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## **STATEMENT OF THE ISSUE**

DOES THE ABUSE OF DISCRETION OR *DE NOVO* STANDARD OF REVIEW APPLY TO REVIEW OF A TRIAL COURT RULING THAT A PRE-TRIAL IDENTIFICATION PROCEDURE WAS NOT UNNECESSARILY SUGGESTIVE GIVING RISE TO A SUBSTANTIAL LIKELIHOOD OF IRREPERABLE MISIDENTIFICATION?

## **STATEMENT OF THE CASE AND FACTS**

Petitioner, convicted of second degree murder and attempted robbery with a firearm, sought review in the Fourth District Court of Appeal arguing, among other things, that the trial court erred by denying his motion to suppress an eyewitness's identifications resulting from an unnecessarily suggestive show-up that gave rise to a substantial likelihood of misidentification. *Alahad v. State*, 4D19-3438 (Fla. 4<sup>th</sup> DCA Sept. 1, 2021) Slip op. at 1. The trial court acknowledged some problems with the witness's testimony and that show-ups are always suggestive,

[b]ut it reasoned a substantial likelihood of misidentification did not exist because the eyewitness had a good opportunity to view the shooter, as the crime was committed in broad daylight and the shooter was near the hood of her car, only three hours elapsed between the shooting and the show-up, and the eyewitness exhibited a high level of certainty, stating she

was one hundred percent positive it was the defendant.

*Id.* Slip op. at 4.

On appeal, petitioner argued the show-up was unnecessarily suggestive because

(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.

*Id.* Slip op. at 5.

The district court rejected petitioner's arguments on the grounds that "the presence of officers or handcuffs, standing alone, does not render a show-up impermissibly suggestive"[,] that police telling the eyewitness that the person she would be shown matched the description of the assailant she provided was not unnecessarily suggestive and no reasonable judge would rule otherwise, and that reasonable minds could differ regarding whether the failure to display another person matching her description to the eyewitness rendered the show-up unduly suggestive. *Id.* Slip op. at 6-7. Finding that the trial court's determination that the show-up was not unnecessarily

suggestive was not an abuse of discretion, the Fourth District affirmed. *Id.* Slip op. at 7. Having concluded that the show-up was not unnecessarily suggestive, the district court did not address whether the show-up procedure gave rise to a substantial likelihood of irreparable misidentification. *Id.*

In affirming the trial court, the district court recognized *Walton v. State*, 208 So.3d 60 (Fla. 2016) wherein this Court wrote:

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.

*Id.* Slip op. at 4. Despite recognizing this Court’s pronouncement requiring independent review of mixed questions of law and fact that ultimately determine constitutional issues, the Fourth District employed the abuse of discretion standard of review in affirming the trial court’s denial of petitioner’s motion to suppress. The district court left no question regarding its failure to review the trial court’s ruling *de novo*, stating, “[o]ur affirmance on the issue is based on the application of the abuse of discretion standard of review”[,] “[t]he

circumstances of this show-up suggest that the trial court's determination was likely a close call. Due to the abuse of discretion standard of review, however, we are compelled to affirm"[,] and "[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." *Id.* Slip op. at 4, 6, & 7.

### **SUMMARY OF THE ARGUMENT**

Both this Court and the Third District Court of Appeal have held that the *de novo* standard of review should be applied by an appellate court when reviewing a trial court's ruling denying a motion to suppress eyewitness identification testimony predicated upon an unnecessarily suggestive pre-trial identification procedure giving rise to a substantial likelihood of irreparable misidentification. The Fourth District Court of Appeal applied the abuse of discretion standard in reviewing the trial court's denial of such a motion in this case. Application of the abuse of discretion standard of review by the Fourth District created express and direct conflict with the prior decisions of this Court and the Third District. In the interest in maintaining uniformity in the law, this Court should exercise its

discretionary jurisdiction to review the Fourth District's decision and resolve the conflict.

### **ARGUMENT**

**THIS COURT HAS JURISDICTION TO REVIEW *ALAHAD v. STATE*, 46 Fla. L. Weekly D1962, 2021WL3891553 (Fla. 4<sup>th</sup> DCA Sept. 1, 2021), WHERE THE DECISION RENDERED IS IN EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND ANOTHER DISTRICT COURT OF APPEAL ON THE SAME POINT OF LAW.**

Article V, § 3(b)(3) of the *Florida Constitution* vests this Court with jurisdiction to hear appeals in criminal cases as follows:

(3) May review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or the supreme court on the same question of law.

*accord Fla. R. App. P. 9.030(a)(2)(A)(iv).*

In *Nielson v. City of Sarasota*, 117 So. 2d 731 (Fla. 1960), this Court discussed "conflict jurisdiction" stating:

the principal situation justifying the invocation of our jurisdiction to review decisions of Courts of Appeal because of alleged conflict are, (1) the announcement of a rule of law which conflicts with a rule previously announced by this Court, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a case disposed of by this Court.



*Id.* at 734; accord *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975).

"The constitutional standard is whether the decision of the District Court on its face collides with a prior decision of this Court, or another District Court, on the same point of law so as to create an inconsistency or conflict among precedents." *Kincaid v. World Insurance Co.*, 157 So. 2d 517, 518 (Fla. 1963).

In *Walton v. State*, 208 So.3d 60 (Fla. 2016), the defendant unsuccessfully motioned the trial court to exclude eyewitness identification testimony on the ground that the pre-trial photo array identification procedure was impermissibly suggestive and created a substantial likelihood of misidentification. *Id.* at 65. This Court agreed. *Id.* In analyzing the issue, the Court did not apply the abuse of discretion standard of review, instead using the *de novo* standard, stating:

Since a trial court's ruling on a motion to suppress is a mixed question of law and fact that determines constitutional rights, we employ a two-step standard of review:

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.*

The Third District Court of Appeal also addressed the standard of review in *McWilliams v. State*, 306 So.3d 131 (Fla. 3<sup>rd</sup> DCA 2020).

*McWilliams* sought to exclude an out-of-court identification procured through a single person show-up, arguing it was unduly suggestive giving rise to a substantial likelihood of misidentification and that any in-court identification should be invalidated due to the taint of the show-up. Although the district court disagreed with the merits of *McWilliams*' argument, it did so through application of the *de novo* standard of review. In addressing the standard of review, the Third District stated:

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 Fourth District Court of Appeal did not apply the *de novo* standard of review, instead applying the abuse of discretion standard. The Fourth District’s application of the abuse of discretion standard of review to affirm the trial court’s ruling is in express and direct conflict with the rule of law announced by this Court in *Walton* and the Third District in *McWilliams*. Accordingly, this Court has discretion to review the decision of the Fourth District Court of Appeal. In the interest of maintaining uniformity in the law, and clarifying the correct standard of review, this Court should exercise its discretion to review *Alahad v. State*.

#### CONCLUSION

Based upon the foregoing argument and the authorities cited therein, petitioner requests this Court exercise its discretionary jurisdiction and accept this case for review

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Celia Terenzio, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401 at [CrimAppWPB@myfloridalegal.com](mailto:CrimAppWPB@myfloridalegal.com) on this 21st day of October, 2021.

/s/ David John McPherrin  
David John McPherrin

CERTIFICATE OF FONT

I HEREBY CERTIFY the instant brief has been prepared with 14 point, Bookman Old type, in compliance with a R. App. P. 9.210(a)(2).

/s/ David John McPherrin  
David John McPherrin