IN THE SUPREME COURT OF FLORIDA

SIRRON JOHNSON,	:	
Petitioner,	:	
v.	:	CASE NO. 93,915
STATE OF FLORIDA,	:	
Respondent.	:	
_____	:	

PETITIONER'S BRIEF ON THE MERITS

_____

On Review from the District Court
of Appeal, First District,
State of Florida

_____

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Sirron Johnson was charged with the December 30, 1994, armed kidnapping and armed sexual battery of Patricia White, the January 13, 1995, armed kidnapping, armed sexual battery, and armed robbery of Nikkita Bronner, and the January 31, 1995, armed kidnapping, armed sexual battery, and armed robbery of Christina Rose. (1R58-59). Only the Rose counts were taken to trial, but evidence of the White and Bronner crimes was admitted on the issue of identity. (1R29-31,148; 10R1283,1317). Johnson was convicted of the three Rose counts, as charged. (1R197-199). He was sentenced to forty-eight years in prison on each count, the sentences to be served concurrently. (2R204-206;13R1794). Johnson appealed (2R222), and on August 13, 1998, the First District Court of Appeal issued its decision affirming on all issues. Johnson v. State, 717 So.2d 1057 (Fla. 1st DCA 1998). Miller sought review based on conflict with decisions of this Court and a district court, and on December 10, 1998, this Court accepted jurisdiction.

STATEMENT OF THE FACTS

Overview

On December 30, 1994, a man took Patricia White at gunpoint to a fenced-in area behind the Atlantic Gardens Apartments in Jacksonville and there committed sexual battery on her. (10R1284-1286,1290-1293). Two weeks later, on January 13, 1995, a man forced Nikkita Bronner, at gunpoint, into an empty apartment in the Atlantic Gardens complex, and there committed robbery and

sexual battery. (10R1322-1328). White and Bronner each positively identified Jessie Ellis as the person who had attacked them, and Ellis was arrested for the White and Bronner crimes on January 20, 1995. (3R61; 11R1375).

On January 31, 1995, while Ellis was in jail, Christina Rose was accosted by a man with a gun on the stairway of the building in which she worked. (3R61; 9R1046-1048). The man asked for her money, and she pulled forty dollars from her purse and gave it to him. (9R1048-1050). The man had Rose drive him to the Atlantic Gardens apartments, directed her to the fenced-in area where Patricia White had been raped, and then committed sexual battery on Rose. (9R1050-1057). Later that day, officers accompanying Rose to the scene of the crime observed Rose's and what were apparently the perpetrator's footprints. (9R1110-1115). The perpetrator's footprints leaving the fenced area did not go back to the apartments; they went toward a tree line, in the general direction of a residential area where Sirron Johnson lived. (8R789; 9R1114-1115; 10R1173-1174).

On February 2, 3, or 4, 1995, Detective C.L. Terry showed a photographic lineup to Christina Rose; Sirron Johnson's photograph was in the lineup. (10R1154). According to Detective Terry, Rose did not make a positive identification, but she said there was a possible suspect among the photographs. (10R1155-1156). Terry did not allow her to show him which photograph was the possible suspect. (10R1056).

On February 6, 1995, Rose, with her husband, stepfather and mother, drove around the Atlantic Gardens complex and the nearby

Art Museum Drive complex for two or three hours, looking for the man who had attacked her. (9R1063-1064). Rose's stepfather pointed out a man behind a car; the man seemed about the same size, weight, and skin color as the rapist, and this man took off running as soon as Rose looked at him. (9R1064-1066). The man was arrested, and Rose observed him again, in the back seat of a police car; the man had on a sweatshirt with the hood up. (9R1064-1066). Rose told police she was about 96 percent sure the man was her attacker, but she could not positively identify him without seeing his hair and hearing his voice. (9R1064-1066,1085). The man was taken to the station where Detective Terry eliminated him as a suspect because of his long dreadlock hair. (10R1158-1159). At trial, Rose testified that she had been under pressure from her family and herself to identify the man who attacked her, and she had jumped to conclusions. (9R1089).

On February 23, 1995, Rose was shown a live lineup, and this time she positively identified Sirron Johnson as her attacker. (10R1160,1163). Johnson was arrested for the Rose crimes, and a sample of his blood was obtained. (10R1167-1169).

It was determined that Johnson's DNA profile matched the DNA found in semen left not only in Rose, but also in White and Bronner. (10R1253; 13R1426-1427). It was determined that Jessie Ellis's DNA did not match. (13R1426-1427). The probability of a random match of the perpetrator's DNA profile in the black population was testified by the state's expert to be one in 4.9 billion, and, using the ceiling method, which the state's expert described to the jury as being more beneficial to the defendant,

the probability of a random match was said to be one in ten million. (10R1267-1268).

These probabilities were for unrelated persons. (11R1528-1529). The state's expert acknowledged that the chances of two first degree related persons having the same profile would be higher. (11R1528-1529).[1] Sirron Johnson's mother testified that Johnson had about three hundred relatives in Jacksonville in her family, and about ninety relatives in the family of Johnson's father. (12R1552-1553). She did not identify any relatives who met Rose's description of a black male aged 18 to 22, about six feet tall and thin, but she did not know all of the relatives, particularly in the family of Johnson's father. (12R1557-1564). The state's expert estimated the chances of one of Johnson's male Jacksonville relatives having the same profile as found in the Rose evidence to be one in 240,000. (12R1653). This calculation was based in part on the product method. (12R1664).

Two defense experts contested the state's DNA frequency evidence. A defense mathematician testified that the FBI data base used to generate the state's numbers was inappropriate for that purpose because it was not randomly drawn and it was too small, and the state's use of the product method to calculate probabilities was inappropriate and a source of error because the state's assumption that the frequencies of the different parts of the DNA compared were independent of each other had been refuted

[1]A defense expert testified that being related increases in a fairly dramatic way the chances of sharing genetic information. (12R1602-1603).

by research. (12R1575-1582). A defense population geneticist also testified that the frequencies calculated by the state's witnesses assumed facts about the population and the FBI's data base that were not supported by research. (12R1598-1604). One problem with the FBI database, according to the population geneticist, is that the FBI threw out any data showing a DNA match, on the undocumented assumption that any match must be due to duplication of data. (12R1632). As an example of how spectacularly the product rule can fail, the population geneticist described research using an inbred Mexican Mayan database; the product rule calculation predicted that a particular six probe DNA profile would have a frequency of one in 96 million, but the actual observed frequency was one in thirty-seven. (12R1603-1604). The defense expert testified that given the problems with the product rule, the results using an analysis that did not rely on the product rule, and the observed false positive laboratory error rate among laboratories doing forensic DNA analysis, the weight to be assigned to the match in this case should be no more than one in several hundred up to one in a thousand. (12R1605-1618).

At the trial, White, Bronner, and Rose all made in-court identifications of Sirron Johnson. (9R1052; 10R1289-1290,1321).

Motion to Suppress Eyewitness Identification

The defense moved to suppress the pre-trial and in-court identifications of Johnson by Patricia White and Nikkita Bronner as being the product of an impermissibly suggestive identification procedure in violation of due process under the

Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Florida Constitution. (1R36,38,49).[2] The evidence presented at the suppression hearing pertaining to White's identification of Johnson established the following:

About noon on December 30, 1994, White had driven to the Independent Life building on Atlantic Boulevard to pick up a check for her employer. (2R260,262). When she got there, she noticed a man in the bushes, but there were other people in the area, and she paid no attention. (2R260). When she came out of the building the other people had left. (2R260). The man spoke to her, asking, "How you doing?" and she spoke back. (2R260,262-263). As she went to get into the car, the man came up behind her with a gun. (2R260). He demanded her purse, but she had no purse; he demanded jewelry, and she had no jewelry. (2R260-261). He directed her to unlock the car for him, he got in, and he told her to open the glove compartment. (2R261,268). He directed her to drive the car onto the street, which was Atlantic Boulevard, and to take the first left, which was the Atlantic Gardens Apartments. (2R261,268). The man directed White to walk to a high wooden fence behind the Atlantic Gardens complex and to go through an opening in the fence. (2R270). He came through the opening behind her. (2R270). The man told White to remove her underclothes so he could check to see if she was carrying any

[2]The defense also moved to suppress the identification of Johnson by Christina Rose, but appellant does not assert reversible error as to that identification.

money. (2R270). She was not facing him at this time. (2R270). He directed her to get up against the wall, facing the wall, and not turn around, and he committed sexual battery on her from behind. (2R270-274). She did not turn around to see him, and after the sexual battery, he told her to pull up her clothes and leave, which she did without looking at the man again. (2R274-275).

