IN THE SUPREME COURT OF FLORIDA

JOHN EDWARDS. :

Appellant, :

vs. : Case No. 70,004

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SARASOTA COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The state's brief will be referred to by use of the symbol "S". Other references will be as denoted in appellant's initial brief.

This reply brief is directed only to Issues I and II. As to the remaining issues, appellant will rely on his initial brief.

ISSUE I

THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE THE IN-COURT IDENTIFICATION TESTIMONY OF JEFFREY WALTERS, WHERE THE TOTALITY OF THE CIRCUMSTANCES (AS ASSESSED IN TERMS OF THE FACTORS ENUMERATED IN NEIL V. BIGGERS, 409 U.S. 188 (1972) AND ITS PROGENY) DEMONSTRATED THE UNRELIABILITY OF WALTERS' PURPORTED ABILITY TO IDENTIFY APPELLANT IN COURT, AND FAILED TO OVERCOME THE PRESUMPTION THAT THE IN-COURT IDENTIFICATION WAS TAINTED BY THE ILLEGAL LINEUP.

The state in its brief makes no effort to show, with reference to the factors enumerated in Neil v. Biggers [1] and Manson v. Brathwaite [2] or those set forth in United States v. Wade [3], that the in-court identification of appellant by Jeffrey Walters was reliable, or that it was based solely on Walters'

1/ 409 U.S. 188 (1972).

2/ 432 U.S. 98 (1977).

3/ 388 U.S. 218 (1967).

observations at the Quick Stop [4/], untainted by the intervening lineup. Nor does the state take issue with any of the reasons discussed by appellant as to why Walters' identification was grossly unreliable [See appellant's inital brief, p.29-38]. Instead of meeting its burden of proving by clear and convincing evidence that the in-court i.d. was both reliable and independently-based, the state's whole argument on appeal seems to be "We don't have to." Well the state does have to [Wade; Neil v. Biggers, Manson v. Brathwaite; United States v. Crews, infra; Cannon v. State of Alabama, infra; Frisco v. Blackburn, infra; see Sobczak v. State, infra; Cribbs v. State, infra], and its failure to do so requires that appellant be granted a new trial. Even assuming arguendo that this Court were to relieve the state of its burden of proof, and were to itself search the record for evidence that Walters' identification of appellant was reliable notwithstanding the unnecessarily suggestive lineup conducted in the absence of

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4/ A 3-4 second glance, divided between the passenger (Hillbilly Boyd) and the black driver, in which Walters by his own admission was paying no attention, and saw only the outline of the driver's face (round) and short hair.

counsel [5/], it will find that, under the totality of the circumstances, virtually all of the factors in this case weigh in the direction of unreliability.

In his initial brief, appellant asserted that, in order to permit the introduction before the jury of an in-court identification which has been preceded by an improper pre-trial confrontation, the state must demonstrate that the in-court identification is nevertheless reliable, and that it is based entirely on the witness' observations at the scene of the crime or encounter, untainted by his subsequent viewing of the accused in the lineup. [See appellant's initial brief, p.27-28, citing, inter alia, Wade; Neil; Manson; Sobczak; Cribbs]. The state's basic premise, supported by no authority whatsoever, is that this principle only applies when the pre-trial confrontation has been

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5/ Regarding the interrelationship between the right to counsel issue and the suggestiveness issue, see appellant's initial brief, p.28 n. 13, and p.42 n. 24. See United States v. Wade, supra, 388 U.S. at 228-241 and n. 26, 29, 30; Stovall v. Denno, 388 U.S. 293, 297-298 (1967); United States v. Thevis, 665 F.2d 616, 642-643 (5th Cir. 1982). Appellant maintains, as he did in his initial brief (p. 38-44, p.28 n. 13) (a) that the lineup was impermissibly and unnecessarily suggestive and (b) that due to the absence of counsel, appellant was unfairly precluded from objecting to the inclusion of the younger, thin-faced, or bushy-haired men in the lineup [contrast State v. Leggett, 287 S.E.2d 832, 837 (N.C. 1982)], and was impaired in his ability to reconstruct the lineup (which the police did not photograph) in order to demonstrate its suggestiveness [see Wade, Stovall v. Denno, Thevis]. However, the most obvious of appellant's threshold arguments (and the one upon which the trial court found the lineup to have been illegal) is that it was conducted in violation of his right to counsel, at a time when, under state law, the right to counsel had attached. Sobczak v. State, 462 So.2d 1172 (Fla.4th DCA 1984); Fla.R.Cr.P. 3.111(a) and 3.130. It is the right to counsel violation - which was the central (though not the only) constitutional issue in the entire matter - which the state completely ignores in its brief.

declared improper on the ground of suggestiveness (S.8), but does not apply when the pre-trial confrontation has been held improper on the ground of a right-to-counsel violation.[6/] The state's bland assumption is, quite simply, wrong. To the contrary, the state's obligation to show by clear and convincing evidence the reliability and independent source of the in-court identification, where there has been an improper pre-trial lineup or other confrontation, is at least as rigorous, if not more so, when the impropriety is a violation of the right to counsel as when it is based on suggestiveness alone. See United States v. Wade, supra; United States v. Crews, 445 U.S. 463, 472-73 and n.18 and 19 (1980); Cannon v. State of Alabama, 558 F.2d 1211, 1217-19 (5th Cir. 1977); Frisco v. Blackburn, 782 F.2d 1353, 1356-57 (5th Cir. 1986).

