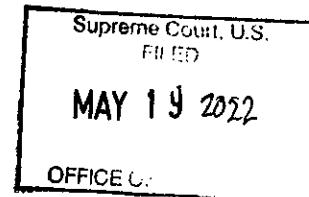


No. 21-7991

IN THE
SUPREME COURT OF THE UNITED STATES



MARIO MANDELL MOORE --PETITIONER

vs.

MICHIGAN--RESPONDENT

**On Petition for Writ of Certiorari to the
Supreme Court for the State of Michigan**

PETITION FOR WRIT OF CERTIORARI

By: Mario M. Moore #524955
Mario Moore #524955
Carson City Correctional Facility
10274 Boyer Rd.
Carson City, Michigan 48811-9746

QUESTION(S) PRESENTED

WHETHER PETITIONER IS ENTITLED TO A WRIT OF CERTIORARI WHERE MICHIGAN HAS DENIED HIM DUE PROCESS, EQUAL PROTECTION AND IGNORED THE DICTATES OF THIS COURT CONCERNING UNDULY SUGGESTIVE IDENTIFICATION PROCEDURES IS IT TIME TO MANDATE POLICE MANUFACTURED "SHOW UP" IDENTIFICATIONS INADMISSIBLE?

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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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

FEDERAL COURT OPINIONS

The Opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to this petition and is reported at:

The Opinion of the United States District Court for the Western District of Michigan appears at Appendix B to this petition and is reported at:

STATE COURT OPINIONS

The opinion of the Michigan Court of Appeals/the highest court to review the merits of the claims appears at Appendix B to this petition and is reported at:

2020 MICH APP LEXIS 7772 (2020)

The opinion of the Michigan Supreme Court denying leave to appeal appears at Appendix A to this petition and is reported at:

2022 MICH LEXIS 396 (2022)

STATEMENT OF JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A-_____

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was March 4, 2022. A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied on the following date: and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A-_____

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV § 1, United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

DEFENDANT/APPELLANT, MARIO MANDELL MOORE, was charged in an Information and bound over on Counts I – Robbery Armed (Amelia Jaszczołt) (MCL 750.529) & Count II – Robbery Armed (Robert Hutton); and to being a Habitual Offender Fourth Offense (MCL 769.12). A jury trial was conducted on June 18, 19 & 20, 2019, before Judge Kevin J. Cox, 3rd Judicial Circuit Court. (Information – lower court file; Trial Transcript dated June 18, 2019 – herein after referred to as T.T. Vol. 1, pp. 4, 5).

The charges involved an incident which occurred at a retail clothing store called Mr. Allan's Elite, located in the City of Hamtramck, Wayne County, on February 18, 2018. Complainants Amelia Jaszczołt and Robert Hutton were employees of Mr. Allan's Elite and were working on this date and location. (T.T. Vol. 1, pp. 205, 208; Trial Transcript dated June 19, 2019 – hereinafter referred to as T.T. Vol. II, p. 6).

At approximately 5:30 p.m. on February 18, 2018, three individuals entered Mr. Allan's Elite. The three individuals separated into different areas of the store and appeared to be shopping. Complainant Amelia Jaszczołt, acting as an employee, approached Defendant Moore near the back of the store to offer assistance. Complainant Robert Hutton, acting as an employee, remained toward the front cash register area of the store. (T.T. Vol I, pp. 209, 210, 211; T.T. Vol II, p. 7).

Within a few minutes Complainant Hutton heard Complainant Jaszczołt screaming and asking Complainant Hutton for help. Upon investigating Mr. Hutton observed Defendant Moore assaulting Complainant Jaszczołt and forcing her into a backroom area of the store which contained a safe. The other two codefendants then appeared and subdued Complainant Hutton. (T.T. Vol I, pp. 213, 214, 219, 226; T.T. Vol. II, pp. 11, 12, 14).

In an attempt to have Complainant Jaszczolt open the safe, Defendant Moore produced a handgun. Complainant Jaszczolt then cooperated and opened the safe which contained approximately \$7,000.00. (T.T. Vol. I, pp. 188, 189, 220, 224, 225, 226, 227; T.T. Vol. II, pp. 17, 18, 19, 20, 23, 26).

