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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 28

THOMAS P. PERDUE,

Appellant.

92 Franklin Street
Buffalo, New York
November 14, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Last case on today's
2 calendar is number 28, People v. Perdue.

3 And just so I don't forget, for the students who
4 remain here and have made it all the way through all these
5 arguments, we'll take a little bit of a break and come back
6 to talk to you if you'd like.

7 MS. WALTHER: Good afternoon, Your Honors. May
8 it please the court. Carolyn Walther for Thomas Perdue.
9 I'd like to reserve three minutes of my time for rebuttal,
10 please.

11 CHIEF JUDGE WILSON: Yes, you may.

12 MS. WALTHER: Thank you. The unduly suggestive
13 first time in court identification - - -

14 JUDGE GARCIA: So Counsel, what would your rule
15 be? What rule would you have us adopt in a situation like
16 this?

17 MS. WALTHER: Your Honor, the rule that - - -
18 that we're asking this Court to adopt really has several
19 components. So the first is notice. We're asking this
20 Court to hold that when the prosecution is going to be
21 asking a witness to make an identification of the defendant
22 in court, that they're required to provide notice to the
23 defense of the intent to - - -

24 JUDGE GARCIA: What if the prosecution doesn't
25 have notice? What if they call a witness - - - seen this

1 happen - - - witness looks out and says, that's the person
2 that I saw.

3 MS. WALTHER: That's - - - that is - - - and I -
4 - - and I - - - and Your Honor is aware of this - - - it's
5 a slightly different situation than - - - than what we're
6 encountering today. The notice that we are - - -

7 JUDGE GARCIA: I understand that, but you want a
8 notice requirement as your rule, so how would the rule
9 apply in that situation?

10 MS. WALTHER: The - - - the notice that - - -
11 that we're seeking really attaches to the - - - the
12 question - - - or the intent to ask the question. So if
13 this - - - in this situation, if the witness sort of makes
14 a spontaneous declaration, oh, that's him over there,
15 that's something that - - - that wouldn't trigger that same
16 - - -

17 JUDGE GARCIA: Would it be - - - it would be the
18 same type of identification. And wouldn't it just
19 encourage a prosecutor never to ask?

20 MS. WALTHER: I think that would be - - - Your
21 Honor's point about incentives is a good one when we're
22 concerned about the same thing here, but the - - - the
23 likelihood that a witness would spontaneously sort of make
24 that declaration without a question being before that
25 witness, I - - - I think, is a - - -

1 JUDGE GARCIA: Well, let's say it happens. So
2 how would you apply your rule?

3 MS. WALTHER: In - - - in that case, I - - - I
4 can imagine the defense making some sort of objection,
5 maybe asking for a curative instruction of some kind to be
6 given to the jury. But it - - - it's really not getting at
7 the situation in this case, which was a situation that was
8 - - -

9 JUDGE TROUTMAN: If you have information provided
10 pursuant to discovery that says there's a witness who's
11 capable of identifying the defendant, is that notice that
12 that witness may be called?

13 MS. WALTHER: The - - - the notice that - - -
14 that we would be asking for is something more specific than
15 that. And I - - - I think what Your Honor is getting at is
16 similar to what happened in this case, that would sort of -
17 - -

18 JUDGE TROUTMAN: In this case, the defense was
19 aware of the existence of this person and that the person
20 could, in fact - - - it's alleged - - - identify the
21 defendant, correct?

22 MS. WALTHER: The - - - the - - - yes, the - - -
23 the defense was aware that this person existed and that
24 five months prior to the trial, they had indicated that - -
25 - that they could make an identification.

1 JUDGE TROUTMAN: So why couldn't the defense then
2 take measures to inquire, is this witness being called?
3 Has there been an identification procedure? And if not,
4 ask - - - ask for something or do something as opposed to
5 just wait?

6 MS. WALTHER: Well, Your Honor, that's really
7 shifting the burden to the defense in a way that - - -
8 that's not really - - -

9 JUDGE TROUTMAN: How is it shifting the defend -
10 - - to the defense? If you know the person exists, how are
11 you surprised? If you know they exist and that they can
12 potentially identify, then that - - - that is much
13 different from all of a sudden a witness appears in court.
14 I don't have discovery information. I have no idea who
15 this person is. And then that person points to the
16 defendant and says, that's the person.

17 MS. WALTHER: In this - - - in this case, the
18 defense was - - - was never given notice that this person
19 had been - - - that there had been any kind of pre-trial
20 identification of - - -

21 JUDGE TROUTMAN: Why - - - why does that matter
22 here - - -

23 MS. WALTHER: - - - person - - -

24 JUDGE TROUTMAN: - - - when they're told that the
25 person could potentially identify the defendant?

1 MS. WALTHER: Well, that - - - that was, again,
2 at the outset of the case that the witness had made this
3 statement five months before. That's a very different
4 thing than that they're going to be asked - - -

5 JUDGE RIVERA: Well, what - - - what is - - -
6 what is the statement? I didn't - - - I didn't - - - I'm -
7 - - I'm misunderstanding this record then. I didn't
8 understand that this witness had said, yes, I can identify
9 that person as the shooter.

10 MS. WALTHER: The witness had - - - at the outset
11 that - - - on the night of the incident had said, I can - -
12 - I can identify the person, through the police, but not -
13 - -

14 JUDGE HALLIGAN: But not the specific - - - not -
15 - -

16 JUDGE RIVERA: Of the specific person, so - - -

17 MS. WALTHER: No, she was not familiar with that
18 - - -

19 JUDGE RIVERA: So - - - so without further
20 notice, why would a defense counsel think that they're
21 going to get on the stand and choose the defendant when
22 they think the exact opposite?

23 MS. WALTHER: I - - - I agree with Your Honor.
24 And - - -

25 JUDGE GARCIA: But you would get notice

1 MS. WALTHER: And the point that I'm making is -
2 - - probably not as - - - as clearly as I could be - - -

3 JUDGE GARCIA: You would get notice of a prior
4 identification, though, right? I mean, if there had been a
5 prior identification, doesn't the prosecutor have an
6 obligation to disclose that to you?

7 MS. WALTHER: If - - - if there had been an - - -
8 an out-of-court identification procedure, yes - - -

9 JUDGE GARCIA: So you knew there was none here?

10 MS. WALTHER: Here there was none. And then in
11 five months - - -

12 CHIEF JUDGE WILSON: Isn't there something in the
13 - - - isn't there something in the record that suggests
14 that the morning before the witness testified, the
15 prosecutor showed the witness photographs?