The state is correct in observing that Neil v. Biggers and Manson v. Brathwaite involve unnecessarily suggestive pre-trial identification procedures (S.8).[7/] However, the United State Supreme Court's insistence in those cases that the state must demonstrate the reliability and the independent source of the in-court identification before such testimony can be put before the jury is a direct outgrowth of the Court's earlier

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6/ The state makes the second half of its argument sub silentio, since it never even acknowledges in its brief that the reason a hearing was held in the first place as to the admissibility of the in-court i.d. [see Wade] was that the trial court had found the pre-trial lineup illegal on right-to-counsel grounds.

7/ As previously noted, appellant contends that the lineup in this case was unnecessarily suggestive, as well as being conducted in violation of his right to counsel.

holding in United States v. Wade, supra, a landmark right-to-counsel decision. In Manson v. Brathwaite, supra, the Court observed that the "driving force" behind Wade and Gilbert [8] was the Court's "concern with the problems of eyewitness identification":

> Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police. Thus, Wade and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability. [9]

Manson v. Brathwaite, supra, 432 U.S. at 112.

The state's sole argument in the instant appeal - i.e., that notwithstanding the illegality of the lineup conducted in violation of the right to counsel, the subsequent in-court identification is automatically admissible without any necessity for the state to show reliability and independent source - was

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8/ Gilbert v. California, 388 U.S. 263 (1967).

9/ The Wade Court observed that "confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial" (388 U.S. at 228). After discussing "the high incidence of miscarriage of justice from mistaken identification", and after quoting Justice Frankfurter's observation that "[t]he identification of strangers is proverbially untrustworthy", the Court emphasized "And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest" (388 U.S. at 229). See appellant's initial brief, p.29-33.

soundly rejected by the U.S. Supreme Court in Wade. The Wade Court declined to adopt a per se rule of either admissibility or inadmissibility of the in-court i.d., and held instead that the issue must be resolved on a case-by-case analysis of the circumstances surrounding the identification (with the prosecution bearing the burden of proof):

> We come now to the question whether the denial of Wade's motion to strike the courtroom identification by the bank witnesses at trial because of the absence of his counsel at the lineup required, as the Court of Appeals held, the grant of a new trial at which such evidence is to be excluded. We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification. See Murphy v. Waterfront Commission, 378 U.S. 52, 79, note 18, 12 L.ed 2d 678, 695, 84 S.Ct. 1594. Where, as here, the admissibility of evidence of the lineup identification itself is not involved, a per se rule of exclusion of courtroom identification would be unjustified. See Nardone v. United States, 308 U.S. 338, 341, 84 L.ed 307, 311, 60 S. Ct. 266. A rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one. The lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for future reference. We have already noted that the lineup identification will have that effect.

The State may then rest upon the witnesses' unequivocal courtroom identification, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself-realizing that possible unfairness at the line-up may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification. Since counsel's presence at the lineup would equip him to attack not only the lineup identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the lineup itself disregards a critical element of that right.

We think it follows that the proper test to be applied in these situations is that quoted in Wong Sun v. United States, 371 U.S. 471, 488, 9 L ed 2d 441, 455, 83 S.Ct. 407, " '[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt 221 (1959)." See also Hoffa v. United States, 385 U.S. 293, 309, 17 L.ed 2d 374, 386, 87 S.Ct. 408. Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant

> prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup. 10/

United States v. Wade, supra, 386 U.S. at 239-241

See also Cannon v. State of Alabama, 558 F.2d 1211, 1218 (5th Cir. 1977)("The Wade factors, moreover, were not intended to be exhaustive. They are but guides to the required inquiry, the independence of the in-court identification from the earlier uncounseled procedure. We may consider any evidence that bears on that inquiry").

