

No. 20-5261

Supreme Court, U.S.  
FILED

JUN 04 2020

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IN THE  
SUPREME COURT OF THE UNITED STATES

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Michael Fred Houston -PETITIONER

vs.

THE STATE OF TEXAS -RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SIXTH COURT OF APPEALS OF TEXAS

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PETITION FOR WRIT OF CERTIORARI

Michael Fred Houston

Telford unit 3899 State Hwy 98

New Boston, TX 75570

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ORIGINAL

QUESTION(S) PRESENTED

- 1) Does under the totality of the circumstance, is the in-court identification reliable even though the confrontation procedure was suggestive?
- 2) Did the Court for Appeals reversibly err in denying the defendent's motion to suppress the identification testimony of the complaining witness obtained after a single photo displayed to that witness?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Michael Houston v. The State of Texas, No.46857-B, 124th District Court of Texas  
Judgement entered April 18, 2019

Michael Houston v. The State of Texas, No.06-19-00091-CR, Sixth District Court  
of Appeals of Texas, Judgement entered Jan. 10, 2020

Michael Houston v. The State of Texas, No.PD-0126-20, Criminal Court of Appeals  
of Texas, Refused Mar. 11, 2020

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OTHER

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,

has been designated for publication but is not yet reported; or,

is unpublished.

The opinion of the Sixth Court of Appeals of Texas court appears at Appendix A to the petition and is

reported at \_\_\_\_\_; or,

has been designated for publication but is not yet reported; or,

is unpublished.

## JURISDICTION

For cases from state courts:

The date on which the highest state court decided my case was 03/11/2020.

A copy of that appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In all criminal persecution, the due process of the Fourteenth Amendment U.S. Constitution prohibits a State from depriving "any person of life, liberty, or property without due process of law". When a pre-trial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of the identification at trial would deny the accused due process of law.



## STATEMENT OF THE CASE

On August 2, 2017 Mr. Houston was indicted fo the offense of Aggravated Robbery alleged to have been committed against Ms. Eleanor Joyce Brown. Under TEX. PENAL CODE § 29.03

On May 17, 2018 Mr. Houston filed a motion to suppress seeking to suppress identification testimony. That same day a hearing was scheduled to be heard on Mr. Houston's motion to suppress. The hearing was rescheduled due to a critical witness being unavailable. The trial court conducted a pre-trial hearing on July 25, 2018.

At pre-trial the following witnesses testified.

Officer Christopher Byrdsong testified for the State. He stated that he was employed by the Longview Police Department. He testified that on April 29, 2017 he and officer Nino were dispatched and advised that a black male left the scene in a black chrysler passenger car. Officer Byrdsong stated that he rode around to see if he could find a car that matched that discription. He said that he combed about a mile radius from the Dollar General located at 2324 Judson Road in Longview and found a black four-door chrysler at the apartment at 2900 McCann. Moments later, officer Byrdsong saw the car moving. He made a traffic stop to identify the driver. Officer Byrdsong stated that there was a black female driving the vehicle and there were four small children inside. The driver was identified as Natasha Houston. Officer Byrdsong testified that he ran the plates on the car and it came back belonging to a Michael Fred Houston.

Officer Fernando Nino testified for the State. He stated that he was a patrol officer with the Longview Police Department. Officer Nino confirmed that on April 29, 2017 he was dispatched to the Dollar General around 9:31 a.m. for an aggravated robbery. He said that he was the primary officer investigating the incident and that he made direct contact with victim, Ms. Brown. He testified

that he asked Ms. Brown for a description of the suspect and a description of the vehicle the suspect was driving. He described Ms. Brown as shaken up, scared and nervous. Officer Nino testified that Ms. Brown said that a black male exited from a black chrysler, opened the door to her vehicle and removed her purse. Officer Nino said that she stated that he displayed a handgun towards her and asked for her phone and she told him that it was in her purse.

Officer Nino testified that he received a call from officer Byrdsong who found a vehicle matching the description at the Parkway Gardens apartments. Officer Nino stated that officer Byrdsong asked him to show Ms. Brown a mugshot of the subject named Mr. Houston as the suspect. Officer Nino confirmed that this was an improper way to do a photo lineup.

Detective Armando Juarezortega testified for the State. He stated that he was employed by the Longview Police Department and was involved in investigating a robbery that took place at the Dollar General on April 29, 2017. He stated that he interviewed Ms. Brown on May 4, 2017. Detective Juarezortega stated that Ms. Brown said that the suspect was holding the gun in his left hand and holding her purse with his right hand. He said that she mentioned that she did not think he had facial hair and described his haircut. Detective Juarezortega testified that Ms. Brown described the assailant as a black male, slim built with short hair, probably 20-25 years of age and that he was wearing a white t-shirt. She told him that the assailant did not have tattoos.

