>> WE WILL NOW TAKE 21.1450.
>> MAY IT PLEASE THE COURT, CHRISTINE GARRITY ON BEHALF OF PETITIONERS, I WOULD LIKE TO RESERVE FOUR MINUTES OF MY TIME FOR REBUTTAL.
IN THIS CASE, THE COURT WAS ASKED TO DECIDE WHAT STANDARD APPELLATE COURTS SHOULD USE TO REVIEW PRETRIAL IDENTIFICATION PROCEDURES FOR BEING UNNECESSARILY SUBJECTIVE.
THE MOST APPROPRIATE STANDARD, THE BEST ADDRESSES THE ULTIMATE PURPOSE UNDERLYING THE SUPPRESSION WHICH IS TO ENSURE IMPROPER POLICE CONDUCT DOES NOT RESULT IN INJURY HEARING EVIDENCE OF IDENTIFICATION FOR SUBSTANTIAL LIKELIHOOD THE IDENTIFICATION IS INCORRECT.
I INTEND ON ARGUING THREE POINTS IN SUPPORT OF THIS.
THE REVIEW CREATES CONSISTENCY AND UNIFORMITY IN THE APPLICATION OF LAW BY ENSURING DIFFERENT COURTS JUDGING SUBSTANTIALLY THE SAME FACTS DO NOT REACH DIFFERENT OUTCOMES.
JUST AS IMPORTANT, A BODY OF CASE LAW PROVIDES LAW ENFORCEMENT OFFICERS WITH MORE PRECISE STANDARD OF WHAT PROCEDURES ARE CONSTITUTIONALLY ACCEPTABLE.
OFFICERS WHO RELY ON THOSE PROCEDURES TO OBTAIN IDENTIFICATION THAT WILL NOT LATER BE SUPPRESSED.
THE TRIAL COURT IS NOT IN A BETTER POSITION IN THE APPELLATE COURT TO APPLY THE CONSTITUTIONAL PRINCIPLES TO THE FACT OF THE CASE.
>> TO MAKE FACTUAL FINDINGS? WHAT ABOUT TO MAKE FACTUAL FINDINGS?
>> THE STANDARD IS FACTUAL FINDINGS ARE REVIEWED FOR SUBSTANTIAL EVIDENCE IN THE RECORD.
>> YOU AGREE THE TRIAL COURT IS IN BETTER POSITION TO MAKE

THOSE.
>> TO MAKE FACTUAL FINDINGS LIKE
--
>> HELP ME UNDERSTAND A
DIFFERENT STANDARD, IN THE PHOTO
LINEUP.
IN A PHOTO LINEUP, TRADITIONALLY
REVIEWED DISCRETION.
>> OP REAL TRIAL IDENTIFICATION
STANDARDS SHOULD BE REVIEWED.
>> NOT JUST WITH RESPECT TO SHOW
UP BUT ALL PRETRIAL
IDENTIFICATION.
>> IT WAS AN ALTERATION IN THE
LAW, THE COURT IS DETERMINED.
THE OVERVIEW IS APPROPRIATE TO
SHOW UP.
>> THE STATE MAY OR MAY NOT
AGREE WITH YOUR READING.
THEY GOT THE CORRECT READING OF
WALTON.
IT IS IMPORTANT TO CLARIFY AT
STEP ONE ON THE UNNECESSARILY
SUBJECTIVE THE COURT IS SUPPOSED
TO BE LOOKING AT BECAUSE THERE
IS SOME AMBIGUITY IN CASE LAW AS
TO WHETHER IT ACCEPTS THE
PREMISE THAT A SHOWOFF IS
SUGGESTIVE AND ASK WHETHER IT
WAS NECESSARY VERSUS AN ANALYSIS
THAT IS LIKE THE FOURTH DCA,
LOOKING AT WHATEVER HAPPENED,
DOING THIS AMORPHOUS ASSESSMENT
OF WHAT THE COURT THINKS OF THE
PROPRIETY OF WHAT WAS DONE.
>> IMPORTANT TO RECOGNIZE THE
DETERMINATION OF WHETHER IT IS
SUGGESTIVE IS NOT A FACT IN AND
OF ITSELF.
IT IS A CONCLUSION DRAWN FROM
HISTORICAL FACTS THE TRIAL COURT
FINDS.
THIS COURT DETERMINED THE SHOW
UP -- SUGGESTIVE.
THEY ARE JUST GIVING THE WITNESS
ONE CHOICE OF A PERSON TO CHOOSE
FROM.
IT WOULD STAND TO REASON IN A
CASE LIKE THIS WHERE THERE'S
ANOTHER POTENTIAL SUSPECT
SHOWING THE WITNESS THE SUSPECT
AS WELL WOULD REDUCE THE
SUGGESTIVENESS.
THE DISTRICT COURT ACKNOWLEDGED