In United States v. Crews, 445 U.S. 463, 472-73 and n.18 and 19 (1980), the Court had occasion to apply the factors affecting the reliability of an identification in a different context. Instead of a right-to-counsel violation or an impermissibly suggestive lineup procedure, Crews involved photographic

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10/ As the Wade opinion reflects throughout (388 U.S. at 228-238, 240-241) the right-to-counsel issue and the suggestiveness issue are not as neatly severable as the state would like to have it. In reality, the main difference between the Wade/Gilbert line of cases and the Neil/Manson line of cases is that where there has been a violation of the right to counsel, the pre-trial identification is per se inadmissible [Gilbert] but the in-court identification may nevertheless be introduced if shown to be reliable and based on the witness' independent recollection [Wade]; while in the cases involving suggestiveness alone, both the pre-trial and the in-court identifications may be introduced if shown to be reliable and based on the witness' independent recall [Neil; Manson]. See Cannon v. State of Alabama, supra, 558 F.2d 1218 n.15. The decisions suggest that, if anything, the state's burden is greater when there has been a right-to-counsel violation, since that magnifies the risks already inherent in state-compelled confrontation procedures. Wade.

and lineup identifications made pursuant to an illegal arrest. After observing that the illegal arrest could not have affected the victim's ability to identify her assailant, the Court cautioned:

> This is not to say that the intervening photographic and lineup identifications--both of which are conceded to be suppressible fruits of the Fourth Amendment violation--could not under some circumstances affect the reliability of the in-court identification and render it inadmissible as well. Indeed, given the vagaries of human memory and the inherent suggestibility of many identification procedures, just the oppositve may be true.

Nevertheless, the Court, using the analysis developed in Wade, Manson, and Neil, found ample support in the record for the trial judge's finding that the in-court i.d. rested on the victim's independent recollection of her initial encounter with the assailant, uninfluenced by the pre-trial identifications. The Court wrote:

> United States v. Wade, 388 US 218, 18 L.Ed.2d 1149, 87 S.Ct. 1925 (1967), enumerated several factors for consideration in applying the "independent origins" test. Id., at 241, 18 L.Ed.2d 1149, 87 S.Ct. 1926. Cf. Manson v. Brathwaite, 432 U.S. 98, 53 L.Ed.2d 140, 97 S.Ct. 2243 (1977); Neil v. Biggers, 409 U.S. 188, 34 L.Ed.2d 401, 93 S.Ct. 375 (1972). We attach particular significance to the following circumstances which support the trial court's determination in this case: the victim viewed her assailant at close range for a period of 5-10 minutes under excellent lighting conditions and with no distractions, Tr 4, 7, 111; respondent closely matched the description given by the victim immediately after the robbery, id., at 52, 59; the victim failed to identify

> anyone other than respondent, id., at 8, but twice selected respondent without hesitation in nonsuggestive pretrial identification procedures, id., at 9-11; and only a week had passed between the victim's initial observation of respondent and her first identification of him, id., at 8-9.
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> Our reliance on the fact that the witness twice identified respondent in out-of-court confrontations is not intended to assign any independent evidentiary value to those identifications for to do so would undermine the exclusionary rule's objectives in denying the Government the benefit of any evidence wrongfully obtained. Rather, the accurate pretrial identifications assume significance only to the extent that they indicate that the witness' ability to identify respondent antedated any police misconduct, and hence that her in-court identification had an "independent source." 11/

United States v. Crews, supra, 445 U.S. at 473 n.18.

The Crews Court also indicated that the Wade test involves two distinct but related considerations: (1) whether the in-court identification has been shown to be reliable enough to satisfy due process [see also Manson; Neil], and (2) whether the prosecution can establish that the in-court i.d. was not tainted by the prior illegality [i.e. the "fruit

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11/ In the present case, in contrast, Jeffrey Walters never told the police of his purported ability to identify appellant until some time after the uncounselled lineup. By that time, Walters had not only viewed Appellant in the lineup (in which appellant was one of the few round-faced participants), but he had also seen appellant's mugshot on the front page of the Sarasota Herald-Tribune under the headline "Murder-for-Sex Suspect Was Convicted in '75 Death" (see R.812,815,873-74,877,1466).

of the poisonous tree" metaphor, see Crews (445 U.S. at 472); Wong Sun v. United States, 371 U.S. 471, 488 (1963)].[12/]

As previously noted, the burden of demonstrating (under the totality of the circumstances, as assessed in terms of the factors suggested in Wade, Manson, and Neil) by clear and convincing evidence that the in-court identification is reliable and untainted by the intervening confrontation is on the state. Wade; Manson; Neil; Crews; Cannon v. State of Alabama, supra, 558 F.2d at 1218-19; Frisco v. Blackburn, supra, 782 F.2d at 1356-57; see Sobczak v. State, 462 So.2d 1172,1173 (Fla. 4th DCA 1984); Cribbs v. State, 297 So.2d 335, 336-37 (Fla. 2d DCA 1974); Hearns v. State, 262 So.2d 907 (Fla.4th DCA 1972). In the present case, the state plainly failed the test [see appellant's initial brief, p.29-47]; indeed, refused to even take the test [see state's answer brief, p.8-11]. The

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12/ The Court observed:

> Respondent contends that the "independent source" test of United States v. Wade, supra, and Stovall v. Denno,388 US 293, 18 L.Ed.2d 1199, 87 S.Ct. 1967 (1967), although derived from an identical formulation in Wong Sun, see 388 US, at 241, 18 L.Ed.2d 1149, 87 S.Ct. 1926, seeks only to determine whether the in-court identification is sufficiently reliable to satisfy due process, and is thus inapplicable in the context of this Fourth Amendment violation. We agree that a satisfactory resolution of the reliability issue does not provide a complete answer to the considerations underlying Wong Sun, but note only that in the present case both concerns are met.

