IN THE SUPREME COURT OF FLORIDA

SCOTT E. MCMULLEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 86,684

****

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

****

MERITS BRIEF OF RESPONDENT

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Bureau Chief
West Palm Beach Bureau
Florida Bar No.:441510

MYRA J. FRIED
Assistant Attorney General
Florida Bar No.: 0879487
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401
(407) 688-7759

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Respondent was the prosecution and Petitioner was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.

In this brief, the parties will be referred to as they appear before this Court.

The following symbols will be used:

R = Record on Appeal

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts for purposes of this appeal subject to the following additions:

Sheron Grewal testified at trial that **at approximately** 9-9:30 P.M., two black men came into the store. One stood by the corner while the other came up to the counter and bought cigarettes and soda. (R 348-349) The man who stood in the corner tried to hide his face. (R 349) One of those men **was** familiar to Mrs. Grewal. (R 349) The man who came to the counter that night was very dark, had no facial hair, had a medium build, and wore trousers and a T-shirt. (R 352-353) The other man **was a** black male, not dark, medium build, and was wearing light-colored trousers and shirt, a baseball hat, and an off-white colored jacket. (R 355-356, 394-395) Mrs. Grewal had seen that person before in the store. (R 356) After the two men left the store, they looked around and walked away. (R 358)

The Grewals started getting ready to close the store sometime before 10 P.M. (R 358-359) Mr. Grewal started filling the beer coolers and Mrs. Grewal began sweeping up inside the store. (R **359)** After Mrs. Grewal finished sweeping inside the store, she

went outside and began sweeping the drive-through. (R 359) Mrs. Grewal was by herself while sweeping the drive-through, and was just coming up to the drive-through window when a man came up to her and grabbed her shoulder. (R 359-361) Mrs. Grewal was able to look at him. (R 361-362) Mrs. Grewal recognized her assailant as the man who had been in the store earlier; the one with the baseball cap who had stood in the corner while the other man bought cigarettes. (R 362) Her assailant was wearing the same clothes. (R 362, 394)

The man grabbed Mrs. Grewal. She told the man to leave her alone, and she struggled. (R 362-363, 395) The man then tried to push her into the store. (R 363) Mrs. Grewal realized that he was trying to get her to go into the store, and she tried to stay outside in case someone came along. (R 363) The man held her with one hand and took out a gun with the other hand. (R 364) Mrs. Grewal resisted, so the man pressed the gun into her, (R 364, 396) and told Mrs. Grewal to "move." Mr. Grewal heard Mrs. Grewal talking to someone outside, (R 365) so Mr. Grewal went to the door to see who Mrs. Grewal was talking to. (R 366) When Mr. Grewal came to the door, the man shot Mr. Grewal while still holding Mrs. Grewal. (R 366) After that, the man left. (R 368) Mrs. Grewal testified that she got a good look at the man's face. (R 369)

Mrs. Grewal identified Petitioner as the person who shot her husband. (R 370) Mrs. Grewal testified that she had seen him in the store before, (R 370)

Mrs. Grewal spoke with the police and gave them a description of the man. (R 372) Later that same week, the police showed Mrs. Grewal some pictures. (R 373-374) The police came to Mrs. Grewal with pictures three or four times. (R 374) Many of those pictures were those of Mrs. Grewal's customers. (R 375-376) Six or seven weeks after the shooting, Mrs. Grewal saw Petitioner again at the store. (R 378) Petitioner came through the drive-through. (R 378) Petitioner was driving a large, white, four-door car. (R 379) Petitioner looked the same as he did on the night of the shooting. (R 379) Mrs. Grewal testified that when Petitioner went through the drive-through, he would not look at her directly. (R 380) Mrs. Grewal gave the police Petitioner's license tag number. (R 381)

The police came approximately twenty minutes later, but the man had left by then. (R 381) Later, an officer came by the store and showed Mrs. Grewal another photograph lineup. (R 382) This time Mrs. Grewal was able to pick out one of the photographs identifying the suspect. (R 382) Mrs. Grewal picked the picture without any hesitation. (R 383)

Mrs. Grewal testified that she had seen the man in the store before on several occasions. (R 384) His appearance would change: Mrs. Grewal had seen Petitioner with a beard and without a beard. (R 384-385) On the day Petitioner came through the drive-through, he appeared to have a little beard. (R 385) Mrs. Grewal was certain Petitioner **was** the man who had shot her husband. (R 385) During cross-examination, Mrs. Grewal testified that the Grewals would normally close the store at 10 P.M. (R 389) Mrs. Grewal testified that the Petitioner came back to the store about 20-30 minutes after the two men left the store. (R 390) The lighting was good in the area where Petitioner grabbed her. (R 391-393) Mrs. Grewal stated that when her husband came to see what was going on outside, Petitioner said nothing to her husband. As soon as Mr. Grewal came to the door, Petitioner shot her husband. (R 403) The entire incident happened quickly; it might have occurred in just **a** few seconds. (R 403) Mrs. Grewal testified that she had seen the Petitioner come to the store weeks after the shooting on more than one occasion. (R 408) She would call the police, but they would not be able to do anything. (R 408)

After the shooting, the police would show Mrs. Grewal pictures almost every week, but she was unable to find Petitioner's picture amongst those shown to her by the police. (R 409) On redirect,

Mrs. Grewal testified that it had rained on the night of the shooting, while the police were there. (R 412) It started drizzling when the police arrived, and then it started to rain heavily. (R 412) She also testified that when the Petitioner stood by her, she was able to look at his face. (R 413)

Mohinder Grewal, the shooting victim, testified that he and his wife were working at the store that night, on November 18, 1991. It became very quiet after 9:30 P.M., and they were talking about closing the store. Then two men came into the store and bought some soda and cigarettes. When the two men came in, sometime after 9:30, Mr. Grewal was sitting down, reading a newspaper. One **man stood in the corner, and the other one walked** around and got some cigarettes or soda. (R 417, 418, 441-442) His **wife waited on the man at the counter,** (R 417) Mr. Grewal **had never** seen the two men before that evening. (R 417) Mrs. Grewal usually does all of the counter work at the store. (R 418) Mr. Grewal got a glance at the person standing in the corner near the door and saw what he was wearing. (R **418)** The man was wearing an off-white color jacket, trousers, and a baseball cap. (R **418)** Mr. Grewal looked at the men **as** long as they were in the store. (R 419) Afterwards, Mr. Grewal started getting the cash register ready for closing, and his wife went outside to sweep. (R 416)

After the men left, they stood outside the store about 30-40 yards away, and looked back at the store. Mr. Grewal's wife said they looked suspicious. Mr. Grewal said not to worry. (R 419, 443) Mr. Grewal then started taking care of the cash register, and his wife began sweeping outside. (R 420) Mr. Grewal remembered hearing his wife whispering something while she was outside. He heard her struggling with someone, or else she was saying something. He went out to see what was happening. (R 420, 443) As soon as he went through the main door, he was shot. (R 421) He saw a man grabbing his wife with one hand and as soon as Mr. Grewal faced the man, the man pointed the gun and shot Mr. Grewal. (R 421) Mr. Grewal stayed standing. (R 444)

