IN THE SUPREME COURT OF FLORIDA

SIRRON JOHNSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 93,915

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

OTHER

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as the State. Petitioner, Sirron Johnson, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as the defendant or by proper name.

The record on appeal consists of fifteen volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State considers the statement of the issues and the statement of the case and facts in appellate briefs to be inextricably intertwined and to be critical to the proper argument and resolution of such appeals[1].

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[1]See, generally, Kneale v. Kneale, 67 So. 2d 233 (Fla. 1953)((Appellant's statement of question lacks skill, sequence or logic, instead of illuminating, it confuses; questions should be concise and direct and embody nothing but point of law or fact brought to court; "stating the question concisely is a very important part of the brief and merits the briefer's most careful consideration;" the record and brief should contain nothing but wheat, the chaff should be let go; less chaff in the wheat will be a great boon to litigants; lack of skill and industry on part of counsel causes a loss of confidence in our system of administering justice.) and Thompson v. State, 588 So.2d 687 (Fla. 1st DCA 1991)(Rules of appellate procedure "place a square obligation upon appellant to provide the court with a full and fair statement of facts;" issue of sufficiency of evidence requires appellant "to accept facts and inferences in light most favorable to the state;" "an appellant's statement of the facts must not only be objective, but must be cast in a form appropriate to the standard of review applicable to the matters presented.". See, also, U.S. Sup. Ct. R. 24(1)(a)(**Questions** presented should be **short, concise, and not argumentative**); Fed.R.App.P 28(b)(Appellee's brief need not present jurisdictional statement, statement of the issues, statement of the case, or statement of the standard of review **unless appellee is dissatisfied with appellant's presentation**); Beverly v. United States, 468 F.2d 732, 747 (C.A.5 1972)(**Appellee's counter-statement is "succinct and accurate**); Robert L. Stern, APPELLATE PRACTICE IN THE UNITED STATES, § 10.9 (2d ed 1989)(**Question** must be **fairly stated and not slanted or twisted**); Frank E. Cooper, *Stating Issues in Appellate Practice*, 49 A.B.A. J. 180 (1963)(Issue must be "**scrupulously" fair, accurate, not slanted and not contain any argument**); Philip J. Padavono, FLORIDA APPELLATE PRACTICE (2d ed. 1997), (**model answer brief restates issue**).

Statements of the issues should be concise, accurate, and scrupulously fair. They should incorporate the standards of review, including preservation or non-preservation of the issue in the trial court, and be neutrally cast to present only the appellate question to be resolved. The state declines to accept statements which do not meet these criteria and restates them to accurately present the question before the court.

Statements of the case and facts should focus on the issues presented and should not include distracting or irrelevant material unrelated to those issues. The facts should be presented in a non-argumentative manner consistent with the standards of review and presumptions of correctness afforded judgments below, including recitations on whether the issues presented were properly preserved below. The state declines to accept statements which do not meet these criteria.

Appellant's statement of the facts does not clearly present the facts relevant to the identification issue and the admission of the DNA evidence. Accordingly, respondent provides facts relevant to those issues and to an understanding of the prosecution of the case.

IDENTIFICATION

The state moved pretrial to admit evidence from other victims, P.W. and N.B., of similar crimes. (V1, 151; V3, 119-120). This evidence included both identification and DNA evidence.

The defendant moved to suppress the pretrial and in-court identifications of P.W. and N.B. on the grounds that both had identified another individual, Ellis, as their assailant in a photo lineup, prior to identifying the defendant from a single photo, after both were informed that the DNA of the first person identified did not match samples obtained from them, whereas that of the defendant, who was in custody, did. (V1, 36-37). He contended the impermissively suggestive identification procedures created a substantial likelihood of misidentification pretrial and also tainted any in-court identification. (V1, 38).

At the pretrial hearing, N.B. testified that she did not identify the photo of Ellis she was shown by the prosecutor as it did not resemble the photo spread photo she picked; the differences were that in that the photo showed an open mouth and teeth with a gold cap which her attacker, Johnson, did not have, the skin tone was a lot lighter and the man in the photo was a lot heavier than her attacker. (V3, 14-15). She identified her attacker, Johnson, from the second photo shown to her; she remembered his eyes. (V3, 15-16). After viewing the photo of Johnson, N.B. had to leave the room and vomit. (V3, 16). When she returned, she was shown a photo spread which included the photo of the man she originally selected; the person she originally selected in the spread did not look like the man in the first photo she was shown, whereas the photo of Ellis she identified in the spread resembled the photo of the defendant. (V3, 16-18, 36). When she selected the photo of Ellis out of the

photo spread, she had no physical reaction to the photo. (V3, 35).

