Filing # 157528553 E-Filed 09/15/2022 06:54:00 PM

RECEIVED, 09/15/2022 06:54:21 PM, Clerk, Supreme Court

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 REPLY BRIEF ON THE MERITS

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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 Perry v. New Hampshire*, 565 U.S. 228, 238–39 (2012); *Manson v. Braithwaite,* 432 U.S. 98 (1977); *Stoval v. Denno*, 388 U.S. 293, 301-02 (1967). [1] Show-up identifications are *inherently* suggestive. *Perez v. State*, 648 So. 2d 715, 719 (Fla. 1995). Only if the show-up meets the threshold being *unneces-*

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[1] Cites to Petitioner's initial brief are designated as "(IB)," and the State's answer brief as "(AB), followed by the page number."

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sarily suggestive does the court weigh the totality of the circumstances to determine the reliability of the identification. *Davis v. State*, 207 So. 3d 177, 207 (Fla. 2016); *Green v. State*, 641 So. 2d 391, 394 (Fla. 1994); *Grant v. State*, 390 So. 2d 341, 343 (Fla. 1980).

A show-up that is unnecessarily suggestive can still be admissible if, under the totality of the circumstances, there are indicia of reliability that mitigate the "corrupting effect" of the suggestive of the procedure. *Perry v. New Hampshire*, 565 U.S. 228, 238-39 (2012) (quoting *Braithwaite*, 432 U.S. at 114).

In *Walton v. State*, 208 So. 3d 60 (Fla. 2016), this Court determined that, because suggestive identification procedures present a mixed question of law and fact, the standard of review is also mixed: the court defers to the trial court's discretion in fact finding but independently reviews the legal conclusions *de novo* to determine if the identification meets the constitutional threshold of being unnecessarily suggestive so to give rise to a reasonable likelihood of misidentification. *Id.* at 65-67.

The State advocates as a general principle that this Court should abandon the mixed standard of review, and instead review mixed questions by differing standards that would sometimes mean

questions of law are reviewed for an abuse of discretion and other times reviewed *de novo*. (AB 22-25, 32-37). Specific to the issue of identification procedures, the State first argues that abuse of discretion review is appropriate because the trial court, as the fact-finder, is better positioned to determine if the show-up was unnecessarily suggestive. (AB 32). Second, determining whether the show-up was unnecessarily suggestive provides little opportunity for the appellate court to clarify the law. (AB 38). Third, it claims that Florida courts historically reviewed the admissibility of identifications for abuse of discretion. (AB 40). Fourth, the amount of appellate effort that go into *de novo* review outweighs any benefit obtained by correcting the trial court's erroneous decision-making. (AB 44).

A. The better-positioned legal actor and the law-clarifying benefits

The State's first two main points are interrelated: the crux of the argument is that the legal conclusions in identification case are "deeply fact-dependent" and thus present little opportunity to clarify the law, so they are not appropriate for independent *de novo* review. (AB 33). In the State's view, because the trial court is best positioned to determine the facts of the show-up, it is also best positioned to

apply the law to the facts.

To the contrary, no amount of fact-finding will resolve the question of how much suggestiveness is constitutionally acceptable; that is a threshold legal question that is appropriate for *de novo* review. *See* Padovano, Philip J., 2 Fla.Prac., Appellate Practice § 19.3 Nature of the adjudication (2022 ed.).

Petitioner does not dispute that the trial court is best positioned to determine facts: credibility of witnesses based on their demeanor in court, the witness's opportunity to view the perpetrator, the degree of attention paid by the witness, the detail and accuracy of the witness's description of the perpetrator, the pressure put on the witness to make an identification. *See Sumner v. Mata*, 455 U.S. 591, 597 (1982). However, the conclusion about whether those facts amount to an unnecessarily suggestive show-up is an objective constitutional legal standard that the appellate court should independently review. *See Id.* at 597 n.10.

