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# State v. Vargas Appellant's Reply Brief Dckt. 44843

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

RECEIVED  
IDAHO SUPREME COURT  
COURT OF APPEALS

STATE OF IDAHO, )  
)  
Plaintiff/Respondent, )  
)  
v. )  
)  
TANYA A. VARGAS, )  
)  
Defendant/Appellant. )  
)  
\_\_\_\_\_ )

Supreme Court No. 44843

**APPELLANT'S REPLY BRIEF**

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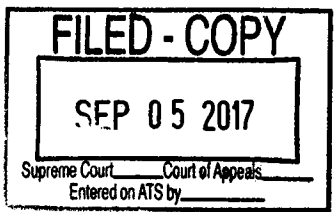
Appeal from the District Court of the Fourth Judicial District  
Of the State of Idaho, in and for the County of Ada  
The Honorable Gerald Schroeder, Presiding.

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## INTRODUCTION

In its responsive briefing, the State sets forth a lone, unavailing argument in opposition to Ms. Vargas's appeal. The State argues that Officer Wing engaged in no impermissible conduct in identifying Ms. Vargas in a single-photo lineup, thereby ending at the first hurdle the two-step inquiry under *State v. Almaraz*, without reaching the reliability factors set forth in *Manson v. Brathwaite*. The State takes the erroneous position that no lineup shown to law enforcement may be impermissibly suggestive because, intrinsically, law enforcement personnel are inoculated against being unduly influenced by the presentation of a single-photo lineup, while a civilian will be swayed and pressured by the power and authority of the badge when similarly shown a single-photo lineup. The State's argument fails, however, because extensive, persuasive authority has ruled that single-photo lineup identifications made by law enforcement may be impermissibly suggestive as law enforcement personnel are not *per se* immune to impermissible suggestion as the State argues. The State, claiming victory at the first *Almaraz* step, does not even deign to discuss the second step and the *Manson* reliability factors, nor does it discuss the irredeemably tainted in-court identification of Ms. Vargas. For these reasons the State's opposition is unavailing and Ms. Vargas's appeal is appropriately granted.

## ARGUMENT

The State and Ms. Vargas agree with regards to the legal framework at issue in this appeal, which is a two-step analysis. "First, the defendant must establish that the identification procedure was overly suggestive. Second, if the defendant meets that burden, courts consider whether the identification was nonetheless reliable under the totality of the circumstances." *State v. Almaraz*, 154 Idaho 584, 593, 301 P.3d 242, 251 (2013) (internal citations omitted). The reliability factors set forth in *Manson v. Brathwaite*, 432 U. S. 98 (1977), govern the second step.

The State takes the position that Ms. Vargas's appeal fails at the first step of the *Alvarez* test and then perfunctorily concludes its analysis. The State argues that "Officer Wing's identification of Vargas occurred as a result of her own observations and investigation, and was not 'procured under unnecessarily suggestive circumstances arranged by law enforcement.'" (*Resp. Br.*, 10.) The State cites *Perry v. New Hampshire*: "In other words, 'the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.'" *Id.*, citing *Perry*, 565 U. S. 228, 248 (2012).

Thus, this appeal turns on a single question. Was Officer Wing's identification of Ms. Vargas in a single-photo lineup unnecessarily and impermissibly suggestive? The answer is yes, identifications made by law enforcement may be unnecessarily suggestive and impermissible, and extensive authority supports this conclusion.

At the outset it is helpful to revisit the reasoning underlying the decision primarily relied upon by the State and the district court, *State v. Hooks*, 752 N. W. 2d 79 (Minn. Ct. App. 2008). In *Hooks*, the court ruled that an officer's identification through a single-photo lineup resulting from the officer's own investigation is not impermissibly suggestive. *Id.* at 84-85. The key consideration of the *Hooks* court was the notional difference between a single photo lineup presented by law enforcement to a civilian, as compared to a single photo lineup identification being made by law enforcement internally. *Hooks* reasoned that a civilian feels undue pressure when presented with a single-photo lineup by law enforcement, due to the weight of authority of the badge, government, and the presumption of the validity of the investigation underlying the presented photo. *Id.* at 84. *Hooks* reasoned that law enforcement personnel are somehow *per se*

inoculated against any such persuasion from their colleagues when identifying a suspect via a single-photo lineup. *Id.* at 85.

Before considering the relevant authority, it bears reflection that law enforcement, though engaged in a dangerous, often thankless profession working for the greater good of society, are not perfect. They are fallible humans who make errors in the execution of their duties, just as does any other professional, be they doctor, teacher, or the undersigned. Law enforcement, like anyone else, is prone to being influenced when presented by strong suggestions by their colleagues or investigations. Such errors and susceptibility to influence do not make law enforcement “bad” or “ill-intentioned”, but nonetheless it is a miscarriage of justice and the rights of criminal suspects to pretend that such errors do not exist.

