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IN THE SUPREME COURT OF THE STATE OF FLORIDA

No. SC21-1450

ZAVION ALAHAD,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

On Discretionary Review from the
Fourth District Court of Appeal of Florida
(*Case 4D19-3438*)

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Guadalupe Urquilla was shot and killed during an attempted robbery outside of a convenience store. His girlfriend Loretta Matthews watched the shooting from her car a few feet away. A few hours after the shooting she identified Petitioner as the perpetrator during a single-suspect show-up near the scene. Petitioner's pretrial motion to suppress evidence of the show-up was denied. The jury heard evidence of the show-up identification and Ms. Matthews identified him as the perpetrator at trial. Petitioner's defense at trial was that he was misidentified. The jury found him guilty and the Fourth District Court of Appeal affirmed his conviction. The issue before this Court is whether the Fourth District applied the correct standard in reviewing the trial court's denial of his motion to suppress the identification evidence.

Evidence from the motion to suppress hearing

Prior to trial Petitioner filed a motion to suppress the out-of-court identification made by Loretta Matthews during a show-up identification and any in-court identification she would make at trial, asserting that the show-up was unnecessarily suggestive giving rise

to a substantial likelihood of misidentification. (R 111-12, 134-40).[1]

At the hearing, Loretta Matthews testified that she drove Guadalupe “Johnny” Urquilla to a convenience store on Sunrise Boulevard on the morning of December 19, 2016, parking a short distance away from it. (SR 688-90, 707). From where she was parked Ms. Matthews could not see the front of the store, but could see its side. (SR 690-91). Mr. Urquilla exited the car and walked along the dirt pathway leading to the store. (SR 690, 707).

Two men were sitting under a tree behind Ms. Matthews’ car, one wearing a white tee shirt or tank top and jeans and the other a shirt with colors and jeans. (SR 692, 711-13). While waiting for Mr. Urquilla, Ms. Matthews saw a man, wearing a white tank top and

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[1] Record cites are designated with “R” followed by the page numbers.

Cites to the supplemental record, including the transcript of the suppression hearing, are designated with “SR” followed by page numbers.

Cites to the trial transcript are designated with “T” followed by the page numbers.

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jeans, walk from the front area of the store to the two men sitting under the tree. (SR 692, 708-11). After a few minutes Ms. Matthews saw Mr. Urquilla returning from the store along the dirt pathway. (SR 690-91, 707).

As Mr. Urquilla neared the car, a man ran up to him. (SR 692-93, 708). The man was wearing a gray pull-over hoodie and light blue jeans, but Ms. Matthews did not see his face or hair, seeing only the side of the hoodie. (SR 694-95, 709-11). Mr. Urquilla attempted to open the car door, but the two men "tussled" around to the front of the car, Mr. Urquilla falling to the ground on his back. (SR 694-96, 708-09).

Ms. Matthews viewed the front of the man's uncovered face though the windshield, although he still had the hood pulled up, noticing a single black mark that looked like a tear drop under his right eye. (SR 696, 698, 704). Ms. Matthews was paralyzed with fear for herself and Mr. Urquilla as she watched the man pull out a gun and fire a few shots at her friend. (SR 697, 705-06, 09). Although the incident happened quickly, Ms. Matthews said she paid attention to the man's face. (SR 697).

Mr. Urquilla ran back to the store. (SR 698-99, 713-15). The

shooter fled down the street, and Ms. Matthews followed him as she drove to the store, seeing him turn into an apartment building. (SR 698-99, 713-15).

Ms. Matthews spoke to a uniformed officer at the store, telling him where the shooter ran, describing him as 5'10" tall and weighing 125 pounds, and being in his twenties or younger. (SR 713). But she did not mention any tattoo on his face and was unable to describe the gun, failing to get a good look at it because the incident occurred so fast. (SR 713, 716-18). Detective Novak responded to the scene around 12:20 p.m. and took a statement from Ms. Matthews thirty minutes later. (SR 729-31, 737-38). Ms. Matthews told him that the shooter had been standing with others under a tree before the incident. (SR 710-11). He was wearing blue jeans and a gray hoodie, had brown skin, was skinny and smaller than Mr. Urquilla, and she got a good look at his face so she could recognize him if she saw him again. (SR 718-20, 727, 731, 738-39, 741). Again, she said nothing about the shape of his face, nose, or mouth, or a tattoo under his eye. (SR 718-20, 727, 731, 738-39, 741).

Later in the day Detective Novak called Ms. Matthews asking if she would view a person police detained who matched the description

she provided. (SR 731-32, 742). Detective Almanzar met Ms. Matthews at the convenience store and drove her to the show-up. (SR 700-01, 720, 751-52, 757). Almanzar told her that she was going to be shown a detained person, who matched the description she provided, and to determine if he was the shooter; to look closely at the person; to take her time and think about the person she saw; and to let him know if the person was or was not the shooter. (SR 700-01, 720, 751-52, 757). The detective did not tell Ms. Matthews that the detained person may or may not be a suspect or that it was as important to clear the innocent as to identify the guilty. (SR 757-58). Although he could not recall telling her if the person was found in the area where she saw the shooter run, Ms. Matthews recalled being told that. (SR 722-23, 757-58).

When Detective Almanzar and Ms. Matthews arrived at the apartment building Petitioner was in handcuffs and flanked by two police officers who walked him outside the gate and Detective Novak was also near him. (SR 734-45). Officers did not present any of the other occupants of the apartment. (SR 742-43).

Ms. Matthews identified Petitioner as the shooter. (SR 701-03, 724-26, 754-56, 758-59). Initially, Ms. Matthews said she was

"pretty positive" regarding the identification, and she affirmed after Detective Almanzar asked if she one-hundred percent positive. (SR 727, 760-61). Asked what about Petitioner reminded her of the shooter, Ms. Matthews said the tear-shaped tattoo under his eye. (SR 754). According to Ms. Matthews, her identification of Petitioner was based not only upon the tattoo under his eye, but also upon the shape of his face and his height and weight. (SR 726).

Petitioner does not have a tattoo under his eye, but he does have a birthmark. (SR 753-54).