White described her attacker as a black man, about nineteen years old, wearing a knit skull cap, a faint scar on his left cheek, a few dark blotches on his face, weight about one hundred and fifty pounds, and height the same as hers, five feet six inches. (2R263-264,290). She did not see his teeth or his hair. (2R264-265). She did not have an opportunity to look at his eyes to see what color his eyes were. (2R265). She did not recognize the man. (2R265).

Five days after the crime, on January 4, 1995, White met with a police artist, and assisted in the preparation of a composite drawing of the perpetrator. (2R239).[3] After the January 13, 1995, Bronner crimes, Detective C.L. Terry developed Jesse Ellis as a suspect for both the White and Bronner crimes. (2R244-245; 3R61). Terry created a six picture photographic

[3]That drawing was admitted at the suppression hearing, and is in the trial record as State Exhibit 25. (3R59-60; 10R1295). The composite drawings made by all three victims were admitted into evidence at the suppression hearing and at trial, but were not transmitted with the record on appeal. Petitioner has filed with this brief a motion to direct the trial court to transmit the composite drawings.

lineup,[4] which Detective James Royal showed to White sometime between January 13 and January 31, 1995.[5] (2R245-246; 3R61,63). White looked at the photo spread and identified picture number three, Jesse Ellis. (2R248,284-285; 3R39,48-49; Defense Exhibit 2). White told Royal she was positive the picture of Ellis was her attacker. (2R248,284-285).

A year later, on January 18, 1996, White was summoned to the prosecutor's office. (3R39). She was told that DNA testing had been done, and that the person she had identified earlier, Jessie Ellis, did not match. (3R50). She was also told that one other person, a man named Sirron Johnson, had been charged with the crime. (3R50). The prosecutor then showed White four photographs, one at a time, three of Ellis and one of Johnson. (3R40-42;82-83).[6] As to each picture of Ellis, White told the prosecutor she did not recognize Ellis to be the attacker. (3R40-42;82-83). When the prosecutor showed White the photograph of Johnson, White testified, she immediately knew this was her attacker, and she

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[4]This photo spread is identified in the record on appeal as Defense Exhibit 2.

[5]The evidence presented to the judge at the suppression hearing only established that White and Bronner identified Ellis from the photographic lineup before Ellis was arrested, which was before the January 31, 1995, Rose crime. During the trial, it was established that Ellis was arrested on January 20, 1995, so the White and Bronner identifications of Ellis actually took place between January 13, 1995, and January 20, 1995. (11R1375).

[6]The three individual photographs of Jessie Ellis are identified in the trial record as State Exhibit 26, State Exhibit 27, and State Exhibit 28. The photograph of Sirron Johnson is State Exhibit 29.

turned the picture face down. (3R42;82-83).

At the suppression hearing, White was asked what it was about Johnson's photograph that led her to recognize him as her attacker, and she testified it was the face, that she knew she had seen Johnson's face before. (3R42). Asked specifically what about the photograph of Johnson was similar to the attacker, White referred to the frowning, and the cringing of the eyes. (3R43). At the January 18, 1996, meeting with the prosecutor, White was also shown the photo spread from which she had identified Jessie Ellis in January of 1995, and she compared the photograph of Ellis in the photo spread with the three individual photographs of Ellis she had just been shown, and with the photograph of Johnson. (3R43-44). White testified that the three individual photographs of Ellis did not look anything like the photograph of Ellis she had identified from the photo spread, and the photograph of Johnson did look like the photo spread picture of Ellis. (3R44). The individual photographs of Ellis had been taken more recently than the picture used in the photo spread. (3R84).

The evidence presented at the suppression hearing pertaining to Bronner's identification of Johnson established the following:

Between 11:30 and 11:45 a.m., on January 13, 1995, Nikkita Bronner was at a bus stop on Atlantic Boulevard, across the street from a restaurant that was next to the Atlantic Gardens apartments. (2R296-298). She saw a man walk up. (2R298). She described him as a black man, medium build, dark skin, wearing a baseball cap, about nineteen or twenty years old. (2R299-300).

She was not certain of the height, but estimated five nine or five ten. (2R299). The man had a scar at the center of his left cheek. (2R300-301). The man looked familiar, and she thought she had seen him once getting on the bus she normally took to work, but she was not certain of this. (3R315,319).

The man asked Bronner if she knew what time the next bus was coming. (2R297). She told him she did not have a schedule, but a bus had passed as she was on her way to the stop, so she suspected it would be another thirty minutes. (2R297). When she said that, she realized there would be a wait, so she sat down. (2R302). As soon as she sat down, the man put a gun to her side. (2R302). He told her he was not going to hurt her, and to get up and come with him. (2R302). The man was facing her. (2R302). He told her to put her arm around him and to act as if nothing was wrong. (2R304). She told him to just take her purse and leave, but he said he wanted to take her to the side of the building so no one would see. (2R304). They went straight across the street to the Atlantic Gardens apartments. (2R304). She did not try to escape, but she was crying and stumbling, and apparently bumping the man near where he held the gun. (2R304-305). The man threatened to kill her, and he told her to shut up, walk straight, and stop touching him near the gun because he thought she was trying to take the gun. (2R304-305). She asked him if he was going to rape her, and he said no. (2R309). He took her into an abandoned apartment at the back of the complex. (2R305). He took her into one room, where he had her undress. (2R305). He went through her purse, and asked her a lot of questions, as if

he was trying to have a conversation. (2R305). The man took Bronner to another room, made her lie down, took his hat off and put it over her face, and committed sexual battery on her. (2R305,310). After the assault, the man took his hat off her, told her to get up, and brought her her clothes. (2R312). He told her to wait five minutes before she left, and not to follow him. (2R312). She did not see him again. (2R314).

Soon after the attack, Bronner assisted in the preparation of a composite drawing of her attacker. (2R317-318;3R59).[7] After preparation of the composite and before January 31, 1995, Bronner was shown the same photographic lineup White was shown. (3R61,63). Detective Terry made it clear to Bronner that if she did not see her attacker among the first photographs she was shown, there would be other photographs for her to look at. (2R321). Bronner identified Jessie Ellis as her attacker. (2R29,321). She told Detective Terry she was one hundred percent positive the picture of Ellis was her attacker. (2R321-322,332). A few days later, she was told that Ellis had been arrested. (2R322).

Some time prior to January 18, 1996, Bronner learned from the prosecution or the police that DNA evidence had shown Jessie Ellis was not the person who had attacked her, and that the prosecution no longer believed Ellis was her attacker. (3R21,37-38). On January 18, 1996, Bronner was asked to come to the prosecutor's office. (3R12). First she was shown a photograph of

[7]That drawing was admitted into evidence at trial as State Exhibit 31. (10R1331).

Jessie Ellis. (3R13-14).[8] She did not recognize Ellis as her attacker. (3R14). In the photograph Bronner was shown on January 18, 1996, unlike the photo spread, Ellis's teeth were visible, and she could see that he had a gold capped tooth. (3R14). She did not remember her attacker having a gold tooth. (3R14,22). Also, in the new photograph, Ellis looked lighter skinned and heavier than the attacker. (3R14-15).

After the prosecutor showed Bronner the photograph of Ellis, she told Bronner she was going to show her the person who had assaulted her so she would not see him for the first time in the courtroom. (3R13). The prosecutor then showed Bronner a photograph of Sirron Johnson. (3R15).[9] Bronner testified that when she saw the picture of Johnson, she recognized him as her attacker, and she became physically ill, and went to the restroom and vomited. (3R15-16).[10] When she returned, she was shown the photo spread from which she had earlier identified Jessie Ellis. (3R16-18). At the suppression hearing, Bronner testified that the photo spread picture of Ellis did not look like the individual photograph of Ellis, but did look like the photograph of Sirron Johnson. (3R16-18). Asked what it was about Johnson's photograph that led her to believe this was the person who had attacked her, Bronner said she remembered his eyes, and she just

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[8]This photograph is in the trial record as State Exhibit 28.