Mr. Grewal glanced at the man quickly. The only time Mr. Grewal had ever seen the man before was earlier that evening, when the man came into the store. (R 421, 445) This man had come into the store about 15-20 minutes earlier. (R 422) He was wearing the same clothes as before. (R 422) Mr. Grewal got a brief look at the man's face before Mr. Grewal was shot. (R 422) The man was a black male, about five feet, seven or eight inches tall, with a light complexion. He had black, short hair, but he had a cap on. He was clean shaven, and did not have any scars, marks or tattoos that were noticeable. (R 422-423)

When Mr. Grewal **came** to the door, the man was grabbing Mrs. Grewal with one hand. A second later, the man shot Mr. Grewal. (R 423) The man was very close to Mr. Grewal, approximately ten feet away. (R 424) The man was outside the store by the main door. Mr. Grewal was inside the store. (R 424) The parking lot was very well lit. (R 424) Mr. Grewal identified Petitioner as the person who shot him. (R 424) Mr. Grewal testified that as he came to the door, the man put up his hand and raised the gun. (R 425) Mr. Grewal heard the sound of a gunshot, and then felt something burning. About half a minute later he told his wife he'd been shot, and to call 911. (R 426) The man ran off after the shooting. Mr. Grewal was conscious for three or four minutes and then lost consciousness. (R 426) He was in the hospital for ten days. The bullet **was** left in Mr. Grewal's chest because the bullet **was** too close to his heart to have it removed. (R 427) The police brought some pictures for Mr. Grewal to look at after he got out of the hospital. (R 434) They brought pictures three or four different times. (R 434-435) While looking through those pictures, Mr. Grewal recognized some of his customers from the store. (R 436) About six weeks after the shooting, the police brought the last group of photographs which contained Petitioner's picture. (R 436-437) Mr. Grewal identified Petitioner **as** the

shooter. (R 438) Mr. Grewal had enough of a look at the shooter the night of the shooting to remember the man. (R 438) About six or seven weeks after the shooting, Mr. Grewal saw the man at the store once or twice again. (R 438-439, 446) About seven weeks after the shooting, the man came through the drive-through. Mr. Grewal agreed with his wife that this was the man. (R 439) The police had been called on several occasions because the Grewals wanted to tell the police who had committed the shooting. (R 439) The police were given a description of the man's car: a white, four-door Chevrolet. The Grewals also got the car's license tag number. (R 439, 446) Mr. Grewal testified that the picture of the person he picked out of the folder was a picture of the person who had shot him, and was the same person Mr. Grewal had seen standing in the corner of his store on the day of the shooting. (R 447)

Detective Michael Harrison testified inter alia, that he arrived at the crime scene at 10:26 P.M., and that there was a very heavy downpour of rain at the time. (R 451-452) Harrison stated that it had been raining for a while. (R 465)

Marsha Moore testified that she, Petitioner's uncle Gus Jones, Petitioner, and Petitioner's girlfriend Iris Livingston, were all together on the night of the shooting at Iris Livingston's house in Dyson Circle. (R 487-491) According to Ms. Moore, all four of

them were in Iris' house for a period of time, and then they went outside and talked. (R 492) According to Ms. Moore, no one left during that period of time. (R 493) Petitioner was with them the entire time. (R 500) Ms. Moore testified that while the four of them were outside, they heard two or three gunshots; everyone ducked. (R 494, 498) Ms. Moore stated that during the previous times she had been at Iris Livingston's home with Gus Jones and Petitioner, Ms, Moore had not heard any gunshots. (R 495) Moore left Livingston's home sometime after 10 P.M. (R 496) Petitioner and Iris were still there when Moore and Jones left. (R 496) After leaving Iris' house, Moore and Jones drove by a store which had many police cars and ambulances around it. (R 497) Moore got to work around midnight. (R 499) On cross-examination, Ms. Moore stated that she **was** not certain of the date that she and the others got together at Iris' house. (R 501) She knew it was sometime in November 1991. (R 501) During her deposition with the State, Ms. Moore told the State that it **was** about a year previously from the date of the deposition, February 1993. (R 501-502) When they rode by the place where they saw **all** of the police, she thought it was a pawn shop because there were bars on the windows. (R 502-503) She also stated that she did not remember if it had rained that night. (R 504) Ms. Moore stated that she had been over at Iris'

house with Petitioner and Gus Jones on other occasions in 1991. (R 516-517)

Iris Livingston, Petitioner's girlfriend, testified that on November 18, 1991, she was getting ready to go back to work. That was the date she was supposed to go back to work, after having been on leave for having surgery. (R 524) On November 18, Gus and Marsha came over to visit at about six or seven in the evening. (R 525) Petitioner was there. (R 526) Between 7:30 and 10 P.M., the four of them were outside talking. (R 526) At approximately 10 P.M., Ms. Livingston had to go inside to get ready for work. (R 527) According to Livingston, Petitioner never left the area to go anywhere. (R 527) During the time when they were outside, they heard gunshots. (R 528) Ms. Livingston came back outside about 10:40. (R 529) She never made it in to work because her car broke down; Petitioner was with her. (R 529) Ms. Livington stated that when she left to go to work, there were a lot of police at the drive-through beer mart. (R 530) She lived close to the beer mart. (R 531) In the deposition given by Ms. Livingston, she said that when she was up in her room dressing, she could not hear the others outside because of the air conditioner. (R 538) She was not with Petitioner for those thirty minutes when she was getting ready for work. (R 538) The beer mart is within walking distance

(a few blocks) from her home. (R 539) It was not raining that night. (R 540)

Petitioner testified that he was with Iris Livingston, his Uncle Gus, and Marsha Moore on the night of the shooting. (R 567-569) He heard gunshots between nine and ten that evening. (R 570, 582) It was not unusual to hear gunshots in that neighborhood. (R 580) Petitioner did not remember it raining that night. (R 580-581) According to Petitioner, Marsha and Gus were gone by the time Iris came downstairs after getting ready to go to work. (R 581) Gus Jones, Petitioner's uncle, testified that it did not rain the entire time they were at Iris' home that night. (R 602)

Deputy Tina Lane testified that there was a steady rain that evening. (R 617) It was raining at 10:15 P.M. when she set up her post near the store. (R 617) This was two blocks away from the store. (R 618)

During cross-examination of the proffer of Dr. Brigham's testimony, Brigham agreed that a survey done by Smith and Cassen resulted in the findings that most jurors already understand the proposition of cross race identification. (R 90)

SUMMARY OF ARGUMENT

POINT ONE: This case should not be accepted for review by this court. Both the trial court and the Fourth District Court of Appeal have held that this Court's decision in Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984), is applicable in the instant case. The Fourth District Court of Appeal has been unable to find fault with this Court's opinion in Johnson, and has certified the question in this case solely on the basis that a number of years have passed since this Court decided Johnson. However, as Judge Dell pointed out in his dissent, this Court has revisited this issue in a case as recent as 1991. If this Court should agree with Petitioner's argument, this Court would be mandating the usurpation of a trial court's discretion in determining which evidence is appropriate for the jury's consideration as well as the jury's role in determining the credibility of witnesses at trial.

POINT TWO: No error was created by the trial court's denial of Petitioner's request for special jury instructions. The instructions given adequately covered the issue raised.

POINT THREE: The imposed sentence was proper since there were two separate victims involved in each of the two separate counts. Although the habitual felony offender statute was applied, since

the Florida Legislature has specifically allowed for mandatory minimum sentences for the crimes in counts one and two, consecutive mandatory minimum sentences were proper.