A CLOSE CALL, WAS SUGGESTIVE.
IT CITED TO THE WALTON OPINION,
BUT APPLIED ABUSIVE STANDARD.
>> DID IT REALLY IN THE SENSE
THAT IT SEEMS THE TRIAL COURT
COULD BE READ AS HAVING STEP ONE
WAS MET AND IT WAS NECESSARY TO
LOOK AT THE RELIABILITY OF THE
IDENTIFICATION WHEREAS IT SEEMS
THE FOURTH DCA PREEMPTED THE
DECISION AT STEP ONE.
AND SUBSTITUTED ITS OWN VIEW OF
WHAT THE ANSWER TO THE QUESTION
WAS.
>> I DON'T READ THE TRIAL
COURT'S ASSESSMENT OF THE FACTS
AS FINDING THAT INITIAL PROBLEM.
THE COURT SAID THAT IT WAS
STRUGGLING TO MAKE THAT
DETERMINATION BECAUSE THEY ARE
INHERENTLY SUGGESTIVE AND DIDN'T
BEGIN WITH ANALYZING, IT JUMPED
TO THE SECOND ONE.
>> THE ONE POINT -- THE FACT
THAT TWO DEFENDANTS WITH SIMILAR
IDs, THE DEFENDANT BROUGHT DOWN,
THEY CHOSE NOT TO SHOW THE
SECOND DEFENDANT TO SEE IF THEY
COULD IDENTIFY HIM.
WAS THAT THE STRONGEST POINT DCA
HAD FOR HAVING CONCERNS ABOUT
THIS?
THE FACT THAT NIXON WAS NOT
BROUGHT DOWN --
>> I THINK THAT IS ACCURATE.
THE CASE LAW ESTABLISHED THINGS
LIKE THE SUSPECT BEING
SURROUNDED BY POLICE OFFICERS,
NOT IN AND OF THEMSELVES
INDICATIVE OF UNNECESSARY
SUGGESTIVENESS.
THE ADDITIONAL FACT IS SOMEBODY
AT THE SCENE MATCHED THE
DESCRIPTION, THE INITIAL
DESCRIPTION THE WITNESS GAVE AND
ALSO THE ADDED DETAILS SHE MADE
AT THE SHOW UP PROCEDURE.
>> DO YOU THINK THERE'S A
POSSIBILITY STEP ONE AND STEP 2
ACT DIFFERENT ENOUGH TO CALL FOR
DIFFERENT STANDARDS OF REVIEW?
STEP ONE IS MORE POLICY, AND
WHAT COURTS THINK IS APPROPRIATE
POLICE CONDUCT TO.

IT SEEMS LIKE STEP 2 IS CALLED APPLICATION BUT VERY CLOSE TO A FACTUAL DETERMINATION, WHETHER THE ID IS RELIABLE AND ON THAT ISSUE THERE IS 0 INSTITUTIONAL ADVANTAGE OVER THE TRIAL COURT, LOOKING AT THAT QUESTION.
>> I AGREE THE WEIGHING OF TOTALITY OF CIRCUMSTANCES IS PRETTY CLEARLY AN ANALYSIS THAT --
>> THE OPPOSITE OF WHAT I SAID ACTUALLY.
THE SECOND STEP, ESSENTIALLY BORDERLINE FACTUAL FINDING, TECHNICALLY CONSIDERED AN APPLICATION OF BROAD FACTS BUT NOT ALL APPLICATIONS ARE EQUAL. SOME ARE CLOSER TO PURE FACT FINDINGS.
THIS ONE SEEMS VERY FACT HEAVY AND MORE APPROPRIATELY THE DISCRETION OF THE TRIAL COURT.
THE FIRST STEP ONE DOESN'T SEEM LIKE IT IS IN THE SAME CATEGORY.
>> STEP ONE IS NOT IN THE SAME CATEGORY AND THERE ARE SEVERAL PRACTICAL REASONS THAT IS SO.
THE FIRST IS THE DENOVO REVIEWS AN ACCEPTABLE IDENTIFICATION SO TRIAL COURTS NO WHERE THEY SHOULD DRAW THE LINE WHEN CONSIDERING WHETHER TO SUPPRESS THE EVIDENCE.
AS --
>> GIVEN THE LIKELIHOOD THAT THE FACTS ARE GOING TO BE SO UNIQUE, UNDER DISCRETION THE APPELLATE COURTS CAN IDENTIFY OUTLIERS AND WRITE THEIR OPINIONS IN A WAY THAT CLARIFIES THE BOUNDARIES OF WHAT IS LEGALLY AT STAKE.
IT DOESN'T SEEM THE CONSISTENCY THING IS THAT PERSUASIVE.
THERE WOULD HAVE TO BE MORE OVERLAP FACTUALLY THAN WHAT IS LIKELY TO BE THE REALITY THAT THERE'S GOING TO BE SO MANY VARIABLES IN THESE CASES.
I DON'T KNOW YOU WILL HAVE THAT MUCH PRESIDENTIAL VALUE FROM WHAT THE APPEALS COURT.
>> THERE IS NOT A FACTUAL OVERLAP, THE IDENTIFICATION