[9]State Exhibit 29.

[10]Bronner testified that when she had identified Jessie Ellis a year before, she did not have a physical reaction. (3R35).

knew that is who it was. (3R15-16).

The trial judge, and apparently the prosecutor, recognized that the identification procedure used was unnecessarily suggestive. (1R157; 3R112). The prosecution argued, however, that because Johnson's DNA profile matched the DNA profile of the semen taken from White and Bronner, there was no substantial risk of misidentification, so the identifications should not be suppressed. (3R72-73,111-112). The defense argued that the DNA evidence should not be considered on the issue of suppressing White and Bronner's identifications. (3R71-72). The judge acknowledged that the DNA evidence was not pertinent to whether the identifications were based on independent recollection or on the suggestive procedure, but stated that the DNA would be relevant to whether there was a risk of misidentification. (3R79).

The trial judge's order denying the motion to suppress found that the unnecessarily suggestive nature of the White and Bronner identification procedures was undisputed. (1R157).[11] The order then considered the following factors as bearing on the likelihood of misidentification:

A. Opportunity to view. The trial court found that White and Bronner had an extended period of time to view the assailant as each was accosted during daylight, the attacker did not hide his face or prevent the victims from seeing him until the rape itself, and each victim drove or walked with the attacker to the

[11]A copy of the trial judge's order is also attached to this brief.

place where the rape occurred. (1R158).

B. Degree of attention. The trial court found that White and Bronner's attention was focused on the perpetrator, and they were able to give detailed clothing descriptions and general physical descriptions of the perpetrator. (1R158).

C. Accuracy of prior description. The trial court found that White gave a description that was inaccurate as to Johnson's height, but otherwise generally consistent with him, though certainly not precise, and that the composite drawing prepared at her direction bore a resemblance to the defendant. The trial court found that Bronner's description was generally consistent with Johnson, but certainly not precise, and that although she estimated the attacker's height as below six feet, she stated she was not good at such estimates.[12] (1R158).

D. Level of certainty. The trial court found that White and Bronner were each resolute in her identification of Johnson, but that each had also been resolute in her earlier identification of Jessie Ellis. The trial court found that the

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[12]White actually described her assailant as being five feet six inches tall, the same height as she was in the shoes she was wearing at the time of the attack. (2R263-264,290). Bronner, who is five-two, described her assailant as not tall or short, five-nine or five-ten, and she said she was not good at estimating heights. (2R299,301). Detective Terry measured Johnson to be six feet one inch tall. (3R89-90).

The one aspect of both White and Bronner's descriptions of their attacker that was not general was their observation of a scar on the attacker's left cheek. No effort was made at the suppression hearing or at trial to show that Johnson had a scar on his left cheek. The only evidence at trial pertaining to any scar on Johnson's cheek was the testimony of Johnson's mother that she had never seen such a scar. (12R1553).

composite drawings were more consistent with Johnson than with Ellis. (1R158-159).

E. Prior identifications. The trial judge repeated his finding that White and Bronner had both previously identified another individual and expressed certainty in that identification. (1R159).

F. Other factors. The trial court stated: "The Court has given great weight to other scientific evidence of the Defendant's guilt." (1R159). Citing Chaney v. State, 267 So.2d 65 (Fla. 1972), Washington v. State, 653 So.2d 362 (Fla. 1994), cert. den. 516 U.S. 946 (1995), and Baxter v. State, 355 So.2d 1234 (Fla. 2d DCA 1978), cert. den. 365 So.2d 709 (1978), the trial judge concluded that it was proper to consider the DNA evidence on the issue of the likelihood of misidentification. (1R159-160). The court found: "In the instant case DNA testing results substantially reduce the risk of misidentification and [have] been accepted and given considerable weight by the Court. ... Accordingly, based upon the totality of the circumstances the Court finds that there is not a great risk of irreparable misidentification ..." (1R160). Johnson's motion to suppress was denied. (1R160).

Sentencing Guidelines Departure

The sentencing guidelines range permitted in this case was 9.6 years to sixteen years. (2R209; 13R1788). The prosecutor filed a motion seeking an upward departure from the guidelines, and at the sentencing hearing argued for an upward departure. (13R1787-1789). Defense counsel objected to a departure, and

argued against it. (13R1789-1793). On September 3, 1996, the trial judge imposed a departure sentence, but did not articulate his reasons; he said he would give his reasons in a written order to follow:

> Mr. Johnson, having been found guilty by the jury of armed kidnapping, armed sexual battery and armed robbery, on each of those offenses the Court will adjudge you to be guilty and sentence you to serve 48 years in the Florida State Prison on each of those offenses to run concurrently.
>
> The Court is exceeding the guidelines, and will follow within seven days with an order explaining its reasons for exceeding the guidelines.

(13R1794). Six days later, the trial judge filed an order stating his reasons for departing. (SR6). The defense did not object at sentencing or in a post-trial motion to the imposition of a departure sentence without oral articulation of the reasons.

SUMMARY OF ARGUMENT

Issue I. The prosecutor met with Patricia White and Nikkita Bronner before the trial and effectively told them that the picture she was showing them of Sirron Johnson was a picture of the person who had attacked them. Consideration of all the relevant factors demonstrates the strong likelihood that absent such an improperly suggestive identification procedure, White and Bronner would not have identified Johnson as their attacker. The trial judge nonetheless denied the motion to suppress because he believed that the existence of a DNA match ruled out any significant likelihood that White and Bronner had identified the wrong person. This was error. Due process forbids the use of identification evidence that is the product of the state's

suggestion, rather than the witness's own recollection. The existence of evidence, such as a DNA match, that tends to show the defendant's guilt, but does not indicate whether the witness's testimony is based on recollection or suggestion, is irrelevant to the due process issue.

Issue II. The trial judge imposed a guidelines departure sentence without orally articulating his reasons for departure at sentencing, in violation of Fla. R. Crim. Proc. 3.702(d)(18)(A). In the 1994 sentencing guideline rule, the requirement of oral articulation of departure reasons at sentencing replaced the requirement of contemporaneous written reasons that was in the pre-1994 guidelines rule. The remedy for failing to give contemporaneous oral reasons under the 1994 rule should be the same as the remedy for failing to give contemporaneous written reasons under the old rule: remand for a guidelines sentence.

The error was not preserved in the trial court, but neither the Criminal Appeal Reform Act nor Fla. R. App. Proc. 9.140(d) precludes correcting this error on appeal. Before the 1996 act, the well established case law rule in Florida allowed correction of unpreserved sentencing errors on direct appeal. The act does not change the case law rule in this case because: (1) the act is an invalid intrusion into the judicial power to regulate practice and procedure in the courts; or (2) if the act deals with substantive criminal law, properly construed it does not apply to crimes occurring before the effective date of the act; and (3) if applied to crimes occurring before the effective date, the act would violate the ex post facto provisions of the Florida and

United States constitutions. Rule 9.140(d) does not prevent correction of the error on this appeal because rule 9.140(d) was not adopted until after petitioner had filed this appeal and the opportunity to preserve the error had already passed.

ARGUMENT

> ISSUE I THE TRIAL COURT USED THE WRONG TEST TO DECIDE WHETHER TO SUPPRESS EYEWITNESS IDENTIFICATIONS INDUCED BY A SUGGESTIVE PROCEDURE. THE JUDGE DETERMINED THAT THE CHALLENGED IDENTIFICATIONS WOULD BE ADMITTED BECAUSE PETITIONER WAS MOST LIKELY GUILTY, INSTEAD OF DETERMINING THE LIKELIHOOD THAT THE WITNESSES IDENTIFIED JOHNSON BECAUSE OF THE IMPROPER SUGGESTION RATHER THAN THEIR OWN RECOLLECTION.

As the trial judge and the First District Court of Appeal both recognized, there is no question that the identification procedure the state used in this case was unnecessarily suggestive. The prosecutor told Bronner she was showing her the man who assaulted her, and White was effectively told the same thing, since she was told the man she had earlier identified had been vindicated, another man had been arrested, and she was then shown pictures only of the vindicated man and Sirron Johnson. Like the procedure used in Foster v. California, 394 U.S. 440 (1969), the state effectively told the witnesses: “This is the man.”