The three codefendants then emptied the contents of the safe and also took Complainant Hutton's cell phone. The three codefendants then fled on foot out of the store's back door and into the alleyway. However, the three codefendants forgot to retrieve Complainant Jaszczolt's cell phone which she immediately used to call '911', giving the police a description of the three perpetrators. The store also subsequently provided in-store surveillance videotape of the incident. (T.T. Vol. I, pp. 185, 186, 215, 232, 233; T.T. Vol. II, pp. 21, 22, 27, 28, 29, 145, 170).

Within minutes of the offense the Hamtramck police observed two of alleged suspects fitting Complainants' description walking separately down a residential street not far from the store's location. Defendant Moore was detained by the police and approximately \$5,570.00 was found on Defendant Moore's person. In addition, both Complainants Hutton and Jaszczolt identified Defendant Moore after an 'on-the-scene' identification proceeding conducted by the police. (T.T. Vol. I, pp. 234, 235; T.T. Vol. II, pp. 32, 33, 114, 115, 119, 120, 173, 174).

At the conclusion of trial, the jury found Mr. Moore guilty as to Count I – Robbery Armed (Amelia Jaszczolt) and not guilty as to Count II – Robbery Armed (Robert Hutton). On July 15, 2019, Mr. Moore was sentenced as a habitual fourth offender to a minimum term of 20 years to a maximum term of 40 years incarceration. (T.T. June 20, 2019, Vol. III, p. 107; Sentencing Transcript, p. 17).

Prior to trial Mr. Moore moved the trial court to suppress the identification in this matter. A "Wade Hearing" was conducted on June 15, 2018, at the conclusion of which the trial court

denied Mr. Moore's motion. (Wade Hearing Transcript – hereafter – W.H. p. 1 – 97; Plea Transcript – hereafter – P.T., p. 3 – 8).

REASONS FOR GRANTING THE WRIT

PETITIONER IS ENTITLED TO A WRIT OF CERTIORARI WHERE MICHIGAN HAS DENIED HIM DUE PROCESS, EQUAL PROTECTION AND IGNORED THE DICTATES OF THIS COURT CONCERNING UNDULY SUGGESTIVE IDENTIFICATION PROCEDURES AND IT IS TIME TO MANDATE POLICE MANUFACTURED "SHOW UP" IDENTIFICATIONS INADMISSIBLE.

Standard of Review: The standard of review is de novo. *Neil v. Biggers*, 409 US 188; 93 S.Ct. 375; 34 L.Ed.2d 410 (1972).

Argument: Mr. Moore is entitled to a new trial where the identification procedure employed was unduly suggestive and resulted in an unreliable identification

This case presents a critical problem underlying Michigan jurisprudence on matters involving unduly suggestive police practices in "show-up" identifications orchestrated by the police and Michigan courts denial of due process and equal protection of the laws.

This Court has stated that the risks inherent in identification are not the "result of police procedures intentionally designed to prejudice an accused," but rather derive "from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of pretrial identification." *United States v. Wade*, 388 US 218, 235; 87 S.Ct. 1926; 18 L.Ed.2d 1149 (1967).

In *Stovall v. Denno*, 388 U.S. 293, 301; 87 S. Ct. 1967; 18 L.Ed.2d 1199 (1967), this Court recognized that "the practice of showing suspects singly to persons for the purpose of identification" has been "widely condemned." The show-up procedure in the instant case was prejudicial to Mr. Moore, and the trial court clearly erred in finding that the procedure was not unduly suggestive. In *Neil v. Biggers*, 409 US 188; 93 S.Ct. 375; 34 L.Ed.2d 410 (1972) an identification procedure is flawed if it tends to suggest the response desired so as to create a "very substantial

likelihood of misidentification". The Court provided a nonexclusive list of factors for determining whether an unnecessarily suggestive identification is reliable:

These include the opportunity of the witness to view the criminal at the time of the crime, 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. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Michigan had the burden of showing by "clear and convincing evidence" that the in-court identification has a basis independent of the prior identification procedure. The independent basis inquiry is a factual one, and the validity of a victim's in-court identification must be viewed in light of the "totality of circumstances." *Neil v. Biggers*, 409 US 188; 93 S Ct 375, 382; 34 L Ed2d 401 (1972).

