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State v. Vargas Appellant's Brief Dckt. 44843

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	Supreme Court No. 44843
Plaintiff/Respondent,)	
)	
v.)	APPELLANT'S BRIEF
)	
TANYA A. VARGAS,)	
)	
Defendant/Appellant.)	
)	
_____)	

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District
Of the State of Idaho, in and for the County of Ada
The Honorable Gerald Schroeder, Presiding.

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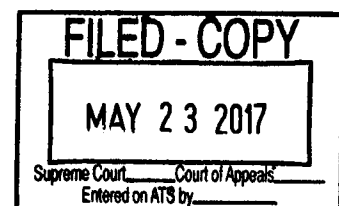


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STATEMENT OF THE CASE

A. *Nature of the Case*

This is an appeal from the Opinion on Appeal of the District Court (“Appellate Opinion”), which affirmed the judgment of conviction of the Appellant, Tanya Vargas, on one misdemeanor count of eluding a police officer. The Appellate Opinion erred in affirming the trial court’s denial of Ms. Vargas’s motion in limine seeking suppression of the police officer’s identification of her, both in and out of court. Accordingly, the Appellate Opinion is appropriately reversed.

B. *Course of Proceedings*

On June 5, 2015 Ms. Vargas was charged with one count of eluding a police officer in violation of Idaho Code § 49-1404. Ms. Vargas pled not guilty and the matter proceeded to a jury trial on March 15, 2016. Ms. Vargas’s pre-trial motion in limine seeking suppression of the police officer’s identification of her, both in and out of court, was denied by the trial court. The jury found Ms. Vargas guilty after a one day trial. Ms. Vargas was sentenced to 166 days of jail and was credited for 166 days served. (R., 0082.) Ms. Vargas timely appealed her judgment of conviction to the District Court on April 15, 2016. (R., 0083-0086.) On December 23, 2016 the District Court issued the Appellate Opinion affirming the trial court’s denial of Ms Vargas’s motion in limine. (R., 0154-0163.) Ms. Vargas timely appealed the Appellate Opinion on February 15, 2017. (R., 0164-0168.)

C. *Factual and Procedural History*

Just before 11:00 p.m. on May 8, 2015 Boise Police Department Officer Natalie Wing was patrolling in a marked car in the vicinity of Curtis and Franklin in Boise, Ada County, Idaho. (Trial Tr., p. 7, L. 12-24.) Officer Wing observed a vehicle driving in front of her that had a non-

functioning taillight. (Trial Tr., p. 8, L. 9-18.) Officer Wing followed the vehicle for approximately two minutes at a speed of thirty miles per hour. (Trial Tr., p. 21, L. 19-25.)

Officer Wing attempted to stop the vehicle near the intersection of Curtis and Cassia. (Trial Tr., p. 9, L. 3-6.) Officer Wing turned on her overhead lights, at which time the vehicle slowed but did not stop. (Trial Tr., p. 10, L. 14-p. 11, L. 10.) Pursuant to Boise Police Department policy, Officer Wing did not pursue the vehicle. (Trial Tr., p. 17, L. 1-15.) Officer Wing obtained the vehicle's license plate number. (Trial Tr., p. 10, L. 7-13.)

While attempting to initiate the traffic stop, Officer Wing observed the driver glancing in the driver's sideview mirror "four to five times." (Trial Tr., p. 12, L. 22-p. 13, L. 13.) Officer Wing never observed the driver from the front or the side, only from behind. (Trial Tr., p. 25, L. 14-18.) Officer Wing observed the driver for a total of four to eight seconds. (Trial Tr., p. 26, L. 14-21.) Based on these glances, Officer Wing described the driver as a Hispanic female in her thirties. (Trial Tr., p. 14, L. 2-5.) Officer Wing was unable to establish any other identifying characteristics of the driver, including build, height, tattoos or physical impairments. (Trial Tr., p. 27, L. 17-p.28, L. 17.)

Officer Wing investigated the registered owner of the vehicle and obtained Ms. Vargas's name. (Trial Tr., p. 17, L. 12-24.) Officer Wing then obtained a state identification card of Mr. Vargas bearing her picture. (Trial Tr., p. 19, L. 9-13.) Officer Wing looked at no other photos or lineup and determined, based on the identification card photograph alone, that Ms. Vargas was driving the vehicle that failed to stop. (Trial Tr., p. 20, L. 16-20; Trial Tr., p. 29, L. 21-24.)