PROCEDURES.
THE LIMITED VARIABLES --
VARIABLES IN THE PROCEDURE
ITSELF.
IN THE REALM OF WHAT IS COMMON,
THE SAME FACTUAL SCENARIO WILL
OCCUR IN THE FUTURE WHICH IS
WHEN MR.
ZAVION ALAHAD WAS FOUND HE WAS
FOUND WITH ONE OTHER PERSON WHO
MATCHED THE EYEWITNESSES
DESCRIPTION OF THE ISSUE.
WHAT THE SHOOTER LOOKED LIKE.
THAT WAS THIS MAN NIXON.
THAT'S NOT SUCH A FAR-FETCHED
FACTUAL SCENARIO THAT IS NOT
LIKELY TO OCCUR AGAIN.
IN THE SENSE WHEN THE APPELLATE
COURT'S REVIEW ON SPECIFIC
FACTS, THAT DOES GIVE THE TRIAL
COURT SOME DIRECTION ON HOW THEY
SHOULD BE LOOKING AT SIMILAR
FACTS.
WHEN THEY ARE ARGUING ON ANY
LEGAL ISSUE BUT PARTICULARLY
SUPPRESSION ISSUES IT IS ALWAYS
COMPARING ONE CASE AND THE FACTS
OF THAT CASE TO WHAT IS GOING ON
IN THIS CASE TO FIGURE OUT WHERE
THAT LINE IS.
>> SEEMS TO ME THERE ARE CERTAIN
LEVELS, TALKING ABOUT FACTS
WHERE THE TRIAL COURT,
SUBSTANTIAL EVIDENCE TO SUPPORT
FACTUAL FINDINGS.
IT SEEMS ON DENOVO YOU ARE
LOOKING AT SUBSTANTIVE LAW.
SHOW UP, LAWFUL AT ALL.
IS IT CONSTITUTIONAL.
IT SEEMS THE DENOVO
DETERMINATION AS A MATTER OF
LAW.
WHEN YOU ARE LOOKING AT
SOMETHING YOU SHOULD CONSIDER TO
BE UNNECESSARILY SUBJECTIVE IN
THE GRANT CASE.
THERE ARE 5 FACTORS TO DETERMINE
WHETHER SOMETHING IS SUGGESTIVE
OR NOT.
WHAT IS DETERMINED IN MAKING THE
LAWFUL DETERMINATION SHOULD BE A
DENOVO REVIEW COMMITTEE, WHAT
THAT IS.
WHEN YOU GO TO THOSE FIVE

FACTORS TO MAKE THAT
DETERMINATION IN THE TRIAL, THE
TRIAL COURT MAKES THAT
DETERMINATION WHY ISN'T THAT AN
APPLICATION TO THOSE FACTS IN
THE TRIAL COURT, SHOULD BE
MAKING THAT DETERMINATION AND WE
EXTEND REVIEW TO THAT.
>> ARE YOU ASKING ABOUT THE
SECOND PRONG OF THE TEST, THE
TOTALITY OF THE CIRCUMSTANCES?
>> WHEN THE TRIAL COURT REVIEWS
THE FACTORS TO BE DETERMINED,
WHETHER THIS WAS MISLEADING OR
NOT, WHY ISN'T THE TRIAL COURT
DETERMINATION OF ALL THOSE
FACTORS SUBJECT TO ABUSE OF
DISCRETION STANDARD REVIEW?
AS OPPOSED TO DENOVO?
>> AGAIN, ARE YOU ASKING ME, THE
COURT'S FACTUAL FINDINGS?
OR MAKING THE CONCLUSION THAT
WAS UNNECESSARILY SUBJECTIVE?
>> THE CONCLUSION THE TRIAL
COURT REACHED BASED ON ALL THE
FACTORS THEY ARE SUPPOSED TO BE
LOOKING AT?
>> IT SHOULD BE DENOVO, TO GIVE,
AS I SAID EARLIER, CONSISTENCY
AND UNIFORMITY NOT ONLY TO THE
TRIAL COURTS WHEN THEY ARE
TRYING TO DETERMINE WHAT IS THAT
LEGAL STANDARD, WHERE THAT LINE
SHOULD BE DRAWN, BUT ALSO
BECAUSE POLICE AND LAW
ENFORCEMENT RELY ON WHAT THE
COURTS TELL THEM IS LAWFUL OR
UNLAWFUL PROCEDURE WHEN THEY ARE
COLLECTING EVIDENCE IN THE FIRST
PLACE AND POLICE AND LAW
ENFORCEMENT NEED TO BE ABLE TO
RELY ON THE OBJECTIVE LINE THAT
IS DRAWN.
>> WHAT IS THE STANDARD OF
REVIEW FOR A TRIAL COURT'S
DETERMINATION REGARDING PROBABLE
CAUSE?
>> THE APPELLATE COURTS REVIEW
THAT.
>> THE NEXT STANDARD, HISTORICAL
FACTS.
>> ON COMPETENT SUBSTANTIAL
EVIDENCE TO SUPPORT THE FACT AND
THEY REVIEW APPLICATION OF THE