The State dismisses the significance of *Mata* because it involved federal habeas review, with the overly broad statement that "AEDPA overruled the *de novo* standard in favor of deference to state court

decisions." (AB 46).[2] But the pre-AEDPA distinction does not diminish the import of *Mata*'s analysis or its application to the issue before this Court. This Court is not bound by the terms of the AEDPA amendment, which restricted the legal scope of what the federal court reviews on habeas petitions.

To be sure, federal habeas review after AEDPA is a technical statutory construct for collateral post-conviction attacks, not a method of evaluating state-court direct appeals. *Mata* is nevertheless instructive precisely because it was operating without the limiting scope of AEDPA, as this Court is here. There is no AEDPA-like limitation imposed on Florida appellate court's direct appeal review, so the reasoning of *Mata* remains applicable to this Court. Indeed, *Walton* applied the same standard recognized in *Mata* – deference to the

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[2] Contrary to the State's broad statement, the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) amendment to 28 U.S.C. § 2254 did not absolutely abrogate the appellate court's *de novo* application of the law to the facts. Rather it limited the scope of the legal question the federal courts answer when the claim has been adjudicated on the merits in state court. *See Williams v. Taylor*, 529 U.S. 362 (2000). But in other federal habeas contexts, courts continue to review the application of the law to the facts *de novo*. *See Austin v. Davis*, 876 F.3d 757, 779 (5th Cir. 2017); *Simmons v. Beard*, 590 F.3d 223, 232–33 n.5 (3d Cir. 2009).

trial court's factual findings but application of the law *de novo* to determine whether the identification was unnecessarily suggestive and gave rise to a substantial likelihood of irreparable misidentification. *Walton*, 208 So. 3d at 64.

The State attempts to frame the constitutionality of suggestive identification procedures as the sum total of various facts. (AB 34-37). To the contrary, the relevant constitutional inquiry into suggestive identifications is not "what happened," but rather the legal significance of wat happened.

De novo review is appropriate to answer the question because no amount of fact-finding can resolve the question of how much suggestiveness is constitutionally acceptable. To review for an abuse of discretion would allow different trial judges to draw different conclusions about whether the identifications violate due process without any significant difference in the facts. *See Ornelas v. U.S.*, 517 U.S. 690, 697 (1996). Such arbitrary application of constitutional standards would violate the notion of a uniform rule of law. *Id.* Rather, the reviewing court must determine whether accepted facts satisfy the relevant constitutional standard, "or to put it another way, whether the rule of law as applied to the established facts is or is not violated."

Id. at 696-97.

Like determinations of probable cause or reasonable suspicion, determining what amount of suggestiveness is constitutionally permissible is the type of inquiry that "acquire[s] content only through application" of the law to the facts. *Id.* at 697. *De novo* review is justified in that determination to "maintain and clarify the legal principle." *Id.* The duty of appellate courts in Florida is similar: "[t]he primary role of the appellate courts is to develop and apply the law," which makes *de novo* review appropriate. Padovano, *supra* § 19:4. Nature of the adjudication—Conclusions of law.

Suggestive identification procedures differ from those inquires that are highly dependent on one facet of fact-finding, such as witness credibility. "Credibility determinations . . . may sometimes contribute to the establishment of the historical facts and thus to identification of the totality of the circumstances. But the crucial question entails an evaluation made after determination of those circumstances: if encountered by a reasonable person, would the identified circumstances add up to [the constitutional standard] . . . The [lower] court is not in an appreciably better position . . . to make the ultimate determination of consistency" with the constitutional requirement.

Thompson v. Keohane, 516 U.S. 99, 113 (1995)) (internal citations omitted).

