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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 28

THOMAS P. PERDUE,

Appellant.

20 Eagle Street
Albany, New York
March 16, 2023

Before:

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

Appearances:

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Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: The next appeal is
2 number 28, People v. Perdue.

3 MS. WALTHER: Good afternoon, Your Honors, may it
4 please the Court. Carolyn Walther for Thomas Perdue. I
5 would like to reserve two minutes for rebuttal, please.

6 ACTING CHIEF JUDGE CANNATARO: You have two
7 minutes.

8 MS. WALTHER: Thank you. The first time in-court
9 identification of Mr. Perdue was unduly suggestive and
10 deprived him of his due process right to a fair trial.
11 First time in-court identifications like this one are both
12 more suggestive to the person making the identification and
13 more prejudicial to the defendant than out-of-court
14 identification procedures, so a defense attorney's ability
15 to cross-examine after one of these identification
16 procedures has taken place in court for the first time is
17 not a sufficient remedy.

18 JUDGE RIVERA: But isn't the basis that you're
19 arguing for the suggestiveness so obvious that that is why
20 the courts just say just bring it up on cross or bring it
21 to the jury's attention?

22 MS. WALTHER: Well, our contention, Your Honor,
23 is that because it is so suggestive --

24 JUDGE RIVERA: Um-hum.

25 MS. WALTHER: -- the impression that -- that this

1 makes first on the witness, that the witness is asked to
2 pick out the person who is seated at the defense table,
3 next to their attorney, and the impression on the jury is
4 also incredibly powerful of these kinds of identifications.

5 JUDGE TROUTMAN: So what should have happened
6 before the attorney was put in the position where the court
7 says, oh, just deal with it on cross-exam?

8 MS. WALTHER: What should have happened here
9 really has two components. The first is notice. And the
10 second is the ability to seek remedial measures to mitigate
11 the undue suggestiveness.

12 JUDGE SINGAS: Okay. But notice pursuant to
13 what? Not 710.30 and not our case law and not the Supreme
14 Court's case law, where it says that if there is a police
15 arranged identification, even if it is suggestive, we still
16 have the opportunity for an independent source for that
17 identification, right. The courts, our legislation, our
18 legislative history basically says if there's an
19 independent source for it, it can go to a jury. The crux
20 of it is the reliability of that eyewitness and the
21 identification; that can be tested still in a setting where
22 there's a judge, a defense attorney, a jury,
23 cross-examination.

24 MS. WALTHER: I would agree with Your Honor that
25 reliability is certainly the crux of the issue here. And

1 in this case -- for example, an independent source; that
2 might have been something that a prosecutor could have
3 presented in a situation where there was an independent
4 source. There wasn't one here. But clearly --

5 JUDGE SINGAS: But there wasn't an identification
6 yet, so aren't we putting the cart before the horse? There
7 hasn't been an identification. There has been no
8 suggestibility. There hasn't been an ID. So I'm not sure
9 what you're asking for.

10 MS. WALTHER: Well, I think the notice that we're
11 asking for is -- is notice that the witness will be asked
12 to make that identification. Because at that point, the
13 defense attorney then has a meaningful opportunity to ask
14 for additional measures, such as an in-court lineup type
15 procedure. Evidence of an independent source, for example
16 that -- at the point at which the defense attorney learned
17 in this case that that question would be asked to the
18 witness, it was too late. The witness had already been --

19 JUDGE SINGAS: But you don't get an independent
20 source because you can't ask the question. The independent
21 source comes only after there's been a suggestive
22 identification.

23 MS. WALTHER: I would submit that if the
24 prosecutor is required to give notice of their intent to
25 ask, that the witness is going to make an in-court

1 identification at that point, given a situation like this,
2 where there was no out-of-court identification procedure,
3 the defense attorney then has the opportunity to ask for
4 either measures to mitigate the undue suggestiveness of
5 this type of situation or if those aren't necessary
6 because, for example, there is an independent source, then
7 that's another possibility altogether.

8 JUDGE SINGAS: But if the prosecutor doesn't know
9 if there's going to be an ID made, so now you're saying
10 that maybe they have a photo array in the middle of trial
11 which then is outside the 15 days that 710.30 requires for
12 notice, so now we're asking for a legislative change
13 regarding ID notice.

14 MS. WALTHER: Well, not necessarily, Your Honor.
15 So to be clear, we -- we're not contending that this issue
16 falls under the umbrella of 710.30. This is a separate
17 issue. An in-court identification is not covered under the
18 plain language of 710.30.

19 JUDGE TROUTMAN: Are you essentially arguing that
20 if the witness is allowed for the first time to point to
21 the person who traditionally sits next to the defense
22 attorney, that's the person, that that's going to taint
23 that process if before they sit down, they don't know if
24 they can or cannot identify. But if they're sitting in the
25 traditional seat, are you suggesting that's where the taint

1 is happening?