LAW.
WHEN TALKING ABOUT A WARRANTLESS SEARCH PROCEDURE.
>> THE COURT IN TERMS -- COURTS COULD, UNDISPUTED AUTHORITY ON QUESTIONS OF LAW.
APPELLATE COURTS COULD ANNOUNCE RULES, LEGAL RULES AS IT IS PER SE A VIOLATION OF DUE PROCESS WHEN POLICE ARE FACED WITH TWO SUSPECTS WHO ARE CLOSE ENOUGH, A VIOLATION TO PRESENT TO THE PERSON OR VIOLATION OF DUE PROCESS TO PUT THEM IN HANDCUFFS.
THOSE ARE LEGAL RULES, RIGHT?
>> YES.
>> THIS KIND OF AMORPHOUS, UNNECESSARILY SUGGESTIVE, NOT ONLY DEPRIVES THE LEGAL ROLES, WITH FACTUAL DETERMINATION.
WHAT WOULD YOU SAY IS THE LEGAL RULE BEING APPLIED AT STEP ONE, IT GOES TO RELIABILITY.
A SET OF FACTORS TO DEFINE WAS UNNECESSARILY SUGGESTIVE.
>> WITH FOURTH AMENDMENT ISSUES, THERE IS NO SPECIFIC FACTOR TEST.
IT REALLY IS WHETHER THE CONSTITUTIONAL STANDARD, IS DETERMINED BY APPLICATION OF THE LAW TO THE FACTS, THE COURT'S JUDGMENT THAT IS UNNECESSARILY SUGGESTIVE.
AS A PRACTICAL MATTER, I THINK DENOVO REVIEW PROVIDES THE PARTIES WITH TOOLS THAT THEY CAN USING REAL-TIME TO MAKE THAT CALL AND I SPECIFICALLY MEAN POLICE OFFICERS.
>> HOW IS THIS DETERMINATION DIFFERENT FROM WHAT THE TRIAL COURT DOES WHEN IT WAYS THROUGH THE UNFAIR PREJUDICE VERSUS PRIVATIVE VALUE EVIDENCE WHICH THEY DO ALL THE TIME.
CREDIBILITY, RELIABILITY, DETERMINATION, ALWAYS REVIEWED BY ABUSE OF DISCRETION.
HOW IS THIS DIFFERENT?
>> IN THIS CASE WE ARE TALKING ABOUT LARGER CONSTITUTIONAL PRINCIPLE AND A LINE THE POLICE

CANNOT CROSS AS OPPOSED TO A
JUDGMENT CALL ABOUT WHETHER
SOMETHING IS RELEVANT OR
UNFAIRLY PREJUDICIAL.
SO THAT DETERMINATION OF A 403
ANALYSIS CAN ONLY BE MADE BY
ABUSE OF DISCRETION.
WHEN TALKING ABOUT A SUPPRESSION
ISSUING A CONSTITUTIONAL BASIS
THERE NEEDS TO BE A CLEAR LINE
POLICE KNOW THAT THEY ARE NOT
ABLE TO CROSS.
THE ONLY WAY THAT CAN REALLY BE
CREATED IS APPELLATE COURTS
ENGAGE IN DENOVO REVIEW WHICH
NOT ONLY TELLS THEM WHAT IS NOT
ACCEPTABLE BEHAVIOR BUT
ACCEPTABLE BEHAVIOR.
>> DOWN TO 2 MINUTES.
>> I WILL RESERVE THE REST OF MY
TIME.
>> MR. CHIEF JUSTICE,
MAY IT PLEASE THE
COURT, BEFORE THIS CAN BE A
PROPERLY APPLIED TO THIS
QUESTION, I WOULD LIKE TO START
AT THE TOP BY CLARIFYING OUR
POSITION IN RESPONSE TO THE
QUESTIONS, WE DO AGREE WITH
JUSTICE PAULSON THAT THERE IS A
DENOVO REVIEW OF SUBSIDIARY
QUESTIONS, TO GIVE AN EXAMPLE
THE CHIEF JUSTICE ASKED THE
SUBSTANTIVE STANDARD FOR PRONG
ONE AND I AGREE WE DON'T HAVE TO
HAVE A TEST FOR PRONG ONE,
WHETHER WE DO WITH PRONG 2 OR
NOT BUT COURTS EVEN APPLYING
ABUSE OF DISCRETION REVIEW AND
ANNOUNCE FACTORS THEY FIND, THE
END OF THE DAY APPLYING THOSE
FACTORS THEY WILL DEFER WHERE
TRIAL JUDGE APPLICATION IS
REASONABLE SO DOING DISCRETION
REVIEW A COURT MIGHT SAY WHEN
CONSIDERING IT IS SUGGESTIVE YOU
LOOK AT THINGS LIKE WHETHER OR
NOT THERE ARE MULTIPLE
INDIVIDUALS WHO FIT THE
DESCRIPTION.
THAT'S THE KIND OF FACTOR YOU
WOULD LOOK AT DENOVO TO ASK IF
IT IS A MATTER OF LAW SO YOU GET
LAW CLARIFICATION EVEN UNDER THE

