IN THE FLORIDA SUPREME COURT

SCOTT E. MCMULLEN,

Petitioner,

VS.

CASE NO. 86,684

STATE OF FLORIDA,

4TH DCA CASE NO. 93-3582

Respondent.
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PETITIONER'S INITIAL BRIEF

ON DISCRETIONARY REVIEW OF A QUESTION CERTIFIED BY THE COURT OF APPEAL, FOURTH DISTRICT

Steel Hector & Davis
L. Martin Reeder, Jr.
Florida Bar No. 308684
Kim A. Prine
Florida Bar No. 902942
1900 Phillips Point West
777 South Flagler Drive
West Palm Beach, FL 33401-6198
(407) 650-7232

Margaret B. Reeder
Florida Bar No. 976740
4240 Tanglewood N. #409
Palm Beach Gardens, FL 33410
(407) 625-3801

Evelyn A. Ziegler
Florida Bar No. 45 1320
711 North Flagler Drive
West Palm Beach, FL 33401
(407) 832-7496

Attorneys for Petitioner
Scott McMullen

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INTRODUCTION

The United States Supreme Court has recognized the "high incidence of miscarriage[s] of justice" caused by mistaken identifications. United States v. Wade, 388 U.S. 218, 229 (1967). "[T]he vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification . . . The dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial and thus his susceptibility to suggestion the greatest."[1] Id. at 228-29.

The record of Petitioner Scott McMullen's prosecution and conviction for shooting the owner of a beer store during an attempted robbery supports the troublesome conclusion that there is a substantial probability that he was wrongly convicted because of a mistaken eyewitness identification. No physical evidence linked Mr. McMullen to the crime and he was not at first a suspect. The investigation focused instead on other persons who, according to "the word on the street," were responsible.[2]

Mr. McMullen, who lived nearby and admitted going to the store from time to time to buy cigarettes, milk and beer, was identified by the victims when he came to the store to buy groceries more than one month after the shooting. McMullen was arrested and charged based

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[1] That numerous cases exist in which a person was wrongfully convicted based on mistaken identification is illustrated by articles included in the Appendix to Petitioner's Initial Brief at tabs 15-23.

[2] On September 27, 1994, Mr. McMullen moved for the Fourth District Court of Appeal to temporarily relinquish jurisdiction to permit the trial court to consider a motion for new trial under Fla. R. Crim. P. 3.850 based on newly discovered evidence. The motion was supported by the affidavits of two prison inmates who testified that a fellow inmate, Henry Henderson, had admitted on separate occasions that he committed the crimes for which Mr. McMullen was convicted. The Fourth District denied the motion to relinquish jurisdiction, so Mr. McMullen's 3.850 motion has not yet been heard.

soley upon the eyewitness identifications.

Mr. McMullen was prepared to call a highly qualified expert witness, Professor John Brigham of Florida State University, to challenge the reliability of the eyewitness identifications. Dr. Brigham would have testified about specific factors -- factors which are unknown to most jurors and were present in this case -- that affect the reliability of eyewitness identifications. The trial judge found that Johnsonv. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984) required him to exclude this evidence and he also denied Mr. McMullen's request that the jury be instructed on factors affecting the reliability of eyewitness identifications.

Although the Fourth District Court of Appeal held that Johnson required it to affirm Mr. McMullen's conviction, the court recognized that advances may have been made in the science of eyewitness identification since Johnson was decided and that courts in other jurisdictions have determined that it is an abuse of discretion to exclude expert testimony relating to eyewitness identifications in cases where the identification is the sole basis for the prosecution.

Accordingly, the Fourth District certified the following question as one of great public importance:

> WHEN THE SOLE ISSUE IN A CRIMINAL PROSECUTION IS ONE OF IDENTITY AND THE SOLE INCRIMINATING EVIDENCE IS EYEWITNESS TESTIMONY, SHOULD THE COURT ADMIT EXPERT TESTIMONY UPON FACTORS THAT AFFECT THE RELIABILITY OF EYEWITNESS IDENTIFICATION?

It is time for Florida to join the growing number of states that have answered "yes" to this question,

STATEMENT OF THE CASE AND OF THE FACTS

Attempted Armed Robbery And Shooting At Beer Store

On November 18, 1991, at about 10:00 p.m., (SR 359), Sharon Grewal was sweeping the parking lot of the beer store she owned with her husband, Mohinder Grewal, when a man approached her from behind and grabbed her shoulder (SR 361). The man tried to move Mrs. Grewal inside the store (SR 362). When she resisted, the man pushed a gun into her side (SR 364). Mr. Grewal, who was inside at the cash register, heard noises outside and walked toward the doorway to look out (SR 420-21). As he approached the doorway, Mr. Grewal glimpsed a man grabbing his wife and was immediately shot (SR 420-21). The assailant turned and fled (SR 421-26). The entire incident lasted only a few seconds (SR 403). Mr. Grewal was taken to the hospital, his wound was treated and he returned to work in December (SR 445).

The Police Investigation

Sheriffs deputies arrived on the scene within minutes (SR 45 1). Detective Mark Murray, a veteran of eleven years on the force, was the lead investigator (SR 545). Mrs. Grewal remained at the scene after her husband was taken to the hospital to tell the deputies what she knew (SR 37 3 - 72). She said the assailant had been in the store with another man earlier that night (SR 461). No physical evidence, such as a gun, shell casings, or fingerprints was found that might have helped to identify the assailant (SR 462, 466). After the officers finished their crime scene investigation, Mrs. Grewal went to the hospital to see her husband (SR 373). Detective Murray also went to the hospital to interview Mr. Grewal, but his condition allowed for only a brief conversation (SR 549).

Detective Murray returned to the hospital the following day and interviewed the Grewals (SR 549). Both Mr. and Mrs. Grewal told Detective Murray that they had never seen the assailant

before the night of the shooting (R 1-3; SR 55 1, 558).

Mr. McMullen was not at first a suspect, The police had identified other suspects based on information from anonymous sources, but the Grewals did not identify any of them as the assailant (SR 553-56).

On January 3, 1992, the Grewal's son called Detective Murray and said that his parents had seen a man whom they believed to be the assailant at the store's drive-through window (SR 557). Mrs. Grewal had recorded the man's license tag number (SR 38 1). The Grewal's son told deputies that his parents had said that the same man had bought groceries at the store December 22, 23 and 26 (R 3; SR 557). The tag number matched Mr. McMullen's car and, for the first time, he became a suspect (SR 557).

On January 8, 1992, Detective Murray prepared a photographic lineup for the Grewals (SR 476). Detective Doug Keubler brought the lineup to the Grewals' store and they identified Mr. McMullen (SR 480-81). McMullen was arrested and charged by a three-count amended information with Aggravated Battery with a Firearm (Count I), Aggravated Assault with a Firearm (Count II) and Shooting into a Dwelling (Count III). Mr. McMullen pleaded not guilty (SR 50).

The Proffered Exnert Testimonv of Dr. John Brigham

Because the eyewitness identifications were the sole basis for the prosecution and attacking the reliability of the identifications was therefore critical to Mr. McMullen's defense, his counsel retained Dr. John Brigham as an expert witness to testify about certain factors that have been shown to affect the reliability of eyewitness identifications. The State moved in limine to exclude Dr. Brigham's testimony (R 42-44) and an evidentiary hearing was held on the State's motion (SR 66-109).

Dr. Brigham testified at the hearing that he has been a professor of psychology at Florida State University since 1969 (SR 70-71). He holds a bachelor's degree from Duke University and a doctorate in psychology from the University of Colorado (SR 71). Dr. Brigham belongs to numerous professional associations and is a former officer of the American Psychology of Law, a division of the American Psychological Association (SR 7 1).

Dr. Brigham has studied the factors that affect the reliability of eyewitness identifications for almost twenty years (SR 71). He has designed and conducted many field studies and has reviewed studies conducted by other researchers (SR 74). He has published five separate studies on factors that affect the reliability of eyewitness identifications and has made presentations on this subject at conferences in the United States, Canada, Wales, Scotland and England (SR 72). Dr. Brigham has been awarded grants from the National Science Foundation and the National Institute of Psychology to study various aspects of eyewitness identification (SR 72).

Dr. Brigham testified that thousands of scientific studies have demonstrated that certain psychological factors that are unknown to the average person can materially affect the reliability of an eyewitness identification (SR 74). Dr. Brigham explained that the relationships of these factors to the reliability of eyewitness identifications has gained general acceptance in the scientific community (SR 72-73). Dr. Brigham has been permitted to testify about these factors approximately twenty times in various court proceedings in Florida, North Carolina, Virginia, Indiana, Texas and Louisiana (SR 73).