16 MS. WALTHER: There was - - - there was some
17 colloquy among counsel and the court that photographs were
18 shown, and there was a question asked of the witness, did
19 you look at photographs. The - - - the prosecutor later
20 elaborated at that colloquy that the photographs were of
21 the - - - of the scene, not of - - -

22 CHIEF JUDGE WILSON: Not of a person.

23 MS. WALTHER: Not of the person.

24 JUDGE RIVERA: Counsel - - -

25 JUDGE HALLIGAN: I thought there was a photo

1 array shown to the victim; is that correct?

2 MS. WALTHER: That's - - - that's correct.

3 JUDGE HALLIGAN: But not a photo array - - - I
4 don't mean photos of the scene, but a photo array - - -

5 MS. WALTHER: Photo array of potential
6 individuals - - -

7 JUDGE HALLIGAN: Yeah. Shown to - - - to the - - -
8 - to Ms. Hill; is that correct?

9 MS. WALTHER: That's correct. Police never
10 returned to conduct any type of out-of-court identification
11 procedure with her.

12 JUDGE HALLIGAN: And at what - - -

13 JUDGE GARCIA: I'm - - -

14 JUDGE HALLIGAN: - - - sorry. Just one more - - -
15 -

16 JUDGE GARCIA: No, I'm sorry. I didn't - - -

17 JUDGE HALLIGAN: - - - at what point - - - at
18 what point was defense counsel aware that the prosecutor
19 intended to call the witness?

20 MS. WALTHER: To call the witness, I - - - I
21 believe she was included in a - - - a list of - - -

22 JUDGE HALLIGAN: In the list.

23 MS. WALTHER: - - - potential witnesses.

24 JUDGE HALLIGAN: Uh-huh.

25 MS. WALTHER: But the - - - the substance of her

1 testimony didn't become clear until she was on the stand.

2 JUDGE HALLIGAN: So - - - so your view, I take
3 it, is that the knowledge that the prosecutor might call -
4 - - or perhaps intended to call her - - - didn't obligate
5 defense counsel to take a look at whatever there had been
6 five months ago and take any affirmative steps that the - -
7 - that there would be a notice requirement with the People.
8 If that's right, what form would that take?

9 MS. WALTHER: I - - - I think that the - - - the
10 notice could take the form of - - - no, ideally, prior to
11 trial, this notice - - - notice would be provided. And it
12 would be similar to the types of notices that are provided
13 when the prosecution tends to intro - - - introduce, for
14 example, Sandoval - - -

15 JUDGE HALLIGAN: Uh-huh.

16 MS. WALTHER: - - - or Molineaux evidence. It's
17 generally sort of a simple written notice. It's provided
18 prior to trial - - -

19 JUDGE CANNATARO: Counsel, notices relative to
20 identifications generally tend to be creatures of statute,
21 don't they? That would be a CPL 710 kind of notice?

22 MS. WALTHER: 710.30. 710.30 covers out-of-court
23 identifications.

24 JUDGE CANNATARO: Right.

25 MS. WALTHER: This would be something slightly

1 different, but it - - - it would - - -

2 JUDGE CANNATARO: But it's in the rubric of
3 identification. That's the point I'm making. And I guess
4 I just want to know why do you think the Court needs to
5 wade into - - - with its own common law notice requirement
6 when this is generally handled by statute?

7 MS. WALTHER: Well, I would respectfully slightly
8 disagree with Your Honor that - - - that this is generally
9 handled by statute because I - - - I would submit that this
10 court has routinely addressed identification evidence in a
11 - - - in a variety of contexts, and also the type of pre-
12 trial identification - - - or excuse me - - - pre-trial
13 evidentiary ruling that - - - that we would submit as
14 appropriate for a court to make in this case is along the
15 lines of, again, Sandoval, Molineaux, Ventimiglia evidence
16 that - - - that happens routinely before trial - - -

17 CHIEF JUDGE WILSON: Let me ask you, aft - - -
18 after we get past the noti - - - let's suppose we agreed
19 with you on notice.

20 MS. WALTHER: Yes.

21 CHIEF JUDGE WILSON: What then are - - - because
22 Judge Garcia was asking you about the components of your
23 rule - - - what are the other components of the rule?

24 MS. WALTHER: The second component would be that
25 - - - that the defense then could ask for, and generally



1 receive, some type of special procedure that is - - - that
2 would essentially be a more - - -

3 JUDGE TROUTMAN: What if the defense asks for
4 nothing?

5 MS. WALTHER: If - - - if the defense asks for -
6 - - for nothing, then I - - - I think it would be likely
7 that they would - - - that - - - that this type of
8 procedure wouldn't take place. I'm - - - I suppose - - -

9 CHIEF JUDGE WILSON: And so what if the defense
10 asks, let's say, for some out-of-court identification
11 procedure, and the judge says, but wait a minute, the
12 witness lives in the same apartment building as the
13 defendant is - - - would testify - - - or at least the
14 prosecution represents - - - that would testify she knows
15 this person.

16 MS. WALTHER: Then I - - - then I think that that
17 would be along the lines of a - - - of the decisions that
18 the - - - the court, again, routinely makes on - - - on a
19 case-by-case basis that this isn't necessary because this
20 identification would be confirmatory - - - or perhaps
21 identity is not at issue in the case, something along those
22 lines - - -

23 JUDGE TROUTMAN: Does the court's discretion play
24 a role here in your rule, or would you take all discretion
25 away from the court?

1 MS. WALTHER: No, I - - - I - - - I think there
2 would necessarily have to be an element of discretion and
3 case-by-case factual analysis, as there - - - as there is
4 in many other similar situations - - -

5 JUDGE GARCIA: So you're in - - -

6 JUDGE HALLIGAN: Would that be subject to an
7 abuse of discretion standard then on review? If there is
8 notice given, and if the defense asks for some further
9 procedure, and the court concludes, having heard from the
10 prosecution, that that's not warranted?

11 MS. WALTHER: Based on - - - based on the facts
12 of that case, if - - - if that were the situation, and the
13 defense were given the opportunity to make that request,
14 and the prosecution made a showing, and then it wasn't
15 necessary, then yes, I would say - - -

16 JUDGE GARCIA: So Counsel, just so I'm clear on
17 your rule, it would be notice by the prosecutor and some
18 type of inquiry by the court, or only in response to that
19 notice, the defendant would have to ask for some type of
20 inquiry?

21 MS. WALTHER: Your Honor is asking whether the
22 defense would have to ask for the inquiry?

23 JUDGE GARCIA: Right. Going to Judge Troutman's
24 question, I think. So we have a notice requirement. You
25 know that this person is going to be asked to make an in-

1 court identification. You notice it. Then the defendant
2 at that point has an obligation to ask for some affirmative
3 relief.