Eleanor Joyce Brown testified for the State. Ms. Brown confirmed that she went to the Dollar General on April 29, 2017 around 9:15 in the morning. She stated that she was on her way to Daingerfield. She stated that she came out of the Dollar General, got into her car and turned the bluetooth on. She said that she put her purse in the passenger seat of the car and made contact with a fellow who had pulled up close to her. She said that he was parked very close to her on the passenger side of the car. Ms. Brown testified that he opened the

door, grabbed her purse, pushed a gun in her face, and said "Give me your phone bitch". She confirmed that she was looking at the man the entire time. Ms. Brown stated that he was driving a black four-door sedan. Ms. Brown confirmed that later on an officer showed her a photograph of someone the police thought might have done this. She testified that she did not use the picture at all to help her identify the person.

The trial court denied the motion to suppress at the conclusion of the suppression hearing. The trial court did not exercise its discretionary authority to re-open the suppression hearing, and parties did not relegate the motion to suppress during trial. In reviewing the trial court's denial of Mr. Houston's motion to suppress, the only evidence that should be considered is the evidence presented at the pre-trial hearing. The improper suggestiveness of the single photo display having been conceded, the reliability of Ms. Brown's identification is at issue.

Eleanor Joyce Brown not only viewed a single photograph of the defendant very shortly after the offense in question, she also saw Mr. Houston alone in jail clothes at the suppression hearing, at a subsequent docket call, and again alone at trial. There should be no doubt but that this procedure was as a whole impermissibly suggestive. The suggestive pre-trial procedure at bar gave a very substantial likelihood of misidentification.

The trial court improperly found Ms. Brown's identification was untainted.

Mr. Houston filed his direct appeal raising a claim that trial court erred in denying Mr. Houston's motion to suppress the identification testimony of the complaining witness obtained after a single photo display to the witness.

The Sixth Court of Appeals of Texas affirmed the trial court's judgment. By placing the burden on Mr. Houston to overcome impermissibly suggestive testimony. See Appendix A, op. at P. 7.

The Court of Criminal Appeals of Texas refused Mr. Houston's petition for discretionary review. See Appendix C

## REASON FOR GRANTING THE PETITION

Since the Court of Criminal Appeals of Texas refused Petitioner's P.D.R., Petitioner's complaint goes to the Sixth Court of Appeals of Texas ruling that Petitioner failed to show by clear and convincing evidence that the in-court identification was unreliable.

Review of this issue should be granted because:

- 1) The Sixth Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this court.
- 2) The Sixth Court of Appeals of Texas has entered a decision in conflict with the decision of another Texas Court of Appeals on the same important matter.

### QUESTION I.

Does under the totality of the circumstance, is the in-court identification reliable even though the confrontation procedure was suggestive?

In the present case the Sixth Court of Appeals observed that the "Sole evidence tying the Petitioner to the aggravated robbery consisted in the in-court identification by the complainent Ms. Eleanor Joyce Brown".

On the constitutional issue the court stated that the first inquiry was whether the police used an impermissibly suggestive procedure in obtaining the out-of-court identification, citing Stovall v. Denno, 388 U.S. 293,294 (1967); Griffith v. Kentucky, 479 U.S. 314, 326 (1987); Simmons v. United States, 390 U.S. 377 (1968)

The court concluded that "The pre-trial identification process was impermissibly suggestive", but "an unnecessarily suggestive pre-trial identification procedure did not, in itself, intrude upon a constitutionally protected interest". The court moved to the second step in the analysis.

"Assessing the reliability of the identification under the totality of the circumstances", established under the factors by Neil v. Biggers, 409 U.S. 188, 199 (1972).

The Court of Appeals analysis of the totality of the circumstances under the retroactive application by Neil v. Biggers 409 U.S. 188,199 (1972), was the incorrect application.

The Court's experience may have convinced the court that the retroactive application of this portion of Stovall also would have a drastic effect on law enforcement; it was, as said in Neil v. Biggers, supra, 409 U.S. at 199, the first occasion on which the court "gave notice that the suggestiveness of confrontation procedure was anything more other than a matter to be argued to the jury".

This interpretation of Neil v. Biggers- that it qualified the Stovall standard only with respect to pre-stovall cases.

In Stovall v. Denno, 388 U.S. 293, 87 s.ct. 1967, 18 L.Ed.2d 1199 (1967). The Supreme Court established the due process standard against which police identification procedures are to be measured. A violation of due process occurs when, under "the totality of the circumstance", a confrontation procedure is "unnecessarily suggestive and conducive to irreparable mistaken identification. Within this court's the due process standard has developed into a bipartite inquiry, United States v. Smith, 546 F.2d 1275 (5th cir. 1977); Bloodworth v. Hopper, 539 F.2d 1382 (5th cir. 1976); United states v. Gidley, 527 F.2d 1345 (5th cir. 1976). First, as a threshold inquiry, the court should decide whether the identification procedure was unnecessarily suggestive. A finding of impermissible suggestiveness raises concern over the reliability of identification and triggers closer scrutiny by the court to determine whether such a procedure created a substantial risk of misidentification. Untied states v. Smith,supra, at 1279; United States v. Gidley,supra, at 1350.