2 MS. WALTHER: I think that's fair to say, and
3 that goes to the suggestiveness, the inherent
4 suggestiveness of this type or procedure. The defendant
5 here -- there -- there's nothing, unfortunately, in this
6 record about his appearance vis-à-vis other people in the
7 courtroom. But certainly, he's the only person seated at
8 the defense table, next to the defense attorney. That --

9 ACTING CHIEF JUDGE CANNATARO: Can I ask you, if
10 that sort of inquiry had taken place, if there was a notice
11 of intent to have an identification, what sort of
12 mitigating -- I think you mentioned defense could take
13 mitigating steps. Short of an effective cross-examination,
14 which is obviously permitted under those circumstances,
15 what other mitigations could have happened?

16 MS. WALTHER: So I think this has been dealt with
17 in the second circuit in Archibald and other cases. For
18 example, an in-court lineup type procedure, where -- I
19 believe in that case, it was requested that the defendant
20 be seated in the audience and that other individuals who
21 shared similar physical characteristics also be included in
22 the audience, to see if the witness could pick out the
23 defendant from among that group.

24 ACTING CHIEF JUDGE CANNATARO: So a different
25 identification procedure?

1 MS. WALTHER: Different identification procedure.

2 JUDGE GARCIA: What if there's no identification
3 they can identify this person, as I think there was here,
4 in -- in the reports? But hypothetical. You know, witness
5 comes in. And there's no intention on the part of the
6 prosecutor to have them ID the witness, but they see the
7 person, right. They're, like, oh, you know, that person.
8 Is that -- what happens there?

9 MS. WALTHER: I think in a situation where it --
10 it's sort of a spontaneous statement on the part of the
11 witness, I think there would potentially need to be some
12 sort of inquiry on the part of the trial court, in terms of
13 whether there was some suggestiveness there. But that's --
14 that's not what we're talking about. And the difference
15 here is --

16 JUDGE GARCIA: No, no, I understand it's not this
17 case, but what would the rule be, then, that allows for
18 that that gives you some type of notice here?

19 MS. WALTHER: Well, I think the notice
20 requirement really attaches to the prosecutor's intent to
21 ask the question. So spontaneous statement by a witness,
22 I -- I'm imagining a defense attorney might object to that
23 and there would be some sort of inquiry by the court. But
24 what I'm talking about is --

25 JUDGE GARCIA: Is there an intent on this record

1 to ask the question -- I just don't remember, honestly. I
2 know there's some colloquy. I don't know if they're going
3 to make an ID, but is it clear they were intending to ask
4 the question?

5 MS. WALTHER: I'm not sure whether there was a
6 definitive statement on the part of the prosecutor that
7 they intended to ask a question. I know that they said
8 that they did not know whether the witness would actually
9 make the ID.

10 JUDGE GARCIA: Yeah, I remember that.

11 MS. WALTHER: But I think it's --

12 JUDGE GARCIA: But then where would this fall on
13 your line of if it's spontaneous, it's okay?

14 MS. WALTHER: Well, the witness was asked.

15 JUDGE GARCIA: They were asked.

16 MS. WALTHER: Do you see that person in the
17 courtroom, can you point them out.

18 JUDGE GARCIA: So --

19 MS. WALTHER: And -- and it was at that point
20 that --

21 JUDGE GARCIA: So it would be --

22 MS. WALTHER: -- defense counsel objected.

23 JUDGE GARCIA: It would depend on the questioning
24 of the prosecutor?

25 MS. WALTHER: I think that's fair to say, that

1 would be a very fact specific --

2 JUDGE RIVERA: Isn't the point of saying I don't
3 know what the answer is going to be that there's a question
4 to be asked?

5 MS. WALTHER: I'm sorry. I don't think I heard
6 Your Honor's question.

7 JUDGE RIVERA: Isn't the point of the
8 prosecutor's statement that they're not sure what the
9 answer's going to be because the question's going to be
10 asked because they're already --

11 MS. WALTHER: Regarding --

12 JUDGE RIVERA: -- intending to ask such a
13 question?

14 MS. WALTHER: Yes. Yes, I --

15 JUDGE RIVERA: You know?

16 MS. WALTHER: I do. I think that's fair to say.

17 JUDGE RIVERA: I thought that's what the record
18 said. Okay.

19 JUDGE GARCIA: But it could be I don't know if
20 they got to look over at that defense table and say hey, I
21 see the guy, but I think you're right. I mean, here, they
22 asked, right?

23 MS. WALTHER: Yes, they -- the question was --
24 was asked. But --

25 JUDGE WILSON: I sort of assumed that an

1 implication of the rule you're asking for is that there
2 be -- the notice rule -- is that there would be a burden on
3 the prosecutor before trial to talk to the prosecution
4 witnesses and say can you make an identification and -- I'm
5 sorry.