4 MS. WALTHER: Yes, I - - - I would say that in
5 general. And that's how the Second Circuit has handled
6 this in - - - in Archibald and similar cases. But - - -
7 but in general, these types of in-court - - - first-time
8 in-court identifications are extremely suggestive. And so
9 this type of procedure is - - - is almost always going to
10 be required unless there's some sort of showing that
11 there's a good reason - - -

12 JUDGE GARCIA: But let's say the People offer and
13 say, okay, I'll do a photo spread out of court, and the
14 defendant says, no, but I don't want the in-court ID.
15 Could they do that because they may not want a photo spread
16 confirming it, right? So what happens then?

17 MS. WALTHER: Well, I think - - - I think the
18 court would have to rule on whether or not the photo array
19 would be sufficient or if the defense is, I guess, asking
20 for another type of procedure. I - - - I think there - - -
21 that would have to be a - - -

22 JUDGE RIVERA: So you're saying then the
23 defendant has a burden to make some kind of showing that
24 the photo array is either not appropriate or it's - - -
25 it's some - - - for some reason, given the circumstances,

1 that's tainted and you either need to do something else or
2 there's no way to cure the problem.

3 MS. WALTHER: I - - - I think that's right. And
4 I - - - I think - - -

5 JUDGE GARCIA: They couldn't just say, I don't
6 really want to take a chance that my client's picked out of
7 a photo array because it's a much better ID for me to cross
8 somebody in a courtroom that's looking at somebody at the
9 table and identifying them for the first time?

10 MS. WALTHER: Well, I - - - I think it's unlikely
11 that the defense attorney would - - - would make that
12 determination just because of the reasons that we discussed
13 - - -

14 CHIEF JUDGE WILSON: I think Judge Garcia is
15 asking - - - maybe I'm misunderstanding - - - he's asking
16 if the defense has gotten notice and then says, wait a
17 minute, I would like to have a procedure, whatever that
18 procedure is, and identifies a specific procedure. And the
19 judge says, I'm not going to give you that. I'm going to
20 give you a different one.

21 MS. WALTHER: I see.

22 CHIEF JUDGE WILSON: Whether at that point,
23 defense counsel can say, you know what? Forget it. Can
24 you - - - can you withdraw your - - - your objection to the
25 in-court identification?

1 MS. WALTHER: I suppose so. I - - - it seems, if
2 that were the determination that counsel were making based
3 on the facts of that case, I suppose they could. It's - -
4 - I think we're getting into a situation where it's sort of
5 hard for me to imagine why they might ever - - -

6 JUDGE TROUTMAN: So you agree that there may be,
7 for strategic reasons, why one procedure or another would
8 not necessarily be desired by the defense?

9 MS. WALTHER: In terms of a - - - sort of an
10 additional procedure that happens after the normal - - -

11 JUDGE TROUTMAN: Or - - - or any procedure.
12 We're - - - we're assuming there was no procedure done
13 before, you're now given notice that there's going to be a
14 witness who can't - - - who will testify, and that it is
15 believed that that witness may be able to identify you.
16 Can't a defense attorney decide that it is more harmful
17 than helpful to have that extra procedure for strategic
18 reasons?

19 MS. WALTHER: I suppose almost anything could be
20 strategically justifiable - - -

21 JUDGE GARCIA: But in a case where - - -

22 MS. WALTHER: - - - within the facts of an
23 individual case, but I - - -

24 JUDGE GARCIA: - - - you have a witness who says,
25 I can identify this person, which I think is this case.

1 Not your client, but I can identify the person that did
2 this. And the police, for some reason, never go back and
3 show that person a photo spread. And now it comes to trial
4 and they say, I'm going to have this witness identify - - -
5 try to identify the defendant. You don't think it's a
6 strategic call to say, hmm, I don't want a photo spread
7 because if they hit a court-approved photo spread that
8 isn't suggestive and then there's an in-court ID, I'm in a
9 much worse position than crossing them on bad police work
10 and you waited until the person was sitting at the table,
11 and now, you're having them identify the only person that
12 could be sitting over there?

13 MS. WALTHER: I - - -

14 JUDGE GARCIA: You don't think that would ever
15 happen?

16 MS. WALTHER: I - - - I think anything can
17 happen, but I think that it is so - - - and sort of our
18 overall point here is that these in-court identifications,
19 when they're happening for the - - -

20 JUDGE CANNATARO: Counsel, in this case, the - -
21 - the trial lawyer didn't ask for an in-court - - - some
22 sort of in-court procedure, right? They didn't ask for a
23 lineup or some sort of seating arrangement when they found
24 out that the witness was being called, did they?

25 MS. WALTHER: They didn't. But again, the - - -



1 the attorney here didn't know that that question was going
2 to be asked. And as soon as it became apparent that - - -
3 that that witness was going to be asked that question, she
4 objected. She asked to approach the bench. But at that
5 point, for the - - -

6 JUDGE HALLIGAN: Is the witness all - - -

7 MS. WALTHER: Yes.

8 JUDGE HALLIGAN: Sorry. I didn't mean to
9 interrupt you.

10 MS. WALTHER: I'm sorry, Your Honor.

11 JUDGE GARCIA: Was - - - was - - -

12 JUDGE HALLIGAN: Was the witness already in the
13 courtroom and able to see the defendant at counsel table at
14 the time the objection was raised? I - - - it wasn't
15 obvious to me from the record. Do you know from the
16 record?

17 MS. WALTHER: Yes. So the witness had been
18 testifying for approximately ten minutes prior - - -

19 JUDGE HALLIGAN: So yes?

20 MS. WALTHER: So yes. And she was first asked to
21 describe the person that she saw that night, and I - - - it
22 was at that point that defense counsel objected.

23 JUDGE RIVERA: So - - - so what - - - is the only
24 - - - given that, as I recall, counsel is arguing on the
25 stand, there's no way now to put this genie back in the

1 bottle, is the - - - what's left to happen, just a
2 mistrial?

3 MS. WALTHER: At - - - at that point, yes, I - -
4 - I believe that it would have to be.

5 JUDGE RIVERA: Once they're - - - this is not - -
6 - once they're - - - they've taken the stand - - - or
7 possibly in the courtroom?

8 MS. WALTHER: Yes, because at that point,
9 suggestiveness has already happened. It's essentially too
10 late - - -

11 JUDGE TROUTMAN: And the fact that the defendant
12 was provided during discovery with information - - -
13 bodycam that captured her saying that she could identify
14 him, that plays no role?

15 MS. WALTHER: It - - - it's not enough, Your
16 Honor, is - - - is - - -

17 JUDGE TROUTMAN: So the fact that you know that
18 this identifiable person may come into court and identify
19 your client. Defense doesn't have to do anything, but the
20 People need to do what exactly, in addition to giving that
21 required information?

22 MS. WALTHER: The People need to - - - to provide
23 the defense notice that this witness will be asked on the
24 stand, under oath, before the jury - - -

25 JUDGE TROUTMAN: But it's on the bodycam.

1 MS. WALTHER: Even so, Your Honor, that - - -
2 that is a very different thing than asking the witness to
3 identify - - -

4 JUDGE TROUTMAN: Actually, it's in the - - - in
5 the right close in time. I would think that that's pretty
6 good information that would give a calculus to the defense
7 as to how they wish to proceed way in advance of trial.