Prior to trial, Ms. Vargas moved to suppress both Officer Wing's out of court, and expected in-court, identification of her. (Limine Tr., p. 12, L. 22-p. 22, L. 25.) The trial court denied the motion in limine. (*Id.*)

At trial, Officer Wing identified Ms. Vargas as the driver of the vehicle. (Trial Tr., p. 17, L. 25-p. 18, L. 10.) Officer Wing also testified regarding her out of court identification of Ms. Vargas as the driver of the vehicle. (Trial Tr., p. 19, L. 2-p. 20, L. 4.) Ms. Vargas was found guilty. (Trial Tr., p. 43, L. 15-19.)

ISSUES ON APPEAL

1. Did the Appellate Opinion err in affirming the trial court's denial of Ms. Vargas's motion in limine seeking suppression of Officer Wing's identification of her, both in and out of court?

ARGUMENT

A. *Standard of Appellate Review*

For an appeal from the district court, sitting in its appellate capacity over a case from the magistrate division, the Supreme Court reviews the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *State v. Korn*, 148 Idaho 413, 415, 224 P.3d 480, 482 (2009). If those findings are so supported and the conclusions follow therefrom, and if the district court affirmed the magistrate's decision, the Supreme Court affirms the district court's decision as a matter of procedure. *Id.* Thus, the appellate courts do not review the decision of the magistrate. *State v. Trusdall*, 155 Idaho 965, 968, 318 P.3d 955, 958 (Ct. App. 2014). Rather, the Supreme Court is procedurally bound to affirm or reverse the decision of the district court. *Id.*

B. *The Appellate Opinion Erred as a Matter of Law in Affirming the Trial Court's Denial of Ms. Vargas's Motion in Limine Seeking Suppression of Officer Wing's Identification of her, Both in and out of Court.*

The Appellate Opinion erred in affirming the trial court's denial of Ms. Vargas's motion in limine seeking suppression of Officer Wing's (1) out of court; and (2) in-court identification

because a single photo lineup, even one organized by law enforcement is, inherently suspicious and impermissibly suggestive as a matter of law. Though not reached by the Appellate Opinion for reasons discussed herein, the trial court also erred in ruling that Officer Wing's out of court identification of Ms. Vargas, even if impermissibly suggestive, was nonetheless reliable and thus admissible.

1. **Out of Court Identification.**

Out of court identifications “must be suppressed when, under the totality of the circumstances, “the identification procedure was so impermissibly suggestive’ that they give ‘rise to a very substantial likelihood of misidentification.’” *State v. Best*, 117 Idaho 652, 654, 791 P.2d 33, 35 (Ct. App. 1990) (quoting *State v. Kysar*, 116 Idaho 992, 994–94, 783 P.2d 859, 861–62 (1989); *State v. Edwards*, 109 Idaho 501, 708 P.2d 906 (Ct. App. 1985). *See also Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375 (1972). “In particular, single subject showups are inherently suspect and generally not condoned.” *State v. Hoisington*, 104 Idaho 153, 162, 657 P.2d 17, 26 (1983).

Though an identification may be inherently suspicious, such inherent suspicion does not render it *per se* inadmissible. Rather, a two-step analysis must be completed. “[W]e first look at whether the identification procedures are overly suggestive, and if we find that they are, we examine whether the reliability of the identification outweighs the corrupting effect of the suggestive identification.” *State v. Almaraz*, 154 Idaho 584, 594, 301 P.3d 242, 252 (2013).

To determine the admissibility of the out of court identification testimony, reliability is the foundation upon which the testimony is weighed. *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243 (1977). Five factors must be considered to determine the reliability of the identification:

(1) the opportunity for the witness to view the criminal at the time of the crime; (2) the degree of the witness' attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated at the identification; and (5) the time span between the crime and the identification. *Kysar, supra; Manson, supra; State v. Hoisington*, 104 Idaho 153, 657 P.2d 17 (1983).