ABUSE OF DISCRETION REVIEW
STANDARD WE WERE ADVOCATING FOR
BUT AT THE END OF THE DAY, ASK
WHAT THE TRIAL JUDGE DID AND THE
BALANCE WAS REASONABLE RATHER
THAN WHETHER IT IS WHAT YOU
YOURSELVES WOULD HAVE DONE.
>> WE AGREE, HOW DO YOU WIN THIS
CASE WHERE YOU HAVE A PHYSICALLY
SIMILAR DEFENDANT DOWN TO THE
TATTOOED TEARS ON THE CHEEK WITH
GUNPOWDER RESIDUE ON HIS HANDS
AND ONLY ZAVION ALAHAD IS SHOWN
TO THE VICTIM.
USING THE TEST YOU ARTICULATED,
DON'T YOU LOSE?
>> WE DISPUTE THE PREMISE OF THE
QUESTION THAT THERE'S A PHYSICAL
SIMILARITY HERE.
YOU CAN LOOK AT THE PHOTOGRAPHS
OF THE TWO MEN WHO IN OUR VIEW
LOOKED NOTHING ALIKE EXCEPT THE
BROADEST MOST GENERAL
DESCRIPTION.
IN FACT, IF POLICE HAD DONE A
2-MAN LINEUP WITH ZAVION ALAHAD
AND MISTER NIXON WHO ARE 8 YEARS
APART IN AGE, WHAT IS NOT
TEENAGER, ONE IS A GROWN MAN,
THE FACIAL STRUCTURES ARE
DIFFERENT, THE SKIN COLOR IS
DIFFERENT, IF THOSE TWO
INDIVIDUALS WERE PLACED TOGETHER
IN A LINEUP, I THINK WE WOULD BE
HERE, THE DEFENSE'S POSITION WAS
THAT WAS AN UNDULY SUGGESTIVE
LINEUP BECAUSE THE TWO LOOKED SO
DISSIMILAR.
>> THAT IS ONLY RELEVANT -- THE
RELIABILITY THING, I AM ASSUMING
THE RELEVANCE OF THE OTHER
SUSPECT IS ON THE UNNECESSARY
UNNECESSARILY SUBJECTIVE --
>> NOT ENTIRELY SURE IT IS NOT
RELEVANT TO BOTH.
>> HOW'S THE RELIABILITY, ISN'T
IT BASED ON WHAT THE WITNESS WAS
ABLE TO OBSERVE?
>> I THINK IT ALL GOES TO
RELIABILITY.
YOU CAN MAKE THE ARGUMENT.
WE HAVEN'T CAREFULLY LOOKED AT
THIS QUESTION.
BUT A DEFENDANT MIGHT MAKE THE

ARGUMENT THERE WAS SOMEONE OUT
THERE WHO RESEMBLED ME, HAD THE
PERSON BEEN THERE, I WOULDN'T BE
PREPARED TO SEE IT WOULDN'T BE
IRRELEVANT UNDER THAT PRONG.
GOING BACK TO THE TRADITIONAL
FACTORS COURTS HAVE APPLIED
HERE, ON CLARIFICATION, THIS
ECHOES JUSTICE SCALIA, YOU GET
LITTLE LAW CLARIFYING BENEFITS
WHEN THE LEGAL QUESTION IS SO
BOUND UP IN THE FACTS, IF ANY
ONE PERSON IS LIKELY TO BE
CONSTRAINED TO WHAT PARTICULAR
FACTUAL MIX OF THE CASE WAS,
THAT IS WHAT YOU GET, THE
BIGGEST FACTORS, THE FIRST IS
THE OPPORTUNITY FOR THE
EYEWITNESS TO GET A GOOD LOOK AT
THE PERPETRATOR.
EVEN IN THAT FACTOR THERE ARE SO
MANY FACTS THAT MIGHT BE
RELEVANT INCLUDING WAS THE
WITNESS WEARING HER GLASSES THAT
DAY?
WHAT TIME OF DAY WAS IT?
WAS SHE TIRED?
HOW FAR AWAY WERE THEY?
IF YOU CHANGE ONE OF THOSE FACTS
YOU MIGHT GET A DIFFERENT
RESULT.
YOU DON'T GET THE SAME BANG FOR
YOUR BUCK AS THE DENOVO REVIEW
HERE BECAUSE PRESIDENTS DON'T GO
THAT FAR.
THE SECOND POINT ON LAW
CLARIFICATION OF IS IT DOES
SUFFICE TO PROVIDE LAW
CLARIFYING BENEFITS.
IN SOME INSTANCES YOU TAKE A
LITTLE LONGER.
YOU GET THE LAW CLARIFICATION I
REFERENCED WHERE SETTING OFF THE
LEGAL TEST, EVEN WHEN DOING
APPLICATION OF FACT, YOU GET LAW
CLARIFYING BENEFITS, YOU GET
THOSE NOT WHEN YOU AFFIRM BUT
WHEN YOU REVERSE BECAUSE ON THE
ISSUE OF FIRST IMPRESSION THE
TRIAL JUDGE'S CHANNEL DISCRETION
LOOKS SOMETHING LIKE THIS, WITH
EACH REVERSAL THE APPELLATE
COURT SAID DON'T DO WHATEVER
THAT WAS, DISCRETION GETS