6 JUDGE GARCIA: I couldn't hear the question --

7 JUDGE WILSON: Sorry.

8 JUDGE GARCIA: -- over the band.

9 JUDGE WILSON: Yeah, I know, it --

10 JUDGE RIVERA: Got a little horn outside.

11 JUDGE WILSON: I took the SATs under this kind of
12 condition. I'm good at tuning it out.

13 But sorry. The question is, would -- I assume
14 that the implication of your rule is that you would want
15 the people to ask their witnesses ahead of time to
16 determine whether they can or would make an
17 identification --

18 MS. WALTHER: I --

19 JUDGE WILSON: -- so that that would get
20 reported. And then -- and that doesn't -- you know, that
21 doesn't eliminate Judge Garcia's hypothetical which is what
22 if they ask and the person says no and the prosecutor
23 doesn't ask a question like that and the witness all of a
24 sudden says, you know, that's -- that's the guy? You have
25 to deal with those on -- as one-offs?

1 MS. WALTHER: Right. That would be -- that would
2 be unpredictable, but dealt with in the course of trial, I
3 think, but -- but yes, I -- I would agree with Your Honor;
4 that does contemplate the prosecution asking that question
5 to the witness.

6 JUDGE SINGAS: But in this case, you did have
7 notice that they -- the witness could probably make an
8 identification because months earlier from the body cam
9 footage when she was talking to the police officer, she
10 said yeah, I got a good look and I could ID him again.

11 MS. WALTHER: She did say that. And -- and I --
12 I do think it's fair to say, defense counsel was aware of
13 this person's existence. But the critical factor here is
14 she didn't know that he would be asked to identify Mr.
15 Perdue and in fact, identify Mr. Perdue in court for the
16 first time. This isn't a situation where there had been an
17 out-of-court identification procedure 710.30 notice, so she
18 would be on notice that this is likely going to be the
19 substance of the testimony, this --

20 JUDGE SINGAS: So I guess I'm just struggling
21 with -- you're asking for more ID procedures that occur
22 outside the presence of a judge with a defense attorney.
23 You're asking for showups that you then have to test the
24 reliability of. You're asking for an additional lineup,
25 additional identifications before the one that goes on in

1 court, where you can't be assured of what happens, instead
2 of it playing out in court. And you can make the
3 arguments, well, you know, look. This is the only person
4 in the courtroom. Obviously everyone watches TV, that's
5 where she's going to go to make the ID. Like, I -- I don't
6 know why -- I guess I'm struggling with why that's not
7 effective and why that's violative of due process when
8 you're in a court of law doing that and instead, you would
9 rather than take place at a police precinct, without those
10 protections.

11 MS. WALTHER: Well, I think addressing Your
12 Honor's question about due process, I would say the
13 suggestiveness as we've been talking about of that type of
14 identification, right, everyone watches TV, everyone knows
15 where the defendant sits, that's a piece of it. And that
16 is in line with the cases from this court, holding that an
17 unduly suggestive identification procedure has to be
18 precluded. Things like a first time in-court photo show
19 up. Those are not allowed.

20 JUDGE SINGAS: Yeah, arranged by the police.

21 MS. WALTHER: This is even more suggestive than
22 that, I would submit. And the second piece of it --

23 JUDGE TROUTMAN: And assuming that this is
24 improper, was it incumbent upon the defense to then, when
25 they're told that this witness could possibly -- they're

1 not sure, but may identify or ask to identify, was it
2 incumbent on the defense at that point to ask for some sort
3 of proceeding in the absence of the jury procedure to take
4 place to test it?

5 MS. WALTHER: I think that --

6 JUDGE TROUTMAN: Whose -- whose burden?

7 MS. WALTHER: I would say in the first instance,
8 it's the -- the prosecution's burden to disclose that. In
9 this case, the defense only learned of the intention to ask
10 that question after the witness had been on the stand and
11 testifying for a number of minutes and observing Mr. Perdue
12 seated at the defense counsel table. And so at that point,
13 it was too late, I would submit. Any of those measures
14 would have been essentially useless because the
15 suggestiveness had already taken place.

16 JUDGE TROUTMAN: So he couldn't have asked that
17 the jury be excused when he knows this witness is coming on
18 the stand?

19 MS. WALTHER: I think had it happened prior to
20 the witness taking the stand, I -- I think that would have
21 been perfectly fine. What happened in this case, though,
22 it was in the middle of testimony, essentially.

23 ACTING CHIEF JUDGE CANNATARO: Counsel, there was
24 some impeachment of the police's identification procedure,
25 right? That -- that was questioned during I think a very

1 effective cross-examination about how the police came to
2 the conclusion that the defendant was the person who did
3 the shooting; isn't that true?