The trial court denied Ms. Vargas's motion in limine seeking suppression of Officer Wing's out of court identification. The trial court premised its ruling on two bases: (1) characterization of Officer Wing's out of court identification as the culmination of a permissible investigation, and not a single photo lineup (Limine Tr., p. 13, L. 5-8; p. 17, L. 24-p. 18, L. 3); and (2) reasoning that even if the identification was impermissibly suggestive, it was nonetheless sufficiently reliable as to be admissible (Limine Tr., p. 18, L. 4-p. 20, L. 23). Stated differently, the trial court ruled that Officer Wing's identification of Ms. Vargas was not impermissibly suggestive because it was made by law enforcement during an investigation, thereby obviating the necessity of analyzing the reliability factors set forth in *Manson*. Assuming *arguendo* that the identification was impermissibly suggestive, the trial court found the identification nonetheless reliable after consideration of the *Manson* factors, which are only reached in instances where an identification is impermissible in the first instance. *State v. Almaraz*, 154 Idaho 584, 594, 301 P.3d 242, 252 (2013) ("As previously stated we first look at whether the identification procedures are overly suggestive, and if we find that they are, we examine whether the reliability of the identification outweighs the corrupting effect of the suggestive identification.")

The Appellate Opinion affirmed the trial court, ruling that Officer' Wing's identification was not impermissibly suggestive:

The appellant has not shown that Officer Wings' [sic] identification of the appellant by viewing her driver's license photo, after her observations and obtaining the license plate number and registration information, was the result of improper ("tainted") state conduct. . . . One may have serious concerns about the reliability of the identification, but the process leading to the identification is not violative of due process.

(R., 0160.)

Because the Appellate Opinion determined that Officer Wing's identification of Ms. Vargas was not impermissibly suggestive, it did not reach the second step of the analysis and consider the *Manson* reliability factors. *State v. Almaraz*, 154 Idaho 584, 594, 301 P.3d 242, 252 (2013) ("As previously stated we first look at whether the identification procedures are overly suggestive, and if we find that they are, we examine whether the reliability of the identification outweighs the corrupting effect of the suggestive identification.")

In ruling that Officer Wing's identification of Ms. Vargas was not impermissibly suggestive, the Appellate Opinion wholly relied upon a decision of the Minnesota Court of Appeals, *State v. Hooks*, 752 N.W.2d 79 (Minn. Ct. App. 2008). In *Hooks*, Urbanski, an undercover officer, was making a controlled purchase of narcotics with the assistance of an informant. *Id.* at 82. Urbanski and the informant drove to a bar where the informant spoke to a man in a parked car. *Id.* The man executed a U-turn and pulled alongside Urbanski's car "so that the drivers were within reach of each other." *Id.* Urbanski purchased crack cocaine from the man. *Id.* Urbanski reported the license plate number and learned the car was registered to Keith Hooks. *Id.* Urbanski looked up Hooks' drivers license photo and identified the man from whom he purchased the crack cocaine as Hooks. *Id.*

The Minnesota Court of Appeals ruled that Urbanski's identification of Hooks was not impermissibly suggestive, thus negating application of the *Manson* reliability factors. The

Minnesota Court of Appeals reasoned that a single photo lineup administered to a lay witness is unduly suggestive:

It is commonly understood that the police solve crimes, so a witness naturally assumes that the police have unique expertise and information to determine the offender's identity. This confidence in police skill and insight demonstrates itself routinely; when the public learns that police have identified a suspect in some publicized crime, for example, the public, relying only on the perception of police credibility rather than on specific evidence, is generally influenced by the announcement and may tend to prejudge the suspect to be guilty.

Id. at 84.

By contrast, the Minnesota Court of Appeals ruled that a single photo lineup, self-administered by law enforcement, is not impermissibly suggestive:

we hold that an investigating police officer who obtains and observes for himself a driver's license photograph to identify for himself the person he observed committing the investigated crime does not implicate that person's due process rights. Unlike the eyewitness to whom a single police-supplied photograph might suggest the photographed person's guilt, Officer Urbanski could not have been unduly influenced by his own identification procedure. Acting as the investigating officer, Urbanski decided for himself which photograph to view to confirm his reasoning that the licensed driver of the car that officers stopped leaving the scene of the crime was the offending drug dealer. The lineup options therefore narrowed to a single photograph based on Urbanski's own reasoning, not based on the influence of an authority whose narrowing would tend to suggest a particular suspect to a witness.