Likewise, many other mixed questions that are highly dependent on the facts or the totality of the circumstances are nevertheless reviewed *de novo* on the law, including whether probable cause or reasonable suspicion existed, *Ornelas v. U.S.*, 517 U.S. at 687; *Connor v. State*, 803 So. 2d 598, 605 (Fla. 2001); whether a defendant received ineffective assistance of counsel in violation of the Sixth Amendment, *Stephens v. State*, 748 So. 2d 1028, 1031-32 (Fla. 1999) (citing the multiple policy considerations listed in *Ornelas* as similar justification); whether the defendant was in custody for *Miranda*[3] and voluntariness of confession, *Thompson v. Keohane*, 516 U.S. at 111-13; *Miller v. Fenton*, 474 U.S. 104, 116-17 (1985); *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999); and *Giglio* violations; *Allen v. State*, 261 So. 3d 1255, 1286–87 (Fla. 2019).[4]

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] Even in Stand-Your-Ground immunity cases under section 776.032, Florida Statutes, which are very fact and credibility intensive but do not invoke a constitutional basis for dismissal, Florida courts generally review the mixed question by accepting the facts when supported by competent substantial evidence but applying the law to the facts *de novo*. *Bouie v. State*, 292 So. 3d 471, 479 (Fla. 2d DCA 2020); *Derossett v. State*, 311 So. 3d 880, 887 (Fla. 5th DCA

Similarly, "once the factual issues have been resolved and the moment comes for determining whether, under the totality of the circumstances," the suggestive identification procedures violated the constitutional prohibition, the trial court is "not in an appreciably better position" than the appellate court to make that determination. *See Miller v. Fenton*, 474 U.S. at 117.

The State suggests that this Court is not bound to apply the same standard of review as applied by the United States Supreme Court to the issue. (AB 48). But this Court does so on constitutional questions because the Supreme Court is, at the very least, extremely persuasive authority for the policies that underpin review of the constitutional question.

For example, in *Connor v. State*, 803 So. 2d at 606 , the case relied upon by *Walton* as authority for the mixed standard in reviewing identification procedures, this Court reviewed *de novo* the legal

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2019). *See also Jarrard v. Jarrard*, 157 So. 3d 332, 337-38 (Fla. 2d DCA 2015) (reviewing *de novo* the application of law to the facts for an alimony modification award); *Greenberg v. Bekins of South Florida*, 337 So. 3d 372, 375 (Fla. 4th DCA April 20, 2022) (same for breach of contract dispute).

determinations of probable cause to search and whether a person was free to leave the police encounter. To determine *de novo* review was appropriate, the Court first looked to the policy reasons announced by the Supreme Court in *Ornelas* and *Thompson*. *Id.* This Court then noted other State courts and Federal courts that relied on the same standard. *Id.* at 607.

Finally, it reviewed its own prior decisions[5] and found that, despite its stated standard of giving deference to the trial court's legal ruling on a motion to suppress, it had, "in fact independently reviewed the application of the legal standard to the facts found by the trial court." *Id.*

It concluded that "for the same underlying policy reasons enunciated in *Ornelas* and *Thompson*," appellate courts must "independently review mixed questions of law and fact" that determine Fourth and Fifth Amendment issues and, by extension, article I, section 9 of the Florida Constitution. *Id.; cf. Stephens v. State*, 748 So. 2d 1032, 1033 (Fla. 1999) (deferring to the trial court's findings of fact but applying *de novo* review to the application of law "[b]ecause

[5] *Id.* at 607 n.2.

the ineffective assistance of counsel claim is based on the Sixth Amendment, [and] we are not at liberty to disregard the United States Supreme Court's decision in *Strickland,*[6] nor do we find that it is appropriate to abdicate the responsibility of the appellate courts to ensure the correct and uniform application of the law.")

Contrary to the State's assertion that *Connor* "simply cited 'United States Supreme Court' precedent for the idea" that review of mixed questions should apply the law to the fact *de novo* (AB 27), the Court in fact undertook the policy-based approach that the State advocates for; it just came to a conclusion adverse to the State's position in the case at bar. A similar result should follow in the case at bar.

For these reasons, *de novo* review strikes the proper balance between giving due deference to the trial court's fact-finding and clarifying the legal standard of whether suggestive identification procedures violate due process.