This is why, in *Manson v. Brathwaite*, it was uncontested that when one officer, based on a description from undercover narcotics officer Glover, showed Glover a single photo from which Glover made an identification, law enforcement had engaged in an impermissibly suggestive single-photo lineup, especially given the lack of exigent circumstances. 432 U. S. 98, 108-09 (1977). Under the State’s *Hooks*-based theory, the identification in *Manson* could not have been deemed infirm because Glover, being law enforcement and not a civilian, would have been *per se* immune from being swayed or impermissibly suggested by the display of a single-photo lineup.

The Ohio Court of Appeals firmly rejected the *Hooks* rationale under facts functionally identical to those of this case. In *State v. Padgett*, Officer Grile was patrolling a shopping area rife with crime when he pulled alongside a car missing a front license plate in the parking lot. 2000 WL 873218, \*1 (Ohio Ct. App. 2000). The car pulled away, and as it did so Officer Grile “was able to see the driver’s face as they passed each other in their cars,” and Officer Grile drove

past the car, enabling observation of the driver, a couple more times *Id.* The car exited the parking lot at a high rate of speed and recklessly struck another vehicle. *Id.* Officer Grile did not give chase for safety reasons. *Id.* The car was later found abandoned, and fingerprints from the car returned the name Ray Padgett. *Id.* Officer Grile observed a single booking photo of Padgett and identified Padgett as the man he observed driving by in the parking lot. *Id.*

The Ohio Court of Appeals ruled that “the procedure Grile used in identifying Padgett from a single photograph was inherently suggestive and was unnecessary since there were no exigent circumstances and a photo array could easily have been prepared and presented to him by his fellow officers.” *Id.* at \*3 (citing *Manson*, 432 U. S. at 99.) The Ohio Court of Appeals recognized that cases from other jurisdictions considering the issue had ruled both ways, that is, that a single-photo lineup presented to a law enforcement officer had been ruled both benign and impermissibly suggestive, but nonetheless deemed Officer Grile’s identification impermissibly and unnecessarily suggestive and proceeded to the second step of the analysis, namely the *Manson* reliability factors. 2000 WL 873218, \*3. Had the *Padgett* court adhered to the *Hooks* rationale urged by the State, it would have ended the analysis at the first step because Officer Grile, as a law enforcement officer and not a civilian, *per se* could not be impermissibly and unnecessarily swayed by a single-photo lineup. *See also Butcher v. State*, 931 A.2d 1006, \*2 (Del. 2006) (Delaware Supreme Court proceeded to second step, consideration of *Manson* reliability factors, in case of impermissibly suggestive identification made by state trooper via single-photo lineup); *State v. Abdo*, 518 N. W. 2d 223, 225-26 (S. Dakota 2014) (South Dakota Supreme Court proceeded to second step, consideration of *Manson* reliability factors, in case of impermissibly suggestive identification made by Sioux Falls police officer via single-photo lineup); *State v. Lumpkin*, 192 F.3d 280, 288 (2d Cir. 1999) (“Because the single photo of

Williams shown by [Officer] McMahon to Officers Galie and Sherer–Young during the debriefing session was impermissibly suggestive . . . the trial court properly suppressed this pre-trial identification. After this ruling, however, the court decided Galie and Sherer–Young still had independently reliable bases upon which to make in-court identifications of the defendant.”).

*Padgett* is directly on-point and represents superior reasoning to that of *Hooks*. Officer Wing in her investigation was given exactly one name, when she had observed no more distinguishing characteristics about the suspect than “Hispanic female in her thirties.” Such provision of one name, with minimal other identifiers, is highly suggestive, indeed impermissibly and unduly so. Significantly, Officer Wing faced no exigent circumstances necessitating use of a single-photo lineup; her law enforcement colleagues could have easily and readily prepared a photo array for her as counseled by the Ohio Court of Appeals in *Padgett*. As discussed *supra*, law enforcement is not infallible. Human error occurs, and law enforcement personnel are susceptible to the undue and impermissible suggestion of single photo lineups. Idaho would be wise to adopt the safer approach espoused by Ohio in *Padgett* and err ever so minimally on the side of safeguarding the rights of criminal suspects, and in doing so reject the *Hooks* rationale urged by the State which will undoubtedly result in a higher likelihood of misidentification of criminal suspects. Furthermore, it is key to remember that simply because a single-photo lineup identification by law enforcement is deemed impermissibly suggestive at the first step, it may nonetheless be admissible at the second step if a court is satisfied that the *Manson* reliability factors are satisfied. Ruling against the State in this appeal does not mean that single-photo lineup identifications by law enforcement will never be admissible, such identifications will simply have to pass muster with the *Manson* reliability factors, thereby ensuring greater accuracy and protection of the rights of criminal suspects.