8 MS. WALTHER: On - - - on the other hand, this
9 witness then was never asked to do any kind of out-of-court
10 identification. And so - - -

11 JUDGE TROUTMAN: And usually out of dent - - -
12 out-of-court identifications are challenged because of a
13 question of suggestiveness.

14 MS. WALTHER: Yes. And - - - and I would submit
15 that that this is similar - - -

16 JUDGE TROUTMAN: Clearly, there are problems with
17 in-court identifications. But going back to a difference
18 between - - - if there's no information at all, that there
19 is a witness that can identify the - - - potentially
20 identify the defendant, that's very different from, here's
21 discovery information. Here's the witness and what the
22 witness said on the night in question.

23 MS. WALTHER: And - - - and our contention, Your
24 Honor, is just that that information is not enough to - - -

25 JUDGE TROUTMAN: Not something for the court to

1 consider in its discretion what is an appropriate way
2 forward?

3 MS. WALTHER: No, Your Honor, because - - -

4 JUDGE SINGAS: But there might be some
5 circumstances where there is no other evidence tying the
6 defendant to the crime other than that identification. And
7 then it would be pretty obvious that there is going to be
8 an ID coming because there's no statement and you have to
9 establish jurisdiction over the defendant, otherwise you
10 would prevail at a trial order of dismissal. So in some
11 circumstances, I think there would be notice.

12 MS. WALTHER: But in those circumstances then, I
13 would submit it - - - it's really still the - - - the
14 prosecutor's burden to provide that notice to the defense -
15 - -

16 JUDGE HALLIGAN: So here there - - - there was
17 other evidence, right? Why - - - why then not a
18 harmlessness conclusion, even if we were to agree with you
19 on the broader - - - on some aspects of the broader rule
20 you're seeking?

21 MS. WALTHER: The identification here was not
22 harmless because the other evidence really consisted of the
23 testimony of the victim, and he had made a number of
24 inconsistent statements - - -

25 JUDGE HALLIGAN: Wasn't there a security cam

1 video?

2 MS. WALTHER: That video did not capture the
3 shooting itself. It captured some of the - - - the
4 aftermath, but it didn't show the shooting itself. So the
5 - - -

6 JUDGE CANNATARO: Would you agree that the
7 evidence here was at least confirmatory? It's - - - and I
8 only ask that because they didn't use this witness's
9 testimony in order to bring charges against the defendant,
10 so - - -

11 MS. WALTHER: Right.

12 JUDGE CANNATARO: - - - it has to at least be - -
13 - there had to be something else in the record, right?

14 MS. WALTHER: And - - - and it was really the - -
15 - the statements of the victim. No one else who was
16 present that night - - - and there were at least four other
17 people who were present that night - - - testified at the
18 trial.

19 And - - - and the victim here really made
20 contradictory statements about how this happened, who was
21 responsible. At first he said he didn't know. Then he
22 said he threw a drink on a girl and she shot him. He said
23 that to several people at the hospital. And then it was
24 only nine days later that he implicated Mr. Perdue.

25 JUDGE CANNATARO: Which is all good fodder for

1 cross-examination. But it was enough to - - - to bring
2 charges. It was sufficient - - - it was a sufficient basis
3 for charges to go forward, right? Without a dismissal,
4 pre-trial - - -

5 MS. WALTHER: That - - - he was - - - he was
6 indicted on that basis.

7 JUDGE CANNATARO: Yeah.

8 JUDGE SINGAS: But in most of these hearings,
9 also, you explore the suggestiveness because there's a
10 vacuum, we don't know what happened and there's an
11 opportunity to explore the actions of the police to
12 determine whether or not something was suggestive. Here it
13 seems to me that there isn't that vacuum because it's
14 taking place in a courtroom with a judge who's there to
15 make sure that the proceedings are held in a just and fair
16 manner. There's a defense attorney there. It's
17 significantly different, in - - - in my view, than
18 something that goes on outside anyone's purview. And why
19 aren't those safeguards enough here in a case where there
20 is an in-court ID?

21 MS. WALTHER: So there's really two reasons why
22 those safeguards aren't enough. The first is the extreme
23 suggestiveness of the overall setting. The defendant is
24 seated at counsel table with the defense attorney. There's
25 - - - there's language - - -

1 JUDGE SINGAS: And granted, those can all be
2 arguments to the - - - to the jury who watches the entire
3 thing take place. That's where I'm having an issue - - - I
4 understand if we're exploring things that you haven't had
5 eyes on, but the jury is witnessing the identification
6 happening. The judge is as well. Counsel is at the table.
7 And the legislature didn't see fit to notice a scenario
8 like this.

9 MS. WALTHER: And - - - and the jury witnessing
10 this is - - - is exactly the second reason why these
11 identifications are extremely prejudicial because the
12 witness - - - because these circumstances are so
13 suggestive, the witness is going to be very confident in
14 pointing out that person - - - he's right over there - - -
15 and the jury is seeing this, they're hearing this, and
16 they're going to be swayed by that confidence. And it's -
17 - - it's very difficult for cross-examination to get
18 underneath whether that confidence is due to circumstances
19 or whether it be a true statement of - - -

20 JUDGE SINGAS: But isn't that the same in the - -
21 - in the photo array when a police officer comes in and
22 say, no, that witness confidently identified picture number
23 two?

24 MS. WALTHER: Except that - - -

25 JUDGE SINGAS: And at that point, there - - -

1 there's nobody to say otherwise. Whereas, at least in the
2 courtroom, a jury can assess the credibility of that person
3 and the reliability of that identification in real time.

4 MS. WALTHER: Well, except that with a photo
5 array, the person who is administering it ideally doesn't
6 know who the person is that is supposed to be identified.
7 Whereas in a courtroom we have a situation where not only
8 is it clear who the police think is responsible for this,
9 but the prosecution has - - - has seen fit to bring charges
10 against. There's a trial taking place. And so it's - - -
11 it's very clear who the person is that should be
12 identified.

13 And so the - - - just the inherent suggestiveness
14 of that circumstance - - - the surrounding circumstances -
15 - - is really why we need these types of heightened
16 protections for these identifications, which are
17 essentially show ups, but show ups that are happening under
18 much more suggestive circumstances than even out-of-court
19 show ups.