Eyewitness identifications are unreliable, regardless of the suggestiveness of the identification procedure.¹ Research indicates that human frailties jeopardize the reliability of eyewitness identifications.² In fact, a witness's certainty in identifying a suspect is not necessarily related to accuracy. "Controlled experiments ... show that eyewitnesses can be both highly confident (even 'positive') and yet totally mistaken in an eyewitness identification."³ Witnesses can develop a false sense of confidence once they make an identification. This false sense of confidence can cause a witness to become entrenched and seem even more convincing at trial even though the identification was actually erroneous.⁴ The infirmities of cross-racial

¹ Brief for American Psychological Association as Amicus Curiae Supporting Petitioner at 14 -15, *Perry*, 132 S.Ct. 716 (No. 10-8974), 2011 WL 3488994, at 12-13.

² Gary L. Wells & Elizabeth F. Loftus, *Eyewitness Memory for People and Events*, 11 *Handbook of Psychology* 149, 157 (Irving B. Weiner ed., 2003); Dana Walsh, *The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness*, 54 *BCL Rev* 1415, 1453 (2013).

³ Gary L. Wells, *Eyewitness Identifications: Systemic Reforms*, 2006 *WIS. L. REV.* 620.

⁴ *Id.*

identification can also heighten the unreliability of eyewitness identifications.⁵ Empirical research shows that witnesses more accurately identify suspects of their own race than suspects of a different race.⁶ Research on eyewitness identification proves that jurors give great weight to eyewitness testimony, and are unable to separate reliable from unreliable testimony, making the admission of such evidence potentially devastating to a criminal defendant.⁷ Justice Brennan recognized this problem when he wrote in his dissent in *Watkins v. Sowders*, 449 U.S. 341, 352; 101 S.Ct. 654; 66 L.Ed.2d 549 (1981). “There is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’” Clearly, eyewitness testimony disproportionately impacts jurors’ evaluation of the case and can lead to unjust outcomes. In addition to the inherent unreliability of eyewitness identification, when an identification procedure is unnecessarily suggestive and conducive to irreparable misidentification, the defendant is denied due process of law. An identification procedure is flawed if it tends to suggest the response desired, as to create a “very substantial likelihood of misidentification.” *Neil v. Biggers*, *supra*. This Court has stated that the risks inherent in identification are not the “result of police procedures intentionally designed to prejudice an accused,” but rather derive “from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of pretrial identification.” *United States v. Wade*, 388 US 218, 235 (1947). The basic purpose of excluding suggestive identification evidence is to prevent misidentification, not to deter misconduct.

⁵ Id.

⁶ Dana Walsh, The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness, 54 BCL Rev 1415, 1453 (2013).

⁷ Sandra Guerra Thompson, Eyewitness Identifications and State Courts as Guardians Against Wrongful Conviction, 7 OHIO ST. J. CRIM. L. 603, 620 (2010).

A conviction based on identification testimony that follows a pretrial identification violates the defendant's constitutional rights to due process whenever the pretrial identification procedure is so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Thigpen v. Cory*, 804 F2d 893, 895 (6th Cir. 1986) cert. denied 482 US 918; 107 S.Ct. 3196 (1987) quoting *Simmons v. United States*, 390 U.S. 377, 384; 88 S.Ct. 967; 19 L.Ed.2d 1247 (1968). It is the likelihood of misidentification that violates the defendant's due process right. *Neil v. Biggers*, 409 U.S. 188, 198; 93 S. Ct. 375, 381-382; 34 L.Ed.2d 401 (1972). The due process concern is heightened when that misidentification is possible, because the witness is called upon to identify a stranger whom she observed for only a brief moment. *Manson v. Brathwaite*, 482 US 98, 112; 97 S. Ct. 2243, 2251-2252; 53 L.Ed. 140 (1977); *Simmons, supra*, 390 US at 383-384; 88 S. Ct. at 970-971; *United States v. Russell*, 532 F2d 1063, 1066 (6th Cir 1976).