Dr. Brigham next described the issues he would testify about at Mr. McMullen's trial.

1. Eyewitness identifications are incorrect more often than most persons think.

According to one study of 500 criminal cases that have been identified as incorrect

convictions, sixty percent were due to incorrect eyewitness identifications.[3] In a study Dr. Brigham conducted at FSU with Leon County registered voters, 83% of the subjects overestimated the ability of witnesses to make accurate eyewitness identifications. Dr. Brigham explained that face recognition is a complex task that is more difficult than most people think (SR 75). According to Dr. Brigham, there are three distinct phases to processing a memory and factors present in each of those phases can interfere with the accuracy of an eyewitness identification (SR 75-76).

2. A witness' confidence in the accuracy of an identification is unrelated to the accuracy of the identification.

Dr. Brigham testified that numerous studies have shown that an eyewitness' professed confidence in the accuracy of his identification has almost no correlation to the reliability of the identification (SR 81). Nevertheless, Dr. Brigham pointed out, witness confidence is the single most important factor jurors rely upon when assessing the credibility of an eyewitness identification (SR 82).

3. Cross-racial identifications are more difficult than same-race identifications.

Dr. Brigham testified that he has conducted several studies and also analyzed the results of 14 other studies on the issue of how racial differences affect the accuracy of eyewitness identifications. The studies have demonstrated that witnesses are significantly better at accurately identifying persons of their own race than persons of other races (SR 79).

4. "Unconscious transference."

Unconscious transference is a phenomenon that occurs when a witness incorrectly associates the memory of an image from one event with the witness' recollection of another event (SR SO).

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[3] See Ronald Huff, Arye Rattner & Edward Sagarin, Guilty Until Proved Innocent: Wrongful Conviction and Public Policy, 32 J. Crim. & Delinq. 5 18, 544 (1986).

Dr. Brigham explained that it is easier for a witness to remember a face than to remember the circumstances under which the witness saw that face. Accordingly, it is common for a witness to correctly remember a face, but to incorrectly associate that face with another event (SR 81).

5. Accuracy of evewitness identification decreases in stressful situations.

Dr. Brigham testified that researchers have thoroughly studied the relationship between stress and the accuracy of eyewitness identifications (SR 76-79). These studies reveal that during mild stress arousal, the accuracy of eyewitness identifications usually increases because the witness tends to pay closer attention to his surroundings. Accuracy worsens, however, when a witness is subjected to moderate or strong stress arousal (SR 78). Moreover, numerous studies demonstrate that a common misperception exists that stress burns an unforgettable image into a person's memory. In fact, studies have shown that the opposite is true (SR 78).

6. Accuracy of identification decreases as the time between the event and the time when the witness attempts to retrieve the memory increases.

Dr. Brigham explained that "the forgetting curve" has been a staple of psychology for over one hundred years (SR SO). The forgetting curve reflects the fact that the longer the time interval between the event and the time a witness attempts to recall the event, the less able the witness is to make an accurate eyewitness identification. (SR SO).

If permitted to testify, Dr. Brigham would not have expressed an opinion on the ultimate issue of whether or not the Grewals' identifications of Mr. McMullen were accurate. Instead, he would have merely informed the jury of the factors described above and how they may affect the ability of a witness to make an accurate eyewitness identification (SR 84-85).

The trial judge granted the State's motion to exclude Dr. Brigham's testimony. The court found that Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 105 1 (1984), required

it to exclude Dr. Brigham's testimony because such testimony would not be helpful to the jury which was capable of assessing the credibility of the eyewitness testimony (R 45). The court also mischaracterized the substance of the proffered testimony as being limited to the proposition "that persons under stress oftentimes err in identification of other persons" (R 45).

The Trial

At trial, the prosecution presented no physical evidence linking Mr. McMullen to the crime (SR 450-466, 466-74, 475-486). The State's case was based solely upon the Grewals' eyewitness identifications.

Mrs. Grewal testified that she and her husband, both natives of India, were at the store on the night of November 18, 1991 (SR 336, 339-340). Two black men entered the store between 9:00 and 9:30 p.m. (SR 349). The first man made a purchase from Mrs. Grewal (SR 348-49, 357). The second man, who was wearing a baseball cap pulled "down," stood just inside the front door and did not speak. (SR 348). After the first man completed his purchase, the two men left together (SR 357).

According to Mrs. Grewal, the assailant who later attacked her in the parking lot and shot her husband was the second man who had been in the store earlier wearing the baseball cap (SR 362). Mrs. Grewal testified that she recognized his clothing (SR 362). Mrs. Grewal identified Mr. McMullen in court as the assailant (SR 369-70). She told the jury she was "a hundred percent certain" and had "no doubt in [her] mind" about her identification of Mr. McMullen (SR 383). Critical to the credibility of Mrs. Grewal's identification of Mr. McMullen was her testimony that she recognized him as an occasional customer of the store from before the shooting (SR 356).

Although Mr. Grewal also identified Mr. McMullen as the assailant, his testimony was not

as strong as his wife's Here is how he described the events of January 3, 1992, the date almost seven weeks after the shooting when he first identified Mr. McMullen at the drive-through window:

> "Well, he came through the driveway and when my wife wanted me, you know, then I said, yes, this is the guy"

(SR 439). Mr. Grewal qualified his identification by admitting that he had only a "split second" to observe the assailant before he was shot as he approached the front door of the store and looked out (SR 421). Mr. Grewal described what he saw as follows:

> "Well, he's grabbing with one hand my wife. That's all I looked at, a glance and then the split second pointed the other hand and shoot me"

(SR 423).

Mr. Grewal contradicted his wife's testimony on a critical point when he testified that he had never seen either of the two men before the night of the shooting (SR 417).

Significantly, the lead detective, Detective Murray, testified for the defense. Based upon his recollection and his report, Detective Murray testified that Mrs. Grewal did not tell him when he first interviewed her the day after the shooting that she had recognized the assailant as a previous customer (R 1-3; SR 551, 558).

The defense presented three alibi witnesses who testified that they were with Mr. McMullen at the time of the shooting (SR 484-96, 526-30, 596-600). Mr. McMullen also testified in his own defense, explaining that he lived near the store and had been an occasional customer before and after the shooting, but flatly denying any involvement in the attempted robbery or the shooting (SR 571-73; 574).

Mr. McMullen's counsel requested that the trial judge instruct the jury on cross-racial identifications and other factors affecting the reliability of eyewitness identifications (R 58-6 1). The

court denied this request (R 59, 61). The trial judge instructed the jury that whether Mr. McMullen was present at the time the crime was committed was an issue in the case (SR 668). In assessing the reliability of the evidence, the trial judge instructed the jurors to "use [their] common sense" and to "consider how the witnesses acted as well as what they said" (SR 669). The jury instructions pertaining to eyewitness testimony consisted of the following:

> Did the witness seem to have an opportunity to see and know the things about which the witness testified?
>
> Did the witness seem to have an accurate memory?

(SR 669).

The jury returned a verdict of guilty on September 22, 1993, (SR 680), and Mr. McMullen was sentenced on November 2. On Count I he was sentenced to thirty years incarceration with a mandatory minimum sentence of ten years pursuant to the habitual violent felony offender statute, with a concurrent three year mandatory minimum sentence because a firearm was used in the commission of the felony. On Count II he was sentenced to ten years incarceration with a mandatory minimum sentence of five years pursuant to the habitual violent felony offender statute, with a concurrent three year mandatory minimum sentence because a firearm was used in the commission of the felony. On Count III, he was sentenced to thirty years incarceration with a mandatory minimum sentence of ten years pursuant to the habitual violent felony offender statute, with a concurrent three year mandatory minimum sentence because a firearm was used in the commission of the felony. The trial court ordered the sentences for Counts I and II to run consecutively and the sentences for Counts I and III to run concurrently (SR 735-36).

SUMMARY OF ARGUMENT

The trial court erroneously concluded that it was required to exclude Dr. Brigham's testimony. The court interpreted Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 105 1 (1984), broadly, as a per se rule precluding the admissibility of expert testimony on factors affecting the reliability of eyewitness identifications.

This case is factually distinct from Johnson and the later Florida cases that have applied the same exclusionary rule because in this case there was no evidence against the defendant other than eyewitness testimony. It is absolutely critical in such a case that the defendant be permitted to challenge the reliability of the State's eyewitness identifications through the testimony of a qualified expert. Courts in other jurisdictions have held that it is an abuse of discretion to preclude a defendant from presenting expert testimony on the factors that have been shown to affect the reliability of eyewitness identifications where eyewitness testimony is the sole basis for the prosecution. Florida should adopt the same rule,

Johnson is based *on* the premise that a jury is fully capable of assessing the reliability of an eyewitness identification without the need for expert testimony. This premise has been discredited by numerous scientific studies which have demonstrated beyond reasonable question that there are factors affecting the accuracy of eyewitness identifications that are unknown to most jurors. Dr. Brigham would have testified about these factors, including unconscious transference, the lack of correlation between a witness' confidence and the accuracy of the identification, the forgetting curve, the difficulty of cross-racial identification, the decrease in accuracy due to stress and the fact that eyewitness identifications are much less accurate than most people think.