4 MS. WALTHER: Well, there was no out-of-court
5 identification procedure with this witness. Is the Court
6 referring to the --

7 ACTING CHIEF JUDGE CANNATARO: No. I'm talking
8 about the -- the police investigator who testified and
9 that -- this is really going to be my question. Which
10 happened first? Did the police identify -- identify or
11 claim to have testified as to how they identified the
12 defendant or was it Mrs. Hill? Is that her name?

13 MS. WALTHER: Yes, Ms. Hill.

14 ACTING CHIEF JUDGE CANNATARO: Yeah.

15 MS. WALTHER: Which -- which testimony happened
16 first, is -- that's the question?

17 ACTING CHIEF JUDGE CANNATARO: Yeah, because what
18 it's going to, I'll just tell you, is I'm just wondering if
19 in the air of the -- the trial, in the -- in the midst of
20 the proceeding, whether the issue of Hill's identification
21 came up because there was an ongoing dispute about whether
22 the police method of identifying the defendant was somehow
23 deficient as a result of the cross-examination that had
24 taken place, and that's why the prosecutor may not have
25 known whether Ms. Hill was going to identify him or not,

1 but decided to ask the question?

2 MS. WALTHER: That -- that was not my impression
3 of the record as the trial unfolded. And Ms. Hill did
4 testify she met with the prosecutor that day and the day
5 prior about her testimony. So I didn't get the sense
6 this -- that this was sort of a spontaneous decision to
7 call this witness to the stand. I got the impression it
8 sort of fit in with the prosecution's overall theory of the
9 case.

10 I -- I believe that -- my recollection of the
11 record was that -- I'll retract that statement because
12 I'll --

13 ACTING CHIEF JUDGE CANNATARO: Okay.

14 MS. WALTHER: -- I'll take a moment and verify
15 it.

16 ACTING CHIEF JUDGE CANNATARO: Your -- your
17 time's up anyway.

18 MS. WALTHER: All right.

19 ACTING CHIEF JUDGE CANNATARO: You know, we'll --

20 MS. WALTHER: I see that my time is up.

21 ACTING CHIEF JUDGE CANNATARO: We'll save it for
22 later.

23 MS. WALTHER: Thank you.

24 ACTING CHIEF JUDGE CANNATARO: Thank you.

25 Doesn't really help with the marching band

1 playing in the background.

2 JUDGE RIVERA: With the music, yeah.

3 ACTING CHIEF JUDGE CANNATARO: Yeah.

4 MS. PORTER: Well, I thought I'd get used to it
5 after a few minutes, but good afternoon.

6 ACTING CHIEF JUDGE CANNATARO: Sure.

7 MS. PORTER: May it please the Court, my name is
8 Kaylan Porter, appearing on behalf of the people. Where
9 there has been no improper and unduly suggestive pre-trial
10 procedure arranged by --

11 JUDGE TROUTMAN: But are you arguing that a
12 witness coming into the courtroom, not having identified
13 the def -- no procedure having taken place, that it's not
14 suggestive if they're sitting at the normal place that the
15 defendant -- that they simply -- they're asked a question,
16 can you identify him, that's him, because he's sitting
17 there?

18 MS. PORTER: Well, the defendant's making a due
19 process claim. And due process has never turned on
20 inherent suggestiveness of any procedure or any --

21 JUDGE TROUTMAN: But is it suggestive for the
22 identification to take place when they're sitting there,
23 nobody else?

24 MS. PORTER: Justice Ginsburg wrote the pairing
25 majority in -- by the Supreme Court and did recognize that

1 there is a degree of inherent suggestiveness in any
2 identification procedure, whether that's happening before
3 court, whether that's happening in court. Certainly, if
4 we're assuming that a witness walking in that has been
5 sequestered is so imminently familiar with a courtroom as
6 to where the defendant's going to be seated, sure.
7 There's some degree of suggestiveness there.

8 But the benefit, though, is that it's all
9 happening before the jury. The trial counsel can make
10 objections. Trial counsel can cross-examination, or can
11 cross that -- that witness as to the degree of
12 suggestiveness there; that there's only one person in this
13 courtroom that --

14 JUDGE TROUTMAN: So that's all assuming in a
15 perfect world, everything is happening the way that it's
16 supposed to. The jury's going to know, well, maybe it is,
17 maybe it isn't. They're not going to think in the
18 temperature of a courtroom, sitting on the stand, and the
19 judge is here, and the person identifies them in front of
20 the judge, might they not think, well, she -- she or he
21 must be right?

22 MS. PORTER: I -- that determination has always
23 fallen within the province of the jury, the reliability of
24 a witness's testimony and whether there is any degree of
25 suggestiveness there. A jury is determining whether a

1 witness's testimony is truthful, whether a witness's
2 testimony is accurate based on their observations, and
3 they're charged accordingly.

4 JUDGE TROUTMAN: So this first time ID is nothing
5 special from normal witness testimony, where you just test
6 their credibility, is what you're suggesting?