The trial court denied the motion. (SR 777-82). It noted that show-ups are always suggestive, they often involve suspects who are handcuffed when the identification is made. (SR 779). Ms. Matthew's initially did not testify that the detective told her the suspect had been found in the area she said the shooter ran to, but her memory was refreshed that on a prior occasion she said the detective did tell her that. (SR 779-80). Detective Novak testified he did not tell her that. (SR 780). She identified Petitioner based on the mark under his eye. (SR 781-82). The court noted that she did not mention the mark until the show-up, but during the show-up she was 30 feet away from Petitioner so it was more reasonable that she saw the mark during

the shooting when she was a few feet away. (SR 781-82). The court acknowledged there were holes in Ms. Matthews' memory. (SR 781). The court did not specifically rule whether the show-up was unnecessarily suggestive, but it did find that there was not a substantial likelihood of misidentification based on the time of day, her ability to observe the shooting from a few feet away, the fact that the show-up took place a short time later, and she was 100% certain Petitioner was the shooter. (SR 777-79, 782).

Trial evidence

On the morning of December 19, 2016, Loretta Matthews drove her boyfriend, Mr. Urquilla, to a store near Fifth Avenue in Fort Lauderdale, parking a short distance away from it. (T 561, 563-65). Mr. Urquilla exited the car and walked along a dirt path leading to the store while Ms. Matthews stayed behind fiddling with her phone. (T 565-66). Two men, eventually joined by a third, were sitting on a wall behind Ms. Matthew's car. (T 566-68). Ms. Matthews overheard the men talking, and briefly viewed them in her rear view mirror, but did not pay attention to them. (T 567-68). After some period of time, Ms. Matthews saw Mr. Urquilla returning from the store along the

dirt path, fiddling with his pocket. (T 569). As Mr. Urquilla approached the passenger side of the car, one of the three men -- the one who had joined the other two, identified by Ms. Matthews as Petitioner -- ran up and grabbed him, saying something to the effect of, "don't fiddle with me, give me the money, and you know what I want." (T 567-68, 570-71, 591-92, 606). What Ms. Matthews was witnessing was extremely traumatic, leaving her panicked, in a state of shock, and paralyzed with fear. (T 573, 579, 603-04).

The two men tussled at the passenger door, Mr. Urquilla opening the door, but the perpetrator pushing it shut. (T 572-73). As the tussling continued, the men moved around the front of the car toward the driver's side. (T 574). Although the perpetrator was wearing a gray hoodie that prevented Ms. Matthews from seeing the sides of his face, she saw the front of his face and noticed a mark on its left side that appeared to be a tear drop tattoo. (T 575-77, 607).[2] From her vantage point, Ms. Matthews could see that the perpetrator was a black man, with short dark hair, rail thin and taller than Mr. Urquilla, wearing a light gray hoodie and light colored baggy jeans. (T

[2] Ms. Matthews previously saw the man's face in her rear view mirror when he joined the two men under the tree. (T 576).

576-77, 609-10).

Mr. Urquilla fell to the ground and the perpetrator pulled out a gun, shooting him a number of times in quick succession. (T 574, 578-79, 608-10).[3]

The perpetrator fled north on Fifth Avenue; Mr. Urquilla got up and ran back toward the store. (T 579-580). Ms. Matthews followed the perpetrator, seeing him turn toward an apartment building at 1032 Northwest Fifth Avenue, but did not see him take-off the hoodie he was wearing as he ran. (T 580, 616-17).

Sabela Louis, who lived at 1020 Northwest Fifth Avenue, was inside her house using the bathroom, having left her two youngest children outside playing in the yard, when she heard multiple gun-shots. (T 652-55, 670-71, 679).[4] After hearing the shots, Ms. Louis

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[3] Four cartridge casings were located in the area of the shooting and a bullet was recovered from the trunk of a nearby car. (T976, 979, 986, 1012-14). The casings were identified as NFRC .9mm Luger. (T 1018). The bullet was consistent with a .38 class of ammunition, which includes .9 mm Luger, although it could not be associated with the casings found. (T 1058-59). All of the casings were fired from the same handgun. (T 1057-58).

[4] A few days later, Ms. Louis gave police a statement, telling them that she was awakened by the shots and did not exit her apartment until after Sandra Gadson called her at 12:47 p.m. (T 671-75, 921-24). Ms. Louis admitted that she lied to police. (T 675).

ran outside, the front door of her apartment almost striking Petitioner as he ran by while taking his shirt off. (T 655-56, 680, 721-22). According to Detective Almanzar, the location where Ms. Matthews said she saw the shooter turn toward the apartments was not where Ms. Louis lived. (T 1250-53).

Ms. Louis was familiar with Petitioner from the neighborhood, knowing him as "Zay." (T 655-56, 663-64). Petitioner, a gray shirt over his shoulder, possibly wearing sweatpants, and holding a black gun, ran toward the back of Ms. Louis' house; Ms. Louis reentered her apartment with her children. (T 657, 720-22, 724-25). Despite multiple officers being present and investigating, Ms. Louis did not tell the police what she saw until hours later when she called the police department anonymously and told them which apartment she believed Zay was in. (T664-67, 713, 716). According to Ms. Louis, Petitioner had some type of scar under his eye and another person who she knew by the nickname "Murder", had a tear drop tattoo under his right eye. (T 728).

Sandra Gadson, a resident of 1014 Northwest Fifth Avenue, heard the gunshots and walked to the convenience store, noticing someone she called "little man", a man with a number of tattoos who

lived across the street from her, in the crowd; she did not see Petitioner there. (T 1177-79, 1080-84, 1090).

Ms. Matthews proceeded to the store where she found a number of people rendering Mr. Urquilla aid. (T 581-82). Ms. Matthews, visibly upset, spoke to Officer Knapp at the store, explaining what happened and describing the shooter as a black man in his early twenties, standing five foot nine, weighing 125 pounds, and wearing a gray hoodie and blue jeans, but she failed to mention the mark on his face. (T 583-84, 617-18, 634-38).

A short time later Detective Novak arrived on the scene and took a statement from Ms. Matthews, again Ms. Matthews failed to mention the mark on the shooter's face. (T 584, 618-20, 876, 933-36).

Around one-thirty in the afternoon Craig Ahringer went to an apartment located on Fifth Avenue to visit a friend. (T 803-05). The friend was not at home, but Petitioner and three others were, including G-Man and Adrean Nixon; Mr. Nixon had a tear drop tattoo under his right eye. (T 805-06, 815-16, 828, 847-49). Petitioner was awake; the men sat around the apartment smoking marijuana. (T 812-13, 827).