The trial judge nonetheless denied the motion to suppress because he believed that the existence of DNA evidence tying Johnson to the crimes eliminated any significant possibility of misidentification. In effect, the trial court, affirmed by the district court, held that an identification is “reliable,” and

thus not suppressible, if the evidence of guilt aside from the identification is strong. Petitioner contends that an identification induced by an unnecessarily suggestive procedure passes muster under due process only if it is based on the witness's own recollection, untainted by the state's suggestive procedure, and that other evidence of guilt is irrelevant to this issue.

In Neil v. Biggers, 409 U.S. 188 (1972), and Manson v. Brathwaite, 432 U.S. 98 (1977), the United States Supreme Court ruled that identification evidence produced by an unnecessarily suggestive procedure could be admitted into evidence without offending due process if under the totality of the circumstances the identification was reliable. Biggers:

> [T]he primary evil to be avoided is "a very substantial likelihood of irreparable misidentification." ... We turn, then, to the central question, whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

409 U.S. 198-199.

As Brathwaite explained:

> [R]eliability is the linchpin in determining the admissibility of identification testimony ... The factors to be considered ... include the opportunity of the witness to view the criminal at the time of the crime, the

> witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

432 U.S. 114.

All of the Biggers/Brathwaite factors go to the likelihood that the witness identified the defendant from the witness's own memory of the crime, untainted by the state's improper influence, not to the strength of the evidence of guilt overall. The list of factors appears to be non-exclusive, however, which suggests that reliability could be taken to mean something else, i.e., whether or not the person the witness identified is in fact the guilty party. Under such a reading, any evidence of the defendant's guilt, though unrelated to the challenged eyewitness identification, would be pertinent to the reliability of the identification.

The Brathwaite opinion itself rules out such an interpretation, however, by noting that other evidence of the defendant's guilt has nothing to do with identification reliability:

> Although it plays no part in our analysis, all this assurance as to the reliability of the identification is hardly undermined by the facts that respondent was arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment.

432 U.S. 116. (Emphasis added.) Justice Stevens, concurring in Brathwaite, gave this point even more emphasis:

> [I]n evaluating the admissibility of

> particular identification testimony it is sometimes difficult to put other evidence of guilt entirely to one side.* Mr. Justice Blackmun's opinion for the Court carefully avoids this pitfall and correctly relies only on appropriate indicia of the reliability of the identification itself. ...
>
> *In this case, for example, the fact that the defendant was a regular visitor to the apartment where the drug transaction occurred tends to confirm his guilt. In the Kirby case, where the conviction was for robbery, the fact that papers from the victim's wallet were found in the possession of the defendant made it difficult to question the reliability of the identification. These facts should not, however, be considered to support the admissibility of eyewitness testimony when applying the criteria identified in Neil v. Biggers, 409 U.S. 188. Properly analyzed, however, such facts would be relevant to a question whether error, if any, in admitting identification testimony was harmless.

432 U.S. 118.

LaFave and Israel make a similar comment in the context of the analogous issue of the admissibility of an in-court identification that follows an uncounseled lineup:

> In favor of a determination that the in-court identification was not tainted, it is emphasized that the witness had a clear or lengthy opportunity to observe the perpetrator of the crime, that the witness was previously acquainted with the defendant, or that the witness gave an accurate and specific description prior to the identification. Some courts also take into account certain external factors. "Possession of fruits of the crime, testimony of accomplices, possession or ownership of an automobile used in the commission of the crime, are some of the external factors considered by some courts in arriving at 'independent source.'" This, of course, is improper, for those factors (though relevant on the question of whether an improperly admitted identification is harmless error) have nothing to do with whether the in-court identification is independent of the earlier improperly conducted identification.

W. LaFave & J. Israel, Criminal Procedure §7.3(f)(1984).

This Court's statement of the law in Edwards v. State, 538 So.2d 440 (Fla. 1989), is consistent with the interpretation of the United States Supreme Court:

> [T]he in-court identification may not be admitted unless it is found to be reliable and based solely upon the witness's independent recollection of the offender at the time of the crime, uninfluenced by the intervening illegal confrontation.

538 So.2d 442. In other words, per Edwards, the identification is reliable, and thus admissible, despite a suggestive procedure, if the witness identifies the defendant based on her own memory, not the memory implanted by the state's suggestive procedure. If the identification is based on the suggestive procedure, then it is evidence that was fabricated by the state's coaching, and due process does not allow its use.

The trial judge in this case was aware of the distinction between evidence that the identification was or was not based on the witness's own recollection and evidence that regardless of the witness's recollection, the identified person was guilty. He chose to deny the Johnson's motion to suppress based on DNA evidence that he recognized was irrelevant to whether White and Bronner identified Johnson from their own recollections. The trial judge cited three cases as authority for the use of evidence unrelated to the challenged identification: Chaney v. State, 267 So.2d 65 (Fla. 1972), Washington v. State, 653 So.2d 362 (Fla. 1994), cert. den., 116 S.Ct. 387, 133 L.Ed.2d 309 (1995), and Baxter v. State, 355 So.2d 1234 (Fla. 2d DCA 1978),

cert. den., 365 So. 2d 709 (Fla. 1978).

In Chaney, the victim was abducted shortly after 8:30 p.m., and was taken first to an abandoned shack and then to an abandoned trailer where she was subjected to repeated sexual attacks until the following afternoon, when her attacker left to get a change of clothes and she managed to escape. In describing the perpetrator to a deputy sheriff later in the afternoon of her escape, the victim said that the attacker had told her he had recently been jailed for the rape of another girl. The deputy promptly showed her a photograph of a man who had recently been arrested for rape, and she identified the man as her abductor. Chaney did not find this showing of a single photograph unnecessarily suggestive:

> Under these circumstances, it was not an abuse of due process rights to use the single photograph as a clue or lead in apprehending the rapist of prosecutrix. In fact, it would be unreasonable to preclude the use of such a photograph for this pre-arrest purpose.

267 So.2d 69. In this respect, Chaney is like Simmons v. United States, 390 U.S. 377 (1968), in which a quick photographic identification was necessary because the perpetrators were still at large.

Chaney did go on to discuss the reliability of the identification:

> Moreover, the fact that prosecutrix had opportunity to see her assailant over a period of several hours, including daylight of the day succeeding his original attack upon her, is such an overwhelming circumstance of independent origin as to discount the suggestion that only through means of the photograph prosecutrix was able to identify

> Appellant. Corroborating latent fingerprints extracted from furnishings and items in the trailer where the rape occurred were identified as belonging to Appellant.
>
> We conclude that the totality of the particular circumstances of this case does not disclose that prosecutrix's identification of Appellant was fatally tainted to the point of denial of his rights of due process.

267 So.2d 69. The reference to fingerprints in Chaney's discussion of whether the eyewitness identification was tainted does suggest that Chaney may have relied on evidence unrelated to the identification to find the identification reliable. The opinion does not state that the fingerprint evidence was used in this way, however, and the preceding sentence indicates that the controlling issue was whether the victim's ability to recognize the defendant was due to the photograph or to the time she had spent with him. As the Chaney opinion makes clear, the many hours the victim spent with her attacker the same day she identified him amounted to overwhelming reason to believe that the identification was based on the time spent with him, not on the state's suggestion. The existence of fingerprints was immaterial to that issue.

If the reference to fingerprints did mean that Chaney considered fingerprint evidence as bearing on the reliability of the identification, that part of the opinion was unnecessary to the decision because Chaney did not find that the showing of a single photograph under those circumstances was unnecessarily suggestive. Absent unnecessary suggestiveness, there is no need to consider reliability. Also, because of the overwhelming evidence of a basis for the victim to recognize the defendant

without regard to any improper suggestion, Chaney does not establish that evidence of guilt apart from the eyewitness identification can save an otherwise unreliable identification. In any event, Chaney should be interpreted to be consistent with Brathwaite, which leaves independent evidence of guilt out of the reliability analysis.

In Washington, this Court found the showing of a single photograph to be unduly suggestive, but affirmed the conviction based on the Edwards formulation, "based solely upon the witness' independent recollection of the offender at the time of the crime, uninfluenced by the intervening illegal confrontation." Washington held:

> The record shows that Leacock and the defendant had previously worked together and that several other co-workers identified Washington as the seller of the watch. Given this familiarity, we find that although the identification method was unduly suggestive, Leacock's previous work experience with Washington provided an independent basis for the identification, uninfluenced by the suggestive procedure. We find no error in the trial court's ruling.