NARROWER AND NARROWER.
>> IT IS UNCLEAR WHAT THE DEMARCATION WAS, WHEN WE COME INTO THE CASE.
WHAT EXACTLY, IF THE TRIAL COURT MAKES THE FACTUAL FINDINGS, AND DETERMINATION AS TO WHETHER THE SHOW UP WAS SUGGESTIVE OR NOT, ONCE THOSE FACTUAL FINDINGS ARE MADE AND WE APPLY AN ABUSE OF DISCRETION STANDARD TO IT WHAT IS LEFT FOR US TO DO IN DENOVO?
>> THE PREDICATE LEGAL QUESTIONS BEFORE THE APPLICATION OF LAW FACT, THERE'S A DISPUTE IN THIS CASE, A QUESTION ABOUT CERTAIN FACTS ARE RELEVANT.
THAT IS THE DENOVO REVIEW.
CERTAIN FACT HAS LEGAL RELEVANCE, IT IS WHEN YOU GET TO THE POINT AND APPLICATION OF FACT, THAT IS WHAT THE CASE IS.
>> HELP US UNDERSTAND, SHOWUP BY DEFINITION IS SUGGESTED.
>> THE COURTS HAVE SAID THAT.
>> ALL THE WORK IS BEING DONE.
>> I AGREE.
>> WHAT ARE THE FACTORS?
THAT'S WHERE THE LAW COLUMNS IN.
WHAT ARE THE FACTORS?
THERE'S A DISAGREEMENT WHERE THE DCA TALKS ABOUT FEDERAL COURTS, THE DRIVING FORCE VERSUS ALL THESE MICRO DETAILS, IT IS NEVER NECESSARY FOR A POLICE OFFICER TO SAY THIS MEETS YOUR DESCRIPTION, OR ANYONE ELSE THEY WOULD SAY IS UNNECESSARY SO IT SEEMS IT IS RELEVANT TO THIS QUESTION OF WHAT THE REVIEW SHOULD BE LIKE.
>> WE DON'T DISPUTE, WHEN SETTING OUT THE PARAMETERS, THERE'S SOME DENOVO.
I DON'T TAKE THE FOURTH DISTRICT TO HAVE DONE ANYTHING DIFFERENTLY.
IN A FOOTNOTE, TO DECIDE THE RELEVANCE OF MR.
NIXON'S EXISTENCE, IT ASSUMED HIS EXISTENCE WAS RELEVANT BUT NOTED IN THE FOOTNOTE THERE IS DISAGREEMENT ABOUT THIS AND THE APPLICATION HAS DIFFERENCE.

>> YOU HAVEN'T ANSWERED THE QUESTION AS TO HOW THE COURT IS SUPPOSED TO KNOW WHAT IS UNNECESSARILY SUBJECTIVE.
HOW ARE YOU SUPPOSED TO DO THAT?
>> COURTS CAN ARTICULATE FACTORS.
A FACTOR OF THE PURE QUESTION OF LAW, THE BODY OF CASE LAW TALKED ABOUT FACTORS THAT ARE RELEVANT, THEY SAID ANYTHING TO THE EYEWITNESS, WHICH FUNNELED THAT PARTICULAR PERPETRATOR.
WAS THE FACTOR RELEVANT?
WHAT THEY ARE GETTING AT.
IT IS NOT WHAT WAS HAPPENING.
THE FACTOR ASSUME THE RELEVANCE OF THE FACT MR.
NIXON WAS THERE.
AND THE FACTS, WALTON IS NOT A SHOWOFF CASE, A PHOTO ARRAY CASE, THE CASES THAT DEAL WITH THIS, THE CROSS APPEALED ABUSE OF DISCRETION REVIEW.
THE MORE CLOSELY ON POINT, RELEVANT AS WELL AS TO IDENTIFY HERE.
>> WHY SHOULD THE STANDARD BE DIFFERENT FROM THOSE CATEGORIES?
THAT ESCAPES ME.
>> NOT SURE THEY SHOULD BE.
>> WHAT IS THE POSSIBILITY OF BEING DIFFERENT?
>> THEY SHOULD BE THE SAME.
IF YOU'RE LOOKING TO DRAW FROM THE PRESIDENT MOST CLOSELY ON POINT --
>> WE WANT OUR PRESIDENT TO BE INTERNALLY CONSISTENT FROM A POINT LIKE THAT.
>> THE IDENTIFICATION PROCEDURES FOR DISCRETION BUT IF YOU WANT TO DRAW FROM CASE LAW THAT ON POINT.
YOUR HONOR ASKED THE QUESTION OF THE CAUSE OF WHICH THERE ARE CASES APPLYING TO DENOVO REVIEW.
>> YOU THINK THAT'S WRONG?
>> YOU HAVE A LITIGATING POSITION IN THE FUTURE CASE.
FOURTH AMENDMENT QUESTIONS ALMOST NEVER GO TO RELIABILITY OF EVIDENCE.
COURTS OFTEN LAMENT ON