20 CHIEF JUDGE WILSON: Thank you.

21 MS. WALTHER: Thank you.

22 MR. MCCARTHY: Good afternoon. Martin McCarthy
23 for the People.

24 JUDGE TROUTMAN: Do you agree or disagree that a
25 first-time identification in court can be suggested?

1 MR. MCCARTHY: I believe the Supreme Court has
2 said so, so I think I'm constrained to agree with that,
3 cards on - - -

4 JUDGE TROUTMAN: Okay. And if it is - - -

5 MR. MCCARTHY: - - - cards on the table.

6 JUDGE TROUTMAN: Is - - - is that the - - - is
7 that the end of the conversation or do you - - -

8 MR. MCCARTHY: No. And the reason why it's not -
9 - -

10 JUDGE TROUTMAN: Could you speak up?

11 MR. MCCARTHY: Yeah. This is a large room. I
12 apologize. Let me try and fill the room with my voice.

13 JUDGE RIVERA: Bring the mic a little closer.

14 MR. MCCARTHY: I could try that too.

15 JUDGE RIVERA: Yes.

16 MR. MCCARTHY: Is that better?

17 JUDGE RIVERA: There you go.

18 MR. MCCARTHY: I'm going to lean in then.

19 JUDGE RIVERA: Lean in.

20 MR. MCCARTHY: But don't misunderstand my leaning
21 in for aggressiveness.

22 The - - - issue is not suggestiveness. It's
23 never been suggestiveness. The issue is whether it's
24 unduly suggestive.

25 JUDGE RIVERA: Uh-huh.

1 MR. MCCARTHY: And in this scenario, when you
2 look at what happened, the record really isn't developed as
3 to whether this particular identification was unduly
4 suggestive. For example, the defendant - - - there's not
5 much description as to what the defendant is wearing, but
6 it's clear he's not wearing an orange jumpsuit. I believe
7 - - -

8 JUDGE RIVERA: But the defendant is at the
9 defense table.

10 MR. MCCARTHY: Correct.

11 JUDGE RIVERA: And unlike the pre-trial ID,
12 you're now in a courtroom where the State has decided, this
13 is the guilty person, and the witness understands that.
14 How is this not even more suggestive?

15 MR. MCCARTHY: The witness doesn't know that the
16 defendant is at the table.

17 JUDGE HALLIGAN: Well, I think - - -

18 MR. MCCARTHY: They can assume it.

19 JUDGE HALLIGAN: - - - the witness may well
20 assume it. And - - - and I thought that one of the
21 purposes of a photo array, for example, assuming that
22 there's nothing unduly suggestive about the way in which
23 the photos are chosen, was to provide, you know, a number
24 of different options, however many you have in the array,
25 five or six, from which the witness then can select if - -

1 - if he or she believes that the person is there. And I'm
2 not sure how - - - how you have that in the courtroom
3 setting.

4 MR. MCCARTHY: Well, let me - - - let me tie that
5 answer to a scenario that justice - - - or Judge, excuse me
6 - - - Judge Garcia posed, which was, would there ever be a
7 strategic reason why a defense attorney would say, do a
8 photo array - - - or not to say don't do a photo array?
9 And the reason for that would be - - - and - - - and the
10 standard for photo arrays now is double blind.

11 JUDGE HALLIGAN: Yes.

12 MR. MCCARTHY: And under the - - - under the law,
13 if a double-blind photo array is administered, and the
14 witness picks the person out of a double-blind photo array,
15 that identification procedure - - - the evidence of that
16 procedure itself could be admitted in evidence.

17 JUDGE HALLIGAN: I'm not - - - I'm not
18 disagreeing there may be some reason - - -

19 MR. MCCARTHY: Yeah. Yeah. And I'm trying - - -
20 I'm going to tie - - - I promise I will tie it in. So in
21 that process, the witness has the ability to select one of
22 twelve people in that double photo - - - double-line photo
23 array.

24 In a courtroom, this particular witness had an
25 opportunity to select the defendant. I've seen that happen

1 before. They've had the opportunity to select the defense
2 attorney. I've actually seen that happen before. They've
3 had the opportunity to select anyone in the audience. And
4 in this scenario, this courtroom was full, according to the
5 trial judge. This was a full courtroom. The witness
6 didn't know whether the defendant would be sitting at the
7 trial counsel table. The witness - - - the defendant could
8 have been sitting in the gallery. Those arrangements under
9 Archibald could have been made where defense counsel had
10 asked prior to trial, I would like my court - - - my - - -
11 my client - - -

12 JUDGE TROUTMAN: Most citizens do assume, even
13 just watching Law and Order, that the defendant is sitting
14 next to the attorney.

15 MR. MCCARTHY: They don't know it. They don't
16 know it. I believe you can say they can assume it - - -

17 JUDGE HALLIGAN: But the suggestion is it to - -
18 - I mean, to subjective - - - sorry - - - does
19 suggestiveness require absolute knowledge? I thought that
20 it encompassed circumstances where you are, you know, being
21 encouraged, whether consciously or subconsciously, to pick
22 A over B.

23 MR. MCCARTHY: Unduly suggestive, yes. So when
24 you consider what's unduly suggestive, in essence, what you
25 want is the witness to pick a particular person. Right.

1 Make a particular selection. When the - - -

2 JUDGE HALLIGAN: Right.

3 MR. MCCARTHY: - - - when the officer puts his
4 thumb on number five, pick number five. When - - -

5 JUDGE TROUTMAN: So in the courtroom, you
6 consider the race and ethnicity of the accused who's - - -
7 who's actually in the courtroom in the gallery. All of
8 those factors have to be taken into consideration. And if
9 the accused is of one race, and everybody else, to the
10 exception of that person, you cannot tell me that that's
11 not unduly suggestive.

12 MR. MCCARTHY: I wouldn't say that. But here's
13 the - - - here's the problem with this record. We don't
14 know. Now, if - - - I believe the court should have
15 demanded, in terms of a record, that that record be made,
16 that my - - - my God, my client is the only black person in
17 this courtroom - - -

18 CHIEF JUDGE WILSON: Can I ask you - - -

19 MR. MCCARTHY: - - - that's not in this record.

20 CHIEF JUDGE WILSON: Can I ask you about the rule
21 that counsel has proposed and where along its path, if at
22 all, you have a problem with it and why.

23 MR. MCCARTHY: Which - - - which - - - so I
24 believe it started with notice - - -

25 CHIEF JUDGE WILSON: So it sounded like the first

1 issue - - - or the first step was notice.

2 MR. MCCARTHY: Yes.

3 CHIEF JUDGE WILSON: And then the second step was
4 an opportunity to ask for an alternative procedure, and the
5 third step I think was for the court to be able to accept
6 or you know, offer some different procedure, or deny it
7 entirely, with some degree of discretion.