Dr. Brigham's testimony met all of the requirements for admissibility of expert testimony

set forth in the Florida Evidence Code, § 90.702, Fla. Stat. and in Ramirez v. State, 651 So. 2d 1164 (Fla. 1995). Dr. Brigham's testimony would have helped the jury weigh the eyewitness testimony against Mr. McMullen. His testimony was based on a body of knowledge generally accepted in the field of psychology. Dr. Brigham was well qualified by knowledge, skill and experience to explain these factors. He was also prepared to show how each specific factor related to the facts of Mr. McMullen's case.

Dr. Brigham's proffered testimony is similar to other kinds of expert testimony that Florida courts have routinely admitted in both criminal and civil cases. Excluding Dr. Brigham's testimony, which was critical to Mr. McMullen's defense, was inconsistent with these Florida precedents.

The trial court compounded its error by denying a request by Mr. McMullen's counsel that the jury be instructed about factors that can affect the reliability of eyewitness identifications.

Finally, the trial court erred by sentencing Mr. McMullen to consecutive rather than concurrent sentences under the habitual violent felony offender statute.

This Court should reverse Mr. McMullen's conviction and his sentence and remand this case for a new trial.

ARGUMENT

I. EXPERT TESTJMONY RELATING TO FACTORS WHICH AFFECT THE RELIABILITY OF AN EYEWITNESS IDENTIFICATION IS ADMISSIBLE WHEN THE PROSECUTION IS BASED SOLELY UPON EYEWITNESS IDENTIFICATION TESTIMONY.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302 (1973). As the Supreme Court explained in Ake v. Oklahoma, 470 U.S. 68, 79 (1985), "unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of the advantage is to cast a pall on the accuracy of the verdict obtained."

By successfully moving to exclude the expert testimony of Dr. Brigham, the State gained an unfair advantage over Petitioner Scott McMullen. With no physical evidence to either incriminate or exonerate McMullen, the outcome of the prosecution hinged upon the credibility of the Grewals' eyewitness identifications, Because Mr. Grewal had only a "split second" to glimpse the man who shot him, it was critically important to Mr. McMullen's defense to effectively challenge Mrs. Grewal's testimony that she was "a hundred percent certain" and had "no doubt in [her] mind" about her identification of Mr. McMullen as the assailant (SR 383).

By excluding Mr. McMullen's expert, the trial court prevented the jury from knowing that the reliability of eyewitness identifications is affected by certain psychological factors that are well known to and generally accepted by the scientific community. These factors would have explained to the jury how the Grewals may have mistaken Mr. McMullen for the assailant in spite of their best efforts to tell the truth. Expert testimony about these factors that have been shown to affect the reliability of eyewitness identifications would have helped the jury to

perform the critical task of weighing the credibility of the eyewitness testimony against Mr. McMullen. Because the prosecution of Mr. McMullen was based solely upon the Grewals' identifications, it cannot be said that the exclusion of Dr. Brigham's testimony was harmless error. Accordingly, Mr. McMullen's conviction should be reversed and a new trial ordered.

A. Either The Trial Court Erred By Interpreting *Johnson v. State* As A *Per* Se Rule Against The Admission Of Expert Testimony On Factors Affecting The Reliability Of Eyewitness Identifications Or, Alternatively, This Court Should Clarify That *Johnson v. State* Does Not Apply When A Prosecution Is Based Solely Upon An Eyewitness Identification.

The trial court excluded Dr. Brigham's testimony based upon Johnson v. State, 438 So. 2d 774 (Fla. 1983), *cert. denied*, 465 U.S. 1051 (1984), which held that expert testimony on "the common problems in such [eyewitness] identifications and the general factors affecting a witness' accuracy" was inadmissible because

> [e]xpert testimony should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions. We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony.

Id. at 777 (citation omitted).

The trial judge below and the Fourth District Court of Appeal apparently understand Johnson to have adopted a per se rule requiring the exclusion of expert testimony relating to factors which affect the reliability of eyewitness identifications. The district court concluded that in Johnson this Court "categorically rejected" expert testimony on eyewitness identification. McMullen v. State, 660 So. 2d 340, 342 (Fla. 4th DCA 1995). In his concurring opinion, Judge Farmer added, "[A] trial judge might fairly read [the holding in Johnson] as nothing less than the

per se exclusion of expert testimony on the psychological factors affecting the reliability of eyewitness identifications." Id. (Farmer, J., concurring).

Other decisions by this Court after Johnson support the conclusion that Johnson adopted a per se exclusion on the admissibility of expert testimony relating to eyewitness identifications. See, e.g., Espinosa v. State, 589 So. 2d 887, 893 (Fla. 1991), rev'd on other grounds, 505 U.S. 1079 (1992); Lewis v. State, 572 So. 2d 908, 911 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991); Hooper v. State, 476 So. 2d 1253, 1257 (Fla. 1985), cert. denied, 475 U.S. 1098 (1986).[4] Whether or not this Court actually intended to adopt a *per* se rule excluding expert eyewitness identification testimony in all cases, it is undeniable that Florida's circuit courts and district courts of appeal are interpreting Johnson and its progeny to have done so.

The trouble with Johnson v. State and its progeny is that these decisions did not consider whether the generally wide discretion afforded to trial judges concerning the admissibility of expert testimony should be more limited in a situation like Mr. McMullen's where the eyewitness testimony is the only evidence of guilt, the proffered expert testimony is therefore

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[4] Petitioner is aware of only one reported Florida decision where the trial judge allowed limited expert testimony about one factor affecting the reliability of an eyewitness identification. In that case, Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), the trial judge allowed Dr. Brigham to testify as an expert about the ability of an eyewitness to make an accurate identification "several months or years. after the fact." Id. at 530. Rogers was convicted and appealed, in part based on the argument that the trial judge should have allowed Dr. Brigham to testify about other factors that may have affected the reliability of the eyewitness identification. Id. This Court rejected that argument based on Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980). It does not appear from the Rogers opinion that the State challenged the trial court's decision to admit Dr. Brigham's testimony as limited, so Rogers does not detract from the conclusion that Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 105 1 (1984), adopted a per se rule against the admissibility of expert testimony on factors affecting eyewitness identifications.

critical to the defense, and the proffer suggests that the expert testimony would in fact assist the jury in weighing the credibility of the eyewitness testimony.

The facts of Johnson are distinguishable from Mr. McMullen's case because in Johnson there was substantial other evidence of the defendant's guilt. For example, the jury heard testimony that the defendant admitted to two people that he committed the crime and that he owned a gun of the same caliber as the murder weapon. 438 So. 2d at 776. Like Johnson, the other reported Florida decisions affirming the exclusion of expert testimony on factors affecting the reliability of eyewitness identifications are factually distinguishable from Mr. McMullen's case because there was other evidence of the defendants' guilt and the exclusion of the testimony may not therefore have been critical to the defense. See. e.g., Esninosa, 589 So. 2d 887 (blood matching that of the defendant was found at the crime scene, blood matching that of two of the victims was found on the defendant's clothing, and money that the defendant asked a friend to keep for him also had specks of blood on it); Lewis, 572 So. 2d 908 (incriminating statement made by defendant at time of arrest); Rogers, 5 11 So. 2d 526 (the defendant's partner in the robbery testified against him and .45 caliber shell casings matching the bullets that killed victim were found at the defendant's home); Hooper, 476 So. 2d 1253 (the defendant's blood was found on a ligature, t-shirt and other areas at the crime scene and he attempted suicide shortly after being arrested); Johnson, 393 So. 2d 1069 (evidence was presented that the robbery victim fired a shot at the robber before the robber killed him and that the defendant had a fresh bullet wound in his leg); and Nelson v. State, 362 So. 2d 1017 (Fla. 3d DCA 1978) (eyewitness identification was buttressed by taped statement of the defendant to police in which he admitted

being at the high school where the crime occurred on the day it occurred).[5]

Another important distinction between Johnson and this case is that Dr. Brigham's proffered testimony appears to have been broader and at the same time more specific than the testimony at issue in Johnson. The trial court below mischaracterized Dr. Brigham's testimony as "in substance, that persons under stress oftentimes err in the identification of other persons" (R 45). As detailed above, Dr. Brigham's proffered testimony addressed several other factors besides stress which have been shown to affect the reliability of eyewitness identifications. By interpreting Dr. Brigham's testimony as relating only to the effects of stress on eyewitness identifications, the trial court concluded that Dr. Brigham's testimony came within the scope of Johnson, which excluded testimony about "the common problems in [eyewitness] identifications and the general factors affecting a witness' accuracy." 438 So. 2d at 777. The proffer of the expert in Johnson was apparently substantially more limited in scope than was Dr. Brigham's proposed testimony. The Johnson court did not address whether the specific factors that Dr. Brigham would have testified about were beyond the common knowledge of jurors.