7 MS. PORTER: No. It does not fall under the due
8 process clause. This is trial evidence. This is trial
9 evidence that the jury can evaluate in determining whether
10 or not they think that this witness is telling the truth,
11 whether this witness is accurate. And the degree of
12 suggestivity that is inherent in a courtroom setting is
13 subject to cross-examination, is subject to arguments that
14 counsel can make before the jury in summation, as well as
15 other trial safeguards, such as the presumption --

16 JUDGE WILSON: Do you -- do you think that the
17 normal pre-trial identification procedures help improve the
18 reliability of eyewitness identifications?

19 MS. PORTER: No, Your Honor. I -- I think that
20 the issue with a pre-trial identification -- we've always
21 looked to whether or not those affected the ultimate
22 in-court identification and the risks that come with a
23 pre-trial identification as to whether or not the witness,
24 then, if they're improperly suggested to pick a particular
25 witness, then when they testify at trial, they're recalling

1 the image of the person that the police presented to them,
2 rather than their memory.

3 JUDGE WILSON: But you're answering a little bit
4 different question than I think I asked, which is not
5 whether an unduly suggestive pre-trial procedure improves
6 the in-court identification, but rather having a properly
7 constructed pre-trial identification procedure gives us
8 more confidence in the reliability of the in-court
9 identification.

10 MS. PORTER: Under those circumstances, if the
11 witness were to identify the defendant in court, if there
12 has been a pre-trial procedure conducted, they're not
13 testifying to the pre-trial procedure.

14 JUDGE WILSON: I understand that.

15 MS. PORTER: So the jury doesn't hear that
16 evidence. So the jury's not hearing about any of that type
17 of reliability. So the jury, their reliability
18 determination is just based on the in-court identification.
19 It's whether or not the prosecutor is allowed to ask the
20 question, even given the fact that there has been a
21 pre-trial procedure. Here, there has been no pre-trial
22 procedure, so the prosecutor is allowed to ask the
23 question. We don't know how --

24 JUDGE GARCIA: You can use a pre-trial to rebut
25 in -- can you here? Like, if -- if there's a charge of

1 recent fabrication in an in-court ID, you can put in the
2 photo spread, let's say, right?

3 MS. PORTER: You can. Or if the witness on
4 present recollection of --

5 JUDGE GARCIA: So it's bolstering the
6 prosecution's in-court ID in that case, right?

7 MS. PORTER: Only under statutorily --

8 JUDGE GARCIA: Limited circumstances, right.

9 MS. PORTER: -- enumerated circumstances, right.

10 THE COURT: But let me ask this. If you have a
11 witness and you're not sure they can make an ID, so you
12 don't ask them and you don't give them a photo spread or a
13 lineup, but you call them and then you ask them in court.
14 Okay. Do you see the person who whatever, is that okay?

15 MS. PORTER: Yes, the prosecutor -- I mean, the
16 prosecutor is taking a risk, of course, because the witness
17 could say -- look around the room and say I don't see them
18 here. It's a risk that is borne on the prosecutor as to
19 whether or not they want to ask that question. The witness
20 could say the -- the person isn't there, the witness could
21 identify the defendant.

22 JUDGE TROUTMAN: And the impact on the defense
23 are you suggesting is nothing by that prosecutor's for the
24 first time just saying pick him?

25 MS. PORTER: The fact that the prosecutor could

1 be expected to ask that question here is reasonably known
2 to the defense ahead of time. I -- I don't think that it
3 negatively impacts the defense, the fact that they haven't
4 received as -- as counsel requested, explicit notice.
5 Counsel mentioned that this does not fall under the ambit
6 of 710.30, so the --

7 JUDGE TROUTMAN: So would it be their respon --
8 the defense responsibility to ask the court for an
9 opportunity for the defendant to sit elsewhere or for some
10 other proceeding to take place outside the presence of the
11 jury? Would it be on them?

12 MS. PORTER: It would be, Judge Troutman. The --
13 any in-court accommodations, defense can of course ask for
14 those. Any of those requests can be made ahead of time.
15 Those accommodations were referenced by this court's
16 decision in Brown which cited the Archibald case that
17 counsel mentioned a few moments ago. In there, the
18 defendant did make those types of request. The court
19 denied the request. And then this court reviewed that for
20 an abuse of discretion, it's not a due process claim; that
21 is a court's discretion as to whether or not the defendant
22 has made such a showing that those are necessary. But it
23 does always fall on the defendant to make those requests
24 ahead of time.

25 JUDGE RIVERA: Yeah, but how -- how are you going

1 to make the request when you don't have advanced notice?
2 That is to say that the damage has been done, to the extent
3 that the witness is on the stand and sees the defendant at
4 the defense table.

5 MS. PORTER: Judge Rivera, I think there is every
6 reason to believe that defense counsel should have been
7 aware that this question could be asked.