8 MR. MCCARTHY: If you were to consider that in a
9 vacuum, let's talk about it in a vacuum. But - - - but
10 before I do it in a vacuum, let's talk about the fact that
11 no - - - they did not make an argument that there was no
12 notice - - -

13 CHIEF JUDGE WILSON: Well yeah, but I'm actually
14 interested in the vacuum.

15 MR. MCCARTHY: And they didn't, in this case,
16 they didn't make an accommodation - - -

17 CHIEF JUDGE WILSON: I have got the record in
18 this case.

19 MR. MCCARTHY: Okay.

20 CHIEF JUDGE WILSON: I'm just wondering about
21 that as a prospective rule.

22 MR. MCCARTHY: So - - -

23 CHIEF JUDGE WILSON: Is there some way you could
24 win in this case and Ms. Walther could win as a rule?

25 MR. MCCARTHY: Sure - - -

1 CHIEF JUDGE WILSON: That's the problem with - -
2 -

3 MR. MCCARTHY: - - - I believe in this case I
4 could because he did have notice - - -

5 CHIEF JUDGE WILSON: I'm trying to ask you about
6 the rule.

7 MR. MCCARTHY: He did have notice.

8 CHIEF JUDGE WILSON: Okay, but - - -

9 MR. MCCARTHY: So actual or constructive notice -
10 - -

11 CHIEF JUDGE WILSON: How about the rule?

12 MR. MCCARTHY: Yeah. Let's start with that.
13 Actual constructive - - - in essence, you can't - - -
14 you're talking about actual notice, right? There's no
15 statutory provision for actual notice. So then you look
16 at, was the defendant on notice?

17 CHIEF JUDGE WILSON: Well, just - - - okay. But
18 sorry, the rule she's asking for is not constructive
19 notice, the rule she's asking for is actual notice. Do you
20 have a problem with actual notice, as a going forward rule,
21 forget about this case, let's assume you're going to win
22 this case.

23 MR. MCCARTHY: Well, in a sense, I - - - I - - -
24 I don't know if I - - - I - - - I - - - I don't know if I
25 can say I - - - I do or don't have a problem with actual

1 notice in the sense of - - - because I would say that that
2 should come from the legislature, but assuming we go past
3 that, right, and we say you have to look at - - -

4 CHIEF JUDGE WILSON: Operationally, is that a
5 problem for you?

6 MR. MCCARTHY: What's that?

7 CHIEF JUDGE WILSON: Operationally, is that a
8 problem for you?

9 MR. MCCARTHY: Um - - -

10 CHIEF JUDGE WILSON: And I'm - - - I'm hold - - -
11 I'm holding - - - I accept your - - - your view that the
12 legislature ought to do this. So let's put that in a
13 basket.

14 MR. MCCARTHY: Then when you look at what the
15 legislature has done, the legislature has - - -

16 CHIEF JUDGE WILSON: I'm trying to ask you a
17 different thing now. So, if we were to adopt a rule that
18 said you have to provide actual notice is that
19 operationally, a problem for you?

20 MR. MCCARTHY: In - - - I could conceive of
21 circumstances where it - - - where it could be.

22 CHIEF JUDGE WILSON: Okay. Help. Where.

23 MR. MCCARTHY: I believe there was an example - -
24 - I don't know who said it - - - of a defendant and the
25 witness living in the same apartment building. That could

1 be an issue.

2 CHIEF JUDGE WILSON: That was me.

3 MR. MCCARTHY: Well, that was you.

4 CHIEF JUDGE WILSON: Yeah.

5 MR. MCCARTHY: Okay. I'm sorry. It was a good
6 example. That could be a potential issue in terms of
7 operationally. The DEA - - -

8 CHIEF JUDGE WILSON: Providing notice in that - -
9 - providing notice in that circumstance - - -

10 MR. MCCARTHY: Yeah, there could be a protective
11 order, there could have been a scenario where the ID
12 witness is subject to a protective order so that notice
13 would be - - - and the ability to give notice would be an
14 issue in that case. So I mean, there are - - - there are
15 certain - - -

16 JUDGE TROUTMAN: Why can't you give it to the
17 attorney, subject to that protective order?

18 MR. MCCARTHY: You mean give the actual notice to
19 the attorney who, on condition, he don't tell the
20 defendant? Is that - - - is that what you are saying - - -

21 JUDGE TROUTMAN: Yes. I'm - - - I'm asking you.

22 MR. MCCARTHY: Okay. But again, let's say - - -
23 let's go past the fact that - - - I - - - again, I don't -
24 - - I can't sit here and conceive of - - - other than - - -
25 other than the ones I've already said. There may be others

1 of different operational issues with providing sort of an
2 actual notice - - -

3 JUDGE TROUTMAN: I'm curious about what the Chief
4 Judge just said. So, you have a problem with a defendant
5 receiving notice, even though courts can grant continuance,
6 et cetera, for the attorney to deal with it. You don't
7 want notice?

8 MR. MCCARTHY: Would say, notice is not required
9 under the Constitution.

10 JUDGE TROUTMAN: I'm - - - I'm asking you if
11 there were a rule that was developed as a result of this
12 case - - -

13 MR. MCCARTHY: Uh-huh.

14 JUDGE TROUTMAN: - - - you're saying no notice to
15 the defendant? That's a problem for you?

16 MR. MCCARTHY: I would - - - I could conceive of
17 issue - - - a - - - of circumstances where that would pose
18 a problem. Whether you, in crafting that rule, could
19 either - - -

20 JUDGE HALLIGAN: But if the rule was not absolute
21 - - - so you identified a circumstance where, for example,
22 there could be a risk, I assume to a witness, in light of a
23 protective order. But you know, I think Judge Troutman
24 suggested one way you might address that. But if - - - if
25 that were, as a general matter, the rule, would that pose

1 any difficulty to you doing your job?

2 MR. MCCARTHY: I mean, other than - - - other
3 than the scenarios they discussed, no - - - I - - - I - - -
4 I don't know. But in terms of what I can think of, other
5 than the things that I've identified, no - - - I - - - I
6 don't know. I honestly don't know. But that would be - -
7 -

8 CHIEF JUDGE WILSON: How about if we move to the
9 - - -

10 MR. MCCARTHY: I'm sorry.

11 CHIEF JUDGE WILSON: - - - how about if we move
12 to the balance of the rule? So forget notice for a moment.
13 Let's say you've given notice, what would you then - - -
14 how would you want the procedure to work after you've given
15 notice? I assume you would want defense counsel to say,
16 look, I want some alternative procedure, right. If they
17 don't request it, you would - - - they waived it.

18 MR. MCCARTHY: Well, let's - - - so you - - -
19 you're moving on to the - - - sort of the second step.

20 CHIEF JUDGE WILSON: Yeah.

21 MR. MCCARTHY: Let's look how that second step
22 had worked in - - - in Archibald, for example. In
23 Archibald, defense attorney had asked for an accommodation.
24 And what the court did was sort of balance what the proof
25 would have been with the ID versus without the ID. And in

1 that scenario, the ID was critical in that case. There
2 wasn't DNA, there wasn't fingerprints, there wasn't video,
3 there wasn't a signed confession. So the ID in that case
4 was critical.