Id. at 85.

By adopting *Hooks'* rationale, however, the Appellate Opinion wholly ignored the facts and rulings in *Manson*, a United States Supreme Court decision. In *Manson*, an undercover narcotics officer, Glover, purchased heroin from the defendant, whom he did not know, but was able to describe to another officer at the police station. 432 U.S. at 100. Recognizing the description of the heroin seller, the other officer showed Glover a single, non-lineup photograph

of the defendant and Glover identified the man in the photograph as the defendant who sold him heroin. *Id.* at 101.

On a *habeas* petition, three separate federal courts confirmed that the single-photo lineup was unduly suggestive, even though the identifying witness was undisputedly law enforcement, specifically a trained narcotics officer. “The [district] court noted that in the Second Circuit, its controlling court, it was clear that ‘this type of identification procedure (display of a single photograph) is impermissibly suggestive and turned to the second inquiry’”, the reliability of the identification. *Manson*, 432 U.S. at 107-108. In direct contravention of *Hooks*, the district court did not deem the single-photo lineup permissible, or otherwise draw a distinction, where identification is made by law enforcement and not a lay witness.

The Second Circuit Court of Appeals affirmed the district court’s ruling in *Manson*, ruling that “the exhibition of a single photograph to Glover was ‘impermissibly suggestive,’ and felt that, in addition, ‘it was unnecessarily so.’” *Manson*, 432 U.S. at 108. Again, Glover was a trained narcotics officer and his identification of the suspect in a single-photo lineup was deemed impermissibly suggestive, with no distinction drawn between identifications by lay and law enforcement witnesses.

At the Supreme Court, the petitioner admitted that “the procedure in the instant case was suggestive (because only one photograph was used) and unnecessary (because there was no emergency or exigent circumstances).” *Manson*, 432 U.S. at 109. The Supreme Court noted that “[n]o explanation was offered by the prosecutor for the failure to utilize a photographic array or to conduct a lineup.” *Id.* at 102.

The Court then enumerated the five specific factors, discussed *supra*, upon which a court may rely in determining whether an impermissibly-suggestive out of court identification is nonetheless sufficiently reliable as to be admissible:

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.

Id. at 114. See also *United States v. Morgan*, 690 F. Supp. 2d 274, 280 (S.D.N.Y. 2010) (undercover narcotics officer purchased crack cocaine from a defendant and identified him through the use of a six-photo array containing the defendant's photograph, as well as five "filler" photographs of "persons that look similar to the target photograph, based on the geographic area selected.")

New Jersey state courts reached the same conclusion as *Manson*, flatly rejecting the reasoning set forth in *Hooks*:

I agree with the majority's implicit disregard of the trial judge's determination that a different standard applies when the eyewitness is a police officer. Although police officers are no doubt cognizant of the importance of accurate identifications, that is no reason to leap to the assumption that police officers always make reliable identifications. Certainly the experience and training of police officers is a factor to be weighed but only with regard to the factors contained in the second prong of the *Manson/Madison* test; that an eyewitness is also a police officer does not present a basis for ignoring the corrupting effect of an impermissible identification procedure.

State v. Micelli, 2012 WL 443996, at *12 (N.J. Super. Ct. App. Div. Feb. 14, 2012), *rev'd in part*, 215 N.J. 284, 72 A.3d 235 (2013). See also *State v. Roberts*, 2010 WL 3516851, at *6 (N.J. Super. Ct. App. Div. Sept. 8, 2010) ("In the present case, the trial court found that the out-of-court photographic showups of October 11 and 20 were impermissibly suggestive. The court did so upon a finding that Officer Kowalski, prior to viewing the October 11 photograph, was told

that the person in the photograph was Alice Roberts. By that point, Officer Kowalski had already been told that other officers had positively identified the seller in the October 6 operation as ‘Alice Roberts.’”)