Two hours after the shooting, Detectives Dukanauskis, Johnson, and Guerra responded to the apartment where the men were at 1032 Northwest Fifth Avenue, the call from Ms. Louis having directed them to the apartment. (T 731-34, 745-46, 790-9, 821). A few knocks, during which the detectives announced their presence, got no response. (T 734, 746-47). According to Mr. Ahringer, everyone in the apartment scattered and began to hide things and it appeared that Petitioner wanted to hide in the attic, but others told him not to do so. (T 814, 831). Some of the men pretended to be asleep. (T 831). Petitioner retired to a bedroom and shut the door. (T 815). Mr. Ahringer eventually opened the front door; other occupants could be seen sitting in the living room and one said Petitioner was in the back room. (T 747-48).

Petitioner was found lying on a mattress in the northwest bedroom appearing to be asleep. (T 749).[5] Petitioner and the others were

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[5] Police later searched the apartment pursuant to a warrant. (T 887). Petitioner was found in the northwest bedroom. (T 896-897). Two containers were found in the southwest bedroom; a Nike box and a hollowed-out book. (T 910, 913-14, 924-25). In the Nike box police found 32 .9mm Luger bullets of the same make and model as the casings found at the scene of the shooting. (T 911-12, 925, 1017-18, 1060-62). In the hollowed-out book police found three identification

escorted outside, but Petitioner the only one in handcuffs. (T 736, 750, 835-36). Detectives Dukanauskis knew Petitioner from the area and usually found him to be animated and friendly, but on this occasion he was distant, failing to make eye contact and looking at the floor. (T 737-38).

When Mr. Nixon asked if he could sit down on the ground, Detective Guerra saw a steak knife in the grass and opened a nearby grill to place it there. (T 792). Inside the grill, packaged in a plastic bag, Detective Guerra found a gray sweater. (T 796).[6] It appeared

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cards in Petitioner's name, money, a rifle round and .45 round, neither consistent with the crime scene evidence, and a .380 round, which could be fired from a .9mm handgun. (T 913-19, 925, 928, 1000-02). No .9mm ammunition was found in the hollowed-out book. (T 929-30).

[6] The sweat shirt belonged to Mr. Nixon's girlfriend. (T 1266). Petition was excluded from all DNA samples taken from the shirt. (T 1307, 1315). A presumptive test on an extremely small stain on the sweat shirt was positive for blood, but could not be confirmed through additional testing. (T 1302-03). A DNA profile, assumed to consist of two males, was developed from the stain. (T 1303, 1306). Mr. Urquilla could not be excluded as a contributor to the profile; it was forty-two septillion times more likely that Mr. Urquilla and an unknown person contributed to the profile than it was that two unknown persons were the contributors. (T 1307). Mr. Nixon was excluded as a contributor. (T 1309). A limited DNA profile, assumed to consist of two people, was also developed from swabbings of the inside neck, underarm, and cuff areas of the sweatshirt, where a per-

that Petitioner looked away from the grill when the sweater was found. (T 797-98).

Police used a gunshot residue collection kit on Mr. Nixon. (T 859-60). Gunshot residue particles were found on both of Mr. Nixon's hands. (T 1103-04, 1107).[7] They also photographed him because he had tattoos on his face, including a tear drop, and looked similar to the description of the shooter. (T 859-60, 864-65, 1021-22).[8]

Later in the day Detective Novak informed Ms. Matthews they had someone in custody who matched the description she provided and wanted to see if she could identify him. (T 586, 620-21, 883-85).

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son would be likely to sweat if he was wearing it. (T 1311-13). Although Mr. Nixon could not be excluded as a contributor to the profile, it was two times more likely that the contributors were unknown people than it was that they were Mr. Nixon and an unknown person. (T 1316, 1319).

[7] Gunshot residue can be left on the hands by firing a gun, being in close proximity to a gun fired by another, or by handling a gun. (T 1099-00). Mr. Nixon told Detective Almanzar he did not discharge a firearm on the day of the shooting, but, because he was a drug dealer selling in another's territory, carried and handled a gun that day. (T 1268, 1284).

[8] At a later time, Detective Almanzar obtained a DNA sample from Mr. Nixon. (T 1221). Mr. Nixon was 25 years-old at the time of the shooting. (T 1265).

Detective Almanzar met Ms. Matthews at the convenience store telling her that police detained a person; it was not known whether he was the shooter; he wanted her to look at the detained person, taking her time in doing so; she should let them know if he was or was not the shooter; and that the investigation would continue regardless of her answer. (T 1195-96, 1223-24).

Ms. Matthews was driven to the area where she saw the shooter run and Petitioner, in handcuffs and flanked by two detectives in tactical gear, was shown to her. (T 586). Ms. Matthews identified him as the person who shot Mr. Urquilla, telling Detective Almanzar she recognized the tattoo on his eye, which to her appeared to be a tear drop. (T 586, 621-22, 628, 886-87, 952-53, 956, 1197-98, 1240-41).

A few minutes later Ms. Matthews gave a statement to Detective Almanzar, telling him she was fairly sure Petitioner was the shooter, answering "yes" when asked if she was one-hundred percent positive, and that she recognized Petitioner due to the mark on the right side of his face. (T 587, 590-91, 626, 1198-99, 1246).[9] Shape of face,

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[9] Ms. Matthews acknowledged she had gone back and forth regarding on what side of Petitioner's face the mark was located. (T 589-90).

height, and weight also played a role in Ms. Matthews making the identification. (T 628). Ms. Matthews did not remember seeing any tattoos on the shooter, other than the mark under his right eye, and did not tell police about the mark until after making the identification. (T 593, 627-28). According to Ms. Matthews, when shown to her Petitioner was wearing the same jeans she saw him wearing during the shooting. (T 610). However, during the show-up Petitioner was actually wearing multi-colored shorts, not jeans. (T 1207, 1247-48).

Petitioner was arrested and transported to the police station where Detective Almanzar used a gunshot residue collection kit on him at around 6:00 p.m. (T 1210-11, 1246, 1261). No gunshot residue was found on Petitioner. (T 1101, 1107-08).[10] Petitioner was five foot nine inches tall and weighed 150 pounds. (T 1219).

The jury found Petitioner guilty of second degree murder and attempted robbery with a firearm, both counts alleging that he actu-

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[10] Because gunshot residue particles do not form a bond with the skin, they can easily be removed through hand-washing or the act of placing the hand in a pocket and are lost through regular activity within four to six hours. (T 1101-03).

ally possessed and discharged a firearm, inflicting death or great bodily harm. (R 483-84, 491-92; T 1622-25). He was sentenced to concurrent 25-year mandatory minimum terms in prison followed by five years of probation. (R 583-88, 594-95, 597-99, 667-68).