5 So the court - - - and when they - - - in the
6 Second Circuit, when they were talking about Archibald,
7 really considered sort of the - - - in using its
8 discretion, would take into account all of those things as
9 to whether the accommodation should be granted.

10 The scenario that I think posed itself in Brown,
11 which was before this Court, like eight years ago, was the
12 ID - - - the accommodation for a witness sought for a
13 witness who had been previously deemed reliable after a
14 Rodriguez hearing. So the Court can consider that as well.

15 But that would be sort of the things I believe
16 that the Court would consider. And then there would be a
17 scenario where maybe the defendant would not want the
18 accommodation granted, like a photo array, or an
19 incorporate - - - in - - - an in-person lineup or, you
20 know, whatever - - - whatever was chosen. There could be a
21 scenario where the defense attorney say, I don't want to do
22 that. I would rather go through cross-examination and
23 highlight, why wasn't this witness ever subjected to an
24 identification procedure before? Why are we just hearing
25 about this now for the first time? It's sloppy police

1 work, which is a typical defense cross-examination tactic
2 of police officers and witnesses.

3 CHIEF JUDGE WILSON: So you're sort of say - - -
4 if - - - if I understand you - - - if I can summarize it, I
5 think you're sort of saying that the - - - whatever the
6 ruling by the court would be would be a - - - for it - - -
7 it would have discretion and be reviewed for a piece of
8 discretion with a variety of factors the court could
9 consider. And if defense counsel didn't like whatever the
10 court ruled, one option would be to withdraw the request
11 for the out-of-court identification.

12 MR. MCCARTHY: But - - - but the - - - the one
13 thing that I would - - - the one thing I would say, which
14 may or may not be controversial is this, I don't think
15 that, in terms of accommodation, that this is a new rule
16 because I have seen trials where this has happened. So
17 this is happen - - - this does happen at the trial level.

18 I just did an appeal where the defendant asked
19 for this type of accommodation at trial. I did a trial
20 where this type of accommodation occurred. So it does
21 happen. The defense attorney has to ask for it. They
22 didn't. That's really the crux of the issue of when you
23 talk about what the rule should be and whether the rule
24 should apply to the defen - - -

25 JUDGE RIVERA: What - - - what could be the

1 accommodation - - - let - - - let's get back now to this
2 case. What could be the accommodation when the witness is
3 on the stand?

4 MR. MCCARTHY: You're talking - - -

5 JUDGE RIVERA: Certainly, the - - -

6 MR. MCCARTHY: - - - you're talking - - -

7 JUDGE RIVERA: - - - of course - - - of course,
8 if you've gotten a notice - - -

9 MR. MCCARTHY: - - - you're talking - - -

10 JUDGE RIVERA: - - - the witness has not yet
11 taken the stand, is not yet in the courtroom, there are
12 actions that can be taken. What do you do once the witness
13 is on the stand?

14 MR. MCCARTHY: You're talking in the abstract,
15 though, right? You're not talking about this particular
16 case?

17 JUDGE RIVERA: Well, that's what happened here.
18 But we certainly - - -

19 MR. MCCARTHY: That's - - -

20 JUDGE RIVERA: - - - I'm asking as a general
21 rule.

22 MR. MCCARTHY: Yeah. I don't - - - I don't agree
23 that that's what happened here.

24 JUDGE RIVERA: Oh, the witness wasn't on the
25 stand?

1 MR. MCCARTHY: No. That the wit - - - that the
2 defense attorney didn't have notice that the witness could
3 identify - - -

4 JUDGE RIVERA: I'm not - - - I'm not asking you
5 about that.

6 MR. MCCARTHY: Yeah. So just - - -

7 JUDGE RIVERA: I'm asking you about once the
8 witness is on the stand.

9 MR. MCCARTHY: I just want to be clear, we're
10 talking hypothetically.

11 JUDGE RIVERA: Your witness - - - yes.

12 MR. MCCARTHY: Yes.

13 JUDGE RIVERA: We've moved past that. I'm asking
14 about this.

15 MR. MCCARTHY: Okay. Good. Then I am happy to
16 answer you hypothetically.

17 JUDGE RIVERA: Yes.

18 MR. MCCARTHY: Hypothetically speaking.

19 JUDGE RIVERA: As well as in this case. Go
20 ahead.

21 MR. MCCARTHY: Okay. Hypothetically speaking - -
22 -

23 JUDGE RIVERA: Yes.

24 MR. MCCARTHY: - - - in this case - - -

25 JUDGE RIVERA: Yes.

1 MR. MCCARTHY: - - - if the - - - the prosecutor
2 didn't - - - where - - - in a scenario where, I believe,
3 the hypothetical was, the prosecutor didn't know that the
4 witness could ID, but then points to the person. Is that -
5 - - is that what we're talking - - - was that the
6 hypothetical? And says, that's the defendant - - - or
7 that's the man that did it?

8 JUDGE RIVERA: I'm - - - I'm asking about a case
9 where the witness - - - like this one - - - the witness is
10 already on the stand. What could be the possible way that
11 one would cure that situation, the suggestivity of that?

12 MR. MCCARTHY: Well, in this - - - in a
13 hypothetical scenario, if that were to happen, similar to
14 what happens at trial - - -

15 JUDGE RIVERA: Right.

16 MR. MCCARTHY: - - - where somebody - - - the - -
17 - a suppression issue arises at trial, if there was an
18 accommodation scenario that could happen, the jury gets
19 excused. The court explores the accommodation to figure
20 out - - - and maybe that accommodation is different than a
21 photo array. Maybe it's - - - it could be - - - it could
22 be any number - - - it can - - - cert- - - -

23 JUDGE RIVERA: I guess - - - I guess I'm asking
24 you what - - - what would be the way one would deal with
25 the situation when the damage has been done, the

1 suggestivity has occurred, they're sitting on the witness
2 stand.

3 MR. MCCARTHY: See, I don't - - - I don't know if
4 the dam- - - -

5 JUDGE RIVERA: I know you don't agree with that.

6 MR. MCCARTHY: No. No.

7 JUDGE RIVERA: Work with the hypothetical.

8 MR. MCCARTHY: That's not what I was going to
9 say. I was going to say, I don't know if the damage has
10 been completely done if - - -

11 JUDGE RIVERA: Exactly. Just assume this
12 hypothetical.

13 MR. MCCARTHY: No. No. No. I meant in the
14 sense of the - - - so one of the things that could happen
15 is the jury gets excused. The court addresses the witness,
16 talks to the witness about the circumstance - - - and some
17 of this is actually in our record in this particular case.
18 What were the circumstances in which you saw the defendant?
19 How long did you see him? What was the lighting? What
20 were the conditions? Similar to if you were to do sort of
21 an independent source - - -

22 JUDGE HALLIGAN: With an eye towards what,
23 excluding the ID? What - - - with - - - what - - - what
24 would those questions be asked with an eye towards,
25 potentially excluding the ID?