The important factual distinctions between this case and Johnson and its progeny make this case one of first impression. Even if it is not, the Fourth District Court of Appeal is correct in suggesting that it is time for this Court to reexamine Johnson and to consider whether the apparent per se exclusion of expert eyewitness identification testimony properly applies to a case

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[5] Petitioner has found only one reported Florida decision, Rodriguez v. State, 4 13 So. 2d 1303 (Fla. 3d DCA 1982), where expert eyewitness identification testimony was excluded and there was apparently no other evidence of the defendant's guilt. Rodriguez was not reviewed by this Court, however, and it was decided fourteen years ago when the science of the factors that affect the reliability of eyewitness identifications was not as well developed as it is today.

such as Mr. McMullen's where the prosecution is based solely upon eyewitness testimony. This Court should clarify Johnson and hold that in cases where there is no other evidence to link the defendant to the crime, expert testimony on factors affecting the reliability of eyewitness identifications is admissible in Florida.

B. The Modern Trend In The Law Is To Admit Expert Testimony Regarding Factors Affecting The Reliability of Eyewitness Identifications When Eyewitness Testimony Is The Only Evidence Of Guilt.

Every court that has squarely addressed the narrow issue presented in this case has ruled that a trial court abuses its discretion by excluding expert testimony like Dr. Brigham's when there is no other evidence of guilt. For example, in People v. McDonald, 690 P.2d 709, 721 (Cal. 1984), in which the prosecution's case was based solely on the testimony of eyewitnesses and the defendant's alibi witnesses apparently were not believed by the jury, the California Supreme Court concluded the trial judge abused his discretion by excluding expert testimony on the factors affecting the reliability of eyewitness identifications. The court reasoned that "although jurors may not be totally unaware of the psychological factors bearing on eyewitness identification, the body of information now available on these matters is 'sufficiently beyond common experience' that in appropriate cases expert opinion thereon could at least 'assist the trier of fact' ." Id. (citation omitted). Finding that the exclusion of the expert witness' testimony "undercut the evidentiary basis of defendant's main line of defense . . . and deprived the jurors of information that could have assisted them in resolving [the] crucial issue [of identification]," the McDonald court held:

> When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the

> defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known or understood by the jury, it will ordinarily be error to exclude that testimony.

Id. at 727.

Similarly, in State v. Chapple, 660 P.2d 1208 (Ariz. 1983), the defendant's conviction was based on the testimony of two eyewitnesses who did not identify the defendant as the perpetrator until more than a year after the crime occurred. The expert witness offered by the defendant in Chapple would have testified regarding, among other things, the "forgetting curve," the fact that stress causes inaccuracy of perception and recall and "unconscious transference." Id. at 1220-21. The Chapple court reversed the conviction and concluded:

> Depriving [the] jurors of the benefit of scientific research on eyewitness testimony force[d] them to search for the truth without full knowledge and opportunity to evaluate the strength of the evidence. In short, this deprivation prevent[ed] [the] jurors from having "the best possible degree" of "understanding the subject" toward which the law of evidence strives.

Id. at 1221 (quoting Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969, 1017-18 (1977)). The Chapple court held that where the "preclusion ruling undercut the entire evidentiary basis for defendant's arguments on this issue," the trial court abused its discretion by excluding the defendant's expert. Id. at 1222.

In United States v. Moore, 786 F.2d 1308 (5th Cir. 1986), the court held that where there was overwhelming evidence of guilt other than an eyewitness identification, there was no abuse of discretion in excluding expert testimony on eyewitness reliability. Id. at 1313. The Moore court emphasized, however, that "in a case in which the sole testimony is casual eyewitness

identification, expert testimony regarding the accuracy of that identification is admissible and properly may be encouraged." Id. The court acknowledged that in some cases an eyewitness identification "may make the entire difference between a finding of guilt or innocence" and that in those cases expert testimony on eyewitness identification "may be critical." Id. The Moore court expressly stated that it "accepts the modern conclusion that the admission of expert testimony regarding eyewitness identifications is proper." Id. at 13 12. A number of other reported decisions have concluded that expert testimony on eyewitness identification should have been admitted when the identification was the pivotal factor in obtaining a conviction. See United States v. Downing, 753 F.2d 1224 (3d Cir. 1985); People v. Brandon, 38 Cal. Rptr. 2d 751 (Cal. Ct. App. 1995); People v. Campbell, 847 P.2d 228 (Colo. Ct. App. 1992); State v. Whaley, 406 S.E.2d 369 (S.C. 1991); People v. Beckford, 532 N.Y.S. 2d 462 (N.Y. Sup. Ct. 1988); Skamarocius v. State, 731 P.2d 63 (Alaska Ct. App. 1987); People v Lewis, 520 N.Y.S.2d 125 (N.Y. Cty Ct. 1987); State v. Moon, 726 P.2d 1263 (Wash. Ct. App. 1986).

Although Mr. McMullen does not necessarily urge this Court to adopt the broad rule that this testimony is admissible under all circumstances, several states have so held. See Echavarria v. State, 839 P.2d 589 (Nev. 1992), cert. denied, 113 S. Ct. 2353 (1993); State v. Buell, 489 N.E.2d 795 (Ohio 1986), cert. denied, 479 U.S. 871 (1986); State v. Fontaine, 382 N.W.2d 374 (N.D. 1986).

So far as Mr. McMullen's counsel have been able to determine, every court that has squarely addressed the narrow issue presented here has held that expert testimony regarding factors affecting the reliability of eyewitness identifications should be admitted where there is no other evidence linking the defendant to the crime.

C. Expert Testimony On Factors Affecting The Reliability Of Evewitness Testimonv Is Admissible Under Florida Law.

Expert opinion testimony in Florida is admissible either through the relevancy-balancing approach of the Florida Evidence Code or the Frye test which is outlined in Ramirez v. State, 65 1 So. 2d 1164 (Fla. 1995). Both standards require that the expert testimony assist the jury in understanding the evidence or in determining a fact in issue and require that the testimony be given by a qualified expert. The chief difference between the two standards is that Frye, unlike the relevancy-balancing approach, requires the expert testimony to be based on a scientific principle or theory that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

As recognized by this Court in Flanagan v. State, 625 So. 2d 827 (Fla. 1993), Frye does not apply to expert testimony that is "pure opinion" testimony. Id. at 828. The distinction between "pure opinion" testimony and the types of expert testimony which must meet the Frye test is thoroughly discussed in Judge Ervin's opinion in Flanagan v. State, 586 So. 2d 1085, 11 08-1 121 (Fla. 1 st DCA 1991), which this Court endorsed in its Flanagan opinion. 625 So. 2d at 828.

Interestingly, Judge Ervin's opinion includes a detailed discussion of People v. McDonald, 690 P. 2d 709 (Cal. 1984), in which he concluded that the Frye test would not apply to an expert's recitation of factual information about the contents of eyewitness identification studies reported in the scientific literature -- such as Dr. Brigham would have testified to below. 586 So. 2d at 1109-1111. Judge Ervin contrasted this type of testimony with expert testimony concerning psychological "profiles" or "syndromes" which must meet the Frye test to avoid the

risk that the jury might be misled by unreliable scientific methods or theories not yet generally accepted within the relevant scientific community, Id.

Although this Court has not yet considered which standard -- relevancy-balancing or Frye -- applies to expert testimony about the factors that affect the reliability of eyewitness identifications, Mr. McMullen submits that the standard does not matter to the outcome of his case because Dr. Brigham's proffered testimony plainly met the requirements of both standards.

Under Ramirez, the admission of expert opinion testimony concerning a new or novel scientific principle is a four-step process.

First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue. Id. at 1167.

Second, the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is "sufficiently established to have gained general acceptance in the particular field in which it belongs." Id. (quoting, Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). This step is commonly known as the Frye test or Frye analysis.

Third, the trial judge must determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue. Id.

Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject. Id.

Applying the four-step test in Ramirez to this case, the record shows that Dr. Brigham's testimony would have helped the jury to assess the pivotal testimony of the two eyewitnesses and that his testimony is based on scientific principles that are sufficiently established to have

gained general acceptance in the scientific community, In addition, Dr. Brigham is well qualified as an expert to present opinion testimony on the reliability of eyewitness identification. Therefore, Dr. Brigham's testimony should have been admitted and the jury should have been given an opportunity to assess its credibility.