In the case at bar petitioner pre-trial confrontation was impermissibly suggestive. The description that Ms. Brown first described of her assailant was simply "a black Male". Shortly after at the crime scene Officer Fernando Nino

displayed a single photo mug shot of petitioner, to Ms. Brown and she identified petitioner as the suspect. Officer Nino confirmed that this was an improper way to do a photo lineup.

The State conceded that the single photo display by Longview Police Officer Fernando Nino Jr. was improper.

RELIABILITY OF IDENTIFICATION:

If the pre-trial procedure is found to be impermissibly suggestive, identification testimony would nevertheless be admissible if the totality of the circumstance shows no substantial likelihood of misidentification. Reliability is the critical question.

The trial court did not exercise its discretionary authority to reopen the suppression hearing, and the parties did not consensually relitigate the motion to suppress during trial, and the trial court's denial of petitioner's motion to suppress, the only evidence that should be considered is the evidence presented at the pre-trial suppression hearing.

In Manson v. Brathwait, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the Supreme Court emphasized that "reliability is the linchpin in determining the admissibility of identification testimony"... 432 U.S. at 114, 97 S.Ct. at 2253. Unquestionably, supreme court jurisprudence attaches overriding importance to the reliability factor in appraising the totality of the circumstances. Brathwait reaffirms that the reliability determination rests upon evaluation of the factors enumerated in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). The factors included "the opportunity of the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation". 409 U.S. at 199-200, 93 S.Ct. at 382. See also Manson v. Brathwait, 1977, 432 U.S. at 114, 97 S.Ct. 2253. The "against these factors is to be weighed the corrupting effect of suggestive identification itself" in deciding whether due

process has been observed. Manson v. Brathwait, 1977, 432 U.S. at 114, 97 S.Ct. at 2253.

Moreover, in Simmons v. United States, 1968, 390 U.S. 377, 88 S.Ct. 967, 19 L. Ed.2d 1247, involving a pre-trial photo identification, the court phrased the test as whether the identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification". 390 U.S. at 384, 88 S.Ct. at 971. The Stovall phraseology was subsequently repeated in Foster v. California, 1967, 394 U.S. 440, 442, 89 S.Ct. 1127, 22 L.Ed. 2d 402. Both are used in Neil v. Biggers, 1972, 409 U.S. 188, 98 S.Ct. 375, 34 L. Ed 2d 401 and are referred to in Manson v. Brathwait, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed 140.

Therefore, the application under retroactive that the Court of Appeals analysed Petitioner's sole issue of denial of due process should not stand.

Petitioner requests that this Honorable court grant his Ceriorari.

#### QUESTION II.

Did the Court of Appeals reversibly err in denying the defendant's motion to suppress the identification testimony of the complaining witness obtained ~~after a single photo displayed to that witness?~~

The opinion of the Court of Appeals fails to discuss August v. State, 588 S.W. 3d 704 (Tex. App.-Houston[14th Dist.] 2019, no pet.), where in the 14th Court of Appeals reversed a conviction for burglary and ordered a new trial holding that a Police "on the scene" single photo identification procedure was improperly suggestive based on the totality of the circumstances and only evidence presented at a suppression hearing, not trial evidence, On a de novo review of evidence adducted at a suppression hearing the appeals court closely scrutinized police videos and conversation in the presence of an alleged eyewitness and found the recollection of that witness to be fatally contaminated. See Appendix D.

The opinion of the Court of Appeals points out in great detail that trial evidence that arguably leads to a jury reasonably concluded that Petitioner is the person who robbed an eighty-five year old woman of her purse and cell phone at gun point. Regardless that the complaining witness only identification to the officer at the scene that her assailant was simply "a black male".

Such evidence included DNA evidence allegedly linking Petitioner to the complainant's purse, prominent facial tattoos, and Petitioner's gold teeth.

A pre-trial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial constitutes a denial of due process. Barley v. State, 906 S.W. 2d 27,32-33 (Tex.crim.App.1995).

Petitioner respectfully request that this Honorable Court grant his Certiorari.

To the Honorable Court, Petitioner respectfully expresses his earnest desire for the court to remain mindful that the paramount focus in his particular judicial matter "is not [Petitioner's] innocence or guilt, but solely whether [his] constitutional rights have been preserved". Accord Moore v. Dempsey, 261 U.S. 86,87-88 (1923)(habeas corpus relief available to redress due process violations "regardless of the heinousness of the crime... [and] the apparent guilt of the offender"); Ex Parte Milligan, 71 U.S. 2, 118-19 (1866)("[I]t is the birthright of every American Citizen when charged with a crime, to be tried and punished according to the law, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender an individual may be or how much his crimes may have shocked the sense of justice or the county, or endangered its safety. By the protection of the law, human rights are secured, withdraw that protection, and they are at the mercy of wicked rulers, or the clamors of excited people.").



CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Michael Horton

Date: 5/27/2020