1 MR. MCCARTHY: Potentially, in essence, ruling
2 that the ID should have been excluded and then asking the
3 jury to disregard in that scenario. I'm not - - -

4 JUDGE RIVERA: So it sounds to me like you're
5 saying, what the judge is going to do is ask a series of
6 questions, perhaps allow counsel to ask a series of
7 questions - - -

8 MR. MCCARTHY: Sure.

9 JUDGE RIVERA: - - - to determine whether or not
10 there really was subjectivity - - -

11 MR. MCCARTHY: Because the issue is - - -

12 JUDGE RIVERA: - - - if we decide as a matter of
13 law that there is. Again, what could possibly be the way
14 to deal with that?

15 MR. MCCARTHY: So there - - - so there was - - -
16 you - - - so you're saying, after that whole encounter, was
17 - - -

18 JUDGE RIVERA: Once the witness is on the stand?

19 MR. MCCARTHY: Yes. So at the end of that - - -
20 sort of, if defense counsel asked questions, attorney asked
21 questions, judge asked questions, there's a determination
22 that the witnesses - - -

23 JUDGE RIVERA: No, that was what you asked. That
24 was your answer. I understood that. But let - - - I think
25 - - - I think I understand your position.

1 MR. MCCARTHY: No, I - - - I just - - - I just
2 wanted to - - -

3 JUDGE RIVERA: No. No. I understand your
4 position.

5 MR. MCCARTHY: Okay.

6 JUDGE RIVERA: Okay.

7 MR. MCCARTHY: Just to finish that thought, I
8 think what you're driving at, and what we're - - - what the
9 goal is is to ensure that the in-court ID's reliable. So I
10 believe in your scenario if the witness is on the stand
11 those questions are to determine whether the ID was
12 reliable. And if the ID was not reliable, then the ID
13 should be disregarded, if that's what the judge determines
14 after the sort - - - after an inquiry like that. I believe
15 that would be my answer to you. And I hope that - - - that
16 - - - that answers your question there.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. MCCARTHY: If there are any other questions?
19 Thank you.

20 MS. WALTHER: Thank you - - -

21 JUDGE SINGAS: Can I just ask one question - - -

22 MS. WALTHER: Yes.

23 JUDGE SINGAS: - - - on the notice - - - and a
24 hostile witness - - - because there may be occasion, like
25 in a gang situation, where the prosecutor doesn't have the

1 opportunity to talk to a witness, and decides, I'm going to
2 put this witness on the stand, whether because of fear or
3 whatever and just see if they could make an identification.
4 There wouldn't be an opportunity for the prosecutor to know
5 that there would be an ID, would that - - - would you
6 consider that as an exemption, or is that up to the trial
7 court and the trial court's discretion? What would you do
8 in that situation?

9 MS. WALTHER: So the - - - the notice that we
10 would be looking for would be - - - would be notice of the
11 intent to ask the question. So we aren't anticipating that
12 the prosecutor is always going to know what the witness is
13 going to say. Sometimes there is an element of
14 unpredictability to witness testimony. But the prosecutor
15 will know that they're going to ask that person to make the
16 identification. And - - - and that's what we are seeking -
17 - -

18 JUDGE RIVERA: I thought that was the scenario
19 here. I thought the prosecutor, in response to the judge,
20 who was as surprised as the defense counsel, said, I don't
21 - - - I don't know that the witness is going to ID the
22 defendant.

23 MS. WALTHER: That - - - that is what she
24 indicated to - - - to the judge and - - - and to counsel.

25 JUDGE HALLIGAN: Would you agree, in - - - in

1 following up on Judge Singas' question, that there may be
2 circumstances. For example, there are some other
3 jurisdictions that have concluded that there may be good
4 cause for a first time in-court ID, as opposed to a blanket
5 rule that there may never be without any notice - - -

6 MS. WALTHER: Yes, I - - - I think that's along
7 the lines of what Connecticut, Massachusetts - - -

8 JUDGE HALLIGAN: Uh-huh.

9 MS. WALTHER: - - - recently New Jersey have
10 held. And - - - and the good cause or good reason
11 framework is - - - is really sort of what I was getting at
12 earlier, with respect to circumstances where maybe
13 identification is not a central issue in the case. Maybe
14 the identification that's going to be made is essentially
15 confirmatory, if the witness has had some familiarity with
16 the defendant, so that would be a showing then, that the
17 prosecution could make in response to the defense request
18 that this ID be precluded or that there be some type of
19 special procedure - - - that there would be a showing that
20 it's not necessary, but in the absence of that special
21 procedure or a good reason, these identifications should
22 not be admissible.

23 JUDGE RIVERA: I'm sorry, could you work through
24 - - - I may have missed it - - - what the - - - what the
25 burdens are in what you've just described. Who's carrying

1 the first burden, does it shift, who's carrying that
2 burden, does it shift back?

3 MS. WALTHER: So I think initially, the
4 prosecution has the burden of providing notice that they
5 intend to ask the witness to make the identification. The,
6 I think, defense would have the burden of making that
7 request for whatever special procedure is appropriate under
8 those circumstances, I think that would be, there'd be a
9 case-by-case element to that. In response, the prosecution
10 could then make a showing - - - they would have the burden
11 of showing that those procedures are not necessary because
12 there's some good reason for that. That the witness was
13 previously familiar with the - - - with the defendant, or -
14 - - identity's not at issue, those types of things.

15 JUDGE SINGAS: And do you think that that's a
16 separate hearing or could that take place at sidebar?
17 Could it take place like once they see a witness list and
18 somebody asks for an offer of proof on the witness's
19 testimony? How do you envision that?

20 MS. WALTHER: I - - - I don't think it would
21 necessarily have to be an evidentiary hearing with - - -
22 with testimony. I think it would happen - - - I think in
23 most cases, similar to other pre-trial evidentiary rulings,
24 it would be on papers, attorney colloquy, things like that.
25 And it would be similar to what courts are doing in other

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contexts. And - - - and as Judge Halligan referenced, what courts are saying in other jurisdictions should also be done.

And I would just conclude by saying that the overall concern here is - - - I - - - I would agree with counsel that it - - - it's the undue suggestivity of these identifications. And their - - - but their impact on the reliability of the identification is - - - is really the issue here. And that unreliable eyewitness identifications play a tremendous role in wrongful - - - wrongful convictions. This Court has recognized that in Boone and other cases, and we're asking the Court to recognize that today as well. Thank you.

CHIEF JUDGE WILSON: Thank you.
(Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Thomas P. Perdue, No. 28 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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