ARGUMENT

POINT ONE (REPHRASED)

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S USE OF AN EXPERT WITNESS TO TESTIFY ON THE RELIABILITY OF **EYEWITNESSES.**

Petitioner **alleges** that the lower court's reliance on Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984), is misplaced because neither Johnson nor any other Florida court has ever squarely addressed this particular issue. Respondent continues to maintain that this issue is not one of first impression, and that this Honorable Court has already decided this issue before on numerous occasions.

The Fourth District Court of Appeal per curiam affirmed Petitioner's conviction and sentence, relying on Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983), cert. denied, 465 U.S 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984); and Newton v. State, 603 So. 2d 558, 560 (Fla. 4th DCA 1992). The court held that

> "Since Johnson controls the trial court and this court, there is no question in our mind that the trial court ruled correctly on the motion in limine and for the right reason. Nevertheless, we certify as a question of great public importance the following question:
>
> 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 THE FACTORS THAT AFFECT THE RELIABILITY OF EYEWITNESS IDENTIFICATION.
>
> While the majority is aware that the supreme court categorically rejected such testimony in Johnson, which was decided in 1983, the court may want appellant's counsel, and amicus curiae if permitted, to present the current studies and decisions of other jurisdictions, which over the last twelve years have developed into a large body of literature on the subject testimony, and which were presented to our court. (Footnote omitted.)

McMullen v. State, 660 so. 2d 340 (Fla. 4th DCA 1995).

Although Judges Glickstein, Farmer, and Dell all concurred in the per curiam affirmance of the Petitioner's conviction and sentence on the basis of this Court's opinion in Johnson v. State and its progeny, Judge Dell dissented as to the certification of a question of great public importance to this Honorable Court.

> . . . As I read the majority's opinion, its basis for certification is grounded primarily upon the passage of time since the supreme court's opinion in Johnson v. State and not upon any express disagreement by my colleagues with the holding stated herein. The state has shown that the supreme court has more recently revisited the question presented sub judice and has consistently concluded, as it did in Johnson:
>
> > 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. We find no abuse of discretion in the trial court's refusal to allow this witness to testify about the reliability of eyewitness identification.

Id. at 77 (footnote omitted). See Espinosa v. State, 589 So. 2d 887 (Fla. 1991); Lewis v. State, 572 So. 2d 908 (Fla. 1990); Rogers v. State, 511 So. 2d 526 (Fla. 1987); Hooper v. State, 476 So. 2d 1253 (Fla. 1985).

> No compelling reason has been offered that shows the interests of justice would be greater served by carving out another area for the admission of expert testimony concerning the fallibility of an eyewitness's identification in either criminal or civil proceedings. The cross-examination of witnesses, the jury instructions and the general knowledge of jurors provide an adequate basis to evaluate an eyewitness's credibility. Expert testimony ordinarily tends to explain matters not within the common sense and understanding of the jury. The admission of expert testimony to explain matters covered in the court's instruction concerning the weight to be given an eyewitness's testimony invades what has been and should be the exclusive province of the jury.
>
> For these reasons, I respectfully dissent.

McMullen v. State, 660 So. 2d 340 (Fla. 4th DCA 1995) (Dell, J. dissenting).

As Judge Dell stated in his dissenting opinion, the Fourth a

District Court of Appeal clearly agreed with the trial court's decision in not allowing Petitioner's expert to testify as to the reliability of eyewitness testimony. The Fourth District agreed with this Honorable Court's decision in Johnson v. State, and could not point out any error in this Court's holding in Johnson, nor in the trial court's holding below. The Fourth District chose to certify the question presented merely on the basis of the passage of time, even though this Court has considered the issue as recently as 1991 in Espinosa v. State, 589 So. 2d 887 (Fla. 1991). Respondent respectfully requests that this Honorable Court to exercise its discretionary jurisdiction by not accepting this **case** for review.

If this Court should decide to answer the certified question as presented by the Fourth District Court of Appeal, Respondent maintains that this Court should answer the question in the negative. Respondent contends that the admittance of expert testimony is an area which lies in the realm of the trial court's discretion. To **mandate** that a trial court **shall** admit an expert's testimony where the only incriminating evidence is that of an eyewitness would result in the usurpation of the trial court's discretion to determine what evidence is or is not appropriately brought before a jury. The floodgate would then be wide open for

prisoners to file post-conviction relief motions on the basis that their trial counsel did not hire experts in their cases. Also, to require the admittance of testimony of an expert on the unreliability of eyewitness identification would invade the jury's province of determining a witness' credibility. An affirmative reply to the certified question would, in effect, relieve the trial judge of one of his or her major roles as trial court judge and would usurp the jury's role of determining the credibility of testifying witnesses.

The decision of whether an expert will be allowed to testify on the reliability of eyewitness identification should remain within the trial court's discretion. The trial court below considered whether to allow Dr. Brigham to testify at a pretrial motion in limine hearing. Although Dr. Brigham stated that he would discuss various factors which would help determine whether an eyewitness identification would be reliable, he also stated during cross-examination of the proffer that a majority of experts in eyewitness research felt that most jurors already understand the proposition of cross-race identification as a matter of their own common sense. (R 90) After hearing the proffer of Dr. Brigham's testimony, the trial court issued a written order granting the prosecution's motion in limine. (R 45-46) The trial court's Order

Excluding Testimony of Defense "Expert Witness On Eyewitness Identification" stated, in substance:

> This Court is of the opinion that the facts testified to by Dr. Brigham are not of such a nature as to require special knowledge in order for the jury to reach a decision. In Johnson v. State, 438 So. 2d 774 (Fla. 1983), the Florida Supreme Court in affirming the trial court's refusal to allow the testimony of an expert witness in the field of eyewitness identification, held:
> ". . . [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."

(R 45) The trial court did not state that it felt it was "bound" to apply Johnson v. State. The trial court found that Johnson was applicable to the instant case (as did the Fourth District Court of Appeal). After hearing the proffer of Dr. Brigham, the trial court held that the testimony of Dr. Brigham would not assist the jury in determining whether the eyewitness identification was reliable. This Court must look at the trial court's findings with a presumption of correctness. Medina v. State, 466 So. 2d 1046 (Fla. 1985).

In determining whether or not to allow an expert witness to testify, the trial court may consider section 90.702, Florida Evidence Code, which states that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Contrary to what Petitioner might argue, the areas which Dr. Brigham would have discussed during his testimony would have covered factors involving the reliablity of an eyewitness' identification. Florida state case law is clear that it is up to the trial judge to determine whether to allow an expert witness to testify in such an instance. Case law also maintains that it is improper for an expert to intrude upon the jury's province of determining a witness' credibility and reliability.

In Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984), this Honorable Court held that there was no abuse of discretion in the trial court's refusal to allow an expert in eyewitness identification to testify, since "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." (Footnote omitted.) This Court relied on another case, Johnson v. State, 393 So. 2d 1069 (Fla.

1980), cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed. 2d 191 (1981), rehearing denied 454 U.S. 1093, 102 S.Ct. 660, 70 L. Ed. 2d 632, denial of habeas corpus vacated in part 911 F. 2d 440, rehearing granted and vacated 920 F. 2d 721, on rehearing 938 F. 2d 1166, certiorari denied 113 S. Ct. 361, 121 L. Ed. 2d 274, rehearing denied 113 S. Ct. 833, 121 L. Ed. 2d 702, post-conviction relief denied 647 So. 2d 106, which stated that expert 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.