1. Expert testimony on eyewitness identifications would have been helpful to the jury in this case.

The heavy burden jurors bear of deciding the guilt or innocence of an accused is especially difficult when, as here, there is no evidence upon which to base a decision other than the conflicting testimony of the victims and the accused. Expert testimony to help the jury find the truth is of great assistance in such a case.

That expert testimony on eyewitness identification would have been helpful to the jury in this case is demonstrated by the fact that other jurisdictions recognize the value of such expert testimony and admit it; expert testimony is usually admitted where it is critical to the defense; and Florida courts have admitted expert testimony analogous to Dr. Brigham's in both criminal cases and civil cases,

a. Other jurisdictions recognize the importance of allowing the jury to hear expert testimony on eyewitness identification and admit such testimony into evidence.

Those cases from other jurisdictions that have squarely addressed the issue presented here have concluded that expert testimony relating to psychological factors affecting the reliability of eyewitness identification, such as cross-racial identification, unconscious transference, the "forgetting curve" and the stress-perception factor, should be admitted because it will help the jury. See, Turner, supra, section I.B. recognize that the substance of expert

testimony such as Dr. Brigham's is beyond the experience of the average juror. The McDonald court noted:

> It is doubtless true that from personal experience and intuition all jurors know that an eyewitness identification can be mistaken, and also know the more obvious factors that can affect its accuracy, such as lighting, distance and duration. It appears from the professional literature, however, that other factors bearing on eyewitness identification may be known only to some jurors, or may be imperfectly understood by many or may be contrary to the intuitive beliefs of most.

690 P.2d at 720; see also Downing, 753 F.2d at 1231-32. The court reasoned that "although jurors may not be totally unaware of the psychological factors bearing on eyewitness identification, the body of information now available on these matters is 'sufficiently beyond common experience' that in appropriate cases expert opinion thereon could at least 'assist the trier of fact.'" 690 P.2d at 721

b. Many courts admit expert testimony analogous to Dr. Brigham's where such testimony is critical to one's defense.

In Mr. McMullen's case, the jury was deprived of valuable information that went to the very heart of his defense. Exclusion of Dr. Brigham's testimony on the factors that affect the reliability of eyewitness identifications lent to the victims' testimony an assumption of correctness and reliability. "Of all the evidence that may be presented to a jury, a witness' in-court statement that 'he is the one' is probably the most dramatic and persuasive." McDonald, 690 P.2d at 717 (quoting United States v. Russell, 532 F.2d 1063, 1067 (6th Cir. 1976)). Here, the jury heard not only that "he is the one," but also that Mrs. Grewel was "a hundred percent certain" and had "no doubt in [her] mind" about her identification of Mr. McMullen (SR 383). Basic fairness required that Mr. McMullen be allowed to inform the jury through Dr. Brigham's

testimony of factors affecting the reliability of eyewitness identification, including the fact that studies show that a witness' certainty bears little relationship to the accuracy of an identification.

In addition to cases from other states in which expert testimony regarding eyewitness identification has been admitted (see, supra, Section I.B.), there are many other cases where courts have admitted expert testimony analogous to Dr. Brigham's testimony because the testimony was critical to the defense. For example, where a defendant ingested PCP for months prior to committing murder, a critical question was whether he was capable of forming the specific intent to commit the crime. Burch v. State, 478 So. 2d 1050 (Fla. 1985), aff'd in part, rev'd in part on other grounds, 522 So. 2d 8 10 (Fla. 1988). The defendant sought to introduce the expert testimony of a toxicologist on the effects of PCP on the human body to support his defense of voluntary intoxication. Id. at 1052. In holding that the trial court abused its discretion in excluding the testimony, this Court explained that the testimony of the toxicologist should have been admitted because it was critical to the defense and would have assisted the jury. Id.

Where a defendant was convicted of involuntary manslaughter and reckless handling of a firearm in a hunting accident, the trial court erred when it refused to admit an experimental psychologist's expert testimony concerning "closure" which was found to be critical to the defendant's defense that he had tried to identify his target before firing. Farley v. Commonwealth, 458 S.E.2d 3 10 (Va. Ct. App. 1995). The court observed that the expert's testimony may have helped the jury to understand how the defendant might have believed he was shooting at a turkey and not a person. Id. at 3 13. The Farley court found that the testimony would have assisted the jury in resolving an essential issue and should not have been rejected on

the grounds that it would not assist the jury or was a matter of common knowledge. Id. The court further found that admitting expert psychological testimony as to "closure" in interpreting and misperceiving the situation would not invade the province of the jury. Id. at 3 14.

As in Burch and Farley, Dr. Brigham's expert testimony was critical to Mr. McMullen's defense. The testimony would have assisted the jury and should it have been admitted.

c. Florida courts admit expert testimony analogous to Dr. Brigham's in criminal cases.

Although no Florida court has previously addressed the narrow issue presented by this case, Florida courts consistently hold that expert testimony analogous to Dr. Brigham's is helpful to juries. For example, in Kruse v. State, 483 So. 2d 1383, 1385 (Fla. 4th DCA 1986), the court admitted expert testimony that a child victim of sexual abuse was suffering from Post-Traumatic Stress Syndrome because the testimony would provide the jury with "more information from which to decide whether the child had been a victim of sexual abuse." The Kruse court's decision to admit the expert testimony rested, in part, on the fact that no physical evidence of sexual assault was presented. Id. The Kruse court explained that "[w]hile we also believe that jurors would have some ability to decide for themselves whether the child's behavioral changes may be related to the trauma, we do not believe that the implications are so easily understood as to bar the receipt of a psychiatric expert's analysis thereof." Id. at 1385.

In State v. Townsend, 635 So. 2d 949 (Fla. 1994), this Court affirmed the admission of a psychologist's testimony in a child abuse case where expert testimony was based on the child's statements and behavior elicited through the use of anatomical dolls. This Court determined that such expert testimony would assist the jury in determining whether the behavior of the child was consistent with the behavior of a child who has been sexually abused. Id. at 958.

Likewise, in Glendening v. State, 536 So. 2d 212, 221 (Fla. 1988), cert. denied, 492 U.S. 907 (1989), this Court affirmed the admission of expert testimony that a child had been sexually abused. Relying on Kruse, this Court concluded that "[t]he opinion of [the expert] witness . . provided the jury more information from which to decide whether the child had actually been a victim of sexual abuse . The jury was properly left free to determine whether to accept the opinion and if so, what weight it should be given." Id. at 220-22 1. See also Jackson v. State, 553 So. 2d 719, 724 (Fla. 4th DCA 1989) ("judges (and presumably jurors) have not been trained to understand ourselves, much less anyone else , Modern psychology, through its startling new insights into the subtleties and complexities of the human mind, should help.").

Where a defendant was convicted of child sexual abuse and a critical issue at trial was the credibility of the victim, the court held that is was an abuse of discretion to exclude a psychologist's testimony that the procedures and interviewing techniques of the abuse treatment experts were unreasonably suggestive and that the victim's "affect" was inconsistent with sexual abuse. State v. Malarney, 617 So. 2d 739 (Fla. 4th DCA 1993).

In Hickson v. State, 630 So. 2d 172 (Fla. 1993), this Court admitted expert testimony regarding battered women's syndrome. This Court reasoned:

> [S]uch testimony is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge.

Id. at 174 (quoting State v. Kelly, 478 A.2d 364, 378 (N.J. 1984)). See also Terry v. State, 467 So. 2d 761 (Fla. 4th DCA 1985), review denied, 476 So. 2d 675 (Fla. 1985) (expert testimony of battered women's syndrome was admissible as part of defendant's claim of self defense);

Jackson, 553 So. 2d 719 (court properly admitted expert testimony of psychologist who performed psychological autopsy of suicide victim).

Dr. Brigham's testimony would have dispelled common misperceptions about eyewitness identifications, revealing that certainty is not an indication that an identification is accurate and that the stressful nature of an event does not burn an unforgettable image into the victim's memory. Because "the conclusions of the psychological studies are largely counter-intuitive," Dr. Brigham's testimony would have served to "'explode common myths about an individual's capacity for perception.'" United States v. Moore, 786 F.2d 1308, 13 12 (5th Cir. 1986) (quoting United States v. Smith, 736 F.2d 1103, 1105 (6th Cir. 1984), cert. denied, 469 U.S. 868 (1984)). Dr. Brigham's testimony would have helped the jury make its difficult decision.