EXCLUSIONARY REVEAL THEY ARE
FORCED TO EXCLUDE FROM JURIES
PURVIEW CLEARLY RELEVANT IN THE
EVIDENCE BY SEARCHES AND
SEIZURES, THE KEY DIFFERENCE IS
THIS LOOKS A LOT LIKE RULE 403
WHERE THE REAL ISSUE IS
RELIABILITY EVIDENCE.
THAT'S THE POINT OF THE PROCESS
INQUIRY.
WHAT WE THINK ARE TRUSTWORTHY.
>> WHAT ABOUT STEP ONE?
IT SEEMS YOUR CASES SUPERSTRONG
AND NOT EQUALLY STRONG.
>> BOTH PRONGS GO TO
RELIABILITY.
UNDER PRONG ONE THE PROCEDURE
USED IS SUGGESTIVE TO
RELIABILITY.
>> THAT DEPENDS ON THE
NECESSARILY PART.
IF NECESSARILY IS LOOKING AT
EXIGENCY AND STUFF, STEP ONE
DOESN'T HAVE ANYTHING TO DO WITH
IT.
>> ON THE WHOLE, IT GOES TO
CONSTITUENT PARTS, THE INQUIRY
LOOKS LIKE 403.
IF YOU WERE TO ASSUME THE US
SUPREME COURT NEVER SAID THE DUE
PROCESS CLAUSE PROTECTS RELIANCE
FROM OUT-OF-COURT
IDENTIFICATIONS, DEFENDANTS COME
BEFORE YOU AND MAKE THE SAME
TYPES OF ARGUMENTS IN THIS CASE.
HE WOULD DO SO NOT UNDER
CONSTITUTIONAL RULE BUT UNDER
RULE 403.
THOSE ARGUMENTS IN THE TRIAL
COURT, YOU WOULD INSTRUCT THE
DCA ON A 403 ANALYSIS TO DO WHAT
THEY SHOULD DO.
A DIFFERENT STANDARD OF REVIEW
APPLIES IN PRONG ONE AS COMPARED
TO PRONG 2.
THERE IS SUPPORT FOR THAT IN
CASE LAW.
THE 10TH CIRCUIT, BOTH DO
SOMETHING LIKE THAT, THEY FLIP
THE ANALYSIS AND THEY SAY PRONG
ONE, THE FINAL FACT, WITH NO
APPLICATION AS TO THE ULTIMATE
QUESTION.
THERE IS AN IDEA IN CASE LAW YOU

COULD SPLIT THE BABY IN THAT
WAY, IF YOU SAY DENOVO IN THE
FIRST PRONG AND THEN IT IS
BETTER IN THE POSITION THAT
ZAVION ALAHAD IS ADVANCING BUT
ON BALANCE WE THINK THERE SHOULD
BE A DIFFERENCE WITH ALL PRONGS.
>> YOU DON'T WANT TO EMPHASIZE
THIS, IT IS A CONSTITUTIONAL
PRINCIPLE AT STAKE THAT PUSHES
INTO DENOVO REVIEW.
>> WE DON'T THINK, IT IS
SIGNIFICANT IN THE ANALYSIS,
CONSTITUTIONAL RIGHTS,
RULE-BASED RIGHTS CAN ALL HAVE
AN IMPACT ON THE JURY'S VERDICT.
HARD TO SAY THE HEARSAY IS LESS
IMPORTANT OR 403 IS LESS
IMPORTANT BUT THAT IS WHAT THE
ARGUMENT TURNS ON, THIS IS
CONSTITUTIONAL ISSUE, THE
CONSTITUTIONAL ISSUE WILL
DICTATE, THIRD PARTIES LIKE LAW
ENFORCEMENT OFFICERS, THERE'S
VERY LITTLE LAW CLARIFYING
BENEFIT TO DOING DENOVO REVIEW.
EITHER WAY LAW ENFORCEMENT COULD
USE THE BEST JUDGMENT AND WITH
ABUSE OF DISCRETION.
>> OUTSIDE THE CRIMINAL CONTEXT
ARE THERE OTHER CONSTITUTIONAL
RIGHTS THAT ARE REVIEWED?
FOR MAJOR CONSTITUTIONAL ISSUES?
>> ARLINGTON HEIGHTS, ANIMUS
REVIEWS A GREAT EXAMPLE BUT EVEN
IN THE CRIMINAL CONTEXT, 4 OR 5
CONTRACTS, TO PROCEED, HARD TO
IMAGINE MANY LEGAL RULES ARE
MORE IMPORTANT TO THE OUTCOME.
THERE IS AN ALLEGATION OF THE
PROSECUTOR, ALL THOSE THINGS, IT
IS THE CASE THAT THE
CONSTITUTIONAL NATURE OF THIS IS
POSITIVE.
THE LAST THING ABOUT STANDARDS
OF REVIEW IS ONE OF THE
CONSIDERATIONS THEY LOOK AT,
WHETHER OR NOT THE SIGNIFICANCE
OF THE ISSUE TO THE OUTCOME AT
TRIAL, WHETHER THERE ARE OTHER
THINGS THE DEFENDANT MIGHT
INVOKE TO MITIGATE THE HARM OF
ERRONEOUSLY EVIDENCE, JUSTICE
GINSBURG MADE THIS POINT IN

