SC21-1450

In the Supreme Court of Florida

ZAVION ALAHAD,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Discretionary Review from
the Fourth District Court of Appeal
DCA No. 4D19-3438

ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE ISSUES

I. Whether appellate courts should apply de novo review or abuse-of-discretion review to a trial court's ruling admitting or excluding, under the Fourteenth Amendment's Due Process Clause, an eyewitness identification made after a police showup.

II. Whether the Fourth District properly affirmed the trial court's decision to admit in-court and out-of-court eyewitness identifications made after a police showup.

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INTRODUCTION

A standard of review should allocate principal decisional authority to the judicial actor best suited to resolve a particular question. *See Miller v. Fenton*, 474 U.S. 104, 114 (1985). That inquiry usually boils down to whether the question "entails primarily legal or factual work." *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018). When a question entails primarily legal work, the better-situated actor is the appellate court, and de novo review is warranted. *Id.* But when a question entails primarily factual work—including when a mixed question of law and fact is bound up in factual questions—the better-situated actor is the trial court, and deferential review is the better fit. *Id.*

The question here is how to apply those general principles to the appellate standard of review for the admissibility of an eyewitness identification made after a police showup (a "post-showup identification"). In doing so in prior cases, this Court has been of two minds. Though it traditionally has deferred to the trial court, more recent decisions independently reviewed the admissibility question.

And the federal courts are likewise deeply divided on the appropriate standard of review. Contrary to Petitioner's view, then, precedent supplies no clear answer for the correct standard of review. To resolve the question presented, this Court should therefore decide whether an appellate court is the actor best positioned to resolve fact-bound questions involving the admissibility of eyewitness identifications, or whether a trial court is.

On balance, the better-suited actor is the trial court, and so the calculus favors the abuse-of-discretion standard. The admissibility of a post-showup identification is a fact-driven question: What were the circumstances surrounding the identification procedure? How much time did police have to formulate an appropriate procedure? What did police say to the eyewitness in presenting the suspect for identification, and in what tone? Did police have good reasons to focus their identification efforts on the suspect? How certain was the eyewitness? Did the eyewitness get a good look at the perpetrator during the crime? And how confident is the trial court in each of these findings?

Because such questions are best resolved by trial courts on the

ground—not appellate courts on a cold record—abuse-of-discretion review is appropriate. A de novo standard of review, by contrast, would increase the risk of wrong outcomes by asking an appellate court to independently perform a task that lies outside its core competencies.

Applying the abuse-of-discretion standard here, the trial court acted well within its discretion in admitting the post-showup identifications. As a result, this Court should approve the decision of the Fourth District.

STATEMENT OF THE CASE AND FACTS

A. Legal background

Police-arranged eyewitness identification procedures (photo arrays, lineups, showups, and so on) have been "used widely and effectively" to "apprehen[d] offenders" and "spar[e] innocent suspects the ignominy of arrest." *Simmons v. United States*, 390 U.S. 377, 384 (1968). But because such procedures can be abused, the U.S. Supreme Court has held that the Fourteenth Amendment's Due Process Clause bars admission of eyewitness identifications made after a police-arranged procedure that renders the identification unreliable. *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012); *see*

also Neil v. Biggers, 409 U.S. 188, 198 (1972) ("[A]s to the relationship between suggestiveness and misidentification . . . . [T]he primary evil to be avoided is a very substantial likelihood of irreparable misidentification." (quotation omitted)). To determine whether an identification procedure is unreliable, this Court applies a two-part test: "(1) did the police employ an unnecessarily suggestive procedure," and "(2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification." *Grant v. State*, 390 So. 2d 341, 343 (Fla. 1980).

Courts have created guidelines for applying these standards. For example, a procedure is "unnecessarily suggestive" when police "aggravate the suggestiveness" of the procedure. *E.g.*, *State v. Jackson*, 744 So. 2d 545, 548 (Fla. 5th DCA 1999) (citing *Johnson v. Dugger*, 817 F.2d 726, 729 (11th Cir. 1987)). And to determine whether a procedure gave "rise to a very substantial likelihood of irreparable misidentification," police consider both the procedure's degree of suggestiveness, *see Simmons*, 390 U.S. at 383–85, and several factors bearing on the witness's ability nonetheless to identify

the defendant correctly. *Biggers*, 409 U.S. at 199–200. These include: (1) "the opportunity of the witness to view the criminal at the time of the crime"; (2) "the witness' degree of attention"; (3) "the accuracy of the witness' prior description of the criminal"; (4) "the level of certainty demonstrated by the witness at the confrontation"; and (5) "the length of time between the crime and the confrontation." *Id.*

B. Factual and procedural history

The crime. On a December afternoon in 2016, Loretta Matthews was waiting in her car outside a convenience store while her boyfriend exchanged a bill for some change. SR. 688–90, 707; R. 7. As her boyfriend walked back to the car, a man tried to mug him. SR. 692–95. The pair began to struggle, moving close beside the passenger car door. SR. 693–94. Her boyfriend tried and failed to open the door and escape, after which the tussle spilled onto the hood of Matthews's car. *Id.* Eventually, her boyfriend fell to the ground on his back. SR. 695–97. The perpetrator then drew a gun, shot her boyfriend multiple times (killing him), and fled toward an apartment building. SR. 696–98.

Matthews had a clear view of these events and the perpetrator.

SR. 696. The attack began just 10 to 15 feet away from her. SR. 693–94. When it moved to the hood of the car, she saw the perpetrator's "whole face"—"[n]ot just a piece, not just the side." SR. 696–98. She "pa[id] attention to the face" so she could identify "who was doing this" to her boyfriend, "concentrat[ing] on it" for what she estimated to be three to four minutes, "[p]robably more." *Id.* After the altercation, she also noted the apartment building to which the perpetrator fled. SR. 698–99, 713–15.

The investigation. Police interviewed Matthews at the scene soon after the shooting. SR. 699–700, 720. She told officers that the perpetrator was a black male, about 5'9, 125 pounds, skinny, in his twenties or younger, and was wearing a grey sweatshirt and blue jeans. SR. 738–39; T. 618, 636, 1231. She did not add other details, but she emphasized that she got a "good look" at his face and could identify him if she saw him again. SR. 699–700, 718–20, 727–28. She also identified the apartment complex to which she saw the perpetrator run. SR. 716.

Later that afternoon, police received a tip from Sabela Louis, a woman living near the scene. T. 664–67. Shortly after hearing gun

shots, Louis saw Petitioner run past her front door with a grey shirt over his shoulder and a firearm in hand. T. 657. She knew him from the neighborhood and identified him by name. T. 655–56. She also identified the apartment where Petitioner could be found. T. 666–67.

Police visited the apartment that Louis had identified. T. 734. When they arrived, most of the inhabitants scrambled to hide drugs, T. 814–15; Petitioner, however, fled to hide in the attic. T. 814. When that plan failed, he rushed to a bedroom and pretended to be asleep. T. 749, 815, 832.

Petitioner and the other inhabitants were then escorted out of the apartment. T. 739–41. Petitioner had a defeated demeanor—different from his usual animated personality. T. 737–38. After one inhabitant asked to sit on the grass, police—to secure the area—moved a steak knife on the ground to a grill in a common area. T. 792, 796. Inside the grill they found a grey sweatshirt. T. 792, 796. When Petitioner saw that police had located the sweatshirt, he would not look at officers or at the grill and turned around to look away. T. 798.

Police then searched the apartment. In a bedroom near where they found Petitioner, they uncovered a box containing 9-millimeter

Luger cartridges—which had the same kind of casings found at the crime scene, T. 910–11. They also found a safe with identification documents belonging to Petitioner. T. 913–14.