Appellate proceedings

On appeal, the Fourth District Court of Appeal affirmed the convictions. (PDF 142). Petitioner argued that the trial court erred by, among other things, denying Petitioner's motion to suppress the out-of-court and in-court identifications of Ms. Matthews. (PDF 142). The Fourth District applied the abuse of discretion standard of review and affirmed the trial court's denial of the motion. (PDF 145-46, 147-48). It declined to address the other issues raised by Petitioner. (PDF 148).

In this Court, Petitioner asserted an express and direct conflict over the appropriate standard of review between this case and *Walton v. State*, 208 So. 3d 60 (Fla. 2016), and *McWilliams v. State*, 306 So. 3d 131 (Fla. 3d DCA 2020). This Court accepted conflict jurisdiction to determine the appropriate standard of review.

SUMMARY OF THE ARGUMENT

Petitioner asks this Court to decide that the Fourth District wrongly applied the abuse of discretion standard of review. Rather, the correct standard to review whether a pretrial identification procedure is unnecessarily suggestive giving rise to a likelihood of misidentification is *de novo* review of the constitutional issue with a presumption that the trial court's facts are correct.

Petitioner presents his argument in four parts. First, the United States Supreme Court has applied *de novo* review to this issue in *Neil v. Biggers*, and *Sumner v. Mata.* Second, this Court has already determined that the *de novo* standard applies to review the constitutionality of a pretrial identification procedure in *Walton v State*. Third, *de novo* review provides a layer of reliability and uniformity in the application of law to ensure wrongful convictions based upon misidentification do not occur. Finally, the facts of this case support a determination that the show-up was unnecessarily suggestive and it gave rise to a substantial likelihood of misidentification.

Petitioner asks this Court to determine that under the *de novo* standard of review, the pretrial identification of him should have been suppressed, and reverse his conviction and remanded for a new trial.

In the alternative, Petitioner asks this Court to remand to the Fourth District with directions to reconsider the issue under the *de novo* standard.

ARGUMENT

THE DISTRICT COURT ERRED BY FAILING TO REVIEW *DE NOVO* PETITIONER'S CLAIM THAT HIS DUE PROCESS RIGHTS WERE VIOLATED BY AN UNNECESSARILY SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURE THAT GAVE RISE TO A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION.

A pretrial identification procedure that is "unnecessarily suggestive" and presents a "substantial likelihood of misidentification" impermissibly violates a defendant's due process rights. *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972); *see Manson v. Braithwaite,* 432 U.S. 98 (1977); *Stoval v. Denno*, 388 U.S. 293, 301-02 (1967). A show-up identification, like the one in the case at bar, is inherently suggestive because it presents the witness with only one choice. *Perez v. State*, 648 So. 2d 715, 719 (Fla. 1995). Courts first evaluate whether it is *unnecessarily* suggestive and, if so, whether there are factors that mitigate against it giving rise to a substantial likelihood of misidentification of the suspect. *See Perry v. New Hampshire*, 565 U.S. 228, 238–39 (2012). If there is a substantial likelihood of misidentification, the out-of-court identification violates due process and should be excluded from trial. *Foster v. California*, 394 U.S. 440, 442-42 (1969) .

Further, exclusion of in-court identification testimony may be

required "when the police have obtained a pretrial identification by means of an unnecessarily suggestive procedure." *Edwards v. State,* 538 So. 2d 440, 442 (Fla. 1989). "[T]he in-court identification may not be admitted unless it is found to be reliable and based solely upon the witness' independent recollection of the offender at the time of the crime, uninfluenced by the intervening illegal confrontation." *Id.* at 442. "The State must overcome a presumption that the in-court identification is tainted and unreliable as a result of improper out-of-court identification." *State v. Gomez,* 937 So. 2d 828, 832 (Fla. 4th DCA 2006).

In the instant case, the Fourth District held that the show-up identification procedure used was not unnecessarily suggestive, and therefore the court did not reach the second prong of whether the suggestive identification procedure gave rise to a likelihood of misidentification. (PDF 148). It recognized two different standards of review. First, it noted this Court's precedent that a mixed standard of review applies to suppression of pretrial identifications:

> In reviewing a trial court's ruling on a motion to suppress, appellate courts must accord a presumption of correctness to the trial court's determination of historical facts, but must independently review mixed questions of law and

> fact that ultimately determine the constitutional issues arising in the context of the Fourth Amendment.

(PDF 145) (citing *Walton v. State*, 208 So. 3d 60, 65 (Fla. 2016) (citations omitted)). However, the Fourth District then stated: "The decision to admit a pretrial identification is within the sound discretion of the trial court and the decision should be overturned only upon a showing of abuse of discretion." (PDF 145) (citing *Walker v. State*, 776 So. 2d 943, 945 (Fla. 4th DCA 2000)). The district court specified that "[d]ue to the abuse of discretion standard of review . . . we are compelled to affirm." (PDF 145).

The court noted that Petitioner identified three factors as police action that unnecessarily aggravated the suggestiveness of the show-up: "(1) the defendant was in handcuffs and flanked by two officers, (2) the police told the eyewitness that he matched her description and that he was found in the area to which she saw him flee, and (3) although others were found in the apartment, at least one of whom matched the description the eyewitness provided, the eyewitness was shown a single person." (PDF 146). The first two factors, the court found, were not, "standing alone," sufficient to make the procedure unnecessarily suggestive. (PDF 147).

The court was more troubled that there was another person in the apartment with Petitioner who also matched the witness's description, yet the police failed to present him in a show-up. (PDF 147). Ultimately, however, it deferred to the trial court's discretion to conclude that the procedure was not unnecessarily suggestive:

> By denying the motion to suppress, the trial court implicitly determined that the police's failure to present Nixon in the show-up was not something that the police did to aggravate the show-up's suggestiveness.
> Reasonable minds could differ as to whether the failure to present Nixon rendered the show-up unduly suggestive. Under the facts and in light of Florida case law, we cannot conclude that the trial court's determination was one that no reasonable judge would make.

(PDF 146) (footnote omitted). It continued, "[a]pplying the abuse of discretion standard of review, we must affirm the trial court's determination that the show-up was not unnecessarily suggestive." (PDF 148).