In addition to providing information to help correct common misbeliefs about eyewitness testimony, Dr. Brigham would have informed the jury about factors that are unknown to the average juror, such as unconscious transference and the fact that an eyewitness' confidence in the accuracy of his identification has little relationship to the reliability of the identification. Further, jurors need not be entirely ignorant about the substance of the expert's testimony before that testimony is admissible. "If that were the test, little expert opinion testimony would ever be heard." McDonald, 690 P.2d at 720. Accordingly, Dr. Brigham's testimony, like other psychological testimony admitted by Florida courts, would have helped the jury to carry out its duty in this case.

d. Florida courts admit expert testimony analogous to Dr. Brigham's testimony in civil cases.

The unjustness of exclusion of Dr. Brigham's testimony is even more apparent when one considers the types of expert testimony admitted in civil cases over the objection that the

testimony was within the common experience of the jury. Indeed, it would be unfair for a criminal defendant whose freedom is at stake to be required to meet a greater burden to introduce expert testimony than a civil litigant whose goal is the mere realization of a sum of money. See La Villarena. Inc. v. Acosta, 597 So. 2d 336,339 (Fla. 3d DCA 1992) (proper to admit expert testimony about how businesses clean floors in slip and fall case because "some people might not know anything about cleaning floors"); Ritzer v. Jefferson Stores. Inc., 516 So. 2d 48, 49 (Fla. 4th DCA 1987) (proper to admit expert to show that a person's arrest record could diminish earning capacity).

Despite the objection that the testimony was within the common experience of the jury, expert testimony analogous to Dr. Brigham's has been admitted in civil cases in which courts have found deceptive qualities or factors present in the environment and where the manner of a person's reaction to such qualities or factors might be counter-intuitive. Two cases serve as examples.

In a personal injury case, a customer of a waterfront recreation area became paralyzed from the neck down as the result of a dive into the river from a seawall. Public Health Found. for Cancer and Blood Research. Inc. v. Cole, 352 So. 2d 877 (Fla. 4th DCA 1977), cert. denied, 361 So. 2d 834 (Fla. 1978). The plaintiff presented expert testimony from a psychologist specializing in human engineering, the study of how factors, such as past experience, present feelings and immediate motor response to the situation or environment, combine to influence a person's decision. Id. at 879. The Cole court concluded that the testimony of the human engineering psychologist concerned the deceptive quality of various factors that were present in

the environment and the manner in which a person would react to these factors." Id. The court recognized that the significance of these factors and the reaction of a person to them might reasonably involve knowledge that was within the expert witness' expertise and beyond the common knowledge of the jurors. Id.

In an action for wrongful death in a railroad crossing accident, this Court supported a trial judge's decision to admit into evidence the testimony of a "human factors" expert. Buchman v. Seaboard Coast Line R. Co., 381 So. 2d 229 (Fla. 1980). The court reasoned that the complicated intersection coupled with the conditions inside the decedent's car presented such a deceptive quality in the environment as to warrant the admission of expert testimony. Id. at 230. Rather than invade the province of the jury, this Court concluded that the testimony would assist the jury as to reaction times, audibility of the train whistle and how the crossing measured up to minimum design standards. Id.

Dr. Brigham's testimony, like the human factors testimony in Cole and Buchman, would have helped the jury to understand the various counter-intuitive factors involved in the eyewitness identification in this case. For example, the confidence-accuracy factor about which Dr. Brigham would have testified is a deceptive or counter-intuitive factor. Similarly, Dr. Brigham would have informed the jury that stress does not burn an unforgettable image into a

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[6] The court found that the weather conditions, the tide, the angle of the sun, the glare and other physical conditions existing at the time of the plaintiffs accident created a situation that may be beyond the ordinary experience and understanding of the jury. Id. In addition to these factors, the human engineering psychologist testified about the impact on plaintiffs decision of information about the area that she knew before the accident, the angle of the dive, murkiness of the water, judgment of depth factor, how habit interferes with observation and the impact of the emotional tone of the Fourth of July holiday. Id. at 880-81 (Downey, J., concurring).

person's memory. Cole, Buchman and this case illustrate that "things are not always what they seem." Dr. Brigham's testimony was very much needed in this case to counteract the common misperceptions jurors have about eyewitness identification testimony.

2. Dr. Brigham's testimony is based on a scientific principle or discovery that is sufficiently established to have gained general acceptance in the scientific community. Dr. Brigham's testimony therefore meets the *Frye* test.

In determining whether Dr. Brigham's testimony is based on a scientific principle or discovery that is sufficiently established to have gained general acceptance in the particular field in which it belongs, a reviewing court must conduct a de novo review. See Flanagan v. State, 625 So. 2d 827 (Fla. 1993) and Stokes v. State, 548 So. 2d 188 (Fla. 1989). Courts employing the Frye standard generally recognize three methods of proof for determining whether a particular scientific technique has attained general acceptance in the relevant scientific community: expert testimony, scientific and legal writings and judicial opinions. Toro v. State, 642 So. 2d 78 (Fla. 5th DCA 1994). The general acceptance under the Frye test must be established by a preponderance of the evidence, Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) Frye merely requires "general" acceptance and, therefore, some debate within the scientific community is permissible. Chrisco v. CSX Transn., Inc., 3 Fla. L. Weekly Supp. 435 (Fla. 4th Cir. 1995). The test is whether or not, by a preponderance of the evidence, the plaintiff can show that there is more acceptance than there is debate. Id.

a. Experts agree that research findings relating to eyewitness identification are reliable enough for courtroom testimony.

There is a high level of consensus among scientists in the field that the research findings most testified to by eyewitness experts in court are reliable enough to include in expert

courtroom testimony. Saul M. Kassin, Phoebe C. Ellsworth, & Vicki L. Smith, The "General Acceptance" of Psycholonical Research on Evewitness Testimonv: A Survev of Experts, 44 Am. Psychologist 1089, 1094 (1989). The survey conducted by Kassin, Ellsworth and Smith addressed the extent to which experts in the field of eyewitness identification thought certain factors affecting eyewitness identification were reliable enough for courtroom testimony. The survey showed that depending upon which of the 13 eyewitness factors was examined, 71% to 97% of the scientists agreed that the research findings in this area are reliable enough for courtroom testimony. Id. For example, 87% of the experts surveyed rated the accuracy-confidence factor (an eyewitness' confidence is not a good predictor of identification accuracy) as reliable enough to include in courtroom testimony. Id. Of the experts surveyed, 85 percent rated the unconscious transference factor (eyewitnesses sometimes identify as a perpetrator someone they have seen in another situation or context) as reliable enough for courtroom testimony, Id. The cross-racial identification factor was considered reliable enough for courtroom testimony by 79% of the experts surveyed. Id. Additionally, 85% of the experts rated the exposure time factor (the less time an eyewitness has to observe an event, the less well he will remember it) as reliable enough to include in courtroom testimony. See also Michael R. Leippe, The Case for Expert Testimonv About Evewitness Memorv, 1 Psychol. Pub. Pol. & L. 1 (1995); Wayne T. Westling, The Case for Expert Assistance to the Jury in Eyewitness Identification Cases, 71 Or. L. Rev. 93 (1992).

Significantly, the factors of accuracy-confidence, exposure time, unconscious transference and cross-racial identification are all relevant to or have a bearing on the facts in this case. As the above survey reveals, scientists in the field of eyewitness identification

consider the scientific information about these factors reliable enough to present in court Therefore, Dr. Brigham's testimony on these factors should have been permitted in this case.

b. Other courts have concluded that the study of psychological factors affecting eyewitness identification is scientifically reliable and/or generally accepted in the scientific community.

Other courts have found that expert testimony on eyewitness identifications is either scientifically reliable or generally accepted in the scientific community. "The scientific validity of the studies confirming the many weaknesses of eyewitness identification cannot be seriously questioned at this point." United States v. Moore, 786 F.2d 1308, 13 12 (5th Cir. 1986).

Acknowledging the dangers of misperception in criminal cases, the court in United States v. Smith, 736 F. 2d 1103 (6th Cir. 1984), cert. denied, 469 U.S. 868 (1984), stated in that it has relied on psychological studies focusing on the problems of misidentification. Additionally, the court recognized that testimony of an expert on eyewitness identification can be said to conform to a generally accepted explanatory theory. Id. at 1107.

In Krist v. Eli Lillv and Co., 897 F.2d 293 (7th Cir. 1990), a products liability case involving DES, the court recognized the potential value to the jury of expert testimony on memory and perception where plaintiffs counsel failed to introduce such testimony to counteract the damaging testimony of plaintiffs mother concerning the color of pills she took during her pregnancy 40 years previously. In Krist, the plaintiffs mother correctly testified as to the size, shape and other features of the DES pills, but incorrectly as to the color and coating of the pills. Id. at 296, Acknowledging the critical nature of the testimony of plaintiffs sole witness and the likelihood of false intuition by the jury, the court concluded that the jury should have had access to "an important body of psychological research [that] undermines the lay

intuition that confident memories of salient experiences . , , are accurate and do not fade with time unless a person's memory has some pathological impairment." Id.