HARRY VERSUS NEW HAMPSHIRE,
THERE ARE PLENTY OF SAFEGUARDS
EVEN IN THE CASE WHERE
SUGGESTIVE IDENTIFICATION
PROCEDURE COMES IN, THE RIGHT TO
COUNSEL, CROSS-EXAMINATION, MORE
VALID CONSTRUCTION.
A COUPLE EXAMPLES ARRIVE IN THIS
CASE.
FLORIDA STANDARD JURY
INSTRUCTION 3.9 SEE INSTRUCT
JURORS TO EXERCISE CAUTION WHEN
REVIEWING EYEWITNESS
IDENTIFICATION AND THERE ARE
MANY FACTORS THEY SHOULD THINK
ABOUT INCLUDING BIGGER FACTORS.
ANOTHER EXAMPLE FROM THIS CASE
IS THE FACT THAT A DEFENDANT CAN
BRING IN EXPERT TESTIMONY ON
RELIABILITY OF IDENTIFICATION
AND THAT IS WHAT HAPPENED HERE
WITH ZAVION ALAHAD'S WITNESS AND
THE JURY COULD TAKE IT ALL IN.
THE POINT I MAKE IS THE DUE
PROCESS TEST IS DESIGNED TO WEED
OUT THE MOST SUGGESTIVE AND MOST
UNRELIABLE IDENTIFICATIONS.
ABUSE OF DISCRETION REVIEW
ALLOWS COURTS TO DO THAT.
THEY ARE SAYING IT IS NOT
UNREASONABLE TO CONCLUDE THIS
IDENTIFICATION WAS NOT SO
SUGGESTIVE AS TO HAVE CHANGED
THE OUTCOME AND OTHER
EVIDENTIARY EVERY SAFEGUARDS.
OTHERWISE I AM HAPPY TO DO THIS.
>> I WOULD LIKE TO BEGIN BY
ADDRESSING THE ARGUMENT THAT
ABUSE OF DISCRETION PROVIDES
ADEQUATE LAW CLARIFYING BENEFITS
BUT I WOULD LIKE TO USE THE
FOURTH DCA'S OPINION ON THIS.
THE FOURTH DCA, ULTIMATELY FOUND
REASONABLE MINDS COULD DIFFER AS
TO WHETHER FAILURE TO PROVIDE
NIXON AND THE LINEUP OR SHOW UP
WAS UNNECESSARILY SUGGESTIVE AND
WHAT THAT MEANS IS IN THE
FUTURE, 1 TRIAL CT.
COULD FIND IT IS NOT
UNNECESSARILY SUGGESTIVE.
ANOTHER TRIAL COURT WOULD FIND
THAT IT IS UNNECESSARILY
SUGGESTIVE.

IN THE FIRST INSTANCE THE
EVIDENCE DOES NOT GET
SUPPRESSED, THE SECOND INSTANCE
IT DOES GET SUPPRESSED.
>> THE STATE'S POSITION WOULD BE
FOCUSING ON THE PIECE OF THE
TEST, IF THE TWO SUSPECTS ARE SO
EASILY DISTINGUISHED THEY WERE
WEARING DIFFERENT COLOR CLOTHES.
READILY DISTINGUISHED, IT WOULD
NOT BE SUGGESTIVE TO PUT JUST
THE ONE THAT MATCHES THE
DESCRIPTION OF THE DEFENDANT.
FROM THE LAW CLARIFYING
STANDPOINT WE ARE AT THE SAME
PLACE WHERE IT IS A FACTUALLY
SENSITIVE DETERMINATION.
IS THAT WHAT THEY ARE SAYING?
THE TRIAL COURT HAVING MADE A
FACTUAL DETERMINATION, PERHAPS
IN THIS CASE THAT THESE TWO
SUSPECTS WERE READILY DISTINCT
TROUBLE FOUND IT NOT
UNNECESSARILY SUGGESTIVE.
ARE YOU ASKING US TO ADOPT A
RULE THAT WOULD DEPRIVE A TRIAL
COURT AFFECTS ABILITY TO DO
THAT?
>> I'M ASKING THE COURT TO ADOPT
A RULE THAT PROVIDES
RELIABILITY.
IN THAT SITUATION, WHERE
REASONABLE MINDS COULD DIFFER ON
WHETHER IT IS SUGGESTIVE, THE
COURTS COME TO OPPOSITE
CONCLUSIONS, THE RESULTS ARE
BOTH GOING TO BE AFFIRMED ON
APPEAL WHICH MEANS THE RESULT
THAT IS LEFT OVER IS THERE IS NO
EXPLANATION FOR IF THE SECOND
PERSON SHOULD BE INCLUDED IN THE
SHOW UP PROCEDURES.
SOME COURTS COULD FIND IT
NECESSARY IN SOME COURTS NOT,
EITHER WAY UNDER ABUSE OF
DISCRETION REVIEW THE APPELLATE
COURT SAYS IT IS OKAY SO THAT IS
A PROBLEM THAT RESULTS IN AN
INCONSISTENT APPLICATION OF THE
LAW.
>> UNLESS ANYONE ELSE HAS ANY
QUESTIONS YOU CAN HAVE 30
SECONDS.
>> BASED ON THE ARGUMENTS THIS

MORNING, I ASK THE COURT DECIDE DENOVO REVIEW IS THE APPROPRIATE STANDARD WHEN COURTS ARE ASKED TO REVIEW PRETRIAL IDENTIFICATION PROCEDURES AND I ASK THE COURT REMAND THE CASE TO THE FOURTH DISTRICT COURT OF APPEAL TO APPLY THE STANDARD OF REVIEW.
THANK YOU.
>> WE WILL NOW TAKE A 10 MINUTE RECESS, THANK YOU.