United States v. Crews, supra, 445 U.S. at 473 n.19.

unreliable identification testimony of Jeffrey Walters should not have been admitted, and the appropriate relief is a new trial. See appellant's initial brief, p.47-49.

ISSUE II

THE TRIAL COURT ERRED IN ARBITRARILY CURTAILING VOIR DIRE, BY PREVENTING DEFENSE COUNSEL FROM ASKING THE PROSPECTIVE JURORS ANY QUESTIONS CONCERNING THEIR VIEWS ON THE LEGAL PRINCIPLES OF PROOF BEYOND A REASONABLE DOUBT, THE PRESUMPTION OF INNOCENCE, AND THE ACCUSED'S RIGHT NOT TO TESTIFY, AS THESE UNNECESSARY RESTRICTIONS INFRINGED APPELLANT'S RIGHTS PRESERVED BY FLA.R.CR.P. 3.300(b), AND IMPAIRED HIS ABILITY TO INTELLIGENTLY EXERCISE HIS PEREMPTORY CHALLENGES.

If the state's argument on this point had any merit, all of the Florida cases relied on in appellant's brief would have been decided differently. If the state's argument had any merit, there would never be any redress available to any party in a civil or criminal case whose right to a reasonable examination of each juror orally on voir dire was arbitrarily curtailed by the trial judge [see Fla.R.Cr.P. 3.300(b); Fla. R.Civ.P. 1.431(b); Lavado v. State, 492 So.2d 1322 (Fla. 1986)[13/]; O'Connell v. State, 480 So.2d 1284, 1286-87 (Fla. 1985); Williams v. State, 424 So.2d 148, 149 (Fla.5th DCA 1982); Barker v. Randolph, 239 So.2d 110 (Fla.1st DCA 1970)], or whose ability

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13/ Adopting in its entirety the dissenting opinion of Judge Pearson in Lavado v. State, 469 So.2d 917, 919-21 (Fla.3d DCA 1985).

to obtain relevant information to intelligently exercise his peremptory challenges was thereby impaired [see Lavado v. State, supra; Barker v. Randolph, supra]. Under the "logic" of the state's argument, the right which is specifically and emphatically preserved by Rule 3.300(b) would be reduced to little more than a suggestion. Under the syllogism employed by the state [14] (S.15), there would never be any relief available for any error of any kind detracting from the fairness of the jury selection process, unless the defendant could show that the jurors who actually served were in fact prejudiced in reaching their verdict. (Of course, no defendant will ever be able to satisfy the impossible burden proposed by the state, at least not without interviewing the jurors [15] after their discharge about the content of their deliberations. And in that event, the state would argue that the defendant is entitled to no relief for improprieties which inhere in the verdict. See, generally, State v. Blasi, 411 So.2d 1320 (Fla.2d DCA 1981)).

In other words, since it can neither advance a convincing justification for the trial court's curtailment of voir dire in this case - nor show that the restriction did not impair appellant's ability to obtain adequate information about the individual jurors' attitudes toward the legal principles to be applied, in

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14/ The state purports to be placing appellant's argument "in sylogistic (sic) form" (S.15). Actually, the state's formulation has nothing to do with appellant's argument.

15/ A procedure which the state finds extremely offensive, even where the interviewing was done by a non-lawyer acting on her own initiative. See the various pleadings and briefs filed by the state in Brown and Troy v. State (coram nobis proceeding), case no. 69,427.

order to intelligently exercise his peremptory challenges - the state has simply constructed a generic "one-size-fits-all" argument, which essentially seeks to confine the right to a reasonable examination by counsel of each juror orally on voir dire to the lowly status of "a right without a remedy". Fortunately, that is not the law. Lavado; O'Connell; Williams; Barker v. Randolph.[16/]

16/ See also DeLaRosa v. State, 414 SW.2d 668 (Tex.Cr.App. 1967); State v. Dolphin, 525 A.2d 509 (Conn. 1987).

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests the relief set forth at p. 83 of his initial brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 8th Floor, 1313 Tampa Street, Tampa, FL 33602, by mail this 24 day of February, 1988.

Steven L Bolotin

STEVEN L. BOLOTIN