Similarly, in Skamarocious v. State, 73 1 P. 2d **63** (Alaska Ct. App. 1987), where the accuracy of eyewitness identification was central to the defendant's defense, the court held that it was an abuse of discretion to exclude expert psychological testimony. Furthermore, the court stated that this type of testimony is "sufficiently within the mainstream of current psychological theory to satisfy the Frye test." Id. at **66.**

These cases show that other courts recognize that the psychological principles on which expert testimony on eyewitness identification is based are generally accepted in the scientific community. Florida should align itself with these other courts by recognizing that Dr. Brigham's expert testimony on the reliability of eyewitness identifications is based on an empirical science generally accepted in the scientific community.

c. Extensive scientific and legal writings published on the science of eyewitness identification indicates general acceptance in the scientific community.

There is a very large and growing body of research on eyewitness reliability. This body of research has expanded at an accelerating rate since 1980. Brian L. Cutler & Steven D. Penrod, Mistaken Identification 68 (1995). Some of the significant appellate cases that created precedential impediments to eyewitness expert testimony predate the vast bulk of the research. Id. Johnson v. State, **438** So.2d **774** (Fla. 1983), cert. denied, 465 U.S. 105 **1** (1984), was decided on the threshold of an explosion of scientific research on eyewitness identification and eyewitness reliability. The Johnson court did not have available to it the plethora of research findings on the subject that are available today. Of the 150 studies cited in a 1992 book, over

80% were conducted after 1980. Cutler & Penrod, supra, at 68. At least seven major scholarly books on factors influencing eyewitness performance have been published since 1978. Id. There are now over 2,000 references to eyewitness research in the academic literature, thousands of studies on human memory, and hundreds of studies specific to eyewitness reliability factors.[7] Id. As one jurist explained:

> [I]t should be obvious that we cannot strike a reasonable and intelligent balance if we take pains to remain in ignorance of the pitfalls in the identification process. The empirical data now available indicates that the problem is far from fanciful.

McDonald, 690 P.2d at 717 n. 9. "The consistency of the results of these studies on eyewitness reliability is impressive, and the courts can no longer ignore their implications for the administration of justice." Id. at 709.

3. Dr. Brigham is a qualified expert whose testimony applied to the evidence at trial

Dr. Brigham's status as an expert was never challenged by the State. The record demonstrates that Dr. Brigham was qualified as an expert to present opinion testimony on the subject in issue and his testimony was highly specific to issues of paramount importance at trial (SR 70-72). Dr. Brigham has testified as an expert witness in over twenty cases on the subject of eyewitness identification (SR 73). He has been a professor of psychology at Florida State University since 1969 (SR 70-71) and holds a doctorate degree in psychology (SR 71). Dr. Brigham has studied the factors that affect eyewitness identifications for the past eighteen years (SR 71) and received grants from the National Science Foundation and the National Institute of

[7] Articles contained in the Appendix to Petitioner's Initial Brief describe some of the studies that have been conducted on factors affecting the reliability of eyewitness identifications.

Psychology to study various aspects of eyewitness identification (SR 72). See Kruse, 483 So. 2d at 1386 (psychologist was an expert based on formal training experience and recognized specialty).

4. The credibility of Dr. Brigham's expert opinion testimony on eyewitness identification factors was a determination that should have been made by the jury.

This Court has declared that after a court determines whether expert testimony will assist the jury, whether the expert's testimony is generally accepted in the scientific field, and whether the witness is qualified as an expert to present opinion testimony on the subject in issue, the court may then allow the expert to render an opinion on the subject of his expertise. Ramirez, 65 1 So. 2d 1164 (Fla. 1995). Ramirez further declared that it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject. Id. at 1167.

Dr. Brigham's proffered testimony was highly specific to issues of paramount importance at trial. Mr. McMullen's frequent visits to the Grewels' store raised the issue of unconscious transference. Cross-racial identification issues were present in that the victims are of Indian descent and Mr. McMullen is black. Dr. Brigham's testimony also dealt with the fact that certainty is not an indication of accuracy, the general reliability of the eyewitnesses' testimony based on their perception and memory, the impact of high stress upon the witnesses' ability to remember specific details and the fact that certainty is not an indication of accuracy. The Grewals' identification of Mr. McMullen at trial involved each of these psychological factors and, thus, the proffered expert testimony was related to the evidence at trial.

Dr. Brigham would not have given an opinion on whether the Grewels' were mistaken in their identification. Dr. Brigham's testimony was offered by Mr. McMullen to assist the jurors

in weighing the reliability of the eyewitness identifications in this case. Dr. Brigham would have informed the jury that confidence or certainty in an identification is unrelated to accuracy of the identification. He also would have informed the jury about unconscious transference, cross-racial identifications, the forgetting curve and the effect of stress on the accuracy of identifications. Dr. Brigham's expert opinion testimony on eyewitness identifications would have simply provided the jury with information to assess the accuracy of the identifications in this case.

Dr. Brigham's testimony would have assisted the jury , was based on a body of knowledge generally accepted in the field of psychology, and was that of an acknowledged and uncontroverted expert in the field. As Ramirez teaches, once these three threshold tests are met, it is the jury that must decide whether the testimony is credible. Therefore, Dr. Brigham's testimony should have been admitted at trial.

II. THE TRIAL COURT ERRED BY FAILING TO GIVE CAUTIONARY INSTRUCTIONS TO THE JURY RELATING TO EYEWITNESS IDENTIFICATION

After its decision not to admit Dr. Brigham's testimony, the trial court compounded the advantage to the State over Mr. McMullen by refusing to allow special jury instructions regarding eyewitness testimony. This Court's holding in Johnson was based on the conclusion that a defendant who is not allowed to present expert testimony on eyewitness identification would have available "the assistance of cross-examination and cautionary instructions." 438 So. 2d at 777.

Mr. McMullen proposed that the jury be instructed on cross-racial identification and other factors, such as stress and the certainty-accuracy factor, that affect the reliability of

eyewitness identification. (R 58-61). The trial court denied Mr. McMullen's special jury instructions and instead instructed the jurors to use their common sense and to consider how the witnesses acted and what they said (SR 669). The only jury instructions that could be said to relate to eyewitness identification were the following:

> Did the witness seem to have an opportunity to see and know the things about which the witness testified?
>
> Did the witness seem to have an accurate memory?

(SR 669). The jury instructions failed to caution the jury on issues related to eyewitness identification that should have been considered in reaching a verdict in this case. Not only was Mr. McMullen denied the opportunity to present expert testimony on eyewitness identification, he was further hampered in his defense because he was not allowed to use one of the only procedural safeguards allowed under Johnson -- the use of cautionary instructions. Therefore, this Court should reverse Mr. McMullen's conviction and grant him a new trial.

HI. THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES ON COUNTS I AND H

The trial court also erred in ordering Mr. McMullen to consecutively serve enhanced sentences for his convictions of aggravated assault (with a firearm) and aggravated battery (with a firearm) pursuant to the habitual violent felony offender statute, § 775.084(4)(b), Fla. Stat. (1993). The Fourth District Court of Appeal affirmed Mr. McMullen's sentences, citing Newton v. State, 603 So. 2d 558 (Fla. 4th DCA 1992), as support for allowing the sentences for aggravated assault and aggravated battery to run consecutively.

The defendant in Newton was convicted of attempting to murder three law enforcement officers. He was sentenced to three consecutive life sentences with three consecutive 25-year

mandatory minimum terms. Newton held that the sentencing statutes for life felonies, such as attempted murder of a law enforcement officer, allow a trial judge discretion to require sentences to be served consecutively (or concurrently) even if multiple offenses were part of a single criminal episode. 603 So. 2d at 561-62.[8]

Unlike the life felony sentencing statute applied in Newton, this Court has consistently held that sentences based on the habitual offender statute must run concurrently so long as the crimes arise out of a single criminal episode. State v. Hill, 660 So. 2d 1384, 1386 (Fla. 1995); Jackson v. State, 659 So. 2d 1060, 1063 (Fla. 1995); Brooks v. State, 630 So. 2d 527, 528 (Fla. 1993); Hale v. State, 630 So. 2d 521, 525 (Fla. 1993), cert. denied, 115 S. Ct. 278 (1994); Daniels v. State, 595 So. 2d 952, 954 (Fla. 1992).