Petitioner matched Matthews's description of the perpetrator, *supra* 6: He is a black male, 5'9, 17 years old, about 150 pounds. T. 843, 1219; R. 7. Although not initially identified by Matthews, Petitioner also has a distinctive, tear-shaped birthmark under his right eye. SR. 753–54; *see also* R. 312 (Petitioner's photograph). Another man in the apartment—Adrean Nixon—had a similar build and distinctive tattoos on his face, including two tear-shaped tattoos under his right eye. T. 849, 864; *see also* R. 324 (Nixon's photograph). Given those similarities, police swabbed Nixon's hands for gunshot residue. T. 859–61. Nixon tested positive, but he had recently cleaned his gun, explaining the residue. T. 1103–04, 1107, 1268.[1] Police also did not consider him a likely suspect given that Louis had identified Petitioner as running with a gun and a grey shirt

[1] Petitioner did not test positive for gunshot residue. But he was tested hours later at the station, and because gunshot residue particles do not form a bond with the skin, they are typically lost through regular activity within four to six hours. T. 1101–03.

just after shots were fired. SR. 743.

The showup. About three hours after the shooting, Detective Novak called Matthews. SR. 731–33. He told her that police had found "a guy from [her] description" and they wanted her to let them know if he was the shooter. SR. 700–01, 723, 732, 742. He also told her that the suspect may or may not be the correct person and to let them know if it was not. SR. 723. He never told her that they found Petitioner "in the area you told us he ran to," SR. 732, 780, though Matthews testified in her deposition that police had told her this. SR. 720–23.

Detective Almanzar then transported Matthews to the location of the showup. SR. 751. On the way, he told her that she would see a detained person who matched her description and that she should "look at the person closely," "take her time," "think about the person that she saw earlier," and "see if this was the same person." SR. 700–01, 720, 751–52, 757. He told Matthews to let him know if it was not the same person. SR. 752–53. He also reiterated that she should take as much time as she needed to look at the individual and that the investigation was not yet complete. SR. 758. He too did not recall

telling her if the person was found in the area where Matthews saw the shooter run. SR. 757.

When they arrived at the area near the apartment, a few police officers were present, along with several civilians, including some young black males who were sitting in the grass or on the sidewalk in front of the apartment. SR. 734. Petitioner was brought out from behind a fence. He was handcuffed and beside two officers. SR. 753–54.[2] He was the only suspect presented to Matthews for identification. SR. 743.

After getting a good look at him, SR. 703, Matthews told Detective Almanzar without hesitation that Petitioner was the shooter. SR. 754. She at first said she was pretty positive, and then followed that she was one hundred percent sure it was the same person. SR. 703, 727. Her identification was based on what she believed was a tear-shaped tattoo under his right eye, SR. 754, and on the shape of his face, his height, and his weight. SR. 726.

The suppression hearing and trial. The State charged Petitioner

[2] Matthews did not recall if he was handcuffed but recalled his hands were behind his back. SR. 702–03, 725.

with second-degree murder and attempted armed robbery with a firearm. R. 3. Before trial, he moved to suppress Matthews's out-of-court identification and any identification she would make at trial, arguing that their admission would violate the Due Process Clause. R. 111–22.

After an evidentiary hearing, the trial court denied the motion. SR. 777–82. It concluded that the showup was not unnecessarily suggestive, rejecting Petitioner's argument that officers had colored Matthews's view by revealing information about the showup suspect before her arrival. SR. 779–81.[3]

The trial court also found that there was not a substantial likelihood of misidentification. SR. 782. It based this finding on

[3] The trial court's finding on the unnecessarily suggestive prong stretched pages of the record and at times comingled that prong with the likelihood-of-misidentification part of the analysis. SR. 777–81. But the transcript reveals that the court in fact found the procedure unnecessarily suggestive. The court began that it was "sa[ving]" the unnecessarily suggestive analysis "for last." SR. 777. And then, after discussing the likelihood-of-misidentification prong, it returned to this first factor and rejected Petitioner's primary argument that police had told Matthews before the showup that they had found Petitioner in the area where the shooter had run. SR. 780–81; *see also* SR. 768–70. The Fourth District was thus quite right that "the trial cour[t] determin[ed] that the show-up was not unnecessarily suggestive." App'x 7.

several facts: (1) the showup occurred just three hours after the shooting; (2) it was daylight both when Matthews saw Petitioner at the scene and at the showup; (3) Matthews was "very close" to Petitioner at the scene; (4) she had a "good opportunity" to see his face "straight on"; and (5) in response to questioning from police about her confidence in her identification, she did not "equivocate"—she affirmed that she was "a hundred percent" sure. SR. 777–82.

At trial, the court admitted both Matthews's out-of-court identification and her in-court identification. T. 504, 591–92, 1197–99. The jury convicted Petitioner of both counts. R. 483–84, 491–92. And the court sentenced him to concurrent 25-year sentences and five years of probation. R. 583–88, 594–95, 597–99, 667–68.

Appellate proceedings. On appeal, the Fourth District affirmed, writing to address only the trial court's denial of the motion to suppress Matthews's identifications. App'x 1. Applying the "abuse of discretion standard," the appellate court saw no error in the trial court's finding that the showup was not unnecessarily suggestive. App'x 6. It rejected Petitioner's first argument—that he was handcuffed—because "handcuffs, standing alone, d[o] not render a

show-up impermissibly suggestive." *Id.* (citing *Jackson*, 744 So. 2d at 548). It rejected his second argument—that police told Matthews she would be viewing someone matching her given description—because the officers' statements were "vagu[e]" and "far [less] egregious" than in other cases. *Id.* (collecting cases). Finally, though the court found the last argument—that police failed to present Nixon to Matthews—the "most troubling," it affirmed because a "reasonable judge" could have determined that "law enforcement had a legitimate basis to zero in on" Petitioner since a "neighbor [had] identified [him] by name." App'x 6–7. It also reasoned that, if anything, any similarities between Nixon and Petitioner would be relevant to the substantial-likelihood-of-misidentification prong, which the Fourth District did not reach given its affirmance of "the trial court's determination that the show-up was not unnecessarily suggestive." App'x 7 & n.3.

SUMMARY OF THE ARGUMENT

I.A. At the outset, Petitioner is mistaken that this Court's precedent resolves the case. True, the Court has reviewed de novo a trial court's decision to admit a post-showup identification. *See*

Walton v. State, 208 So. 3d 60, 65–67 (Fla. 2016). But *Walton* did not discuss whether de novo review was the proper standard of review, nor did the parties brief the issue. And *Walton* conflicts with a parallel line of this Court's precedent applying abuse-of-discretion review to a trial court's ruling on whether the Due Process Clause prohibits the admission of an identification. This Court's precedent is thus far from settled, and the Court should clarify the correct standard.

I.B. In clarifying the standard, the Court should consult the traditional factors that appellate courts employ when crafting standards of review. The first is which judicial actor—trial court or appellate court—is best situated to accurately resolve whether a post-showup identification is admissible. The second factor is whether appellate decisions in this context will be helpful in future cases or will be too factually nuanced to provide precedential guidance. The third is how appellate courts have historically reviewed this question. Last, if the proper standard remains unclear, the Court should weigh which standard will advance the sound administration of justice.

I.C. Applying these factors, the Court should hold that abuse of

discretion is the correct standard for reviewing the admissibility of a post-showup identification.

That is because the trial court is best positioned to decide that question. Whether an identification violates due process turns on whether it is reliable enough to be admitted into evidence—a matter uniquely within the purview of the trial court. The two-part inquiry is also heavily fact dependent, turning not on mechanistic rules, but on case-specific factors. And trial courts often will not announce their credibility determinations on the record, making it nearly impossible for appellate courts to reach more accurate results on review. Asking appellate courts to independently review this type of ruling, in other words, is a recipe for reaching less accurate outcomes.

For similar reasons, appellate decisions reviewing applications of this due process test will have little precedential value. Given that both parts of the inquiry turn on variable circumstances, the presence or absence of even one fact may drive an appellate precedent off-point, making these cases poor candidates for the "investment of" finite "appellate energy." *Pierce v. Underwood*, 487 U.S. 552, 561 (1988). In the few cases where appellate review could

clarify the law, the abuse-of-discretion standard would also suffice to achieve that end. And applying abuse-of-discretion review to the mixed constitutional question here would not prevent appellate courts from declaring what the law is; appellate courts would still review de novo trial-court pronouncements of the governing legal standards.

All of this is no doubt why Florida courts historically (and still today) review the admissibility of an identification for abuse of discretion. They also review with deference other issues of evidentiary reliability. And the identification inquiry mirrors other contexts in which trial courts discern an actor's state of mind to secure the fairness of judicial proceedings—all of which courts review with deference.