Thus, the relevant question appears to be one of first impression in Idaho, namely whether a different standard applies for law enforcement personnel, as opposed to lay witnesses, when determining whether an identification is impermissibly suggestive. *Hooks* stands for the proposition that a different, more deferential standard applies to law enforcement identifications, but Ms. Vargas can locate no instances of *Hooks* being applied outside Minnesota. By contrast, *Manson* explicitly recognized that an identification made by a trained narcotics officer was impermissibly suggestive because it resulted from a single-photo lineup. The Appellate Opinion ignored, and made no attempt to distinguish, the *Manson* identification by law enforcement personnel as part of a single-photo lineup which was deemed impermissibly suggestive.

This Court should decline to create Idaho law adhering to *Hooks* and directly contravening *Manson*, an abundantly cited United States Supreme Court decision. To adopt *Hooks*' rationale is to rule that law enforcement are infallible in making identifications, that no matter how suggestive a single-photo lineup is, as long as law enforcement is making the identification, a resultant identification, by definition, cannot be impermissibly suggestive. The training of a law enforcement officer is appropriately considered as part of the *Manson* reliability factors, but those factors are never reached unless the identification is first deemed impermissibly suggestive. In practice, *Hooks* serves to inoculate all identifications made by law enforcement from ever reaching the second step of scrutiny under the *Manson* reliability factors, as demonstrated by the Appellate Opinion's failure to do so. Such a firm and fast rule does not

allow for instances in which law enforcement errs and makes an identification on the basis of an impermissibly suggestive single-photo lineup.

If *Hooks* is rejected, it does not mean that all impermissibly suggestive identifications, whether made by lay or law enforcement witnesses, will be suppressed. Such impermissibly suggestive identifications may nonetheless be admissible if the identification is deemed sufficiently reliable under the *Manson* reliability factors. The identification in *Manson*, though deemed impermissibly suggestive, was nonetheless ruled admissible based on its reliability. *Manson*, 432 U. S. at 114-16. Rejection of *Hooks* simply means that the *Manson* reliability factors will be reached in the case of all impermissibly suggestive out of court identifications, whether made by lay or law enforcement witnesses.

Though, as discussed, the Appellate Opinion failed to reach the *Manson* reliability factors, the trial court considered them and erroneously concluded that Officer Wing's out of court identification was sufficiently reliable. The trial court relied most heavily on the second *Manson* factor, degree of witness attention:

The degree of witness attention I think would probably be intense. . . . this is a police officer who's actively trying to figure out who it is who's driving, and so, I think their attention is laser focused on who that was driving.

(Limine Tr., p. 18, L. 12-18.)

The trial court, erred, however, because the *Manson* factors, particularly the first one, weighed heavily and decisively against the reliability, and therefore admissibility, of Officer Wing's out of court identification of Ms. Vargas. First, Officer Wing had minimal time to view the criminal at the time of the crime. Officer Wing observed the reflection of the criminal by virtue of a few glances in a side view mirror a few square inches in size, while driving

presumably at least a car length behind, in the pitch darkness at 10:48 p.m. Despite the trial court concluding that Officer Wing was “laser focused” on identifying the vehicle’s driver, Officer Wing was able to describe the driver in no more detail than “Hispanic female” in her thirties.

The State cited no authority, and counsel could locate none, in which an identification satisfying the *Manson* standard occurred absent face to face identification of the defendant by the witness. In both *Morgan* and *Manson, supra*, the predicate identification was face to face and stationary, as opposed to occurring in moving vehicles through mirrors at night in this case. In *Manson*, the undercover officer stood face to face within two feet of the defendant in an apartment doorway for two to three minutes, and the undercover officer’s description included such detail as “his height, his build, the color and style of his hair, and the high cheekbone facial feature. It also included clothing” 432 U. S. at 114. In *Morgan*, the undercover officer also described the suspect in detail: “male black, medium build, approximately 23–27 years old, 5’7”–5’309”, 175–185 pounds, wearing black frame glasses, a black and white striped shirt, and blue jeans.” 690 F. Supp. 2d at 284. Officer Wing’s description of the driver of the vehicle as nothing more than a thirties Hispanic female is, by comparison to the descriptions in *Manson* and *Morgan*, so scant as to be non-existent and strongly indicative of the fact that Officer Wing could not have been paying close attention to the identity of the driver of the vehicle.