In Lewis v. State, 572 So. 2d 908 (Fla. 1990), this Court relying on its holding in Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984), held that there was no abuse of discretion where the trial court excluded a psychiatrist's opinion regarding the eywitness-identification process, the effects of drugs on memory, and the unwarranted reliance of jurors on eyewitness testimoy. The psychiatrist in Lewis admitted that he could not testify regarding the reliability of any specific witness, but could only offer general comments about how a witness arrives at conclusions. See also Rogers v. State, 511 So. 2d 526 (Fla. 1987) (this Court relied on Johnson v. State to affirm lower court's limitation of Dr.

Brigham's testimony as to accuracy of eyewitness identifications); Hooper v. State, 476 So. 2d 1253 (Fla. 1985) (this Court held it was proper to exclude testimony of expert in eyewitness identification; trial court has wide discretion concerning admissibility of evidence and range of subjects about which an expert can testify); Esninosa v. State, 589 So. 2d 887 (Fla. 1991) (trial court did not abuse its discretion by denying authorization for costs for retaining a professor of psychology to testify with respect to the reliability of eyewitness identification); Vega v. City of Pompano Beach, 551 So. 2d 594, 596 (Fla. 4th DCA 1989) (appellate court held that the responsibility of determining qualifications and range of subjects on which expert may testify generally lies within discretion of the court; exclusion of expert testimony as to existence of hazardous conditions on property where plaintiff was injured was not abuse of discretion).

In Nelson, 362 So. 2d 1017 (Fla. 3d DCA 1978), Dr. Elizabeth Loftus was presented by the defense as an expert in the area of eyewitness identification. The trial court refused to allow the doctor to testify. The appellate court determined that:

> The expert testimony proffered by defense counsel concerned the memory process in general and the various factors which may affect an individual's perception. The testimony did not relate to an examination of

> the victim, Miss Siegel, but dealt with hypothesis, theories, generalization and speculation. Its purpose was to prove that Miss Siegel could have misidentified the defendant given the facts pub iudice.

Id at 1021. The Nelson Court also found that:

> When facts are within the ordinary experience of jurors, conclusions to be drawn therefrom **are** left to the jury. McGough v. State, 302 so. 2d **751** (Fla. **1974); Tongay v. State**, 79 so. 2d **673** (Fla. **1955);** Thomas v. State, 317 So. 2d 450 (Fla. 3d DCA 1975). We believe it is within the common knowledge of the jury that a person being attacked and beaten undergoes stress that might cloud a subsequent identification of the assailant by the victim. As such, the subject matter was not properly within the realm of expert testimony. Tonsav v. State, supra; see Seaboard Coast Line Railroad Company v. Kubalski, 323 So. 2d 32 (Fla. 4th DCA 1975) and Judge Downey's concurring opinion in Public Health Foundation for Cancer and Blood Pressure Research, Inc. v. Cole, 352 So. 2d 077 (Fla. 4th DCA 1977).

Id.

In Phillips v. State, 440 So. 2d 432 (Fla. 1st DCA 1983), it was held that the trial court did not abuse its discretion by refusing to allow **a** psychologist's testimony of an out-of-court experiment he had performed using a reproduction of a photographic lineup. The Phillips court held that the trial court has wide discretion in determining whether an expert should be allowed to testify **as** to the probabilities of misidentification. The Court

concluded that the jury is capable of determining a witness' ability to perceive and remember, with the aid of cross-examination and cautionary instructions. Phillips v. State, 440 So. 2d at 432.

This Court has recently held that there was no prejudice resulting from the failure of defense counsel to obtain an expert in eyewitness identification. Rose v. State, 617 So. 2d 291, 297 (Fla. 1993). In Rose, this Court determined that trial counsel effectively cross-examined the eyewitnesses to the crime by pointing out inconsistencies between the eyewitnesses' testimony, as well as the differences in the trial testimony of each witness and their earlier statements.

In the case at bar, it was proffered that Dr. Brigham would not make any specific conclusions as to whether either of the eyewitnesses' identifications of the Petitioner were accurate. (R 84) According to Brigham, his purpose in testifying would "be informational to give jurors a frame of reference or some factual basis on which to base the difficult decison that they have to make." (R 84). Dr. Brigham stated during proffer that he had no way of knowing which witnesses in a case such as this were making an accurate identification and which were not. (R 88) Also, there was no "handy" standard to apply to everyone in order to measure how much stress a person must be under before their performance

begins to deteriorate. (R 88)

The State maintains that the trial court did not abuse its discretion by excluding Petitioner's expert witness since such testimony would not aid the jury to determine whether the testimony of the eyewitnesses to the shooting was reliable. The test for determining whether a trial court has abused its discretion was best described by this Court in Booker v. State, 514 So. 2d 1079 (Fla. 1987):

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another **way** of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Id. at 1079 [quoting Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) 1. The reviewing court must look at the facts surrounding the entire circumstances of the case, and if the reviewing court finds the trial court's ruling to be so excessive as to shock the judicial conscience, then there is likely to be an abuse of discretion. Booker v. State, 514 so. 2d at 1085.

This Court recently held that the trial court has broad discretion in determining the subject on which an expert may testify in a particular trial, and that the trial court's decision

will only be disregarded if that discretion has been abused. Ansrand v. Key, 657 So. 2d 1146 (Fla. 1995). See also Burns v. State, 609 So. 2d 600 (Fla. 1992)(absent a clear showing of error, trial court's decision will not be disturbed); Rodrisuez v. State, 413 so. 2d 1303 (Fla. 3d DCA 1982)(decision as to whether expert testimony should be allowed into evidence rests within broad discretion of trial court and will not be disturbed on appeal absent clear showing of error)[1]; Johnson v. State, 438 So. 2d 774, 777 (Fla. 1983) (trial court has wide discretion concerning admissibility of evidence and the range of subjects about which an expert can testify); Jent v. State, 408 So. 3d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982) (same); Johnson v. State, 393 so. 2d 1069, 1072 (Fla. 1980) (trial court has broad discretion in determining range of subjects on which an expert witness may be allowed to testify, and, unless there is a clear showing of error, its decision will not be disturbed on appeal); Fortianos v. State, 329 So. 2d 397 (Fla. 1st

---

'In Rodriguez v. State, the expert would have testified generally as to the ability of individuals to make reliable identifications taking into account stress, age and weapon focus. Such testimony would have demonstrated that because the witness was only eleven years old, and because of the circumstances of the situation, the witness could have misidentified the defendant.

DC A 1976)(same). This discretion is not boundless, and expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts. Johnson v. State, 393 So. 2d at 1072. The common thread running from all the decisions dealing with the admissibility of expert testimony is the premise that if the disputed issue is beyond the ordinary understanding of the jury, such testimony is admissible. See Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980) (facts affecting reliability of the eyewitness testimony were found to be within the ordinary experience of the jury) .

In Johnson v. State, 438 So. 2d at 777, this Court held 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." (Footnote omitted.) This Court held that the trial court did not abuse its discretion in not allowing the witness to testify in the areas of the reliability of eyewitness identification, the common problems with eyewitness identifications, the general factors affecting a witness' accuracy and the suggestiveness of the lineup.