An Identification procedure violates a defendant's right to due process when it is unduly suggestive. *Neil v. Biggers, supra*. Listing factors to determine admissibility (a) opportunity of the witness to view the criminal at the time of the crime, (b) the witness' degree of attention, (c) the accuracy of his prior description of the criminal, (d) the level of certainty demonstrated at the confrontation, and (e) the time between the crime and the confrontation.

In the case at bar misidentification was not prevented, it was manifested by one alleged victim signaling to the other witness in the courtroom. Amelia Jaszcolt was caught motioning or signaling to Robert Hutton while Mr. Hutton was on the stand and Jaszcolt in the spectator's section, to say that the Defendant had a beard during the incident. When Mr. Moore was arrested, he **did not have a beard.** (T.T. 75, 86 – 102). Moreover, Mr. Moore has a (%) mark tattooed between his eyes. This very specific mark was not observed by neither Jaszcolt or

Hutton and made their identification before the jury of Mr. Moore even more unreliable. Especially with testimony that they were face to face observing all distinguishing marks. (T.T. 77, 78, 228, 242, 247, 261, 273).

THE WADE HEARING – the trial court held a *Wade* hearing which produced:

(a) opportunity of the witness to view the criminal at the time of the crime; Ms. Jaszcziol said “they did not have masks on their face” “they had something around their necks” (WH pp. 22, 23, 24, 26, 27). But Ms. Jaszcziol never told the 911 dispatch, nor the court of the % sign between the robber’s eyes. Please go to “Michigan.Gov OTIS – Moore 524944.”



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BIOGRAPHICAL INFORMATION



MDOC Number:

624856

SSN Number:

2374876H

Name:

MARIO MАНDELL MOORE

Racial Identification:

Black

Gender:

Male

Hair:

Blonde

Eyes:

Brown

Height:

6'8"

Weight:

170 lbs.

Date of Birth:

01/22/1983 (31)

MARIO MАНDELL MOORE

Image Date:

7/17/2018

MDOC STATUS

Current Status:

Parolee returned to prison for alleged parole violation

Supervision Begin Date:
11/16/2017

Mr. Hutton never gave any description of the robber. The trial court held:

And there is considerable, credible evidence, in this case, that both of the witnesses did have an opportunity to observe each of the defendants in this case, at the time of the crime, and within, somewhere between ten and fifteen or sixteen minutes thereafter. (PT 6-18-18, pp 4 – 5).

(b) the witness' degree of attention, Ms. Jaszczołt testified she look people in their face (WH pg. 23); again Ms. Jaszczołt never told the 911 dispatch, nor the court of the % sign between the robber's eyes.

Mr. Hutton never gave any testimony as to his degree or attention. The trial court held:

And again, there was substantial and credible testimony that each of the witnesses had the opportunity to see, each of the defendants at the time of the crime. (PT 6-18-18, pg. 5).

(c) the accuracy of his / her prior description of the criminal, Ms. Jaszczołt testified the robbers were 19 to 20 years old (WH pg. 14). Mr. Moore was 30 years old on the day of the reported incident. Please go to "Michigan.Gov OTIS – Moore 524944." Date of Birth 01/23/88.

Mr. Hutton never gave any testimony regarding a description of the robber. The trial court held:

And the Court, once again, notes that the description of the defendants, at the time, for example, in the 9-1-1 call –

At the time of the 9-1-1 call, is consistent with subsequent identifications, and with the testimony of the witnesses, at the pre-trial confrontation.

Once again, there is substantial and credible testimony regarding the level of certainty, of each of the witnesses, with respect to both of the defendants. (PT 6-18-18, pg. 5).

Indeed, one of the witnesses said that they were a hundred percent certain that the defendants were the individuals that robbed the store. (PT 6-18-18, pp. 5 - 6).

(d) the level of certainty demonstrated at the confrontation, Ms. Jaszczołt was adamant that the robber “changed clothes” (WH pg. 18).

Mr. Hutton never gave testimony regarding his level of certainty. The trial court held:

Once again, there is substantial and credible testimony regarding the level of certainty, of each of the witnesses, with respect to both of the defendants. (PT 6-18-18, pg. 5).

Indeed, one of the witnesses said that they were a hundred percent certain that the defendants were the individuals that robbed the store. (PT 6-18-18, pp. 5 - 6).