653 So.2d 365. It is not clear what significance the identifications by other co-workers had on the analysis, but it is clear that Washington found the challenged identification reliable because the witness knew the defendant from having worked with him. Thus, the witness was not identifying a stranger. When the witness knows the defendant, the identification of a photograph is less a matter of establishing the witness's ability to identify as it is a way for the witness to unambiguously communicate the identity of the perpetrator to

the police. Put in Brathwaite terms, any doubt raised by the suggestiveness of showing the witness only one photograph was clearly outweighed by the witness's previous knowledge of the defendant. Washington does not support the judging of a challenged identification by weighing other evidence of guilt.

In Baxter, the suggestiveness of the procedure was that the victim was given a stack of photographs to look though, and there were three photographs of the defendant in the stack. The victim looked at the pictures one at a time, however, and she identified the defendant when she saw the first picture of him, before she got to the others. Thus, the court was able to accurately state, "It is obvious that the suggestiveness of the photo-pak played no role in prosecutrix' extra-judicial identification." 355 So.2d 1238. The court's additional conclusion that other evidence "negates any very substantial likelihood of misidentification," occurs in the court's discussion of harmless error, and is unnecessary to the decision, since the identification was not at all tainted by suggestiveness.

It should be clear, thus, from Brathwaite and from Edwards, that due process mandates suppression of identifications the state procures by a procedure that unnecessarily suggests to the witness the identity of the person the state believes is the criminal, unless the witness's identification is based on the witness's own recollection, not the state's hint.[13] Evidence

[13]Edwards cited United States Supreme Court cases, and did not refer to the Florida constitution, but petitioner contends that both the federal and Florida constitutional due process guarantees prohibit the use of unnecessarily suggestive

indicating that the person identified is guilty without regard to the eyewitness identification is irrelevant to the due process issue. That it makes sense to focus solely on the identification procedure itself in deciding whether the jury should hear evidence of an identification is indicated by the nature of a tainted identification. Such evidence is fabricated evidence. The state's suggestive procedure creates the evidence by putting into the witness's mind the erroneous belief that the witness recognizes the defendant as the perpetrator. Due process does not allow the state to use such fabricated evidence regardless of the existence of other evidence of guilt. The only proper use of other evidence of the defendant's guilt is in the harmless error analysis.

Thus, the trial judge in this case committed error when he considered the DNA profile match as bearing on whether or not the use of White and Bronner's out-of-court and in-court identifications of Johnson would violate due process. Johnson maintains that a fair reading of the trial judge's order shows that if the judge had known the DNA evidence could not be considered, he would have suppressed the White and Bronner identifications. If he did not, petitioner maintains, his decision would have been unreasonable and an abuse of discretion.

The trial judge found, as to the first Biggers factor, that White and Bronner had an adequate opportunity to view the criminal at the time of the crime. Petitioner does not dispute

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identification procedures.

that White and Bronner had an adequate opportunity to view the criminal. They did not spend hours with the criminal as in Chaney, and the testimony does not indicate how long each episode took, but it appears that each victim had at least several minutes, in daylight and at close range to see the criminal.

The trial judge's finding that White and Bronner's attention was focused on the criminal during the crime, petitioner also does not contest.

The trial judge's finding that White and Bronner's descriptions of the perpetrator did not match Johnson as to height is correct. This fact is more noteworthy as to White, since she in effect used herself as a measuring stick and found her attacker to be the same height as she was in her shoes, five feet six inches, while Johnson is six one. The trial judge's finding that otherwise White and Bronner's descriptions were consistent with Johnson but were not precise is generally correct, but ignores White and Bronner's report that the perpetrator had a scar on his left cheek, which Johnson apparently did not have. To the extent that White and Bronner's descriptions match Johnson, they are entitled to virtually no weight, as they match only to the extent that Johnson is an average build young black man.

The trial judge found that the composite drawing prepared at White's direction bore a resemblance to the defendant. It is significant that the judge found a resemblance, not a striking resemblance. Petitioner has asked the Court to order the composite drawings transmitted, so the Court can see them and

compare them to the photograph of Johnson that White and Bronner identified. Petitioner submits that it will be readily apparent from this comparison that none of the composite drawings bears any striking resemblance to Johnson. If they did, this would be strong evidence that the victims had Johnson's image in their memories before the state put it there through the suggestive identification procedure. Given only the general resemblance that the judge found and that the comparison of the composite drawings to the photograph shows, the resemblance is of no more significance than Johnson's having fit a general description of young, medium build black man.[14]

The judge found that White and Bronner were resolute in their identification of Johnson, but had also been resolute in their identification of Ellis. It appears that the judge gave their certainty no weight. This would be appropriate not only because any value of their certainty in identifying Johnson is refuted by their certainty in identifying Ellis. Also, psychological research indicates that certainty of identification does not correspond to accuracy of identification. See W. LaFave & J. Israel, Criminal Procedure §7.1 (1984); Macias v. State, 673 So. 2d 176 (Fla. 4th DCA 1996), rev. den. 680 So. 2d 423 (1996), at 181, n3. Indeed, the one factor listed in Biggers that is not included in Edwards is the certainty of identification.

The trial judge found that White and Bronner had made a

[14]The judge's finding that the composite drawings were more consistent with Johnson than with Jessie Ellis is of no weight. The issue is not whether the culprit was Ellis or Johnson, though the prosecutor and victims may have seen it this way.

previous identification of another suspect. He did not make any finding, however, concerning the testimony the prosecutor elicited from White and Bronner at the suppression hearing to the effect that the photo spread picture of Ellis they had identified actually looked like the photograph of Johnson they were shown a year later in the prosecutor's office, and did not look at all like the more recent pictures of Ellis they were shown by the prosecutor. Petitioner urges the members of this Court to examine these exhibits. What appears from comparison of the photo spread picture of Ellis with the individual photographs of Ellis and Johnson is the opposite of White and Bronner's testimony. The photo spread picture of Ellis is obviously the same person as the individual pictures of Ellis, and is obviously a different person from the individual picture of Johnson. Instead of explaining away the previous identification of Ellis, as the prosecutor had hoped, White and Bronner's testimony shows just how susceptible to the prosecutor's suggestion they were. Moreover, the lack of any resemblance between the photo spread picture of Ellis that White and Bronner identified in 1995 and the photograph of Johnson they identified in 1996 completely refutes any notion that White and Bronner had an image of Sirron Johnson in their own recollection. White and Bronner's previous positive identification of Jessie Ellis is powerful evidence that when they later identified Sirron Johnson they were following the prosecutor's lead; they were not matching Johnson's image with their own recollection.

The one reliability factor that is in Biggers and Brathwaite

and Edwards that the trial judge did not address is the time between the crime and the challenged identification. A full year elapsed between the White and Bronner crimes, December 30, 1994, and January 13, 1995, and the January 18, 1996, meeting when the prosecutor showed White and Bronner a picture of Sirron Johnson. A time lapse of one year between the crime and the identification strongly undermines the identification. Biggers stated that a lapse of seven months between a rape and the identification "would be a seriously negative factor in most cases," 409 U.S. 201, but was not in that case because during the seven months the victim had been shown numerous lineups and showups and had never made an identification, thus indicating a reliable ability long after the crime to resist the suggestiveness implicit in showups. White and Bronner indicated no such reliability, having positively identified the police's first suspect, and then a year later having identified the police's next suspect.

The state may argue that because two of the Biggers factors, opportunity to view and degree of attention, militate for a finding of reliability, the trial court's weighing of all the factors should not be disturbed. There are at least two problems with this approach. First, the trial judge answered the wrong question. He determined that Johnson was likely guilty rather than determining whether the witnesses' identifications were likely based on the suggestiveness of the procedure as opposed to their own recollections. In doing so, the judge gave great weight to a factor that is legally irrelevant. Second, deferring to the trial judge's weighing of the factors would misapprehend

the proper standard of review.