Contrary to Petitioner's argument, this Court's holding in Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465

U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984) remains applicable to the case at bar. In Johnson, the defendant alleged that the witness would have explained the common problems of eyewitness identification and the general factors affecting a witness' accuracy. In the case at bar, Dr. Brigham would have testified as to the problems of eyewitness identification and the factors involved in making such identifications inaccurate. (i.e., eyewitness identification often incorrect because of improper face recognition due to stress, cross identification problems due to race biases, memory-retention problems due to unconscious transference, alleged misconceptions due to certainty of identifications by eyewitnesses). Those problems which Dr. Brigham would have testified to at trial all deal with reliability problems of eyewitness identification and the factors involved in making inaccurate eyewitness identifications. (R 68-93) Jurors understand that eyewitness identifications can be inaccurate for a variety of reasons. There are numerous factors involved in which the jury is instructed by the trial court. Here, the trial court gave the jury the standard jury instructions as to a witness' credibility and reliability and as to the State's burden of proof. (R 669-670)

Respondent maintains that this Court should uphold its prior

ruling in Johnson v. State, and the other Florida cases which hold that it is within the trial court's discretion to exclude a witness such as Dr. Brigham. Petitioner would have this Honorable Court overrule well-established law in this state that the standard of allowing expert testimony is abuse of discretion. Petitioner appears to interpret this Court's holding in Johnson as never allowing an expert to testify on the issue of reliability of eyewitness identification. That is not what this Court held in Johnson. This Court held in Johnson that it is not an abuse of discretion to exclude a defendant's eyewitness identification expert from testifying at trial. However, this Court **did** not hold that such a witness is never allowed to testify. This Court logically held that it is up to the trial court to determine whether or not such a witness should be allowed to testify. Respondent would urge this Honorable Court to continue to apply such a line of reasoning in this case and in future cases.

Respondent would point out that the United States Eleventh Circuit Court of Appeal has ruled specifically on the admittance of expert testimony on eyewitness identification, holding that in the federal circuit, it is the established rule that such testimony is not admissible. See United States v. Holloway, 971 F.2d 675 (11th Cir. 1992), [citing United States v. Benitez, 741 F.2d 1312, 1315

(11th Cir. 1984), cert. denied, 471 U.S. 1137, 105 S.Ct. 2679, 86 L.Ed.2d 698 (1985); United States v. Thevis, 665 F.2d 616, 641 (5th Cir. Unit B), cert. denied, 456 U.S. 1008, 102 S.Ct. 2300, 73 L.Ed.2d 1303 (1982)]. Cf. Rodriguez v. Wainwright, 740 F. 2d 884 (11th Cir. 1984) (under state law, admission of expert testimony is within discretion of trial judge).

If this Court should so chose, this Court may follow the Eleventh Circuit's decisions and hold that such testimony is forbidden. The rationale underlying such a decision is that the use of such an expert to testify as to the problems with eyewitness identification would permit "the proponent's witness to comment on the weight and credibility of opponents' witnesses and open the door to a barrage of marginally relevant psychological evidence." United States v. Thevis, 665 F. 2d 616, 641 (11th Cir. 1982).

Although Petitioner refers to a number of non-Florida cases which hold that it is error for a trial court to deny the use of an expert **on** eyewitness identification, there are numerous out-of-state cases which hold that it is **not** an abuse of discretion to deny the use of such an expert.

In United States v. Rincon, 28 F.3d 921 (9th Cir. 1994), if permitted to testify, the expert would have explained, inter alia, the three phases of eyewitness identification, the effect of

various psychological factors, including stress, observer's state of mind, suddenness, suggestibility, and cross-ethnic identification. She would also have testified that empirical research contradicts numerous lay notions of eyewitness identifications, but would have offered no definitive opinion concerning the reliability or certainty of the witnesses' identifications in the case. The Court found no abuse of discretion in excluding the expert's testimony. The Court stated that the proffered testimony would not have assisted the trier of fact and would likely have confused or misled the jury. Id. See also United States v. Christophe, 833 F. 2d 1296 (9th Cir. 1987) (expert testimony on unreliability of eyewitness identification did not conform to generally accepted explanatory theory and exclusion of such testimony was not reversible error in trial for unarmed bank robbery; cross-examination was sufficient to bring to jury's attention any difficulties in eyewitness identification of defendant as robber); United States v. Langford, 802 F. 2d 1176 (9th Cir. 1986) (it was within broad discretion of trial court to conclude that jury would not benefit from admission of expert in field of eyewitness identification unreliability; court has repeatedly upheld exclusion of such testimony); United States v. Sims, 617 F. 2d 1371 (9th Cir. 1980) (admissibility of

expert testimony on reliability of eyewitness identification is strongly disfavored by most courts).

In the case of United States v. Harris, 995 F.2d 532 (4th Cir. 1993), the appellant claimed it was error to exclude his expert witness, who would have testified as to the eyewitnesses' memories being unreliable because they discussed the bank robbery amongst themselves, and that this could have strengthened their misidentifications; the stress of the robbery could have clouded their memories; appellant had been in the bank twice earlier that day, and this could have transposed the shape of his face or his other general features to the robber's; and their memories could have been distorted over time. The court affirmed the district court's decision to exclude the expert's testimony.

> Until fairly recently, most, if not all, courts excluded expert psychological testimony on the validity of eyewitness identification. See, e.g., United States v. Thevis, 655 F.2d 616, 641 (5th cir.), cert. denied, 456 U.S. 1008, 102 S.Ct. 2300, 73 L.Ed.2d 1303 (1982); United States v. Amaral, 488 F.2d 1148, 1152-53 (9th Cir. 1973). But, there has been a trend in recent years to allow such testimony under circumstances described as 'narrow." See United States v. Downing, 753 F.2d 1224, 1231 (3d Cir. 1985) (citing People v. McDonald, 37 Cal.3d 351, 209 Cal. Rptr. 236, 690 P.2d 709 (1984). Most courts allowing such expert testimony, however, recognize that the ultimate determination of admissibility, as with most Rule 702 evaluations, rests within

> the sound discretion of the trial court. See United States v. Stevens, 935 F.2d 1380, 1400-01 (3d Cir. 1991); State v. Chapple, 135 Ariz. 281, 296, 660 P.2d 1208, 1223 (1983) (en banc); People v. McDonald, 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709, 724-725 **(Cal.** 1984). Rut see United States v. Holloway, 971 F.2d 675, 679 (11th Cir. 1992) (declaring expert testimony on eyewitness identification per se inadmissible), cert. denied, U.S.-, 113 S.Ct. 1390, 122 L.Ed.2d 764 (1993).