8 JUDGE RIVERA: But let's put -- put -- forget the
9 camcorder for one moment. What about a case where you
10 don't have the camcorder? What -- what would have been the
11 recourse for defense counsel? What -- what could you have
12 asked for --

13 MS. PORTER: I --

14 JUDGE RIVERA: -- other than no, you don't get to
15 ask the question, right. Other than to ask the judge to
16 prohibit the prosecutor from answering the que -- asking
17 the question, what other recourse would they have?

18 MS. PORTER: Is this a witness that was known to
19 the defendant or --

20 JUDGE RIVERA: They may know about the witness,
21 but there's not -- like in this case, which I thought was
22 your argument, they're on notice because they've got the
23 camcorder and she says on the camcorder I can -- I can ID
24 the person.

25 MS. PORTER: I think it's a fair assumption that

1 any eyewitness that defense knows about could be asked to
2 describe the perpetrator. They could be asked to describe
3 the perpetrator to give a description of who they saw, and
4 then if they --

5 JUDGE RIVERA: You mean if there's nothing in --
6 you mean just because a witness happens to be at the scene
7 without knowing anything about what the witness actually
8 observed, that they may be testifying to something else
9 about the events, you should assume that they are going to
10 be able to eye -- be the eyewitness as to the perpetrator?

11 MS. PORTER: I think it's fair for a defense
12 counsel to be aware that that question could be asked.
13 Then certainly the witness here was an eyewitness, was on
14 the phone with 911 while she was observing the shooting.
15 She --

16 ACTING CHIEF JUDGE CANNATARO: What -- what
17 triggers that responsibility on the part of the defense
18 counsel? Is it the fact that Ms. Hill said I can identify
19 the witness if asked to do so, or is it something else?

20 MS. PORTER: I think even without that. Even
21 without that, defense counsel would be reasonably aware.
22 They know of an eyewitness to a crime and that eyewitness
23 provided a description of the perpetrator. I think it's
24 fair that then in the trial, when that witness is asked to
25 give their --

1 JUDGE RIVERA: Well, that does suggest that you
2 observe them, right, that the witness -- I was asking about
3 how would one know that any particular witness is going to
4 identify the defendant.

5 MS. PORTER: They don't.

6 JUDGE RIVERA: And I thought -- yeah, I may have
7 misunderstood you. I thought you were responding that as
8 long as you know they're going to be a witness for the
9 prosecution, related not -- not to forensics, right,
10 related to the events that have unfolded, that defense
11 counsel should assume that the question might have been
12 asked, and take -- take efforts, appropriate efforts, to
13 protect their client under the circumstances.

14 MS. PORTER: If they reasonably know that this
15 person was an eyewitness to the crime, not simply any fact
16 witness --

17 JUDGE RIVERA: Okay.

18 MS. PORTER: -- testifying for the prosecution,
19 but if they --

20 JUDGE RIVERA: So let me -- let me then ask you a
21 different question. Maybe you've already answered it, I
22 just want to be clear. What, from your perspective, is the
23 difference between the suggestiveness in a pre-trial
24 proceeding and -- or pre-trial identification and the
25 suggestiveness that we're referring to here?

1 MS. PORTER: Well, here it's all in-court, it
2 plays out in front of the jury. But the most -- the most
3 significant difference is that it was a pre-trial
4 procedure. So the risks that are attendant in a pre-trial
5 procedure are the risk of misidentification, and that --
6 what I was describing --

7 JUDGE RIVERA: But -- but aren't -- but aren't a
8 significant amount of those risks about the suggestiveness
9 is that there's some action or some way that the procedure
10 is established that is going to suggest to the witness who
11 they should pick out? Which is exactly the suggestiveness
12 you're talking about, and ID in -- excuse me, an in-court
13 ID, where they're going to look over at the defense table,
14 say yeah, there -- there's the person. Not the lawyer, the
15 person next to them.

16 MS. PORTER: Well the risks of a pre-trial
17 procedure are the risk of mistaken identification; that the
18 witness, based on improper police conduct, will choose
19 essentially the wrong person and they'll remember the face
20 of the wrong person that they were presented to pre-trial,
21 when they testify in court. The inherent suggestiveness of
22 the courtroom setting --

23 JUDGE RIVERA: I see.

24 MS. PORTER: -- is a matter of credibility for
25 the jury to determine if they are credible.

1 ACTING CHIEF JUDGE CANNATARO: So is --

2 JUDGE RIVERA: But doesn't but --

3 ACTING CHIEF JUDGE CANNATARO: Sorry.

4 JUDGE RIVERA: I'm sorry. But I get your point
5 there. It's -- it's not one that's not well-taken. But
6 isn't the point that we want to avoid, given the data we
7 now know of these wrong eyewitness IDs, whether they're
8 because an officer or prosecutor may have before the trial
9 perhaps done something that suggests a particular
10 identification, versus sitting on the witness stand and
11 there's the defendant and so I'm going to say it's them?
12 I -- not -- not committing perjury, but genuinely believing
13 that this is the person that they've seen before that they
14 are going to ID as the perpetrator?