Petitioner asks this Court to decide that the Fourth District wrongly applied the abuse of discretion standard of review, which is not appropriate to review whether a pretrial identification procedure is unnecessarily suggestive giving rise to a likelihood of misidentifi-

cation. Rather, the correct standard of review of this due process issue should be as stated in *Walton*: the trial court's factual findings are presumed correct unless not supported by the record but the appellate court applies the law to those facts *de novo*.

First, the United States Supreme Court has applied *de novo* review to this issue. Second, this Court has already determined that the *de novo* standard applies to a determination of the constitutionality of a pretrial identification procedure. Third, *de novo* review provides a layer of reliability and uniformity in the law to ensure wrongful convictions based upon misidentification do not occur. Finally, the facts of this case support a determination that the show-up was unnecessarily suggestive and it gave rise to a substantial likelihood of misidentification.

a. The United States Supreme Court applied *de novo* review to the issue.

Although it did not use the term "standard of review," the United States Supreme Court in *Biggers* effectively applied a *de novo* standard when considering whether an unnecessarily suggestive pretrial identification procedure gave rise to a substantial likelihood of misidentification. *Biggers*, 409 U.S. at 193 n.3.

The dissent in *Biggers* argued that the Court should not review the merits of the case because, in its view, the majority was second-guessing the lower courts' findings of fact by conducting a *de novo* review. *Id.* at 203-04 (Brennan, J. concurring in part and dissenting in part).[11] The Court responded that "the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them." *Id.* at 193 n.3. The Court continued that because the facts were contained within the record on review, it was in the same position as the lower courts to apply the law to the facts and determine the constitutional issue.[12] *Id.*

After reviewing the facts from trial and the lower court's hearing, the Court formulated the issue as one where "[w]e must decide whether, as the courts below held, this identification and the circumstances surrounding it failed to comport with due process. *Id.* at 196. It went on to reason:

[11] There was another procedural issue to the case, as well, which all justices agreed was properly before the Court. *Id.* at 190-92.

[12] *Biggers* involved a Federal petition for writ of habeas corpus. The Court noted that it was in the same position to review the findings of the lower Federal courts, which relied on the facts contained in the state court record. *Id.*

> It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis for the exclusion of evidence in *Foster* [*v. California*, 394 U.S. 440 (1969)]. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.

Id. at 198.

The Court was "inclined to agree with the courts below that the police did not exhaust all possibilities" to avoid creating an unnecessarily suggestive identification procedure. *Id.* at 199. The language here is instructive because it does not appear the Court was deferring to the trial court's discretion – it was deciding the issue of unnecessary suggestiveness *de novo*. It then ruled that an unnecessarily suggestive identification is not *per se* inadmissible, but rather is inadmissible if it is unreliable under the totality of the circumstances. *Id.* "Weighing all the factors"[13] the Court found no substantial likelihood of misidentification. *Id.* at 201.

[13] "[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the

In *Sumner v. Mata*, 455 U.S. 591 (1982), the Court explained the mixed standard of review that applies to pretrial identification procedures. The Court was considering the treatment by federal courts conducting review of a petition for writ of habeas corpus of a state-court case under 28 U.S.C. § 2254(d). *Id.* at 591-93. Section 2254(d) required a Federal court reviewing a state-court holding to afford a presumption of correctness to the state-court's findings of fact unless they are not "fairly supported" by the record. The Court clarified what is a finding of fact afforded a presumption of correctness, and what is an application of constitutional principle to historical fact that the court is to review *de novo*.

"[T]he ultimate question as to the constitutionality of the pretrial identification procedures used in this case is a mixed question of law and fact. . ." *Id.* at 597. In deciding this question, the reviewing court "may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard. But the questions of fact that underlie this ultimate conclusion

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length of time between the crime and the confrontation." *Id.* at 199-200.

are governed by the statutory presumption of correctness." *Id.* (emphasis in original).

The Court then noted what types of things are facts found by the trial court: "whether the witnesses in this case had an opportunity to observe the crime or were too distracted; whether the witnesses gave a detailed, accurate description; and whether the witnesses were under pressure from prison officials or others are all questions of fact." *Id.* at 597. The existence of those facts is a matter for the trial court that carries a presumption of correctness unless there is not record support. *Id.* at 597-98. But the weighing of those factors to determine if they amount to an unnecessarily suggestive identification procedure that gives rise to a likelihood of misidentification is a constitutional standard that requires the appellate court to review *de novo*. *Id.* at 597 .

Thus, the Supreme Court has indicated, twice, that the proper standard of review is *de novo*, not abuse of discretion.

b. This Court in *Walton v. State* determined that the constitutionality of pretrial identification procedures is reviewed *de novo*.

"As stated by the United States Supreme Court, mixed questions of law and fact that ultimately determine constitutional rights

should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of historical fact but conducting a *de novo* review of the constitutional issue." *Connor v. State,* 803 So. 2d 598, 608 (Fla. 2001) (citing *United States v. Bajakajian,* 524 U.S. 321, 337 n.10 (1998); *Ornelas v. United States,* 517 U.S. 690, 699 (1996); *United States v. Adams,* 1 F.3d 1566, 1575 (11th Cir. 1993)); *see also Miller v. Fenton,* 474 U.S. 104, 114 (1985) (Where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law.").

This Court in *Walton*, 208 So. 3d at 65-67, relied upon *Connor* to determine the standard of review to be applied to pretrial identification procedures. This Court held that a pretrial photo array procedure administered by police to an eyewitness was both unnecessarily suggestive and created a substantial likelihood of misidentification. A detective investigating an attempted murder showed an eyewitness a photo array and remarked to her several times on the fact that she seemed to linger looking over the photo of the defendant. *Id.* at 63.

Eventually, the witness identified the photo of the defendant as the perpetrator. *Id.*

This Court in reviewing the identification issue used a mixed standard of review applicable generally to motions to suppress:

> In reviewing a trial court's ruling on a motion to suppress, appellate courts must accord a presumption of correctness to the trial court's determination of the historical facts, but must independently review mixed questions of law and fact that ultimately determine the constitutional issues arising in the context of the Fourth Amendment. *See Connor v. State,* 803 So. 2d 598, 608 (Fla. 2001); *Stephens v. State,* 748 So. 2d 1028, 1032 (Fla.1999); *Albritton v. State,* 769 So. 2d 438 (Fla. 2d DCA 2000).