Since the trial court and the Fourth District must have been aware that the sentencing statutes at issue in this case were different from Newton and identical to those applied in Jackson, Brooks. Hale and Daniels, it appears that they concluded that the crimes for which Mr. McMullen was convicted did not arise out of a single criminal episode. The facts of this case reveal that the trial court and the Fourth District erred in making this conclusion. When determining whether multiple offenses arise out of a single criminal episode, courts are required to examine three factors: whether the crimes took place at the same time, whether the crimes

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[8] In reaching this conclusion, the Newton court followed State v. Enmund, 399 So. 2d 1362 (Fla. 1981), rev'd, 102 S. Ct. 3368 (1982), on remand, 439 So. 2d 1383 (Fla. 1983), appeal after remand, 459 So. 2d 1160 (Fla. 2d DCA 1984), quashed, 476 So. 2d 165 (Fla. 1985). Enmund held that courts have discretion to impose consecutive (or concurrent) 25-year mandatory minimums for capital felonies. The Newton court noted the identical language regarding mandatory punishment in the sentencing statute for life felonies and in the sentencing statute for capital felonies.
603 So. 2d at 561.

happened at the same place, and whether there were multiple victims. Lifred v. State, 643 So. 2d 94, 97 (Fla. 4th DCA 1994); Smith v. State, 650 So. 2d 689, 691 (Fla. 3d DCA 1995); Woods v. State, 6 15 So. 2d 197, 199 (Fla. 1 st DCA 1993). The mere fact that there is more than one victim does not mean that two or more crimes are not part of a single episode. As the First District explained:

> Even if two victims are involved, minimum mandatory sentences must be imposed concurrently, so long as the offenses were committed during a single criminal episode.

White v. State, 618 So, 2d 354, 360 (Fla. 1st DCA 1993) (citing Staten v. State, 600 So. 2d 1269 (Fla. 2d DCA 1992)).

The "same time" and "same place" factors support the conclusion that the crimes Mr. McMullen was convicted of occurred during a single criminal episode because the crimes took place at the same time near the entrance to the victims' store. The assailant in this case put a gun in Mrs. Grewal's side (SR 364) as he moved her toward the door of the store (SR 362) and then quickly raised the gun and shot Mr. Grewal as he came to the door (SR 420-21). Mr. Grewel testified at trial, "Well, he's grabbing with one hand my wife. That's all I looked at, a glance and then the split second pointed the other hand and shoot me" (SR 423). The aggravated assault on Mrs. Grewal and the aggravated battery on Mr. Grewal, therefore, occurred virtually simultaneously (SR 403).

The facts in Newton are in stark contrast to the facts in this case. The court identified three separate and distinct offenses in that case: (1) firing at one officer and turning and firing at another; (2) fleeing and firing again at the same officers; and (3) after being spotted running through a field, firing at a third officer. 603 So.2d at 56 1. In addition to involving multiple

victims, the conduct in Newton took place at separate locations and over a more extended period of time than occurred here. Based on these factual distinctions, Newton cannot support the conclusion that Mr. McMullen's crimes were not part of a single criminal episode and does not support the Fourth District Court of Appeal's affirmance of that part of Mr. McMullen's sentence that required his sentences for aggravated assault and aggravated battery to run consecutively.

This case is much more like Howard v. State, 648 So. 2d 1250 (Fla. 4th DCA 1995), in which the defendant was convicted of two counts of robbing the driver and the passenger of a vehicle, and of possession of a concealed firearm. The probable cause affidavit (copy attached) revealed that the robberies took place at one location and over a short period of time.[9] The Howard defendant was sentenced as a habitual violent felony offender and sentenced to consecutive 30-year terms with consecutive mandatory minimum sentences. The State conceded that even though two victims were involved, the defendant's convictions arose from one criminal episode. 648 So. 2d at 125 1. The Howard court held that the defendant's 30-year sentences and the mandatory minimum sentences must run concurrently. Id.

Similarly, in Smith v. State, 650 So. 2d 689 (Fla. 3d DCA 1995), the court held that the defendant's sentences under the habitual violent felony offender statute must run concurrently because only one criminal episode was involved. The defendant in Smith assaulted and robbed an elderly patron of a gas station. As the defendant attempted to leave, the owner of the gas station locked the front door. An employee of the gas station telephoned the police from outside.

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[9] The probable cause affidavit was attached as Exhibit V to the State's Response to Defendant's Motion for Post-Conviction Relief.

Later, when a police officer arrived in response to the call, the defendant hit the officer in the chest and fled. Id. at 690. The Smith court found that even though two victims were involved, the fact that the conduct occurred "with no significant break in time and place" required the conclusion that only one criminal episode was involved. Id. at 692.

In Gardner v. State, 5 15 So. 2d 408,411 (Fla. 1 st DCA 1987), the court found that the defendant's shooting of three law enforcement officers in a bus over a period of six or seven seconds was one criminal episode. The Gardner court explained:

> While [the defendant] may have committed "separate offenses" by virtue of having shot three separate victims, those offenses did not occur at "separate times and places" so as to remove them from the well-established rule that consecutive sentences are not allowed for offenses arising from a "single continuous criminal episode."

Id.

Florida case law is replete with examples of crimes involving multiple victims that were found to constitute a single criminal episode. See Palmer v. State, 438 So. 2d 1, 3 (Fla. 1983) (consecutive sentence improper even though there were thirteen victims where robberies took place at one location); Young v. State, 601 So. 2d 636, 639 (Fla. 4th DCA 1992), rev. denied, 613 So. 2d 13 (Fla. 1992) (only one criminal episode occurred where two victims were robbed and car was then stolen); Fraley v. State, 641 So, 2d 128, 129 (Fla. 2d DCA 1994) (robbery and shooting of clerk followed by shooting of security guard at same location constituted one criminal episode); Dietrich v. State, 635 So. 2d 148, 148 (Fla. 2d DCA 1994) (two counts of aggravated assault and one count of battery on two victims, concurrent habitual sentence required); Smith v. State, 632 So. 2d 95, 97 (Fla. 2d DCA 1994) (robberies of three victims at same place and time constituted a single criminal episode); Koon v. State, 640 So. 2d 1226, 1226

(Fla. 2d DCA 1994) (robberies of husband and wife at same time in same motel room was one criminal episode); Goff v. State, 616 So. 2d 551, 552 (Fla. 2d DCA 1993) (charges of armed robbery and kidnaping of several victims at the same place and time found to be single criminal episode); Brown v. State, 599 So. 2d 132, 132 (Fla. 2d DCA 1992) (two aggravated battery convictions arising from short violent knife fight in which two victims injured, court finds single criminal episode); Staten v. State, 600 So. 2d 1269, 1270 (Fla. 2d DCA 1992) (single criminal episode for robbery of two victims where episode occurred without interruption in time and location). In each of these cases, the court concluded that it was improper to sentence the defendant to consecutive sentences.

As Howard, Smith, Gardner and the cases cited above show, the trial court improperly sentenced Mr. McMullen to consecutively serve the sentences imposed for his convictions for aggravated assault and aggravated battery. Even though this case involves two victims, only one criminal episode took place because the crimes occurred at the same place without a significant break in time. Therefore, because Mr. McMullen was sentenced as a habitual violent felony offender, the 30-year and 10-year sentences and the mandatory minimum 10-year and 5-year sentences cannot run consecutively. Accordingly, this case, at a minimum, must be remanded for resentencing.

CONCLUSION

As this Court has recognized, the "defense should be allowed broad leeway in offering contrary evidence on the subject of an alleged victim's credibility." Malarney, 617 So. 2d at 740 (emphasis added). This Court should realign the imbalance in this area, which sharply compromises the ability of an accused to defend himself, and conclude that evidence such as Dr. Brigham's is admissible on behalf of a defendant in cases where the prosecution is based solely upon an eyewitness identification. The trial court also erred by refusing to instruct the jury on factors affecting the reliability of eyewitness identifications. These errors cannot be considered harmless

In addition, Mr. McMullen was improperly sentenced under the habitual violent felony offender statute to serve his sentences for aggravated assault and aggravated battery consecutively rather than concurrently. Accordingly, Mr. McMullen's conviction and sentence should be reversed and this cause remanded for a new trial,

Respectfully submitted,

8/16/08 Fla. Bar.

L. Martin Reeder, Jr.
Florida Bar No. 308684
Kim A. Prine
Florida Bar No. 902942
Steel Hector & Davis
1900 Phillips Point West
777 South Flagler Drive
West Palm Beach, Florida 33401
(407) 650-7232

Margaret B. Reeder
Florida Bar No. 976740
4240 Tanglewood N. #409
Palm Beach Gardens, Florida 3 34 10

Evelyn A. Ziegler
Florida Bar No. 45 1320
7 11 North Flagler Drive
West Palm Beach, Florida 33401