(e) the time between the crime and the confrontation, Ms. Jaszczołt testified it was 15 minutes later (WH pg. 15), the robbers could have potentially been over a mile away within 15 minutes; Mr. Moore was arrested two blocks away.

Mr. Hutton never gave any testimony as to the time between crime and confrontation.

The trial court held:

The Court does recall credible testimony that the identifications were somewhere on the order of eleven to fifteen minutes, after the robbery. (PT 6-18-18, pg. 6).

Neither Ms. Jaszczołt, and especially Mr. Hutton’s testimony established by “clear and convincing evidence” that the in-court identification had a basis independent of the prior identification procedure. In fact, Ms. Jaszczołt’s testimony of 19 to 20 years old when Mr. Moore was 30 at the time and the lack of testimony that the guy who robbed me had a tattoo of a % sign between his eyes negates an independent basis.

Moreover, it was highly suggestive to walk Mr. Moore, first, from out from behind a police car handcuffed escorted by a uniformed police officer.

As the *Stovall v. Denno*, 388 U.S. 293, 301; 87 S. Ct. 1967; 18 L.Ed.2d 1199 (1967) Court said: that “the practice of showing suspects singly to persons for the purpose of identification” has

been “widely condemned.” The show-up procedure in the instant case was prejudicial to Mr. Moore, and the trial court clearly erred in finding that the procedure was not unduly suggestive.

THE MICHIGAN COURT OF APPEALS decision to uphold the trial court’s erroneous application of Supreme Court precedent as a mechanicalistic recitation rather than applying the facts to the factors establishes a systematic breakdown of Michigan courts to properly apply the *Wade* factors by failing to acknowledge that the witness is not describing the defendant. The Michigan Court of Appeals opinion (App. B, Unpub. No. 350397, Nov. 19, 2020) is another example of lack of description of Mr. Moore. “Jaszczolt described one of the men as having “bulgy” eyes and sporting dreadlocks, and identified defendant at trial as that man.” (App. B, pg. 1 ¶ 2)

As can be seen from Mr. Moore’s OTIS photo above, Mr. Moore does not have “bulgy” eyes, he is not 19 to 20 years old, and he has a very noticeable % sign right between his eyes which any victim of an armed robbery who “look people in their face” (WH pg. 23) would have surely noticed and should have been screaming at the 911 operator – the guy who just robbed me had a tattoo or a % right between his eyes. But she didn’t. She didn’t because she was robbed by someone else and that someone else was 19 or 20 years old with bulgy eyes. Ms. Jaszczolt was robbed by and described someone other than Mr. Moore but neither the trial court or the court of appeals took the time to identify the discrepancies or lack of reliability in Ms. Jaszczolt’s claimed tainted identification due to a police orchestrated “show up” that was highly suggestive by leading Mr. Moore out from behind a squad car, handcuffed, escorted by a uniformed officer, clearly under arrest.

As the dissent of Honorable Michigan Supreme Justice Cavanagh (App. A, Mich. SC No. 163136) rightfully acknowledges all of the errors of the trial court’s determination and the

Michigan Court of Appeal's decision which violated the 14th Amendment Due Process Clause and the factors of *Wade*, the court refused to take action to correct the injustice.

Is it time for this Court to take that long awaited step to mandate that police manufactured identification procedures as the "show up" are banned and any identification obtained by such procedure will be automatically inadmissible?

SUMMARY OF ARGUMENT

The procedure here was one photo (Mr. Moore in handcuffs escorted by a police officer) shown to two witnesses at one time. Only God knows, as well as Ms. Jaszczołt, Mr. Hutton and the police officer driving the car what was said on the way to the "show up". There was no 6-pack photo array, no line up – the result was what was desired by police – identify Mr. Moore regardless of previous or post description. Such procedure should never be allowed in America, this is not Afghanistan; due process of the 14th Amendment and the line of cases developed by this Court demand a better, more reliable procedure.

Therefore, Petitioner Mario Moore respectfully requests that this Court grant this petition for a writ of certiorari.

Respectfully submitted,

Mario M. Moore

Mario Moore
In Pro Se
Carson City Corr. Fac.
10274 Boyer Rd.
Carson City, MI 48811-9746

Dated: 5/19/22