United States v. Harris, 995 F.2d at 534-535.[2]

The Seventh Circuit has held that a district judge has broad discretion to exclude relevant evidence that is confusing or redundant under Federal Rule of Evidence 403. "Although it is likely that it **was** within the discretion of the trial court to allow the eyewitness expert testimony here, we decline to hold that the court was required to do so." United States v. Curry, 977 F.2d 1042, 1052 (7th Cir. 1992). See also United States v. Larkin, 978 F. 2d 964 (7th Cir. 1992) (expert testimony regarding potential

---

[2] The Court in Harris did state that there were narrow circumstances under which expert eyewitness identification testimony **could be** admitted. (i.e., cross-racial identification, identification after a long delay, identification after observation under stress, psychological phenomena as the feedback factor and unconscious transference). The Court cited to United States v. Downing, 753 F.2d 1224 (3d Cir. 1985), in reference to such narrow circumstances. However, it should also be noted that the Downing Court emphasized **that a trial court always retains discretion** to exclude such testimony under Federal Rule of Evidence 403. United States v. Harris, 995 F.2d at 535, n. 3.

hazards of eyewitness identification 'will not aid the jury because it addresses an issue of which the jury already generally is aware, and it will not contribute to their understanding'); United States v. Hudson, 884 F. 2d 1016 (7th Cir. 1989) (testimony offered to show effect of stress on identification, the difficulty of cross-racial identification, an overview of memory process, and impact of short viewing period on accuracy of identification is excludable on grounds it will not assist trier of facts because it addresses issue of which jury is already generally aware); United States v. Watson, 587 F. 2d 365 (7th Cir. 1978)(admission of expert within trial court's discretion).

In United States v. Fosher, 590 F. 2d 381 (1st Cir. 1978), where the prosecution for robbery relied almost entirely on the testimony of two eyewitnesses who placed the defendant in the vicinity of the bank at the time of the robbery, the First Circuit held there was no error in refusing to admit expert testimony on the unreliability of eyewitness identification, since the written offer of proof did not make clear the relationship between scientific evidence offered and specific testimony of eyewitnesses, and the offer did not make clear that the testimony, even if it was relevant to the particular witnesses involved, would be based on a mode of scientific analysis that met any of the standards of

reliability applicable to scientific evidence. The Fosher Court considered the potential dangers surrounding such testimony, and held:

> Th[e] expert testimony would raise a substantial danger of unfair prejudice, given the aura of reliability that surrounds scientific evidence.

Id. at 382.

Many other non-Florida courts have held that it is within the trial court's discretion to exclude such an expert's testimony. See State v. Cunningham, 863 S.W.2d 914, 923 (Mo.App.E.D. 1993) (admissibility of testimony is within discretion of trial court, and appellate court will not overturn lower court's decision unless there is a showing of abuse of discretion; expert testimony admissible only if jury is incapable of drawing from their own experience or knowledge correct conclusions from the facts; no abuse of discretion where expert not allowed to testify on issues of cross-racial identification, over-estimation of duration of crime, noncorrelation between witness confidence and accuracy of identification, and prejudicial photographic lineup where defendant was identified); State v. Donnell, 862 S.W.2d 445, 450 (Mo. App. W.D. 1993) (exclusion of expert testimony as to reliability of cross-racial identification and on psychological factors affecting

reliability of eyewitness identification was within general knowledge of jurors); State v. Hill, 854 S.W.2d 486 (Mo.App. E.D. 1993) (admissibility of expert testimony is within discretion of trial court; appellate court will overturn its decision only upon a showing of abuse of discretion; expert opinion testimony should not be admitted unless jurors themselves are incapable of drawing from their own experience or knowledge correct conclusions from the facts; there is no abuse of discretion if defendant has opportunity to inform jury about problems of eyewitness identification through cross-examination of eyewitnesses and closing argument; testimony of defendant's expert witness on reliability of eyewitness identifications was not admissible where defendant had full opportunity to cross-examine robbery victim, where defendant had opportunity to discuss issue in closing argument, and where jury received pattern instruction on reliability of identification); State v. Jordan, 751 S.W. 68, 78 (Mo.App. 1988) (admissibility of expert testimony is left to sound discretion of trial court and will not be disturbed in absence of clear abuse of discretion); State v. Turner, 591 so. 2d 391 (La. App. 2 Cir. 1991) (prejudicial effect of expert testimony regarding accuracy of eyewitness identifications outweighed probative value in rape trial due to substantial risk that potential persuasive appearance of expert

witness would have greater influence on jury than other evidence presented during trial); People v. Enis, 564 N.Ed.2d 1155, 1163-1165 (Ill. 1990)(trial court did not err in granting state's motion in limine precluding expert witness on eyewitness testimony where expert would have covered **areas** such as the misconceptions dealing with confidence of a witness; stress level at time of identification; belief that when a weapon is present, identification is usually more accurate; and the over importance given to time estimates; such testimony would not aid trier of fact in reaching conclusion, thus there was no abuse of discretion in excluding expert evidence) .

See also Commonwealth v. Middleton, 378 NE 2d 450 (Mass. App. 1978); People v. Perruquet, 454 NE 2d 1051 (Ill. 5th Dist. 1983); State v. Calia, 514 P. 2d 1354 (Or. App. 1973); Burke v. State, 642 SW 2d 197 (Texas App. 14th Dist. 1982); State v. Lewisohn, 379 A 2d 1192 (Me. 1977); U.S. v. Purham, 725 F. 2d 450 (Mo. 8th Cir. 1984); State v. Valencia, 575 P. 2d 335 (Ariz. App. 1977); Criglow v. State, 36 SW 2d 400 (Ark. 1931); Caldwell v. State, 594 SW 2d 24 (Ark. App. 1980); People v. Guzman, 121 Cal. Rptr 69 (Cal. 2d Dist. 1975)(**disapproved People v. McDonald, 37** Cal. 3d 351, 208 Cal Rptr

236, 690 P. 2d 709)[3]; People v. Brooks, 51 Cal. App. 3d 602, 124 Cal. Rptr 492, cert. den. 424 U.S. 970, 47 L.Ed. 2d 738, 96 S.Ct. 1469 (Cal. 2d 1975) **(disapproved People v. McDonald)**; People v. Bradley, 115 Cal. App. 3d 744, 171 Cal. Rptr 487 (4th Dist. 1981) **(disapproved People v. McDonald)**; People v. Lawson, **37** Colo. App. 442, 551 P. 2d 206 (1976); Smith v. U.S., 389 A.2d 1356 (D.C. App. 1978), cert. den. 439 U.S. 1048, 58 L.Ed. 2d 707, 99 S.Ct. 726; Brooks v. U.S., 448 A. 2d 253 (Dist. Col. App. 1982); Jones v. State, 208 S.E. 2d 850 (Ga. 1974); State v. Hoisinston, 657 P. 2d 17, later proceeding 671 P. 2d 1362 (Idaho 1983); People v. Clark, 463 N.E. 2d 981 (Ill. 1st Dist. 1984); State v. Reed, 601 P. 2d 1125 (Kan. 1979); State v. Warren, 635 P. 2d 1236 (Kan. 1981); State v. Fernald, 397 A. 2d 194 (Me. 1979); State v. Helterbridle, 302 N.W. 2d 545 (Minn. 1980); State v. St. John, 299 N.W. 2d 737 (Minn. 1980); State v. Ammons, 305 NW 2d 812 (Neb. 1981); Porter v. State, 576 P. 2d 275 (Nev. 1978); People v. Valentine, 385 NYS 2d 545 (NY 1st Dept. 1976); People v. Brown, 459 NYS 2d 227 (NY 1983); State v. Goldsby, 650 P. 2d 952 (Or. 1982); State v. Porraro, 404

---

[3]Petitioner relies on People v. McDonald, supra, in his merits brief on pages 18, 19, 21 and 24. However, People v. McDonald was disapproved by the Guzman court in California. People v. McDonald was also disapproved by the court in People v. Brooks, supra, and People v. Bradley. supra.