B. History of appellate practice

As Petitioner argued in his initial brief, Florida courts, including

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[6] *Strickland v. Washington*, 466 U.S. 668 (1984).

this Court, have used the abuse of discretion standard to review suggestive identification procedures. That standard appears to have no principled grounding in legal precedent and was not applied uniformly, even by this Court. (IB 34-37).

The State cites to *Thomas v. State*, 748 So. 2d 970, 981 (Fla. 1999), and *Willacy v. State*, 640 So. 2d 1079, 1084 (Fla. 1994), as additional examples where this Court applied an abuse of discretion standard to suggestive identification procedures. (IB 41). As with the cases discussed in the initial brief, however, *Thomas* and *Willacy* provide no authority in case law or analysis for why discretion applies; they just summarily stated there was no abuse of discretion. *Thomas*, 748 So. 2d at 981; *Willacy*, 640 So. 2d at 1084.

The State argues these cases are examples of the Court recognizing that the trial court is better situated to determine reliability of evidence based on its fact-finding. (AB 41-42). But, if so, those opinions suffer the same flaw that the State attributes to *Walton* and *Connor* – a lack of the policy explanation for why abuse of discretion is appropriate.

In fact, as discussed in the initial brief, several of this Court's prior identification cases appear to have independently reviewed *de*

novo how the law applied to the facts, rather than use abuse of discretion. (IB 33-36). *See, e.g., Green v. State*, 641 So. 2d 391, 394 (Fla. 1994) (after reviewing the evidence: "We find that the police did not use an unnecessarily suggestive procedure. . . Thus, the trial court did not err in refusing to suppress the photo identification."); *Lewis v. State*, 572 So. 2d 908, 910-11 (Fla. 1990) ("Under the totality of the circumstances, there was not a substantial likelihood of misidentification."); *Grant v. State*, 390 So. 2d 341, 344 (Fla. 1980) (after reviewing the evidence: "[W]e do not believe that the police employed unnecessarily suggestive procedures in obtaining Ms. Campbell's out-of-court identifications.").

Similarly in *Edwards v. State*, 538 So. 2d 440 (Fla. 1989), this Court independently reviewed the record to determine that an in-court identification should have been suppressed because it was tainted by an earlier illegal line-up. The trial court did not make specific factual findings about whether the in-court identification was tainted. *Id.* at 443. "Nonetheless, the pertinent facts were fully developed at the suppression hearing and at trial, and the parties ad-

dressed the issue at those proceedings and on this appeal. Accordingly, we find the record fully adequate to permit an informed judgment by this Court." *Id.* at 443-44 (footnote omitted).

If "[a] practice of applying a particular standard of review suggests that the standard has proven workable and lends itself to reliable outcomes," (AB 26), then these cases demonstrate that the abuse of discretion standard has failed with respect to identification procedures.

In the State's final argument for this point, it categorizes suggestive identification procedures as a "state of mind" determination where the trial court's rulings are reviewed for discretion, like biased jurors,[7] competency,[8] or prosecutorial intent in striking jurors.[9] (AB 42). But unlike those state-of-mind cases where the constitutional violation "take[s] place in open court on a full record," the trial court does not have "a first-person vantage" of whether the show-up was unnecessarily suggestive and gave rise to a reasonable likelihood of irreparable misidentification. *Thompson v. Keohane*, 516 U.S. at 114;

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[7] *Patton v. Yount*, 467 U.S. 1025 (1984).

[8] *Maggio v. Fulford*, 42 U.S. 111 (1983).

[9] *Batson v. Kentucky*, 476 U.S. 79 (1986).

see also Miller v. Fenton, 474 U.S. at 117. For this reason, the trial court is not "in an appreciably better position" than the appellate court to apply the law to the facts. *Id.*

C. Sound judicial administration

Finally, the State argues that efficient use of appellate judicial resources favors abuse of discretion review instead of *de novo* because any benefit provided by *de novo* is outweighed by the effort it would take appellate courts to independently review. (AB 43-44). It relies mainly on *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985), for its discussion of judicial resources. But the State quotes *Anderson* out of context. (AB 44).