The First District asserted that the trial judge's ruling came with a presumption of correctness. This is only partially correct. This Court has not stated in a suggestive identification case that the trial court's ruling is entitled to a presumption of correctness. On the contrary, this Court's opinions have reflected a de novo examination of the evidence and independent analysis of the reliability factors. See, e.g., Perez v. State, 648 So. 2d 715 (Fla. 1995), Pittman v. State, 646 So. 2d 167 (Fla. 1994), cert. den. 514 U.S. 1119 (1995), Coleman v. State, 610 So. 2d 1283 (Fla. 1992), cert. den. 510 U.S. 921 (1993), Edwards, Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. den. 465 U.S. 1051 (1984). Johnson is particularly instructive. In dealing with a separate issue of a motion to suppress an informant's statements, Johnson pointed out that the trial judge's ruling was presumptively correct. In discussing the trial judge's denial of a motion to suppress a suggestive identification, however, Johnson said nothing about presumptive correctness, and gave the issue plenary review. This is in accord with the federal practice. See, e.g., United States v. Puckett, 147 F.3d 765 (8th Cir. 1998):

> We review the denial of a motion to suppress an identification de novo, and look to whether the procedure was impermissibly suggestive and if under the totality of the circumstances "suggestive procedures created a very substantial likelihood of irreparable misidentification."

147 F.3d 769. (Citations omitted). See also, Livingston v. Johnson, 107 F.3d 297 (5th Cir. 1997), cert. den. 118 S.Ct. 204,

139 L.Ed.2d 141 (1997), (review of habeas corpus petition attacking state court conviction):

> The question of whether identification evidence is constitutionally admissible is a mixed question of law and fact and is not entitled to a presumption of correctness. However, the factual findings underlying the determination of the admissibility of identification testimony are entitled to that presumption.

107 F.3d 309.

Petitioner maintains that evidence presented at the suppression hearing, including the facts found by the trial judge, demonstrate a substantial likelihood that White and Bronner's identifications of Johnson were based on the state's suggestion, not on their own recollection. That White and Bronner had an adequate opportunity to see the criminal and their attention was focused on him demonstrate that it would have been possible for White and Bronner to have acquired a mental image of the criminal. Shortly after the crime, however, each positively identified a man who looked nothing like Sirron Johnson. The identification of Jessie Ellis proves that at the time the photo spread was shown to White and Bronner, neither had Sirron Johnson's image in her mind. If they had had Johnson's image in their minds when they compared that mental image with the photograph of Ellis, they would not have identified Ellis. Thus, the prior identification of Ellis negates opportunity to view and degree of attention as reasons to find the identification of Johnson reliable.

The descriptions the witnesses gave to the police after the

crime do not show that White and Bronner had Johnson's image in their recollections prior to the challenged identification. As discussed above, to the extent their descriptions were at all specific, they do not match Johnson. The length of time between the crimes and the identification of Johnson is a powerful factor casting doubt on the reliability of the identification. The only other factor at all suggesting reliability is the certainty White and Bronner expressed when they identified Johnson. As the trial judge seemed to recognize, their certainty when they identified Johnson, as a factor supporting reliability, is negated by their certainty when they identified Ellis.

As a whole, then, the Biggers factors do not offer any assurance that White and Bronner's identification of Johnson was based on their own recollections. Brathwaite directs that the listed factors be weighed against the corrupting effect of the suggestive identification. It is hard to imagine a suggestive identification with a more corrupting effect than that in this case. This was not a subtle influence, like a lineup in which the suspects are not sufficiently alike in appearance. The identification here was even worse then simply showing the witness one photograph and asking if that is the person. With Bronner, the prosecutor showed her one photograph and told her this is the man who assaulted you. With White, it was essentially the same, since the only pictures other than the one of Johnson were of Ellis, and the prosecutor had already told White that Ellis had been vindicated by the DNA and that another man had been arrested. This is the sort of unfair practice that

led the United States Supreme Court in United States v. Wade, 388 U.S. 218 (1967), to begin providing constitutional protection against unfair identifications. Considered with the other factors, which themselves give reason to doubt the reliability of these identifications, the prosecutor's conduct makes it beyond question that there is a substantial likelihood that White and Bronner's identifications of Johnson were based on the prosecutor's coaching, not on their own recollections.

The trial judge erred, then, in admitting the White and Bronner identifications. This Court should reverse unless it is established beyond a reasonable doubt that the error was harmless. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In the harmless error analysis, DNA evidence and all other evidence of guilt is pertinent.

The erroneous admission of White and Bronner's tainted identifications was not harmless. The primary other items of evidence implicating Johnson were Rose's identification and the DNA. Rose's identification could have left the jury unconvinced. She showed her susceptibility to suggestion and her eagerness to identify a culprit when she virtually admitted she made a ninety-six percent certain identification of the wrong man due to pressure from her family. The force of her identification of Johnson was lessened by her having failed to pick him from a photographic lineup, and from her having already become familiar with him from the photographic lineup when she picked him out of the live lineup. The force of the DNA evidence was lessened by the evidence that the probability of a DNA match is higher among

family, and that Johnson has a large extended family in the Jacksonville area, and by the defense experts' challenge to the scientific basis for the state's statistical conclusions. There is a reasonable possibility that if the only evidence implicating Johnson had been DNA and one eyewitness, instead of three, the jurors could have had a reasonable doubt. Under DiGuilio, the error was not harmless.

ISSUE II APPELLANT'S DEPARTURE SENTENCE IS INVALID BECAUSE THE TRIAL JUDGE FAILED TO ORALLY ARTICULATE THE REASONS FOR DEPARTURE AT THE TIME SENTENCE WAS IMPOSED. THIS ISSUE SHOULD BE ADDRESSED DESPITE PETITIONER'S FAILURE TO RAISE IT AT THE TRIAL LEVEL.

The rule implementing the 1994 sentencing guidelines, Fla. R. Crim. Proc. 3.702(d)(18)(A),[15] provided:

> If a sentencing judge imposes a sentence that departs from the recommended guidelines sentence, the reasons for departure shall be orally articulated at the time sentence is imposed.

The trial judge imposed a departure sentence on Sirron Johnson without orally articulating the reasons for departure. This was a violation of rule 3.702(d)(18)(A).

Under the pre-1994 sentencing guidelines, a trial judge could not go above or below the sentence permitted by the

[15]Fla. R. Crim. Proc. 3.702 applies to offenses dated from January 1, 1994, until October 1, 1995, and thus is the rule that governs the crimes in this case. Offenses from October 1, 1995, to October 1, 1998, are governed by Fla. R. Crim. Proc. 3.703, which is not materially different from rule 3.702. Offenses on or after October 1, 1998, are governed by the new Criminal Punishment Code and Fla. R. Crim. Proc. 3.704, under which there is no restriction on upward departures, and the requirement of oral articulation of reasons at the time sentence is imposed has been removed.

guidelines without contemporaneously issuing written reasons for departure. Ree v. State, 565 So. 2d 1329 (Fla. 1990), explained the rationale for such a rule:

> We realize this procedure will involve some inconvenience for judges. However, a departure sentence is an extraordinary punishment that requires serious and thoughtful attention by the trial court.

565 So. 2d 1332. A transcription of departure reasons orally stated at sentencing did not suffice. State v. Jackson, 478 So. 2d 1054 (Fla. 1985). When a trial judge orally stated his reasons for departure at sentencing, but did not prepare written reasons, the departure sentence was reversed and the case remanded for a guidelines sentence; one reason departure was not allowed on re-sentencing was to prevent "unwarranted efforts to justify an original departure." Pope v. State, 561 So. 2d 554, 556 (Fla. 1990). Otherwise, as Justice Grimes noted, concurring in Pope, "there would be no practical way to insure that trial judges would employ the necessary written statement in imposing departure sentences."

In the 1994 guidelines revision, the requirement that the judge issue written departure reasons at sentencing was removed, and the requirement that departure reasons be orally articulated at sentencing was added. The pre-1994 rule, Fla. R. Crim. Proc. 3.701(d)(11), did not refer to oral articulation of reasons. The 1994 rule, rule 3.702(d)(18)(A), quoted above, requires oral articulation of departure reasons at the time of sentencing, and allows the filing of written reasons to take place within fifteen days after sentencing, and to be satisfied by a signed transcript

of the orally stated reasons.[16]

In the 1994 guidelines, oral articulation of departure reasons at sentencing took the place that contemporaneous written reasons played in the pre-1994 rule. Under rule 3.702, the only guarantee that a trial judge give "serious and thoughtful attention" to the decision to depart, before imposing sentence, is the requirement that departure reasons be orally articulated at sentencing. Without an oral statement of reasons at sentencing, the later written reasons can amount to *post hoc* justification for the already imposed sentence.