Second, Officer Wing was focused on safely operating her vehicle and effecting a traffic stop. Notwithstanding her training and desire to identify the driver of the vehicle, Officer Wing could not have been solely and entirely focused on identifying the driver of the vehicle.

Third, as discussed *supra*, Officer Wing’s description of the driver of the vehicle, prior to identifying Ms. Vargas, was scant. Officer Wing identified the criminal as a “Hispanic female.”

Officer Wing identified no further characteristics such as approximate age, build, tattoos, hair or eye color, or distinguishing physical characteristics. Approximately 99,296 persons in the state of Idaho fit the description of “Hispanic female”.¹

Fourth, Officer Wing undoubtedly demonstrated certainty in her identification of Ms. Vargas, but that is easy to do when the lineup consists of a single photograph of a person who matches the incredibly vague description of “Hispanic female”. It would have been a simple task for Officer Wing, after obtaining Ms. Vargas’s name, to ask a colleague to pull Ms. Vargas’s photograph and then arrange a lineup of Hispanic females in order to make a non-suggestive identification. Officer Wing declined to do so, rendering her certainty in identifying Ms. Vargas in a lineup of one both expected and irrelevant.

Fifth, it is unclear from Officer Wing’s report how much time elapsed between her witnessing of the driver of the vehicle and her identification of Ms. Vargas in a highly suggestive lineup of one.

Consideration of the *Manson* factors, as applied to this case, require exclusion of Officer Wing’s highly unreliable nighttime, side view mirror, single photograph lineup identification of Ms. Vargas.

2. In-Court Identification.

In *State v. Crawford*, 99 Idaho 87, 577 P.2d 1135 (1978), the Idaho Supreme Court recognized that the “the due process test for suppression of an in-court identification that is allegedly tainted by an impermissibly suggestive out-of-court identification is whether the out-

¹ Idaho Quickfacts – United States Census Bureau – Available: <http://www.census.gov/quickfacts/table/PST045215/16>

of-court identification was so suggestive that there is a very substantial likelihood of misidentification.” *Id.* at 103, 577 P.2d at 1151 (citing *Manson v. Braithwaite*, 432 U.S. 98 (1977) and *Neil v. Biggers*, 490 U.S. 188 (1972)); see also *State v. Hoisington*, 104 Idaho 153, 657 P. 2d 17 (1983).

Regarding Officer Wing’s in-court identification of Ms. Vargas, the Appellate Opinion cursorily ruled that “[r]eliability concerns exist but they are not the product of improper police conduct.” (R., 0161.) This ruling is the logical result of the Appellate Opinion’s first ruling, that Officer Wing’s out of court identification of Ms. Vargas was not impermissibly suggestive. Absent an impermissibly suggestive out of court identification, a related in-court identification does not give rise to a substantial likelihood of misidentification.

As discussed in the previous section, however, the Appellate Opinion erred in its ruling that Officer Wing’s out of court identification of Ms. Vargas was not impermissibly suggestive. Officer Wing’s out of court identification of Ms. Vargas was, in fact, both impermissibly suggestive and unreliable.

Accordingly, there existed a substantial likelihood for Ms. Vargas to be misidentified in court by Officer Wing as a result of the tainted out of court identification. As discussed *supra*, Officer Wing identified Ms. Vargas in an inherently suspect single photo lineup. The identification was based on fleeting glances in a side view mirror, in pitch darkness, from a following car. The out of court identification was so suggestive as to be useless, and it irreconcilably taints any in-court identification of Ms. Vargas by Officer Wing. At trial it would be unreasonable to expect Officer Wing to completely block from memory her prior identification of Ms. Vargas in the single photo lineup and identify her anew, based solely on the

events of May 8, 2015. The Appellate Opinion erred in affirming the district court's denial of Ms. Vargas's motion in limine with regards to Officer Wing's in-court identification of Ms. Vargas.

CONCLUSION

For the reasons set forth herein, the Appellate Opinion is appropriately reversed.

Dated this 23rd day of May, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of May, 2017, I served a true and correct copy of the foregoing *Appellant's Brief* in the manner indicated below:

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