Id. at 65 (quoting *Moody v. State,* 842 So. 2d 754, 758 (Fla. 2003)). [14]

The Court relied on the fact that the detective had repeatedly directed the witness's attention to the defendant's photo. *Id.* at 65. It then applied the law to the facts: "Detective Padgett called Gillan's

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[14] The quoted language from *Connor v. State,* 803 So. 2d at 608, references a Fourth Amendment violation, but in context the Court was explaining that motions to suppress on constitutional grounds, in general, merit the mixed standard of *de novo* review because of their constitutional implication, not unique to Fourth Amendment issues. *See also Ornelas v. United States,* 517 U.S. at 699 (Fourth Amendment issues); *Thompson v. Keohane,* 516 U.S. 99, 112-15 (1995) (Fifth Amendment *Miranda* issues); *U.S. v. Bajakajian*, 524 U.S. at 336, n.10 (Eight Amendment excessive fines); *Miller v. Fenton*, 474 U.S. at 110-12 (due process voluntariness of confession).

attention to the picture without her having given any indication that she recognized Walton. By repeatedly asking Gillan questions about Walton's photograph, Detective Padgett influenced Gillan to pay special attention to that photo." *Id.* at 66.

It concluded that the identification procedure rose to the level of being *unnecessarily* suggestive. *Id.* This Court then evaluated the totality of the circumstances according to the *Biggers* factors and held that the procedure gave rise to a likelihood of irreparable misidentification. *Id.* at 66-68.

Similarly in the second conflict case, *McWilliams v. State*, 306 So. 3d 131 (Fla. 3d DCA 2020), the Third District affirmed the trial court's denial of the defendant's motion to suppress his show-up identification in a sexual battery prosecution. The court addressed the standard of review:

> Whether an identification procedure is impermissibly suggestive, thereby denying an accused due process of law, presents a mixed question of law and fact. *Sumner v. Mata*, 455 U.S. 591, 597, 102 S. Ct. 1303, 1306, 71 L. Ed. 2d 480 (1982). Thus, "[w]e defer to [the] trial court's findings of fact as long as they are supported by competent, substantial evidence, but ... review de novo [the] ... application of the law to the historical facts." *Ross v. State*, 45 So. 3d 403, 414 (Fla. 2010) (citing *Cuervo v. State*, 967

So. 2d 155, 160 (Fla. 2007)).

Id. at 134.

The court noted that the show-up procedure was "inherently suggestive": the witness was shown the defendant several days later while he was still wearing the distinctive clothing described by the witness. *Id.* at 135. Further, there was nothing in the record to indicate any exigency that made this suggestive show-up necessary. *Id.*

Thus, although the Third District did not explicitly say so, it appears to have found the show-up to be unnecessarily suggestive and moved to evaluate the second prong under the totality of the circumstances. *Id.* After evaluating the *Biggers* factors, the Third District held that the reliability of the victim's identification outweighed the corrupting effect of the show-up procedure, and affirmed denial of the suppression motion. *Id.* at 137.

In conflict with this Court's *de novo* standard, the Fourth District cited *Walker v. State*, 776 So. 2d 943 (Fla. 4th DCA 2000), a case

that predates *Walton* and *Connor*, where the defendant moved to suppress his pretrial show-up.[15] The analysis in *Walker* summarized that there was competent substantial evidence of the *Biggers* factors to support the trial court's exercise of discretion in denying the motion. *Id.* at 945-56.

Walker cited to *Lee v. State,* 635 So. 2d 128, 130 (Fla. 3d DCA 1994), as authority for the abuse of discretion standard. *Lee*, which involved a police officer eyewitness to a car burglary and purse snatching, cited *Baxter v. State,* 355 So. 2d 1234 (Fla. 2d DCA) *cert. den.* 365 So. 2d 709 (Fla.1978), as authority for the abuse of discretion standard.

In *Baxter*, a sexual battery victim was shown 11 photos, three of which were different photos of the defendant. She identified him as the perpetrator in two of the three. *Baxter* does not explicitly state any standard of review. After reviewing the relevant Supreme Court

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[15] The Fourth District has cited to *Walker* for this standard of review in other cases, as well. *See*, *e.g.*, *Anderson v. State*, 946 So. 2d 579, 581 (Fla. 4th DCA 2006). The Third District has likewise cited to *Walker* for this standard. *See, e.g.*, *Alfonso v. State*, 275 So. 3d 215, 218 (Fla. 3d DCA 2019).

law, including *Biggers*, the Second District stated: "Applying these tests to the case at bar and *considering the totality of the circumstances* surrounding the identifications, we hold that the trial court did not err in finding the identifications sufficiently trustworthy to warrant consideration by the jury." *Id.* at 1238 (emphasis added). To the extent this indicates any standard of review, it appears the court evaluated the issue *de novo.*[16]

Of note, this Court prior to *Walton* has applied an abuse of discretion standard to review motions to suppress suggestive pretrial identifications. *See Gorby v. State*, 630 So. 2d 544 (Fla. 1993); *Hayes v. State*, 581 So. 2d 121 (Fla. 1991).

In *Gorby,* the defendant moved based on *Manson v. Braithwaite* to suppress his identification gained after a witness picked him out of a photo lineup where some photos, including his, contained writing on them. 630 So. 2d at 546. This Court found no abuse of discretion by the trial court in denying the motion because, though the photo

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[16] Later in the opinion the Second District stated that the trial court acted "reasonably" in allowing the victim to identify the defendant during trial and in allowing a Williams Rule witness to also identify the defendant. *Id.* at 1238-39.

array was suggestive, the writing did not affect the reliability of the witness in picking the defendant's photo. *Id.* This Court cited to *Power v. State,* 605 So. 2d 856 (Fla.1992), *cert. denied,* 507 U.S. 1037 (1993), as authority for the abuse of discretion standard.

In *Power*, however, the defendant did not allege that the pretrial identification was unnecessarily suggestive giving rise to a likelihood of misidentification. *Id.* at 862. The issue was an affidavit for search warrant that omitted information, one of the omissions being that the photo used to identify the defendant was outdated. *Id.* This Court appears to have hinged its finding that there was no abuse of discretion on the fact that the defendant did *not* raise an error "under *Braithwaite.*" *Id.* *Power* does not support application of abuse of discretion where a defendant *does* claim a due process violation in the pretrial identification procedures.