15 MS. PORTER: Both are --

16 JUDGE RIVERA: Aren't we concerned with the same
17 thing, I guess is what I'm asking at the end of the day, an
18 incorrect ID that may result in a wrongful conviction.

19 MS. PORTER: No, Judge Rivera. So I would point
20 to this Court's decision in People v. Marshall which I
21 believe was your opinion as well in Marshall. And the
22 risks inherent with the pre-trial procedure are very
23 different from the in-court ID. But the suggestiveness of
24 an in-court ID, the jury is charged on that. The jury is
25 charged that it is up to them to determine credibility,

1 whether the witness testified truthfully and accurately.
2 And there is a charge in there for -- in the credibility
3 charge which was read to the jury in this case that any
4 degree of suggestiveness is also a matter for them to
5 determine. Now --

6 JUDGE SINGAS: But don't the people do that at
7 their peril if they're waiting until trial to ask for
8 identification because at summation, during
9 cross-examination, they will be confronted with the fact
10 that of course the identification was made. So it's not
11 like there's an advantage there. Would you agree with me
12 there?

13 MS. PORTER: There's -- there's really not, Judge
14 Singas. So the -- as I was saying, the people did take a
15 risk in asking this for the first time in court of this
16 particular witness. Now I will mention it because it was
17 mentioned earlier, we weren't sure that this witness was
18 cooperative. So it wasn't until the day before trial that
19 the people had a chance to speak with this witness, it
20 seems that she was fearful and wasn't going to testify.

21 JUDGE SINGAS: And are your notice requirements
22 based solely on police arranged identifications?

23 MS. PORTER: They are. They are. This court has
24 interpreted 710.30 pretty strictly. Anything that falls
25 outside of police arranged, where the witness positively

1 identified the defendant, this was a pre-trial procedure.
2 If those conditions are not met, 710.30 does not apply, and
3 this court has repeatedly revisited that.

4 JUDGE TROUTMAN: In this particular instance,
5 this partic -- this witness's identification became
6 important because the alleged victim gave conflicting
7 identifications, correct?

8 MS. PORTER: Well, I do dispute the conflicting a
9 little bit. I know it was --

10 JUDGE TROUTMAN: Said it was a woman.

11 MS. PORTER: It seems to be a little bit of a
12 game of telephone in the medical records. He does state at
13 one point that he was shot after throwing a drink on a girl
14 which was consistent with his testimony at trial that he
15 threw this drink on this woman and then later was shot;
16 that seems to be passed along through the medical records,
17 until we get to the point where it says that he was shot by
18 the girl after throwing a drink on her. He refuted that.
19 And he did identify the vict -- or he did identify the
20 defendant in the police line --

21 JUDGE TROUTMAN: But it certainly helped that you
22 had another witness, disinterested, who then came in and
23 said that's the person.

24 MS. PORTER: It certainly did. But I will also
25 noted -- note that any first time in-court identification

1 will always be corroborative of other evidence of
2 identification. The people had other evidence of
3 identification which did include the victim's testimony and
4 the victim's identity.

5 JUDGE RIVERA: You're saying that's always the
6 case?

7 MS. PORTER: It -- it would always --

8 JUDGE RIVERA: So even if the people proceed with
9 a purely circumstantial case?

10 MS. PORTER: The circumstances --

11 JUDGE RIVERA: And this would be the sole
12 eyewitness?

13 MS. PORTER: It does not -- it's not necessarily
14 always the -- or excuse me. The people can proceed on
15 circumstantial evidence of identification. But the first
16 time in-court identification would never be the sole
17 evidence of identification.

18 JUDGE RIVERA: Ah.

19 MS. PORTER: The people could certainly proceed
20 on circumstantial.

21 JUDGE RIVERA: Fair enough.

22 MS. PORTER: But I will note that it will, in
23 this instance, always be corroborative, it does not fall
24 under the due process clause.

25 JUDGE RIVERA: But it would be the direct

1 evidence.

2 MS. PORTER: Correct.

3 JUDGE RIVERA: It would be someone saying --

4 MS. PORTER: Correct.

5 JUDGE RIVERA: -- this is who I saw.

6 MS. PORTER: Correct, absolutely.

7 ACTING CHIEF JUDGE CANNATARO: Thank you,

8 Counsel.

9 MS. PORTER: Thank you.

10 JUDGE WILSON: All right, Mr. Walthers. The
11 music seems to have stopped, so let's get your rebuttal.

12 MS. WALTHER: For now. Let's hope. Thank you,
13 Your Honors.

14 JUDGE TROUTMAN: What do you say about the fact
15 that the people have said that pre-trial identifications
16 are the ones that are fraught with possible suggestiveness;
17 that an identification done in the courtroom with the judge
18 presiding, proper instructions, is actually a safer
19 procedure?