Finally, abuse-of-discretion review here advances sound judicial policy. Even if appellate review could sometimes lead to more accurate results, such marginal improvements would not be worth the costs that accompany de novo review. And even in the rare cases in which a trial court erroneously admits an unreliable identification, a conviction does not inescapably follow—the defendant may use all

the ordinary safeguards of trial practice to persuade the jury to discredit the identification.

I.D. Petitioner's remaining arguments to the contrary fall short. He relies mostly on two U.S. Supreme Court cases that he says "effectively applied" de novo review when reviewing state-court decisions on habeas. But it is far from clear that these cases "effectively applied" de novo review; neither case even mentioned de novo review. And even if those cases were on point, this Court need not follow them—standards of review are not constitutionally mandated.

Petitioner also cites *Ornelas v. United States*, 517 U.S. 690 (1996), in which the U.S. Supreme Court applied de novo review to a trial court's determination of probable cause and reasonable suspicion. But that decision did not address post-showup identifications; and the distinctively amorphous legal standards governing probable cause and reasonable suspicion require more appellate law clarification than the detailed, bi-part test used to weigh the admissibility of a post-showup identification. So even if de novo review was justified in *Ornelas*, it is not justified here. And

again, federal standards of review are not constitutionally required. So the Court remains free to chart its own path, and for the reasons explained below, it should do so here.

II. Finally, under either the abuse-of-discretion standard or the de novo standard, the Fourth District properly affirmed the trial court's decision to admit the post-showup identifications. Police did not use an unnecessarily suggestive procedure; they took pains to ensure that the showup was fair and noncoercive. What is more, Petitioner and the other man bore few physical resemblances, and police reasonably focused their investigation on Petitioner given substantial corroborating evidence establishing him as the shooter.

ARGUMENT

I. The abuse-of-discretion standard of review applies to rulings on the admissibility of identifications made after a showup.

The main objective in fashioning a standard of review is to pick the standard that will "result in better or more accurate decisions." *State v. Weisler*, 35 A.3d 970, 999 (Vt. 2011) (Dooley, J., concurring and dissenting). But this Court has yet not considered what standard best advances that goal when reviewing the admissibility of a post-showup identification. It should do so now and instruct appellate

courts to review the admissibility of post-showup identifications for abuse of discretion.

A. Precedent does not resolve this question.

According to Petitioner, this is a straightforward case. Citing *Walton v. State*, 208 So. 3d 60, 65–67 (Fla. 2016), he claims that this Court "has already established that" de novo review is "the appropriate standard" for the mixed question whether a post-showup identification violates due process. *See* Init. Br. 37; *see also id.* at 28–31.

Walton no doubt applied de novo review to this question. But this Court neither considered nor had briefing in *Walton* on whether de novo review was the proper standard in this context. *Cf. Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020) (Issues "neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). And indeed, another line of this Court's precedent holds to the contrary, instead applying the deferential abuse-of-discretion standard to a trial court's ruling on whether a witness identification would offend due process. *E.g.*, *Gorby v. State*,

630 So. 2d 544, 546 (Fla. 1993); *Thomas v. State*, 748 So. 2d 970, 981 (Fla. 1999).

As with many mixed questions, the proper standard for reviewing the admissibility of a post-showup identification turns on consideration of several factors. *Infra* 20–26. But neither line of this Court's precedent has grappled with those considerations or offered a reasoned explanation for the standard of review it ultimately applied.

When, as here, the Court's prior precedents "cannot be fully reconciled," the Court "adopt[s]" the most reasoned "principle." *See Vasilinda v. Lozano*, 631 So. 2d 1082, 1086–87 (Fla. 1994). Rather than accept Petitioner's view that precedent resolves the standard-of-review issue, the Court should instead apply first principles. Applying those principles here, the most reasoned standard of review for the admissibility of a post-showup identification is abuse of discretion.

B. This Court should apply a context-specific functional approach to determine the proper standard of review.

1. Crafting a standard of review is a context-specific task. *E.g.*, *United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998) ("[I]n this

context de novo review of that question is appropriate."); *see also Hernandez v. New York*, 500 U.S. 352, 366 (1991) (plurality op.). For pure questions of either fact or law, the task is usually simple—the appellate court defers to the trial court's findings of fact but does not defer to its conclusions of law. *E.g.*, *Van v. Schmidt*, 122 So. 3d 243, 246 (Fla. 2013).

The task is harder for mixed questions of law and fact. A mixed question asks whether "the historical facts . . . satisfy the [legal] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman–Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). The admissibility of a post-showup identification presents such a mixed question: The trial court must determine whether, on these facts, the showup procedure was "unnecessarily suggestive" and "g[a]ve rise to a substantial likelihood of irreparable misidentification." *Grant*, 390 So. 2d at 343. Simply put, the court must decide whether the facts satisfy the legal standard.

Still, mixed questions "are not all alike." *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct.

960, 967 (2018). Some are well-suited for searching appellate review; others are best left to the trial court's judgment. *See id.* Courts thus balance an array of factors to decide which standard of review is the best fit for the context. *See Pierce v. Underwood*, 487 U.S. 552, 559 (1988) ("No more today than in the past shall we attempt to discern or to create a comprehensive test; but we are persuaded that significant relevant factors call for an 'abuse of discretion' standard in the present case."). Those factors are as follows.

First, because the core function of appellate courts is to ensure that the trial courts appropriately adjudicate the cases before them, *see* Philip J. Padovano, 2 *Fla. Prac.*, *Appellate Practice* § 7:1 (2022 ed.),[4] appellate courts consider "which judicial actor is better positioned" to resolve the mixed question. *Lakeridge*, 138 S. Ct. at 967 (citation omitted). This inquiry—which seeks to promote

[4] Petitioner disagrees. He claims that law clarification is the key role of an appellate court. Init. Br. 29. Perhaps that is true of state high courts. But it is not true for the many more intermediate appellate courts that review trial-court decisions on the admissibility of an identification. Their "most direct function" is "to correct errors by trial courts." Adam N. Steinman, *Rethinking Standards of Appellate Review*, 96 Ind. L.J. 1, 15 (2020). And this Court must craft rules to be applied by all of the State's appellate courts.

accurate outcomes—usually turns on "whether answering [the mixed question] entails primarily legal or factual work." *Id.*

On one hand, appellate courts are "structurally suited" to resolve legal questions accurately. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991). Because the record is "settled," they can "devote their primary attention to legal issues." *Id.* They also sit in "multijudge panels" that foster "reflective dialogue and collective judgment." *Id.* They enjoy a relatively "unhurried" decisional process, insulated from the time-sensitive demands of trial-court litigation. *Id.* And the trial court has no better vantage point to settle a legal question than an appellate court, because such questions seldom turn on evidentiary nuances like credibility or reliability. *See Thompson v. Keohane*, 516 U.S. 99, 114 (1995).

On the other hand, trial courts have "unchallenged superiority" when it comes to "factfinding." *Salve Regina*, 499 U.S. at 233. They have far more practice performing that function. *See Buford v. United States*, 532 U.S. 59, 64–65 (2001) (trial court better positioned to resolve sentencing issue because it routinely resolved similar sentencing issues). And they are better suited to the task. After all,

the trial judge "smell[s] the smoke of battle," *Culbreath v. Johnson*, 427 So. 2d 705, 708 (Miss. 1983)—it observes evidence as it is admitted, giving it the advantage in resolving fact issues that hinge on the "credibility of witnesses," the "evaluation of demeanor," and the weighing of proof. *See Miller v. Fenton*, 474 U.S. 104, 114 (1985); *Thompson*, 516 U.S. at 117–18 (Thomas, J., dissenting).

Trial-court rulings also benefit from innumerable unstated "insights" that the trial court has obtained, either at the hearing or "by reason of settlement conferences and other pretrial activities." *Pierce*, 487 U.S. at 560. Such "subtle" determinations are inherently "difficult to reduce to writing," and thus may be lost on an appellate court "reviewing the cold record." *Thompson*, 516 U.S. at 119 (Thomas, J., dissenting). And without those crucial, in-the-moment insights, appellate courts are far more likely to "mistakenly reverse a correct trial court decision" on a question of fact than a trial court is to make a mistake in the first place. Adam N. Steinman, *Rethinking Standards of Appellate Review*, 96 Ind. L.J. 1, 5 (2020).