Similarly in *Hayes v. State*, 581 So. 2d at 125, this Court summarily found no abuse of discretion in the trial court denying a motion to suppress a pretrial identification, citing to *Lewis v. State,* 572 So. 2d 908, 910–11 (Fla. 1990). But *Lewis* did not cite any standard of review and, to the contrary, the Court appears to have engaged in *de novo* review. *Id.* at 911 ("Under the totality of the circumstances,

there was not a substantial likelihood of misidentification.”)[17]

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[17] By comparison, Federal circuit courts apply either an abuse of discretion or a *de novo* standard. *See, e.g.*, *U.S. v. Constant*, 814 F.3d 570, 576 (1st Cir. 2016) (noting some “tension” between cases where the First Circuit has used an abuse of discretion standard and others where it has used a plenary, or *de novo*, standard, but deciding to apply deference to the reasonableness of the trial court’s discretion); *U.S. v. Steel*, 390 Fed.Appx. 6, 9-10 (2d Cir. 2010) (reviewing for abuse of discretion); *U.S. v. Green*, 543 Fed.Appx. 266, 268 n.4 (3d Cir. 2013) (“We review the District Court's decision to admit evidence of pre-trial identifications under an abuse of discretion standard. . . Where a motion to suppress has been denied, we review the order for clear error as to the underlying facts, but exercise plenary review as to its legality in the light of the court's properly found facts. . .”) (citations and quotations omitted); *Livingston v. Johnson*, 107 F.3d 297, 309 (5th Cir. 1997) (“The question of whether identification evidence is constitutionally admissible is a mixed question of law and fact and is not entitled to a presumption of correctness. . . However, the factual findings underlying the determination of the admissibility of identification testimony are entitled to that presumption.”) (citations omitted); *U.S. v. West*, 528 Fed.Appx. 602, 604 (7th Cir. 2016) (“[W]e review district court findings of historical facts for clear error but exercise independent judgment in applying the law to those historical facts and resolving the ultimate and decisive question of the independence in-court testimony the witness might give.”); *United States v. Donelson*, 450 F.3d 768, 772 (8th Cir. 2006) (“A pretrial identification may implicate a defendant's due process rights, and its admissibility is reviewed *de novo* using a two part test.”);*U.S. v. Bruce*, 984 F.3d 884, 890 (9th Cir. 2021) (reviewing *de novo*); *Smith v. Archuleta*, 658 Fed. Appx. 422, 427 (10th Cir. 2016) (“The ultimate question of whether the admission of pre-trial identification testimony violates due process is reviewed *de novo* on appeal, although the underlying facts found by the state court are entitled to a statutory presumption of correctness pursuant to 28 U.S.C. § 2254(d).”); *Cikora v. Dugger*, 840 F.2d 893 (11th Cir. 1988) (noting that the court’s ultimate conclusion of whether due process was violated is subject to plenary review, but finding the suggestive nature of the

In sum, considering the constitutional standards involved in determining whether a pretrial identification procedure was unnecessarily suggestive and gives rise to the likelihood of misidentification, this Court in *Walton* has already established that the appropriate standard of review is *de novo*. The authority for the abuse of discretion standard on this issue within Florida does not withstand scrutiny.

c. *De novo* review provides a layer of reliability and uniformity in the application of law to ensure convictions based upon misidentification do not occur.

The role that eyewitness misidentification plays in wrongful convictions is now well-known. The Supreme Court has acknowledged that "the annals of criminal law are rife with instances of mistaken identification." *Perry v. New Hampshire*, 565 U.S. at 245 (quoting *U.S. v. Wade*, 388 U.S. 218, 228 (1967)).

Since *Braithwaite* in 1977, there has been an "explosion" of scientific research on the unreliability of eyewitness testimony. *Young*

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identification is an issue of fact subject to a presumption of correctness unless clearly erroneous). In sum, despite the Supreme Court's rule that *de novo* (or "independent" or "plenary") review governs the application of law to the facts, there is no clear consensus among the Federal courts on how to review challenges to pretrial identification procedures.

v. State, 374 P.3d 395, 414 (Alaska 2016).[18] The science surrounding eyewitness identification is unusually consistent and robust. *State v. Henderson*, 27 A.3d 872, 916 (N.J. 2011) (noting that eyewitness identification social science "represents the gold standard in terms of the applicability of social science research to the law" (internal quotation marks omitted)). In fact, the science is so undisputable that the Oregon Supreme Court took judicial notice of it. *State v. Lawson*, 291 P.3d 673, 685 (Or. 2012).

For example, according to one study, misidentifications occurred in 76% of wrongful conviction cases. *See* Brandon L. Garrett, *Convicting the Innocent*, Harvard Univ. Press 48, 50-51 (2011). This is because "eyewitness identification evidence is inherently unreliable." Evan C. Miller, *Impermissible Instructions: State v. Henderson and the Ebbing Utility of Eyewitness Evidence*, 66 Rutgers L. Rev. 803, 821 (2014). Yet "studies show conclusively that jurors overvalue eyewitness testimony." Matthew S. Foster, *I'll Believe It When You See*

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[18] *See also* National Academy of Science, *Identifying the Culprit: Assessing Eyewitness Identification* 69 (2014), *available at* https://www.innocenceproject.org/wp-content/uploads/2016/02/NAS-Report-ID.pdf.

It, 60 Loy. L. Rev. 857, 893 (2014) (citing Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 Psychol. Pub. Pol'y & L. 817, 817 (1995)).

Because this evidence "poses one of the most serious problems in the administration of criminal justice," the courts play an important role in guarding a defendant from the jury's misplaced reliance on eyewitness identification evidence. Miller, *supra* at 821 n.8; *see also Manson v. Brathwaite*, 432 U.S. at 128–29 (Marshall, J., dissenting) (state courts should "guard against the evil" of mistaken identification).

Appellate courts are uniquely situated to guard against eyewitness misidentifications through the exercise of *de novo* review. The role of the appellate court reviewing decisions is to ensure a uniform application of the law across the jurisdiction. *See, e.g. Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999) (applying *de novo* review to questions of ineffective assistance of counsel under the Sixth Amendment). *De novo* review ensures that due process principles governing impermissibly suggestive identifications are being applied uniformly across the jurisdiction.

d. Application of the *de novo* standard to the facts found by the trial court.

