why -
13 - -

14 JUDGE PIGOTT: Well, as Ms. - - - as Ms.
15 O'Hara Gillespie is saying, you had a - - - you had a
16 spontaneous ID. That's the person, you know. Now if
17 you'd gone to trial in a week, you know, this - - -
18 this thing wouldn't have shown up.

19 So it shows up. He shows her, you know,
20 this picture, which turns out not - - - to be - - -
21 to be nothing, at least in their eyes. I asked you
22 if it was Brady, and you don't seem to think it's
23 Brady. And I - - - and I - - - and I - - - and I
24 know in 710.30, they don't have to disclose unless
25 they intend to introduce it at trial. So if - - -

1 where - - - where does this thing end up?

2 MR. JOSELSON: I think normally, because
3 they intend to introduce the in-court identification,
4 they would have to give notice of that out-of-court
5 identification under 710.30, except for this Herner
6 confusion.

7 I have to address this spontaneous
8 identification at the hospital. That is no excuse
9 for not having a Wade hearing. I cite the court's
10 case in Mato. That was a case where an undercover
11 officer does a sale. Three weeks later he makes a
12 spontaneous identification. He sees the defendant
13 again. The back-up team comes in and arrests - - -

14 JUDGE PIGOTT: But that's the police.

15 MR. JOSELSON: - - - the defendant. But -
16 - - but - - - but look what happens. And then after
17 that, the undercover makes a show-up ID of the
18 defendant, and even there, the People argued, oh, he
19 just made a spontaneous ID moments before. You don't
20 know need a Wade hearing to test the show-up. And in
21 Mato, this court said, absolutely you need a Wade
22 hearing.

23 JUDGE PIGOTT: Right.

24 MR. JOSELSON: And if you need it with an
25 undercover a few minutes afterwards, you certainly

1 need it in - - - in the case that - - -

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 JUDGE FAHEY: Can I just ask a short - - -

4 CHIEF JUDGE LIPPMAN: Sure, Judge Fahey.

5 JUDGE FAHEY: Yeah. One - - - one last
6 question. What remedy are you asking for? You're
7 just asking for a Wade hearing. You're not asking -
8 - - let me just finish - - - for automatic
9 preclusion, are you?

10 MR. JOSELSON: No. I just want a Wade
11 hearing, a normal Wade hearing, at which the
12 prosecutor test - - - the - - - the person who did -
13 - - the law enforcement official who conducted the
14 procedure testifies, the picture that was subject of
15 the procedure is introduced, and the court makes
16 findings about suggestiveness.

17 CHIEF JUDGE LIPPMAN: Okay.

18 MR. JOSELSON: Not trial preparations;
19 suggestiveness.

20 CHIEF JUDGE LIPPMAN: Okay. Thank you,
21 counsel. Thank you both. Appreciate it.

22 MR. JOSELSON: Thank you, Judge.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Kaity Marshall, No. 195, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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