The upshot then is this: When a mixed question mostly "require[s] courts to expound on the law," appellate courts "should

typically review a decision de novo." *Lakeridge*, 138 S. Ct. at 967. But when "mixed questions immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence" and "make credibility judgments"—appellate courts should typically review the decision with deference. *Id.*

Second, because appellate courts serve a precedent-setting function, courts also consider whether "probing appellate scrutiny" will "contribute to the clarity of legal doctrine." *Salve Regina*, 499 U.S. at 233. The "investment of appellate energy" required for de novo review is best spent issuing opinions that have "law-clarifying benefits" applicable in future cases. *Pierce*, 487 U.S. at 561. But "[l]aw clarification requires generalization, and some issues lend themselves to generalization much more than others." *Ornelas*, 517 U.S. at 703 (Scalia, J., dissenting). So when a legal test's "unique factors" require a court to make "fact-intensive, close calls," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990), that turn on "multifarious, fleeting, special, narrow facts that utterly resist generalization," *Lakeridge*, 138 S. Ct. at 967, the appellate court's decision will rarely have the precedent-setting benefits that justify

intensive appellate labor. *See Pierce*, 487 U.S. at 561–62; *see also Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). In such cases, the abuse-of-discretion standard is appropriate, for it allows the relevant legal question to "profit from the experience" amassed through diverse trial-court applications. *Pierce*, 487 U.S. at 562.

Third, courts "ask whether the 'history of appellate practice' yields an answer." *McLane Co., Inc. v. E.E.O.C.*, 137 S. Ct. 1159, 1166 (2017) (quoting *Pierce*, 487 U.S. at 558). Both "longstanding" and modern approaches to reviewing a mixed question "carr[y] significant persuasive weight." *Id.* at 1167. And for good reason: A practice of applying a particular standard of review suggests that the standard has proven workable and lends itself to reliable outcomes.

Finally, if those primary factors do not settle the proper standard of appellate review, courts consider what standard will best further the "sound administration of justice." *See Pierce*, 487 U.S. at 559–60 (quoting *Miller*, 474 U.S. at 114). A key consideration is whether "[d]uplication of the trial judge's efforts in the court of appeals" is worth the substantial "judicial resources" that de novo review demands. *Anderson*, 470 U.S. at 575–76.

2. Florida courts have long used similar functional considerations to discern the proper standard of review for mixed questions. *See Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980); *Schmidt*, 122 So. 3d at 253; *see also* Philip J. Padovano, 2 *Fla. Prac., Appellate Practice* § 27:7 (2022 ed.).

In recent years, however, this Court not always applied these functional factors in deciding the standard of review for a mixed question involving an alleged constitutional violation. *See Connor v. State*, 803 So. 2d 598, 605 (Fla. 2001). In *Connor*, this Court simply cited "United States Supreme Court" precedent for the idea that "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." *Id.* (citing *Bajakajian*, 524 U.S. at 337 n.10; *Ornelas*, 517 U.S. at 699). Since then, this Court has, without discussion, on several occasions applied de novo review to the mixed question whether

certain facts meet a constitutional standard.[5]

Connor's language, if taken literally, is overbroad and inaccurate. The U.S. Supreme Court has never held that de novo review always applies to mixed questions involving constitutional rights. Cases like *Ornelas* and *Bajakajian* merely applied the functional considerations discussed above and determined that—"in th[ose] context[s]"—de novo review was appropriate. *See Bajakajian*, 524 U.S. at 337 n.10; *Ornelas*, 517 U.S. at 699. Nor would it make sense to mandate a rigid categorical rule of de novo review simply because constitutional rights are involved. Securing accurate outcomes—the aim of the more detailed, context-specific functional approach to establishing standards of review outlined above—is if anything more important when protecting individual constitutional rights.

For that reason, the U.S. Supreme Court has applied deferential

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[5] *Compare Walton*, 208 So. 3d at 65 (applying de novo review to whether identifications violated the Due Process Clause), *with Gorby*, 630 So. 2d at 546 (previously applying abuse-of-discretion review); *compare Wyche v. State*, 987 So. 2d 23, 25 (Fla. 2008) (applying de novo review to whether consent to search was voluntary for purposes of the Fourth Amendment), *with Davis v. State*, 594 So. 2d 264, 266 (Fla. 1992) (previously applying clear-error review).

review to many mixed questions involving constitutional rights.[6] It has also been clear that there is no categorical rule mandating de novo review for such questions: "[T]he constitutional underpinnings" of a mixed question, the Court has said, do not resolve the proper standard of review because "not every decision that touches on" the Constitution "is subject to searching review." *McLane*, 137 S. Ct. at 1169.

What is more, this Court in *Connor* did not address the proper standard of review for due process challenges to identifications made

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[6] *E.g.*, *Minnesota v. Olson*, 495 U.S. 91, 100–01 (1990) (deferring to trial court's determination that facts satisfied the exigent-circumstances exception to warrant requirement); *United States v. Doe*, 465 U.S. 605, 613–14 (1984) (same for determination that "act of producing the documents would involve testimonial self-incrimination" under the Fifth Amendment); *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (same for magistrate's determination of probable cause when issuing warrant); *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (same for determination that racially discriminatory intent in voting context violated the Equal Protection Clause); *Dayton Bd. of Ed. v. Brinkman*, 443 U.S. 526, 534 & n.8 (1979) (same for determination that racially discriminatory intent in school-segregation context violated the Equal Protection Clause); *see also June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2141 (2020) (Roberts, C.J., concurring) (agreeing with plurality's deference to determination that an abortion restriction posed an undue burden since the determination "entail[ed] primarily . . . factual work" (citation omitted)).

after a police-arranged identification procedure. Contrary to Petitioner's suggestions, *Connor* is thus not controlling here. Init. Br. 28–29. That is confirmed by the host of constitutional contexts in which this Court still applies the abuse-of-discretion standard.[7] Applying *Connor* here would call all these cases into doubt and short-circuit the flexible decisional process used to craft appropriate standards of review. So this Court should clarify that *Connor* does

[7] *E.g.*, *Craven v. State*, 310 So. 3d 891, 898 (Fla. 2020) (voluntariness of waiver of right to counsel); *Rose v. State*, 249 So. 3d 547, 550 (Fla. 2018) (voluntariness of waiver of postconviction proceedings); *Lebron v. State*, 232 So. 3d 942, 953 (Fla. 2017) (closure of courtroom to certain witnesses); *Hannon v. State*, 228 So. 3d 505, 511 (Fla. 2017) (right to public records under the Florida Constitution); *Robertson v. State*, 187 So. 3d 1207, 1212 (Fla. 2016) (voluntariness of waiver of right to present evidence); *id.* at 1216 (whether sentencing order prepared pre-hearing violates due process); *Griffin v. State*, 114 So. 3d 890, 897 (Fla. 2013) (voluntariness of a guilty plea); *McCray v. State*, 71 So. 3d 848, 878 (Fla. 2011) (removal of defendant from courtroom); *Hunter v. State*, 8 So. 3d 1052, 1068 (Fla. 2008) (severance of trial because of potential *Bruton* error); *State v. Contreras*, 979 So. 2d 896, 907 (Fla. 2008) (witness unavailability under the Confrontation Clause); *Boyd v. State*, 910 So. 2d 167, 187 (Fla. 2005) (competency to stand trial); *id.* at 178 (allegations of juror misconduct); *Dessaure v. State*, 891 So. 2d 455, 464–65 (Fla. 2004) (propriety of comments by prosecutor on defendant's exercise of right to remain silent); *Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002) (voluntariness of waiver of advisory jury in capital sentencing); *Chavez v. State*, 832 So. 2d 730, 760 (Fla. 2002) (limits on public access to courtroom).

not mandate de novo review for *all* mixed questions involving constitutional rights. Rather, *Connor* is best read to stand for the commonsense proposition that appellate courts defer to findings of historical fact but give no deference on issues of law. *See Lakeridge*, 138 S. Ct. at 965–66. When "the issue falls somewhere between a pristine legal standard and a simple historical fact," *Miller*, 474 U.S. at 114, courts should apply the functional considerations discussed above to determine the proper standard of appellate review.[8]

C. Abuse of discretion is the proper appellate standard of review for reviewing the admissibility of identifications made after a showup.