Under the *de novo* standard, the reviewing court is to presume the trial court's factual findings are correct and apply the law to those facts with independent judgment. The question arises, is a determination under the first prong of *Biggers,* that the identification procedure was unnecessarily suggestive, a finding of fact or a conclusion of law. As argued above, this Court in *Walton* and the Third District in *McWilliams* considered it a conclusion of law.

While it is not controlling of this Court's decision, in *Cikora v. Dugger*, 840 F.2d 893 (11th Cir. 1988), the court of appeals applied a "clearly erroneous" standard of review to the first prong because the court believed it was a factual finding. The court acknowledged *Mata*'s standard that the ultimate question of constitutionality is a mixed question of law and fact. *Id.* at 896. But it relied upon language from *Manson v. Braithwaite* to conclude that the first step of inquiry – whether a pretrial identification is unnecessarily suggestive – is a factual one subject to a clearly erroneous standard, not a constitutional one subject to "plenary" review. *Id.*

According to *Cikora*, only the second step of inquiry -- whether

the totality of the circumstances gives rise to a likelihood of misidentification -- is a constitutional question that merits *de novo* review; the suggestiveness prong is simply a triggering fact and one of the circumstances the court can look to. *Id.* at 897 (citing *Braithwaite*, 432 U.S. at 113 n.13.)

This is a misapplication of *Braithwaite*. First, the parties in *Braithwaite* conceded that the identification procedure was unnecessarily suggestive. *Braithwaite*, 432 U.S. at 109. The only dispute before the Court was whether the unnecessarily suggestive procedure *per se* resulted in exclusion of the evidence for a constitutional violation or whether courts should rely on the "more lenient" totality of the circumstances approach to exclusion. *Id.* at 109-10. Thus, the Court was not considering the constitutional threshold of the suggestiveness prong.

Second, the *Braithwaite* Court noted that "reliability is the linchpin in determining the admissibility of identification testimony. . ." and reliability is determined by the totality of the circumstances when weighed against the "corrupting effect of the suggestive identification itself." *Id.* at 114. In application, the threshold of an unnecessarily suggestive identification must be triggered before the court

moves on to test reliability. Put another way, before evidence of an identification is inadmissible, *both* prongs must fail constitutional muster. *See Perry v. New Hampshire*, 565 U.S. at 238–39. For these reasons, this Court should not follow *Cikora*'s reasoning that determination of whether the identification is unnecessarily suggestive is a factual finding.

In the case at bar, the Fourth District looked to several facts to conclude whether the identification procedure was unnecessarily suggestive: 1) Petitioner was handcuffed and brought out by two officers, 2) the police told Ms. Matthews that he matched her description and was found in the area where she saw the shooter flee to, and 3) although others were found in the apartment, at least one of whom matched the description the eyewitness provided, the eyewitness was shown only Petitioner. (PDF 146). These are factual findings. But whether an identification based on these facts is unnecessarily suggestive is, inherently, a question about what level of suggestiveness the law is willing to tolerate as constitutional.

Absent from the record is any evidence establishing that a photographic array could not have been compiled in a timely manner and

shown to Ms. Matthews. *See McWilliams*, 306 So.3d at 135. Moreover, the Fourth District stated there was no indication of "intentional misconduct or incompetence on the part of law enforcement" in conducting a show-up of only Petitioner. (PDF 149). But, the officers who apprehended the men in the apartment were concerned enough that Nixon also matched Ms. Matthews' description that they photographed him, swabbed his hands for gunshot residue, and, later, obtained his DNA. Yet they did not present him, or his photograph, to Ms. Matthews. Because there was no exigency to justify not showing Ms. Matthews a photographic array of Petitioner, or showing her Nixon or the other occupants of the apartment, this show-up procedure was *unnecessarily* suggestive.

The unnecessarily suggestive show-up gave rise to a substantial likelihood of irreparable misidentification. Ms. Matthews testified she observed the person who accosted Mr. Urquilla and shot him. When the gunman first approached Mr. Urquilla, Ms. Matthews could not see his face or hair, seeing only the side of the gray hoodie he was wearing. It was not until the scuffle moved to the front of the car and the man pulled out a gun that Ms. Matthews saw his face, with the hoodie still pulled up.

Ms. Matthews acknowledged she was paralyzed with fear at that time and the incident occurred quickly. Although Ms. Matthews told police she paid attention to the man's face and would recognize him, she initially failed to mention the most distinctive feature on Petitioner's face – the mark under his eye. She could not describe the gun because the speed of the incident preventing her from getting a good look at it. The description of the gunman Ms. Matthews provided to police – 5"10" tall, 125 pounds, brown skin, and being in his twenties or younger – was a general description at best; she did not describe the shape of his face, nose, or mouth and, again, failed to mention the single distinctive aspect of his appearance, the apparent tattoo under his right eye.

Upon seeing Petitioner at the show-up, which occurred approximately three hours after the shooting, Ms. Matthews was "pretty positive" he was the gunman, only saying she was one-hundred-percent positive after Detective Almanzar prompted her to do so.

The out-of-court identification was neither reliable, nor based upon her independent recollection of the gunman at the time of the crime, uninfluenced by the unnecessarily suggestive show-up. Ap-

plication of the *Biggers*' factors show that the out-of-court identification should have been suppressed: the short period of time during which Ms. Matthews observed the gunman; her being paralyzed with fear while doing so; her providing only the most general description of the gunman; her failure to initially tell police about the apparent tattoo on the gunman's face, which, if she was paying close attention to his face as she claimed, she would have seen; her inability to describe the gun; and her being less than unequivocal about the identification until prompted to do so by Detective Almanzar.

For the same reasons the in-court identification also should have been suppressed. *See Edwards,* 538 So. 2d at 444-45; *Gomez,* 937 So. 2d at 832.

CONCLUSION

For the foregoing reasons, Petitioner asks this Court to determine that under the *de novo* standard of review, the out-of-court and in-court identifications should have been suppressed, reverse his conviction, and remand for a new trial. In the alternative, Petitioner asks this Court to remand to the Fourth District with directions to reconsider the issue under the *de novo* standard.

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CERTIFICATE OF SERVICE

I certify that on March 18, 2022, a copy hereof has been electronically filed with this Court and furnished to Deborah Koenig, Esq., Assistant Attorney General, Counsel for Appellee, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401-3432, by email to: CrimAppWPB@MyFloridaLegal.com.

/s/ CHRISTINE C. GERAGHTY
Attorney for Petitioner

CERTIFICATE OF FONT SIZE

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