A 2d 465 (RI 1979); State v. Wooden, 658 SW 2d 553 (Tenn. Crim. 1983); State v. Griffin, 626 P. 2d 478 (Utah 1981); State v. Barry, 611 P. 2d 1262 (Wash. 1980); State v. Jordan, 694 P. 2d 47 (Wash. 1985).

In People v. Brown, 426 N.Ed.2d 575, 574 (Ill. 2d DCA 1981), the trial court properly excluded expert testimony as to the reliability of eyewitness identification, on the theory that there was no relationship between an individual's confidence and his ability to identify another and the accuracy of identification, and to the theory that identification resulting from a group consensus was more inaccurate than an individual identification.

The Brown court also made the following observations:

> This court recently discussed the subject of expert testimony in the area of cross-racial identification in People v. Dixon, 87 Ill.App.3d 814, 43 Ill. Dec. 242, 410 N.Ed.2d 252 (1980). In that case, also involving testimony by Dr. Luce, the court concluded that expert opinions may not be admitted on matters of common knowledge unless the subject is difficult of comprehension and explanation. The court concluded that expert testimony in the area of cross-racial identification was inadmissible. In the course of its holding, the court observed that 'the trustworthiness of eyewitness observations is not generally beyond the common knowledge and experience of the average juror and is, therefore, not a proper subject for expert testimony." (Dixon at 819, 43 Ill.Dec. 252, 410 N.Ed.2d 252).

> The courts have uniformly upheld a trial court's refusal to allow expert testimony on the subject of eye witness identification. (See, e.g., United States v. Brown, 540 F.2d 1048, 1054 (10th Cir. 1976), cert. denied, 429 U.S. 1100, 97 S.Ct. 1122, 51 L.Ed.2d 549 (1977); Smith v. United States, 389 A.2d 1356 (D.C.App. 1978), cert. denied, 439 U.S. 1048, 99 S.Ct. 726, 58 L.Ed.2d 707; State v. Valencia, 118 Ariz. 136, 575 P.2d 335, 337 (1977); Nelson v State, 362 So. 2d 1017, 1021 (Fla. App. 1978); State v. Fernald, 397 A.2d 194, 197 (Me. 1979); State v. Porraro, 404 A.2d 465, 471 (R.I. 1979). These courts have generally held that factors such as stress, opportunity to observe, distortion of memory, and problems of interracial identification, are within the realm of common experience and can be evaluated by the jury without expert assistance.

People v. Brown, 426 N.Ed.2d at 574.

Federal law does not require the admission of testimony on the unreliability of eyewitnesses. See People v. Enis, 564 N.Ed.2d 1155, 1164 (Ill. 1990). The decision whether to admit expert testimony on eyewitness identification is squarely within the discretion of the trial judge. United States v. Moore, 786 F.2d 1308 (5th Cir. 1986). Although admission of expert eyewitness testimony may be proper, there is no federal authority for the proposition that such testimony must be admitted. The district judge has wide discretion in determining the admissibility of this evidence. United States v. Moore, 786 F.2d 1308, 1312-1313 (5th

Cir. 1986).

In the instant case, Petitioner was not greatly prejudiced by the exclusion of his expert witness on eyewitness identification. Petitioner had the opportunity to raise issues as to the reliability of eyewitness identification during cross-examination and closing argument. During closing argument, defense counsel covered many of the areas which Dr. Brigham would have touched upon, including reliability of the eyewitnesses, opportunity to view the perpetrator, the factor of having seen the perpetrator on previous occasions, the stress factor, and gun distraction. (R 639-652)

The trial court did not abuse its discretion in denying the use of an expert witness to testify as to the reliability of the testimony of the eyewitnesses to the shooting. After hearing Petitioner's proffer of what Dr. Brigham would testify to, the trial court found that Dr. Brigham's testimony would not cover a special area of knowledge that would be outside the jury's own realm of understanding. (R 45) The trial court held that the jury was 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." (R 45) The trial court's decision to deny Dr. Brigham the opportunity to

testify as to his theories surrounding the unreliability of eyewitness identification was neither arbitrary, fanciful, nor unreasonable. The trial court considered the proffered testimony, and concluded that the jury could determine for itself whether the eyewitness identifications given by the two victims were reliable. The trial court's ruling was not so excessive as to shock the conscience. Two witnesses testified that Petitioner committed the shooting. (R 370, 424) There was evidence given at trial (i.e., evidence about the weather around the time of the shooting) that indicated that the alibi witnesses could have been mistaken as to when they were with Petitioner. (R 462, 465, 474, 615, 617-618) There was also evidence that Petitioner's girlfriend was unaware as to Petitioner's whereabouts for thirty minutes on the night of the shooting. (R 539)

Based on the foregoing arguments and authorities, this Honorable Court should exercise its discretion and not take this case for review. In the alternative, if this Court should review this case, this Court should answer the certified question in the negative.

POINT TWO

THE TRIAL COURT DID NOT ERR BY NOT GIVING THE SPECIAL JURY INSTRUCTIONS REQUESTED BY DEFENSE COUNSEL RELATING TO EYEWITNESS IDENTIFICATION.

Petitioner alleges that the trial court erred by refusing to read to the jury the special instructions requested by defense counsel. Respondent maintains that the instructions, as read to the jury, were adequate to cover the reliability factor of the eyewitness identification testimony given at trial.

The trial court ruled that the Florida Standard Jury Instructions for Criminal Cases would cover the issue of an eyewitness' reliability. (R 622-626) According to the trial court, defense counsel could argue the issue of misconceptions about identification of the Petitioner during closing arguments. (R 622-626)

This Court has held that when jury instructions properly and adequately cover the matters raised, there is no error when the trial court to denies defendant's requests for special jury instructions. Mendyk v. State, 545 So. 2d 846 (Fla. 1989). See also Hubbell v. State, 312 So. 2d 470 (Fla. 4th DCA 1975); Warren v. State, 20 Fla. L. Weekly D647 (Fla. 3d DCA March 15, 1995); Johnson v. State, 484 So. 2d 1347 (Fla. 4th DCA 1986); Jimenez v. State, 480 So. 2d 705 (Fla. 3d DCA 1985); Wells v. State, 270 So. 2d 399 (Fla. 3d DCA 1972). The granting or denial of a jury instruction is addressed to the sound discretion of the trial

court. Williams v. State, 591 So. 2d 319 (Fla. 3d DCA 1991). See also Rodriguez v. State, 413 So. 2d 1303 (Fla. 3d DCA 1982) (trial court did not err in refusing to give jury special instruction concerning identification testimony); State v. Freeman, 380 So. 2d 1288 (Fla. 1980) (separate instruction on identity, and state's burden of proof, does not have to be given in every case where identity is in issue and such instruction is requested; trial court did not err in refusing to give requested identity instruction where charges given were clear, comprehensive and correct, and where from instructions given it was clear that burden was on state to prove beyond a reasonable doubt all the elements of the alleged crime, including identity of defendant).