Abuse of discretion is the proper standard of review here. That deference is warranted because the trial court is better situated to accurately answer the identification question; because the fact-bound nature of the legal inquiry makes it less amenable to law clarification; and because deference is the traditional approach in

[8] If, however, this Court does not believe that it can simply clarify *Connor*'s language, it should recede from the opinion to the extent that it compels courts to apply inflexible de novo review to mixed questions involving constitutional rights. As discussed, that "precedent clearly conflicts with" both Florida and federal case law, and there is no "valid reason why not to recede from" it. *State v. Poole*, 297 So. 3d 487, 507 (Fla. 2020) (per curiam) (emphasis omitted).

this context.

1. Better positioned judicial actor.

To start, trial courts are best positioned to accurately resolve the fact-intensive questions of whether a showup (1) was unnecessarily suggestive and (2) gave rise to a substantial likelihood of misidentification. *See Grant*, 390 So. 2d at 343. Those questions implicate a typical trial-court function: ensuring that identification evidence is sufficiently reliable to present to the jury. *See Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) ("[R]eliability is the linchpin in determining the admissibility of identification testimony."); *Watkins v. Sowders*, 449 U.S. 341, 347 (1981) ("It is the reliability of identification evidence that primarily determines its admissibility.").

That is an inquiry "well suited to a [trial] judge's expertise." *McLane*, 137 S. Ct. at 1167; *see also United States v. Brown*, 415 F.3d 1257, 1265 (11th Cir. 2005) (assessing reliability of evidence is a "matte[r] uniquely within the purview of the [trial] court"). For one thing, trial courts are far more practiced than appellate courts in assessing evidentiary reliability. *See Buford*, 532 U.S. at 64–65. They routinely weigh the reliability of expert evidence, *Cristin v. Everglades*

Corr. Inst., 310 So. 3d 951, 956 (Fla. 1st DCA 2020); hearsay, *Perez v. State*, 536 So. 2d 206, 210 (Fla. 1988); and potentially "prejudicial, misleading, or confusing" evidence under Section 90.403's balancing test. *Ramirez v. State*, 810 So. 2d 836, 843 (Fla. 2001) (quotations omitted) (describing the test as gauging "lega[l]" reliability). This unparalleled "familiar[ity]" with the evidentiary process cannot be matched by an appellate panel. *See Buford*, 532 U.S. at 64; *see also Watkins*, 449 U.S. at 347 ("[T]he proper evaluation of evidence" is "the very task our system must assume [the fact-finder] can perform.").

Both parts of the due process test are also deeply "fact-dependent," and thus well-suited to the trial court's superior ability to "marshal the pertinent facts." *See Cooter & Gell*, 496 U.S. at 402. Whether a procedure was "unnecessarily suggestive," for example, can turn on case-specific factors like exigency, *see Stovall v. Denno*, 388 U.S. 293, 302 (1967) (showup not unnecessarily suggestive when lone witness was dying); corroborating evidence, *Simmons*, 390 U.S. at 384–85 (same when "clues" were already pointing to the suspect); and the boundlessly varying details of the police procedure employed, *see United States v. Wade*, 388 U.S. 218, 232–33 (1967) (listing

examples of suggestive procedures, like when "other participants in a lineup were grossly dissimilar in appearance to the suspect," or when "only the suspect was required to wear distinctive clothing which the culprit allegedly wore"). And whether there was a substantial likelihood of misidentification similarly turns on a five-prong balancing test that requires courts to identify and weigh (1) "the opportunity of the witness to view the criminal at the time of the crime"; (2) "the witness' degree of attention"; (3) "the accuracy of the witness' prior description of the criminal"; (4) "the level of certainty demonstrated by the witness at the confrontation"; and (5) "the length of time between the crime and the confrontation." *Biggers*, 409 U.S. at 199–200.

The potential factual permutations are endless, as shown by the diverse fact patterns to which courts have applied the test.[9] And

[9] *See, e.g.*, *Wade*, 388 U.S. at 232–33 (citing examples of suggestive identification methods, like when "all in the lineup but the suspect were known to the identifying witness"; "the other participants in a lineup were grossly dissimilar in appearance to the suspect"; "only the suspect was required to wear distinctive clothing which the culprit allegedly wore"; "the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail"; "the suspect is

when judging each unique mix, the "fact-finding tribunal" typically will not apply cold, hard logic—a task better suited for an appellate court—but its "experience with the mainsprings of human conduct to the totality of the facts of each case"—a task for which it is well equipped. *See Ornelas*, 517 U.S. at 702 (Scalia, J., dissenting) (quoting *Comm'nr of Internal Rev. v. Duberstein*, 363 U.S. 278, 289 (1960)).

On top of that, application of that test will often turn on "credibility determinations" about the testimony of both police and the identifying witness, *see id.* at 701 (Scalia, J., dissenting), "precisely the type of judgment that trial judges" are well-positioned to make. *United States v. Constant*, 814 F.3d 570, 576–77 (1st Cir. 2016). And it would not suffice to simply review the trial court's factual findings for clear error while reviewing the ultimate application of law to fact de novo. Given the rapid pace of trial-court litigation, many trial-court findings critical to the ultimate determination of the legal question will go unannounced. Trial courts

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pointed out before or during a lineup"; or "the participants in the lineup are asked to try on an article of clothing which fits only the suspect").

generally need not state all their findings on the record, and it is often more efficient not to. In fact, resource constraints may force trial courts to limit their orders to a mere "motion denied." But undergirding those few words are myriad determinations that may be critical to the trial court's analysis, yet lost on an appellate court "reviewing the cold record." *Thompson*, 516 U.S. at 119 (Thomas, J., dissenting).

To offer just one illustration, consider the many subtle micro-determinations that a trial court makes when it does something as simple as credit an eyewitness's testimony. The trial court may predicate this factual finding on the tone with which the witness answers a question or the witness's mannerisms on the stand. It may also internally assign a degree of confidence to the witness's testimony—"the witness is clearly credible"; "the witness is credible"; "it's close, but the witness is credible"—without saying so for the record. Those delicate, subsidiary factual determinations cannot be replicated on appeal—they are known to the appellate court only if the trial court expressly makes them known. But they may be crucial to the ultimate accounting. For example, in weighing

the risk-of-irreparable-misidentification prong, a trial court may assess particular weight to a factor for which it has a high degree of confidence in its factual findings, and discount factors for which it has less confidence. *See Biggers*, 409 U.S. at 199–200.

All of this explains why Petitioner is wrong to assert that de novo review is necessary "to ensure convictions based upon misidentification do not occur." Init. Br. 37–39. The best way to advance that goal is to assign primary responsibility to the decider who has a comparative advantage in making the decision—which, as discussed above, is the trial judge. That favors abuse of discretion, not de novo, review.

With that in mind, this Court should adopt a deferential standard of review that accounts for unstated factual findings and recognizes that appellate courts are "not omnipotent." *Weisler*, 35 A.3d at 991 (Dooley, J., concurring and dissenting). A de novo standard would bleed decisional authority from the judicial actor better equipped to "produce accurate and fair decisions of high quality." *Id.*

2. Lack of law-clarifying benefits.

The fact-bound nature of this due process inquiry also makes rulings on the admissibility of post-showup identifications poor candidates for law clarification. As discussed, the "factual details bearing upon" whether a showup was unnecessarily suggestive and led to a substantial likelihood of misidentification "are often numerous." *Ornelas*, 517 U.S. at 701 (Scalia, J., dissenting). Pertinent are details like what procedure was used; why did police choose that procedure; how long and at what range did the witness see the suspect (both at the showup and the crime scene); how much time passed between the crime and the showup; how sure was the witness in making the identification; and countless other case-specific factors. *Supra* 32–37.