The 1994 guidelines abolished the requirement that written departure reasons be prepared at sentencing, but the 1994 guidelines do not reflect any intention to retreat from the holdings requiring that after a departure sentence is reversed, the new sentence be within the guidelines. Pope has been applied to bar a departure on re-sentencing under the 1994 guidelines, when the trial judge had departed without filing written reasons at all, State v. Tiedge, 670 So. 2d 191 (Fla. 3d DCA 1996), and when a trial judge filed written reasons late. Pierre v. State, 708 So. 2d 1037 (Fla. 3d DCA 1998). Also under the 1994 guidelines, a departure sentence has been reversed both for failing to provide written departure reasons and because "the trial court did not sufficiently orally articulate reasons" for departure. State v. Payne, 684 So. 2d 863, 864 (Fla. 2d DCA

[16]The 1995 revisions to the 1994 guidelines shortened the time for filing written reasons to seven days. Fla. R. Crim. Proc. 3.703(d)(28).

1996).[17]

The trial court's failure in this case to orally articulate departure reasons at sentencing mandates reversal and remand for a guidelines sentence unless review is barred by defense counsel's failure to raise this issue at sentencing or in a post-trial motion under Fla. R. Crim. Proc. 3.800(b). The First District did not reach the merits of the sentencing issue, citing two earlier First District opinions that had declined to address unpreserved sentencing errors because of the Criminal Appeal Reform Act. As petitioner asserted in the jurisdiction brief, the First District's decision is inconsistent with Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998), which holds that to the extent the Criminal Appeal Reform Act prevents a district court from addressing serious, patent, sentencing errors even when the court has jurisdiction over the appeal based on other issues, the act is an unreasonable restriction on the right to appeal. Denson, on the other hand, is inconsistent with Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), rev. granted 718 So. 2d 169 (1998), which holds that no unpreserved sentencing error may be raised on direct appeal. Nelson v. State, 719 So. 2d 1230 (Fla. 1st DCA 1998), certified conflict with Maddox. In contrast, Mizzell v. State, 716 So. 2d 829 (Fla. 3d DCA 1998), declares that the Third District will steer clear of this "fratricidal warfare" and instead will correct unpreserved

[17]But Weiss v. State, 23 Fla. L. Weekly D2380a (Fla. 3d DCA, Oct. 21, 1998), asserts that the Criminal Appeal Reform Act repealed Ree.

sentencing errors on direct appeal by recognizing that the failure to preserve a sentencing error is ineffectiveness of counsel on the face of the record. Seccia v. State, 23 Fla. L. Weekly D2346b (Fla. 1st DCA, Oct. 12, 1998), criticizes Mizzell's approach as nullifying the preservation requirement of the act.

Prior to the Criminal Appeal Reform Act, criminal defendants had every right to raise unpreserved sentencing issues on appeal. In a series of decisions beginning with State v. Rhoden, 448 So. 2d 1013 (Fla. 1984), this Court held that the contemporaneous objection rule would not be applied to sentencing errors, and that unpreserved sentencing errors would be addressed on direct appeal so long as the error was demonstrable on the appellate record. See Taylor v. State, 601 So. 2d 540,541 (Fla. 1992): "This Court has held in a long line of guidelines precedent that departure errors apparent on the face of the record do not require a contemporaneous objection in order to be preserved for review." Unlike trial errors, sentencing errors can be corrected without the time and expense of a second trial. The Rhoden rule was not limited to errors in the length of sentence; the error in Rhoden itself was the imposition of adult sanctions on a juvenile without required written findings.

The pertinent portion of the Criminal Appeal Reform Act creates section 924.051(3), Fla. Stat., which provides that appeals not be taken and reversals not be ordered unless the error is preserved or fundamental. This of course was the general rule before the new law, and the statute does not actually express any intent to abolish the Rhoden exception. The

statute is susceptible to being read as merely codifying the general preservation rule as enunciated in the case law. Under such a reading, the statute does not overrule Rhoden and does not interfere with this Court's determination as to when a contemporaneous objection is a prerequisite for appeal and when it is not. Given the rule of strict construction of criminal statutes in favor of the accused, construing section 924.051(3) as not interfering with the right to appeal unpreserved sentencing errors would seem to be required. See section 775.021(1), Fla. Stat.; Perkins v. State, 576 So.2d 1310 (Fla. 1991).

This Court's opinion in Amendments to Florida Rules of Appellate Procedure, 696 So. 2d 1103 (Fla. 1996), (hereafter, Amendments), however, seems to assume that the Criminal Appeal Reform Act was intended to change, not codify, the preservation rule as enunciated in the cases. If section 924.051(3) is intended to overrule the Rhoden rule, then petitioner maintains that the statute does not prevent a ruling on the sentencing error in this case either because: (1) the statute deals with the practice and procedure of the courts, which are matters reserved by Art. II, § 3, Fla. Const., and Art. V, § 2, Fla. Const., to the judicial branch; or (2) the statute deals with substantive criminal law and properly construed does not, and under the ex post facto clauses of the Florida and federal constitutions, may not, be applied to offenses that occurred before the effective date of the act.

Separation of powers

In State v. Garcia, 229 So.2d 236 (Fla. 1969), this Court had to decide whether a capital defendant has the right to waive a jury. A statute said no; a rule adopted by this Court said yes. Garcia held that because the constitution reserves the regulation of court practice and procedure to the judicial branch, the rule and not the statute governed. In describing the difference between substantive law, which is the province of the legislature, and procedure, which is the province of the courts, Garcia explained:

> As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor, while procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished.

229 So.2d 239. See also the concurring opinion of Justice Adkins in In re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972).

Booker v. State, 514 So. 2d 1079 (Fla. 1987), upheld a statute prohibiting appellate review of the extent of the trial judge's departure from the sentencing guidelines. Booker found this provision on the length of sentence to be substantive, but this does not mean that section 924.051(3) is substantive. The statute in Booker directly affected the length of sentence that could be imposed. Under the Booker statute, imposition of a sentence up to the statutory maximum based on valid reasons for departure is not error at all. Section 924.051(3) does not bear on what sentence can be imposed; it affects only the process for correcting sentencing errors. Also, Booker warned:

> We point out, of course, that our holding here is limited to the narrow issue of the extent of departure from a guidelines sentence within the statutory maximum, and does not involve appellate review of claims based upon other grounds. It should also be noted that appellate scrutiny of the process by which a defendant is convicted and sentenced is not implicated by our holding herein.

514 So. 2d 1082, n2. The process is procedural, and legislative direction in that area would not be allowed.

Markert v. Johnson, 367 So.2d 1003 (Fla. 1978), invalidated as procedural a statute that regulated the joinder of motor vehicle insurers in civil suits. R.J.A. v. Foster, 603 So. 2d 1167 (Fla. 1992), found speedy trial rules to be procedural, and thus a statutory speedy trial rule to be invalid. Knealing v. Puleo, 675 So. 2d 593 (Fla. 1996), invalidated as procedural a statute changing the time for accepting an offer of judgment.

On the other hand, this Court has tended to find arguably procedural statutes to be substantive when they are an integral part of a clearly substantive enactment, especially if the overall scheme is an effort to solve some perceived problem. E.g., Carter v. Sparkman, 335 So. 2d 802(Fla. 1976), cert. den. 429 U.S. 1041 (1977), dealing with the medical malpractice insurance crisis; Department of Agriculture and Consumer Services v. Bonanno, 568 So. 2d 24 (Fla. 1990), dealing with the citrus canker crisis; Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So. 2d 1239 (Fla. 1996), cert. den. 117 S.Ct. 1245, 137 L.Ed. 2d 327 (1997), (hereafter, Agency), dealing with a perceived tobacco health cost problem.

There is no sensible way to view the contemporaneous objection rule, or the exception to that rule for sentencing errors, as a matter of substantive law. These rules deal with procedure that is two steps removed from substantive law. The rules that govern practice in the trial courts establish the primary processes of determining whether the substantive criminal laws have been violated and imposing the punishment authorized by substantive criminal law. The contemporaneous objection rule, and its sentencing error exception, are part of a secondary process that insures the reliability of the primary process. Correcting unpreserved sentencing errors on appeal helps to ensure that the sentence imposed conforms to the substantive laws of crime and punishment. The legislature may think that the judicial system would function more efficiently if there were no sentencing exception to the contemporaneous objection rule, but regulating the practice and procedure of the courts is not a legislative function. Section 924.051(3) is an invalid intrusion into the judicial power, prohibited by the Florida Constitution.