Where the requested instruction is either adequately covered by the standard instructions, misstates the law, or was not supported by the evidence, there is no error in denying the instruction. Parker v. State, 641 So. 2d 369 (Fla. 1994). Although a defendant is entitled to have a jury instructed on the rules of law applicable to a theory of defense if there is any evidence supporting the instruction, e.g., Bedova v. State, 634 So. 2d 203 (Fla. 3d DCA 1994), a trial court should not give instructions which are confusing, contradictory, or misleading. Maynard v. State, 20 Fla. L. Weekly D1732 (Fla. 2d DCA July 28,

1995); Butler v. State, 493 So. 2d 451 (Fla. 1986). Also, a trial court's failure to give a requested instruction will not result in a reversal where, taken as a whole, the instructions actually given are clear, comprehensive, and correct. Mavnard v. State, 20 Fla. L. Weekly D1732 (Fla. 2d DCA July 28, 1995); Darty v. State, 161 So. 2d 864 (Fla. 2d DCA), cert. denied, 168 So. 2d 147 (Fla. 1964). Where the jury instruction is subsumed in the standard jury instruction given, there was no error in refusing the defendant's requested instruction. Bertolotti v. State, 476 So. 2d 130 (Fla. 1985).

In the instant case, the instructions which were given to the jury were broad enough to cover the issue of the eyewitnesses' credibility. (R 669-671) See Bowen v. State, 20 Fla. L. Weekly D1239 (Fla. 4th DCA May 24, 1995). No error was committed by the trial court by refusing to give the special instructions requested by Petitioner.

POINT THREE

THE TRIAL COURT DID NOT ERR BY IMPOSING CONSECUTIVE SENTENCES ON COUNTS ONE AND TWO.

Petitioner was sentenced for one count of aggravated assault against Mrs. Grewal and one count of aggravated battery against Mr. Grewal. Petitioner alleges that the trial court erred by imposing consecutive sentences on those two counts. Respondent maintains that the trial court's imposition of consecutive sentences was not improper.

The Fourth District Court of Appeal affirmed Petitioner's sentence, citing Newton v. State, 603 So. 2d 558, 560 (Fla. 4th DCA 1992). In Newton, it was held that where three separate and distinct offenses were committed against three separate victims, the trial court properly imposed consecutive mandatory minimum sentences for the three offenses. Newton v. State, 603 So. 2d 558 (Fla. 4th DCA 1992). Consecutive minimum mandatory sentences are proper in cases involving a single criminal transaction or episode where the defendant commits "two separate and distinct offenses against two separate and distinct victims." Permenter v. State, 635 So. 2d 1016-1017 (Fla. 1st DCA 1994) [quoting Gardner v. State, 515 So. 2d 408, 410 (Fla. 1st DCA 1987), citing State v. Thomas, 487 So. 2d 1043 (Fla. 1986)(defendant who shot a woman four times,

followed her outside to the yard, shot her again, then fired at her son, was properly sentenced to consecutive mandatory minimum sentences since there were two separate and distinct offenses involving two separate and distinct victims; Woods v. State, 615 So. 2d 197 (Fla. 1st DCA 1993). See also Kelly v. State, 522 So. 2d 206, 208 (Fla. 5th DCA 1989)(consecutive minimum mandatory sentence for aggravated assault committed on driver of vehicle **was** proper where it constituted separate and distinct events involving separate and distinct attempted murder victim).

In Willis v. State, 640 So. 2d 220 (Fla. 2d DCA 1994), the court determined that the lower court did not err in sentencing defendant to consecutive mandatory minimum sentences pursuant to the habitual violent felony offender statute for robbery and possession of cocaine. The Willis court relied on the analysis of the single criminal episode in Parker v. State, 633 So. 2d 72, 75 (Fla. 1st DCA 1994).

> The task of determining when a criminal episode can be denominated "single" or 'separate" for purposes of consecutive minimum mandatory sentencing is not an easy one. There is no "bright line" rule to which we can refer. As the above cases demonstrate, there have been attempts to loosely categorize criminal episodes by focusing on the nature of the offenses, the time sequence in which they were committed, and the place they were committed, see, e.g., Murray [v. State, 491

> So. 2d 1120 (Fla. 1986)], and State v. Boatwright, 559 so. 2d 210 (Fla. 1990), as well as by focusing on whether there was a single victim or multiple victims, e.g., Woods [v. State, 615 So. 2d 197 (Fla. 1st DCA 1993)]. Palmer [v. State, 438 So. 2d 1 (Fla. 1983)], indicates that when making this determination, whether separate sentences may be imposed for separate offenses occurring in the same criminal transaction or episode under subsection 775.021(4) is neither controlling nor relevant. Thus, when we stated in Woods that the imposition of consecutive minimum mandatory sentences is justified "where two separate and distinct criminal offenses have occurred," 615 So. 2d at 198, it would be misleading to overlook the remainder of that discussion where we denied "separate offenses" in terms of separate victims, separate locations, and temporal breaks between the incidents, not in terms of separate statutory elements. Id. Obviously, in determining whether a series of criminal events constitutes a single criminal episode or separate criminal episodes, the focus must be directed to the facts of each individual case.

Willis v. State, 640 So. 2d at 220-221. A number of the cases Petitioner cites are not applicable to the facts of this case. Those cases support the argument that minimum mandatory sentences imposed for crimes arising out of the same criminal episode may only be imposed concurrently when the defendant has been sentenced as a habitual felony offender, and where the legislature did not include a minimum mandatory sentence, except through the habitual felony offender statute. See Daniels v. State, 595 So. 2d 952, 953

(Fla. 1992); Hale v. State, 630 So. 2d 521 (Fla. 1993); Brooks v. State, 630 So. 2d 527 (Fla. 1993).

In the case sub judice, the legislature authorized a minimum mandatory sentence for aggravated battery and aggravated assault, the offenses charged against Petitioner in counts one and two. See section 775.087 (2) (a), Fla. Stat. (1993). That statute, in pertinent part, states that persons convicted of aggravated assault and aggravated battery who had in their possession a firearm shall be sentenced to a minimum term of three years. Therefore, the trial court did not err in sentencing Petitioner to consecutive sentences as to counts one and two.

This case involved two separate crimes against two victims. Petitioner committed aggravated assault on Mrs. Grewal when he accosted her outside of the store. Petitioner next committed aggravated battery against Mr. Grewal when Mr. Grewal came to the door of the store and saw Petitioner with Mrs. Grewal. (R 4-5) Both counts require a minimum mandatory term of three years, and since there were two separate victims, those mandatory sentences were appropriately applied consecutively.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Respondent respectfully requests this Honorable

Court to decline to accept jurisdiction over this case. Alternatively, if this Court should accept jurisdiction, the certified question should be answered in the negative, and the affirmance of the conviction and sentence by the district court should be approved by this Court.

Respectfully submitted,

ROBERT BUTTERWORTH
ATTORNEY GENERAL
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Bureau Chief, Criminal Div.
Florida Bar No. 441510

MYRA J. FRIED
Assistant Attorney General
Florida Bar No.: 0879487
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401
(407) 688-7759

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's Merits Brief has been furnished by U.S. Mail to: Evelyn Ziegler, 711 North Flagler Drive, West Palm Beach, Florida 33401; and L. Martin Reeder, Jr., 1900 Phillips Point West, 777 South Flagler Drive, West Palm Beach, Florida 33401-6198, on March 27, 1996.

MYRA J. FRIED
Counsel for Respondent

A:\MCMULLFS.WPD