Contrary to Petitioner's view (Init. Br. 39), these kaleidoscopic inquiries are "not amenable to broad *per se* rules." *McLane*, 137 S. Ct. at 1168 (quoting *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008)). Each application calls for an "individual-specific decision." *Thompson*, 516 U.S. at 114. One subtle change to the factual mix can distinguish one case from another, *cf. Ornelas*, 517

U.S. at 703 (Scalia, J., dissenting), making it "impracticab[le] [to] formulat[e]" a widely applicable "rule of decision." *Pierce*, 487 U.S. at 561 (citation omitted). Searching appellate review will thus "provide only minimal help" in future cases, *Buford*, 532 U.S. at 66, meaning that these "'fact-intensive, close calls' [are] better suited to resolution by the [trial] court than the court of appeals." *McLane*, 137 S. Ct. at 1162 (quoting *Cooter & Gell*, 496 U.S. at 404); *see also Pierce*, 487 U.S. at 561 (deferential review warranted when legal issue lacked the law-clarifying benefits that justify the substantial "investment of appellate energy" required by de novo review).

Nor will applying abuse-of-discretion review to this mixed question prevent appellate courts from clarifying the law. Appellate courts can still outline legal precepts when they review de novo a trial court's pronouncement of the governing legal standard. *See, e.g.*, *Schmidt*, 122 So. 3d at 246; *Barr v. State*, 293 So. 3d 592, 593 (Fla. 1st DCA 2020). And moreover, abuse-of-discretion review of the mixed question can also clarify the law. *See Ornelas*, 517 U.S. at 704 (Scalia, J., dissenting) ("[W]here the appellate court holds, on the basis of deferential review, that it *was* reversible error for a district

court to find probable cause or reasonable suspicion in light of certain facts, it advances the clarity of the law just as much as if it had reversed the district court after conducting plenary review."). When an appellate court reverses under the abuse-of-discretion standard, it inherently "narrow[s]" the "channel of discretion," providing guidance for future cases. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1934 (2016) (citation omitted).

Thus, even when applying abuse-of-discretion review to this mixed constitutional question, appellate courts will retain the power to "say what the law is." Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 229 (1985). And in the few cases where appellate review of the mixed question could have law-clarifying benefits, the abuse-of-discretion standard is up to the task.

3. History of appellate practice.

Given the trial court's superior position and this issue's resistance to law clarification, it makes sense that appellate courts in Florida historically have reviewed a trial court's ruling on the admissibility of an identification for abuse of discretion. Until 2005—

when this Court first applied *Connor* to review this question de novo, *see Fitzpatrick v. State*, 900 So. 2d 495, 517 (2005)—this Court routinely reviewed the issue for abuse of discretion.[10] And even today, many district courts still apply abuse-of-discretion review. *See Lynch v. State*, 260 So. 3d 1166, 1170 (Fla. 1st DCA 2018); *Alfonso v. State*, 275 So. 3d 215, 218 (Fla. 3d DCA 2019); *Valentine v. State*, 307 So. 3d 726, 732 (Fla. 4th DCA 2020); *Reed v. State*, 944 So. 2d 503, 504 (Fla. 5th DCA 2006).[11]

Abuse-of-discretion review also tracks how appellate courts have traditionally analyzed similar issues, like a trial court's ruling on the reliability of evidence. *See Witt v. Stryker Corp. of Mich.*, 648 F. App'x 867, 873 (11th Cir. 2016) (when it comes to "evaluating . . . reliability," the "abuse-of-discretion standard thrives" (quoting *Brown*, 415 F.3d at 1266)). Decisions on the reliability of expert testimony, for instance, are reviewed for abuse of discretion. *Kumho*

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[10] *E.g.*, *Thomas v. State*, 748 So. 2d 970, 981 (Fla. 1999); *Willacy v. State*, 640 So. 2d 1079, 1084 (Fla. 1994); *Gorby v. State*, 630 So. 2d 544, 546 (Fla. 1993); *Power v. State*, 605 So. 2d 856, 862 (Fla. 1992); *Hayes v. State*, 581 So. 2d 121, 125 (Fla. 1991).

[11] The federal circuits are split on the question. *See* Init. Br. 36 n.17.

Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999); *Cristin*, 310 So. 3d at 956. So too are decisions on the reliability of a hearsay statement. *Perez*, 536 So. 2d at 210; *Rivers v. United States*, 777 F.3d 1306, 1312 (11th Cir. 2015). And so are determinations that evidence is "legally unreliable" under Section 90.403's balancing test. *Ramirez*, 810 So. 2d at 843 (quotation omitted); *Old Chief v. United States*, 519 U.S. 172, 183 n.7 (1997).

There, as here, the trial court is "best position[ed] to [assess] the reliability of the evidence," making the "abuse of discretion" standard appropriate. *See United States v. Jayyousi*, 657 F.3d 1085, 1113–14 (11th Cir. 2011).

Lastly, rulings on the accuracy of a witness's identification fall right in line with the kinds of "state of mind" determinations that trial courts routinely make to safeguard the fairness of a trial and to which appellate courts defer. *See Miller*, 474 U.S. at 113–14. Trial courts often must delve into an actor's state of mind to ensure that a trial meets constitutional standards, be it to weed out juror bias,[12] ensure

[12] *Patton v. Yount*, 467 U.S. 1025, 1036 (1984).

a defendant's competency,[13] or prevent a prosecutor from acting with discriminatory intent.[14] Courts review each of those decisions with deference. And a trial court makes the same kind of decision in the identification context: It probes the witness's state of mind to determine whether the witness's identification is so unsound that it would result in an unfair trial. *See Johnson v. State*, 717 So. 2d 1057, 1063 (Fla. 1st DCA 1998) ("[T]o warrant exclusion of evidence of the identification, the identification procedur[e] must have been so suggestive, and the witness' unassisted ability to make the identification so weak, that it may reasonably be said that the witness has lost or abandoned his or her mental image of the offender and has adopted the identity suggested." (citation omitted)). Courts typically treat such inquiries more like "question[s] of fact" and afford them deferential review. *See Miller*, 474 U.S. at 113–14 (collecting examples). This Court should do the same.

4. Sound judicial administration.

If any doubt remains over the proper standard of review for this

[13] *Maggio v. Fulford*, 462 U.S. 111, 117 (1983).

[14] *Batson v. Kentucky*, 476 U.S. 79, 98 n.21 (1986).

question, two considerations of sound judicial administration make clear that abuse of discretion is the correct fit.

For one, even if searching appellate review might, in some cases, lead to a more accurate result, any improvements to the trial court's decision-making "would very likely" be "negligbl[e]" given the appellate court's structural weaknesses in considering this fact-laden inquiry. *See Anderson*, 470 U.S. at 575; *supra* 32–40. Such meager added benefit is not worth the additional judicial resources that appellate courts must devote to full-blown de novo review. *See Anderson*, 470 U.S. at 575–76.

For another, deferential review still permits defendants to recruit the many "other safeguards built into our adversary system" to dissuade juries from "placing undue weight" on the identification. *Perry*, 565 U.S. at 245. They can "cross-examine the identification witnesses." *Id.*; *see also Simmons*, 390 U.S. at 384 ("The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error."). They can request an "[e]yewitness-specific jury

instruction[.]" *Perry*, 565 U.S. at 246. They can argue "in summation" that the jury should "doub[t]" the "accuracy of the identification" given "any suggestibility in the identification procedure and any countervailing testimony such as alibi." *Watkins*, 449 U.S. at 348 (citation omitted). Or, as here, they can submit photos of an alternate suspect in an attempt to convince the jury that the eyewitness confused them for one another. *Compare* R. 324 (photo of Nixon), *with* R. 312 (photo of Petitioner).

In the end, the potent rules that "ordinarily govern the admissibility of evidence" stand ready to catch any ill effects of an erroneously admitted identification. *Perry*, 565 U.S. at 237; *see also Davis v. State*, 207 So. 3d 142, 168–69 (Fla. 2016) (rejecting argument that an identification offended due process in part because "the defense had ample opportunity to attack [the] identification at trial"). That lessens the need for a more searching standard of appellate review.

D. Petitioner's remaining arguments lack merit.

1. Petitioner does not grapple with the functional considerations described above establishing that abuse-of-discretion review for

identification questions is the most sensible standard of review. He instead rests mainly on two U.S. Supreme Court cases that he claims "effectively applied" de novo review to this question. Init. Br. 24–28 (citing *Biggers*, 409 U.S. at 193 n.3; *Sumner v. Mata*, 455 U.S. 591 (1982)). Those cases miss the mark.