20 MS. WALTHER: Well, I -- what I would say, Your
21 Honor, is -- is I think the fact that this first time
22 identification is taking place in the courtroom actually
23 cuts the other way because it's happening in front of the
24 fact finder. And so it's taking the issue out of just the
25 realm of admissibility and directly implicating guilt or

1 innocence.

2 JUDGE GARCIA: That -- I -- as I understand
3 suggestiveness and the challenges made, the challenge to me
4 seems to be the pre-trial ID was so suggestive, it taints
5 the in-court ID, right; that's the analysis we do, right.
6 And is there a way you can allow the in-court ID to go
7 forward sometimes despite a suggestive pre-trial
8 identification procedure because of an independent basis,
9 whatever, which seems to indicate that there's a
10 presumption an in-court ID is okay unless there has been
11 something that happens to taint it before trial, and this
12 tends to stand that on its head, right.

13 MS. WALTHER: I -- I think that's fair to say. I
14 think, Your Honor, what we are asking for, given what sort
15 of the body of knowledge has revealed about eyewitness
16 identifications, you know, this court recognized that in
17 Boone and said that recent information demands a new
18 approach, essentially. And that is what we are asking for;
19 that because --

20 JUDGE TROUTMAN: How far would you ask us to go?

21 MS. WALTHER: What we are asking for, Your Honor,
22 is a holding from this court that first time in-court
23 identifications need to be noticed by the prosecution; that
24 the defense attorneys needs a meaningful --

25 JUDGE SINGAS: But how could they be noticed?

1 MS. WALTHER: They --

2 JUDGE SINGAS: They haven't happened yet. I
3 mean, that's my --

4 MS. WALTHER: No.

5 JUDGE SINGAS: -- fundamentally my issue here.

6 MS. WALTHER: And it's --

7 JUDGE SINGAS: Like, nothing has -- there hasn't
8 been an ID, so what are we noticing?

9 MS. WALTHER: That -- the intent to ask the
10 question, Your Honor, is what I believe the defense need --
11 needs notice of to give them a meaningful --

12 JUDGE SINGAS: I mean, do you think that's a
13 workable rule?

14 MS. WALTHER: I -- I do, Your Honor. And this is
15 along the lines of other types of pre-trial rulings that
16 courts routinely make --

17 ACTING CHIEF JUDGE CANNATARO: And what would
18 that notice --

19 MS. WALTHER: -- in the context of --

20 ACTING CHIEF JUDGE CANNATARO: What would that
21 notice trigger? Would it trigger some sort of inquiry by
22 the court or does it automatic -- just to sort of
23 understand your rule now. Does it require some sort of
24 Perdue hearing, where we have to do an identification
25 procedure before the witness is allowed to testify?

1 MS. WALTHER: Well, I think then the next step
2 would be that the defense attorney could request a
3 procedure like that. It would be I -- I think incumbent
4 upon the defense attorney to make that request. And then
5 the court could hear information from the prosecution about
6 potentially an independent source for the identification or
7 what type of identification procedure the -- the defense
8 attorney's asking for. But if in a case like --

9 JUDGE RIVERA: So if they don't ask, but they've
10 put on notice, and the witness gets called, prosecution can
11 decide, again, until the very last minute whether or not to
12 ask the question. Maybe they choose not to, based on what
13 - what the witness testifies to.

14 MS. WALTHER: I -- I think that that would be
15 consistent with what the second circuit has said on that
16 issue; that if the defense attorney has notice and they
17 don't make the request that they may essentially waive an
18 ability --

19 JUDGE RIVERA: And -- and I'm sorry. You were
20 going through the procedures. Are you suggesting that
21 there would be procedures that don't include a pre -- well,
22 you've already started the trial. A pre-in-court
23 identification?

24 MS. WALTHER: Pre-testimony? I think that's
25 possible. I -- I think if the prosecution makes a showing

1 that perhaps identity is not really at issue in this case
2 or --

3 JUDGE RIVERA: Would that mean that the defendant
4 has got to subject themselves at that point to perhaps a
5 lineup?

6 MS. WALTHER: Potentially a lineup. Potentially
7 there would be a photo array.

8 JUDGE RIVERA: Photo array.

9 MS. WALTHER: Something along those lines.

10 JUDGE RIVERA: Yeah.

11 MS. WALTHER: But there might be a showing on the
12 part of the prosecution that those things aren't necessary.
13 I certainly think that's possible.

14 ACTING CHIEF JUDGE CANNATARO: Thank you.

15 MS. WALTHER: Thank you.

16 (Court is adjourned)

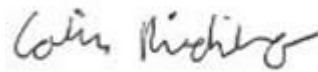
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C E R T I F I C A T I O N

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



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