Anderson specifically addressed whether appellate court must give deference to the trial court's findings of fact. *Id.* at 574-75. It did not address how appellate courts should apply the law to those facts on review.

Anderson's actual analysis was that "[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly *to the accuracy of fact determination*" – not to decision-making in general, as asserted by the State. *Id.* at 574-75.

Anderson's entire discussion about the allocation of judicial resources was in the context of whether appellate courts must give deference to both credibility determinations and non-credibility factual findings. *Id.* In answering the question affirmatively, the Court reasoned that litigants should not have to "concentrate their energies and resources" on persuading appellate judges of facts that they already proved to the trial judge. *Id.* at 575. However, litigants should absolutely concentrate their energies on persuading appellate judges about the legal decision-making of an issue.

The clarification between these two different functions of the court is important, even if the State is arguing by analogy: fact-finding is *not* decision-making. This is especially so in a situation like unnecessarily suggestive show-ups, where no one fact is determinative of the issue.

Next, the State argues, the "safeguards" of the adversarial system are sufficient to prevent jurors from relying too heavily on improperly admitted identifications. (AB 44). If that were true, the Court would not have decided *Neil v. Biggers* or *Manson v. Braithwaite* in the first place. The second step of the *Braithwaite* inquiry is whether there is substantial likelihood of *irreparable* harm.

Unlawful identification procedures are inadmissible at trial exactly because the traditional methods of the adversarial system are *not* enough to counteract the irreparable harm of the misidentification.

The instant case demonstrates why the established mixed standard is appropriate, with deference to the trial court's factual findings but *de novo* review of the legal conclusion. The police did three things that cumulatively aggravated the already-suggestive show-up: Alahad was shown to the witness while handcuffed; the witness recalled being told by police that Alahad matched her description and was found in the area where she said the shooter ran; and police could have shown the witness others who were detained at the apartment with Alahad and also matched her description, instead of just Alahad by himself. The District Court was particularly troubled by this third fact, though not enough to reverse.

Like Alahad, Nixon matched the description of the shooter given by the witness and he was detained in the same location where the witness said the shooter ran.[10] (T 859-60, 864-65, 1021-22). Despite

[10] Nixon also tested positive for gun residue on his hands (T 859-60, 1103-04, 1107), while Alahad tested negative. (T 1101, 1107-08).

this, Alahad alone was displayed, handcuffed, to the witness, who recalled being told by police that he matched her description and was found in the area where she said the shooter ran. (SR 722-23,734-45,757-58). After viewing Alahad, the witness stated the mark under his eye is what reminded her of the shooter, even though she did not mention any facial marking in her prior descriptions of him. (SR 713, 716-18, 718-20, 727, 731, 738-39, 741, 754). She was unaware that police also found at least one other person -- Nixon -- who was in the same area and also matched her description, including having a tattoo under his eye.

The police had the opportunity to mitigate the inherent suggestiveness of Petitioner's show-up by presenting Nixon, or others, along with Alahad, but they chose not do so. By unnecessarily aggravating the already suggestive show-up, the police action ran afoul of what the Constitution objectively tolerates. The identification was neither reliable, nor based upon the witness' independent recollection of the gunman at the time of the crime, uninfluenced by the unnecessarily suggestive show-up. The Fourth District erred by affirming the denial of Petitioner's motion to suppress the identification on an abuse of discretion standard.

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 September 15, 2022, a copy hereof has been electronically filed with this Court and furnished to David M. Costello, Esq., Assistant Solicitor General, The Capitol, PL-01, Tallahassee, Florida 32399, by email to david.costello@myfloridalegal.com.

/s/ CHRISTINE C. GERAGHTY
Attorney for Petitioner

CERTIFICATE OF FONT SIZE

I certify this brief is submitted in Bookman Old Style 14-point font in compliance with Florida Appellate Rule 9.210(a)(2) and that the word count is 4,000 or less exclusive of the caption, cover page, table of contents, table of citations, certificate of compliance, certificate of service, or signature block.

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