For starters, *Biggers* and *Mata* were habeas cases in which a federal court reviewed a state court's application of the U.S. Constitution before the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA). Back then, the U.S. Supreme Court applied "plenary federal review" to "mixed constitutional questions" on habeas. *Wright v. West*, 505 U.S. 277, 289 (1992) (Thomas, J.) (plurality op.). The Court did so not for the practical reasons discussed above, but because "independent federal review ha[d] traditionally played an important parallel role in protecting" constitutional rights asserted in state courts. *See Miller*, 474 U.S. at 118. That reasoning has long since been discarded,[15] and at any rate,

[15] AEDPA overruled the de novo standard in favor of deference to state-court decisions. *See* 28 U.S.C. § 2254. And even pre-AEDPA, many criticized the Court's automatic de novo review of mixed constitutional questions on habeas. *See West*, 505 U.S. at 291–94

it does not apply to direct appeals in state court, which do not raise the same federal-state concerns.[16]

Nor did either *Biggers* or *Mata* decree that de novo review is the proper standard for reviewing a trial court's ruling on the admissibility of a post-showup identification. *See, e.g.*, *West*, 505 U.S. at 289 (Thomas, J.) (plurality op.) (explaining that *Biggers* did not "explicitly conside[r] whether" federal habeas courts should apply "de novo or deferential" review). Neither opinion so much as uttered the phrase "de novo," and presuming that a case "effectively applied" an unstated standard of review breaks a cardinal rule of the U.S. Supreme Court. *See Webster v. Fall*, 266 U.S. 507, 511 (1925)

(Thomas, J.) (plurality op.) (outlining such criticisms). They did so quite fairly—the de novo standard rested on the mistaken notion that "state judges are not sufficiently competent and reliable to" accurately resolve constitutional questions. *See Thompson*, 516 U.S. at 120 (Thomas, J., dissenting).

[16] *Cikora v. Dugger*—a case Petitioner tries to distinguish, Init. Br. 40–42—suffers the same flaw as *Biggers* and *Mata* but still gets part of the analysis right. 840 F.2d 893 (11th Cir. 1988). Like those cases, *Cikora* too applied pre-AEDPA de novo review to a state court's "ultimate" determination of whether the admission of an identification violated due process. *Id.* at 896. But it still held that the unnecessarily suggestive prong should be treated more like a fact reviewed for clear error. *Id.* at 896–97. In other words, *Cikora* applied deferential review to the unnecessarily suggestive prong, exactly what this Court should do here.

("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). And if either case were sufficiently clear on this point, the federal circuits would not be split on the question. *See* Init. Br. 36 n.17.

In any event, even if those cases spoke to the proper standard of review on direct appeal, this Court would not be bound to follow them. The U.S. Supreme Court has never suggested that the standards of review it applies to federal constitutional questions must govern resolution of those questions in state court. *Cf. State v. Brockman*, 528 S.E.2d 661, 664 (S.C. 2000) ("[N]othing in" *Ornelas* "suggest[s] that the Fourth Amendment mandates de novo review . . . ."); *see also Weisler*, 35 A.3d at 990 (Dooley, J., concurring and dissenting) ("[T]his Court has the power to establish the standard of review, even for federal constitutional questions and even in the face of a contrary standard-of-review decision from the U.S. Supreme Court."). That is because standards of review are procedural rules, *State v. Thurman*, 846 P.2d 1256, 1267 (Utah 1993), and state courts may apply such rules even when resolving federal constitutional

questions. *See, e.g.*, *State v. Jenner*, 451 N.W.2d 710, 716 (S.D. 1990) ("We do not perceive that the fifty sovereign states have been mandated to follow" a particular standard of review.), *cert. denied*, 510 U.S. 822 (1993); *cf. Martinez v. Ryan*, 566 U.S. 1, 9 (2012) (federal courts will not review on habeas a state decision denying a federal constitutional claim when the defendant violated a state procedural rule).[17]

This Court may therefore choose which standard of review is appropriate for Florida's courts. And for the reasons above, abuse of discretion is the proper standard of review here.

2. Petitioner also makes fleeting reference to *Ornelas v. United States*, in which the U.S. Supreme Court held that federal courts should review de novo a trial court's decision on whether officers had reasonable suspicion for a stop and probable cause for a search.

[17] *See also Clark v. State*, 287 S.W.3d 567, 572 (Ark. 2008) (rejecting federal standard of review); *State v. Ford*, 738 A.2d 937, 941 (N.H. 1999) (similar); *Thurman*, 846 P.2d at 1265–71 (similar); *see generally* R. Coombs, *A Third Parallel Primrose Path: The Supreme Court's Repeated, Unexplained, and Still Growing Regulation of State Courts' Criminal Appeals*, 2005 Mich. St. L. Rev. 541, 551–52 (2005) (stating it is a mistake for state courts to assume they are bound by U.S. Supreme Court decisions requiring de novo review).

Ornelas, too, is off point.

To begin, "even in the federal context, *Ornelas* is limited to an appellate court's review of ultimate determinations of reasonable suspicion and probable cause for warrantless searches and seizures." *Brockman*, 528 S.E.2d at 665. For that reason alone, the decision is inapplicable.

Compounding that limitation, the amorphous legal standards that inform the probable-cause and reasonable-suspicion inquiries require an unusually high degree of appellate law clarification to operate effectively. Consider the definitions of reasonable suspicion and probable cause. Reasonable suspicion exists when there is "a particularized and objective basis" for suspecting the person stopped of criminal activity, *United States v. Cortez*, 449 U.S. 411, 417–18 (1981), and probable cause exists when the known facts would lead a reasonable person to think that evidence of a crime will be found. *Florida v. Harris*, 568 U.S. 237, 243 (2013).

These standards are not bright-line tests that courts can apply across factual scenarios. They are legal chameleons—they adopt the elements of the crimes to which they are applied, and thus "take their

substantive content from the [criminal] contexts in which the standards are being assessed." *Ornelas*, 517 U.S. at 696. What is enough to constitute reasonable suspicion of murder, for instance, will turn on the unique elements of that crime, and will therefore differ from what is enough to constitute reasonable suspicion of theft. As a consequence, it "is not possible" to "[a]rticulat[e] precisely what" these legal standards require—they will require many different things in many different cases. *Id.* at 695; *see also Harris*, 568 U.S. at 243. Federal appellate courts thus use de novo review to "clarify" how these "fluid [legal] concepts" apply to specific crimes, equipping trial courts with a library of appellate-court decisions from which they can attempt to glean a roughly "defined set of rules." *Ornelas*, 517 U.S. at 696–97 (simplified).

No such appellate project is needed to clarify the post-showup identification inquiry. It turns on a clearcut, two-step test. The first part asks a straightforward question: was the police procedure unnecessarily suggestive given the surrounding facts. *Biggers*, 409 U.S. at 198–99. And the second part provides no less than five factors to guide courts in resolving whether there was a substantial

likelihood of a misidentification. *Id.* at 199–200. These are not barebones legal standards that "can be given meaning only through [their] application to . . . particular circumstances." *Miller*, 474 U.S. at 114. They are static rules that can be applied across varied factual scenarios. And so, quite different from the legal standards considered in *Ornelas*, appellate courts need not engage in the burdensome process of recurring de novo review to ensure that trial courts have adequate legal guidance. *Cf. Anderson*, 470 U.S. at 575.

At any rate, *Ornelas* is non-binding—states may establish their own standards of review in applying federal constitutional rights. *Supra* 48–49. So even if this Court thinks this case is just like *Ornelas*, the Court may chart a different path, as many other states have done. *Id.* And for the reasons discussed above, as well as for the reasons expressed in Justice Scalia's dissent in *Ornelas*, this Court should do just that. *See* 517 U.S. at 700–05 (Scalia, J., dissenting). As he explained there, the "extremely fact-bound nature" of this due process inquiry is better suited to a trial court's "expertise" and "will cause de novo review to have relatively little benefit." *Id.* at 700–01.