Retroactive Application of Section 924.051(3)

If this Court were to hold that section 924.051(3) is valid substantive law, then this law should not be applied to crimes occurring before the law took effect. Section 924.051 was created by ch. 96-248, §4, Laws of Fla., and took effect on July 1, 1996. The crimes Sirron Johnson was convicted of were committed on January 31, 1995. Nothing in ch. 96-248 or section 924.051 indicates that the legislature focused on whether the law was to be applied to offenses predating the act. Because the law

does not address retroactivity, it cannot be assumed that the act was intended to apply to previous crimes. Two rules of statutory construction support this view: the presumption of non-retroactivity, and the strict construction of criminal statutes, discussed above. The presumption of non-retroactivity is stated in Agency:

> The law is clear in this state that there can be no retroactive application of substantive law without a clear directive from the legislature.

678 So. 2d 1256. There is no clear directive from the legislature, in fact, no directive at all, to apply section 924.051 to crimes predating the act. See Landgraf v. USI Film Products, 511 U.S. 244 (1994):

> A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.

511 U.S. 257. See also, Lynce v. Mathis, 519 U.S. 433 (1997):

> The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen.

519 U.S. 439.

The rule of strict construction of criminal statutes confirms the conclusion that section 924.051(3) should not be applied to crimes that occurred before the effective date of the law. The statute does not indicate whether it is to be applied to previous crimes, so it could be construed either to apply only to future crimes or to previous crimes as well. The rule of strict construction requires that the construction favoring the

defendant be adopted. If the statute is construed to remove the right to appeal unpreserved sentencing errors, then applying the statute only to future crimes is the construction that favors the defendant.

Section 924.051(3) should also be construed as applying only to future crimes in order to keep the statute from violating the ex post facto provisions of the Florida and federal constitutions. Art. I, § 10, Fla. Const.; U.S. Const. art. I, §§ 9,10; U.S. Const. amend. XIV. If this Court were to hold the abolition of the sentencing error exception to the contemporaneous objection rule to be valid substantive law legislation, then the most analogous ex post facto case would probably be Booker, discussed above. Booker held that a statute prohibiting appellate review of the extent of a guidelines departure was a proper subject for legislation because it dealt with substantive criminal law. Application of that statute to crimes occurring before the effective date of the act, however, Booker held barred by ex post facto. Booker stated:

> In Weaver v. Graham, 450 U.S. 24, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981), the Supreme Court reaffirmed that "two critical elements must be present for a criminal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it."

514 So. 2d 1082. In analyzing the effect of the new statute, Booker's essential holding was:

> Although chapter 86-273 states that its effective date is July 9, 1986, its provisions constrict current appellate review of petitioner's sentence based on crimes

> committed before its effective date, and thus operates retroactively.

514 So. 2d 1084. Like ch. 86-273, Laws of Fla., section 924.051(3) constricts appellate review. If applied to review of sentences for crimes committed before the effective date, it operates retroactively. Per Booker, the application of section 924.051(3) to this appeal would make the law ex post facto.

Florida Rule of Appellate Procedure 9.140(d)

In Amendments, this Court adopted Fla. R. App. Proc. 9.140(d), which provides that unpreserved sentencing errors may not be raised on appeal. If section 924.051(3) does not preclude review of the unpreserved sentencing issue in this case, it may still be argued that rule 9.140(d) does. That rule was adopted, however, in an opinion dated November 22, 1996, to take effect January 1, 1997. Petitioner was sentenced on September 3, 1996, and filed his notice of appeal on September 19, 1996. (2R222;13R1794). At the time rule 9.140(d) went into effect, it was no longer possible for petitioner to preserve the sentencing error, either at sentencing or in a motion within thirty days of sentencing pursuant to rule 3.800(b). Rule 9.140(d) should not be retroactively applied to preclude review of an unpreserved sentencing error after it is no longer possible to preserve the error. Pearlstein v. King, 610 So. 2d 445 (Fla. 1992), involved a new rule of civil procedure that required the plaintiff to serve the defendant within 120 days of filing the initial pleading, or face dismissal of the complaint. Pearlstein stated the general rule: “Rules of procedure are prospective unless

specifically provided otherwise." Pearlstein directed that the new rule be applied to pending cases, but for already filed cases, the 120 days would start on the date the rule became effective, not the date of the initial filing. Thus, this Court did not interpret the rule to impose a new 120 day limit in such a way that the limit had already passed for some plaintiffs.[18] Neither should rule 9.140(d) be applied to cases already on appeal, after the time to preserve sentencing errors has already passed. See also State v. Williams, 23 Fla. L. Weekly 568a (Fla. October 29, 1998), refusing to apply the rule change that removed the defendant's right to be at jury selection bench conferences retroactively to cases in which jury selection had already taken place.

If rule 9.140(d) were construed to prevent appeal of unpreserved sentencing errors in cases already on appeal, where the time to preserve the error had already passed, this would violate due process under the Florida and federal constitutions. Art. I, § 9, Fla. Const.; U.S. Const. amends. V, XIV. See Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673 (1930), holding that a retroactive change in the procedure for challenging tax assessments after the opportunity to challenge had expired violates due process.

Finally, petitioner would respectfully suggest that this Court reconsider whether a rule preventing correction of

[18]Justice Kogan, joined by two other justices, dissented, asserting that even starting the 120 day period for pending cases on the date of the rule was unfair because the rule did not give existing plaintiffs clear enough notice.

unpreserved sentencing errors is good policy. The Florida constitution reserves this sort of decision to this Court for good reason. The courts, and not the legislature, have the experience to know what procedures work for the court system. If correcting sentencing errors on direct appeal, whether preserved or not, is the most efficient way to ensure that sentences comply with the law, then that practice should not be changed out of deference to a separate branch of government that is reaching outside its constitutional authority. To those working in the criminal justice system it is well known that many trial lawyers do not have the time, inclination or experience to ascertain whether errors are occurring in the sentencing process. Obviously, this is not an ideal state of affairs. Nonetheless, it is a reality that makes the Rhoden rule an important fallback safeguard to be sure that the law is followed.

The comments of Mizzell and Denson are pertinent here. Mizzell:

> It is ironic that, although this amendment to the Florida Appellate Rules, and, more to the point, the Criminal Appeal Reform Act of 1996, ch. 96-248, Laws of Fla.; §924.051, Fla. Stat. (Supp. 1996), which engendered it, were largely meant to reduce a supposedly oppressive appellate caseload, they have had quite the opposite effect. In addition to creating an entirely new and difficult body of law of its own — including en banc consideration and certified questions of such arcane matters as whether an unpreserved error should result in affirmance or dismissal, Thompson v. State, 708 So. 2d 289 (Fla. 4th DCA 1998) — the Act has, as in this very case, required a resort to creative judging to achieve results which had been routinely and straightforwardly arrived at before. We will not resist the urge to refer to the relative

> merits of the cure and the disease or to observe that one should not repair something that is in no need thereof.

716 So. 2d 830 n.1. Denson:

> If a goal of criminal appeal reform is efficiency, we are hard pressed to argue that this court should not order correction of an illegal sentence or a facial conflict between oral and written sentences on a direct appeal when we have jurisdiction over other issues. Although it is preferable for the trial courts to correct their own sentencing errors, little is gained if the appellate courts require prisoners to file, and trial courts to process, more postconviction motions to correct errors that can be safely identified on direct appeal.

711 So. 2d 1229.

Petitioner requests that the sentencing error be addressed and be remedied by remand for a guidelines sentence.

CONCLUSION

Petitioner's convictions should be reversed based on the erroneous admission of tainted eyewitness identification evidence. Petitioner's departure sentence should be reversed based on the judge's failure to orally articulate departure reasons at sentencing, and the case remanded for a guidelines sentence.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Assistant Attorney General Giselle Lylen Rivera, The Capitol, Plaza Level, Tallahassee, Florida, on this ____ day of January, 1999.

STEVEN A. BEEN

A P P E N D I X

Trial Court Order Denying Motion
to Suppress Identifications