II. The Fourth District correctly affirmed the trial court's decision to admit the post-showup identifications.

Applying the abuse-of-discretion standard of appellate review, this Court should approve the Fourth District's affirmance of the trial court's decision to admit the post-showup identifications. At a minimum, "reasonable [people] could differ as to the propriety" of that decision, so "it cannot be said that the trial court abused its discretion." *Canakaris*, 382 So. 2d at 1203 (citation omitted). And given the strength of the evidence supporting the trial court's ruling, this Court should approve the decision below even under a de novo standard. *See State Farm Fire & Cas. Co. v. Levine*, 837 So. 2d 363, 365 (Fla. 2002) ("[A] reviewing court [may] affirm . . . so long as there is any basis which would support the judgment in the record." (simplified)).

To support his claim that the showup was unnecessarily suggestive, Petitioner highlights two facts, neither of which moves the needle.

Petitioner first claims that there is no "evidence establishing that a photographic array" or a lineup "could not have been compiled in a timely manner and shown to Ms. Matthews." Init. Br. 42–43. At

the gate, "it is the defendant's burden to make [a] showing" that such procedures could have been assembled on short notice. *United States v. Cooper*, No. 1:18-CR-118-SCJ-CMS, 2019 WL 3369430, at *4 (N.D. Ga. Feb. 26, 2019). But more to the point, this argument misunderstands the due process inquiry. A procedure does not violate the Due Process Clause simply because a less-suggestive alternative may have been available; due process requires fairness, not perfection. *See Mackey v. Montrym*, 443 U.S. 1, 13 (1979). A procedure is thus "unnecessarily suggestive" only when it is "*impermissibly* suggestive" given all the circumstances. *See Walton*, 208 So. 3d at 65 (emphasis added). That typically occurs when police needlessly "aggravate the suggestiveness" of the procedure. *See Jackson*, 744 So. 2d at 548; *Johnson*, 817 F.2d at 729.

Police did not do that here. Far from it, they took pains to ensure that the procedure was fair and thorough, explaining to Matthews that the suspect may or may not be the correct person, SR. 723; that she should look at the person "closely," "take her time," and "think about the person that she saw earlier," SR. 700–01, 720, 751–52, 757; that the investigation was not yet complete, SR. 758; and

critically, that Matthews should let police know if they had apprehended the wrong suspect. SR. 723, 752–53.[18]

Next, Petitioner notes that police did not present Nixon to Matthews even though he supposedly also "matched" the suspect's description and was tested for gun residue. Init. Br. 43.[19] But Nixon had recently cleaned his gun, explaining the residue. T. 1103–04, 1107, 1268. And as described below, police had good reasons to rule out Nixon and focus on Petitioner. *See Simmons*, 390 U.S. at 384–85 (showup not unnecessarily suggestive when "clues" were already pointing to suspect).

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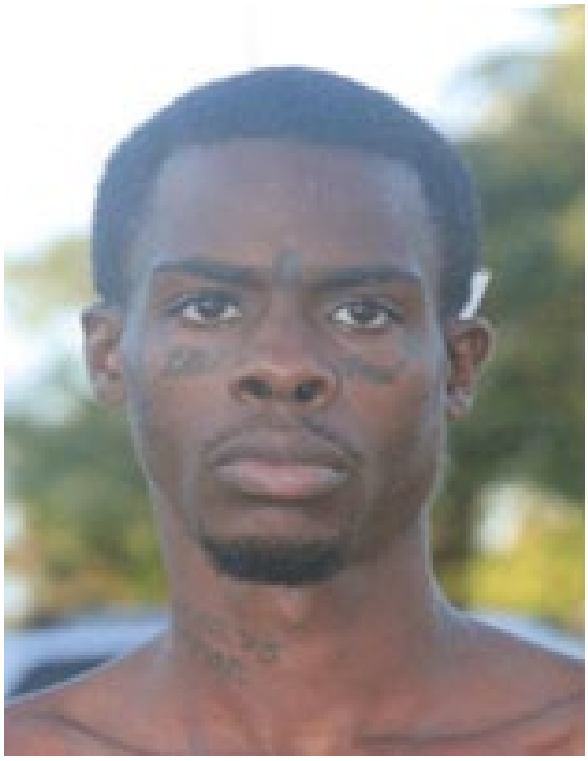
[18] To be sure, Petitioner was handcuffed during the showup. But Petitioner has not pressed this argument in his brief. *See generally* Init. Br. 42–43. And rightly so—handcuffs alone are not enough to invalidate a showup. *See Jenkins v. State*, 96 So. 3d 1110, 1113 (Fla. 1st DCA 2012) (citing *Jackson*, 744 So. 2d at 548).

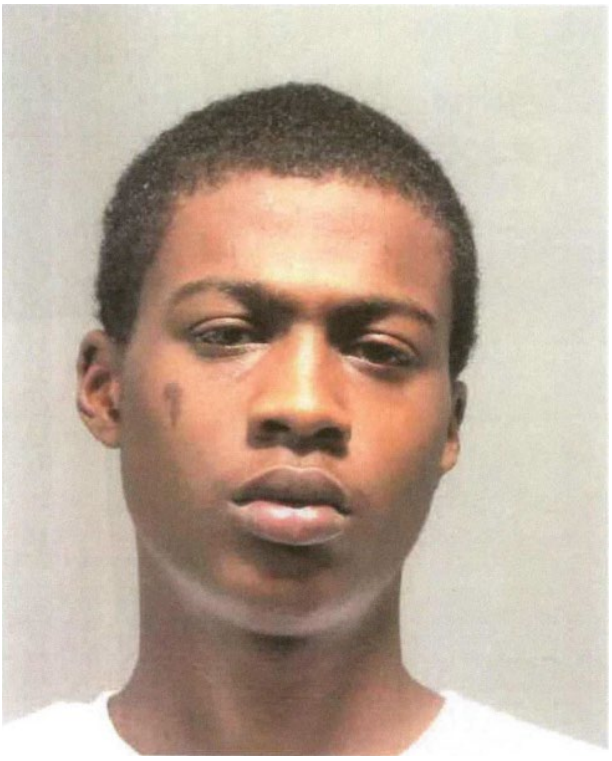
Petitioner is also wrong to suggest that the trial court found that "police told Ms. Matthews" that Petitioner "was found in the area where she saw the shooter flee." Init. Br. 42. If anything, the trial court found to the contrary, crediting police testimony that they never said this to Matthews. SR. 779–81.

[19] The Fourth District reasoned that Nixon's presence was irrelevant to the unnecessarily suggestive prong. App'x 7 & n.3. This Court need not consider whether that determination was correct, because even if Nixon's presence were relevant, the procedure still was not unnecessarily suggestive for the reasons stated in the text.

Compare Nixon and Petitioner's photographs:



Nixon (R. 324)



Petitioner (R. 312)

Nixon and Petitioner have distinct faces. Nixon has a goatee, an angular face, dark skin, two large undereye tattoos, and a tattoo in the middle of his forehead. Had Nixon been the shooter, Matthews almost certainly would have mentioned to police his many face tattoos—at least six, judging from the photo—especially since she got a good look at the perpetrator's "whole face" for what she estimated to be three to four minutes, "[p]robably more." SR. 696–98. Petitioner, by contrast, has no facial hair, an oval face, lighter skin, a single

tear-shaped birthmark, and no tattoos. And Nixon looks older than Petitioner, whose baby-faced appearance accurately reflected his 17 years.

Along with all that, a host of corroborating evidence connected Petitioner to the crime, including: (1) Sabela Louis had identified Petitioner as running with a gun and a grey shirt just after shots were fired, T. 657: (2) Petitioner had an unusually defeated demeanor after being escorted from the house, T. 737–38; (3) Petitioner refused to look at officers after they located a grey sweatshirt hidden in an outdoor grill near the apartment where Petitioner was found, T. 798; and (4) police found the same kinds of bullets found at the scene in a bedroom that also contained identification documents belonging to Petitioner, T. 910–14. Under any standard of review, it was therefore reasonable for officers to clear Nixon as a suspect and present only Petitioner to Matthews at the showup.

CONCLUSION

For these reasons, the Court should approve the decision of the Fourth District.

Dated: August 1, 2022

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal to all counsel of record on this **first** day of August 2022.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 11,409 words.

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