The State did not show N.B. any photographs during her testimony to avoid any claim of further taint as to in-court identifications (V10-11); the defendant showed her the photographs during the hearing. (V3, 23-27).

P.W. also did not identify the photo of Ellis as that of her attacker on January 18, 1996. (V3, 39-40). She was then shown two more photos, all of the same person, which she also could not identify. (V3, 41). P.W. identified a fourth photo, that of the defendant; she immediately recognized her attacker and flipped the picture over. (V3, 41-42). The prosecutor flipped it back over and asked if she was positive; P.W. said she was and turned it back over. (V3, 42). She recognized him by his eyes. (V3, 43). P.W. was able to pick out the photo she had initially selected from the photo spread, but testified that the person did not resemble the man in the first three photos she was shown. (V3, 43-44). The person in the fourth picture resembled the person in the photo spread. (V3, 44). The defendant used the photos during cross-examination. (V3, 45-47).

Sgt. Terry testified that all three victims did composites shortly after their attacks. (V3, 59; V11, 1373). He developed Ellis as a suspect during his investigation of the N.B. case; both N.B. and P.W. were shown the photo spread containing Ellis' picture. (V3, 60-61). Both crimes were similar as to time of day, and location from the standpoint of where the victims

originally were and where they were taken. (V3, 61). After they both identified Ellis, Terry arrested Ellis who fired a shot over his head before they took him into custody. (V3, 61-2). The photo spread did not include the defendant's picture. (V11, 1375). Ellis was a black male, 5'10", 250, pounds, black hair, brown eyes, medium brown complexion. (V11, 1375). Ellis was in jail at the time of C.R.'s rape; Terry then identified the defendant as a suspect. (V3, 63; V11, 1390). C.R. was shown a photo spread, but was unable to identify anyone. (V3, 63). She later immediately identified the defendant during a live lineup he voluntarily participated in. (V3, 68-70). The defendant was in jail at the time on unrelated charges. (V3, 93).

Terry spoke to N.B. after she identified the defendant's photo at the prosecutor's office, because he wanted her to show and tell him who she picked when she selected a photo from the spread. (V3, 81). N.B. identified Ellis' photo from the spread, told him that wasn't him, and then pointed to a picture of the defendant which she positively identified, saying that was the guy who assaulted her. (V3, 82). N.B. was crying, upset, and became sick to her stomach as she made the identification. (V11, 1379). When P.W. identified the defendant's photo, she took a look, picked up the defendant's photo and turned it over because she did not want to see it anymore. (V11, 1380). Apparently, the photos of the defendant were taken to be shown to the victims pursuant to the court's direction. (V3, 88). The defendant was 171 pounds and 6'1" tall. (V3, 90).

In asserting the court should not consider DNA evidence in determining whether to suppress the identifications, the defendant complained that DNA evidence was not comparable to a fingerprint. (V3, 71-80).

The court denied the motion to suppress based upon the totality of the circumstances, finding that all of the victims has opportunity to view their attacker, all were focused upon him, all gave descriptions which were consistent with the defendant with some variance as to height, and all were resolute in their identification of the defendant although N.B. and P.W. had earlier identified Ellis in the photo spread. (V1, 152-60). The court also considered the fact that DNA evidence also identified the defendant as the perpetrator. (V1, 160).

DNA EVIDENCE

At the pretrial hearing on the admission of DNA evidence, James Pollock, an FDLE specialist in RFLP DNA analysis, testified that the laboratory protocol utilized in this case is generally accepted within the scientific community. (V4, 176). Tests done on vaginal swabs from N.B. and P.W. excluded Ellis as a possible donor, but matched the defendant. (V4, 182, 185; V11, 1426-27). The computer program used to determine the sizing of matches is reliable and generally accepted in the scientific community. (V4, 187-189, 192). The NRC has accepted RFLP analysis as a valid scientific procedure. (V4, 225).

The probability of selecting an unrelated individual at random and having a profile matching the sperm fractions in both N.B.'s

and P.W.'s cases were approximately 1 in 80,000,000 Caucasians, 1 in 120,000,000 blacks, and 1 in 10,000,000 Hispanics. (V4, 191-92; V11, 1439-40). The ceiling principle generated a figure in both cases of 1 in 339,000 persons. (V4, 191; V11, 1439-40).

Dr. Martin Tracey, a population geneticist and molecular biologist, testified that population genetics deals with the mathematical or statistical side of genetics. (V4, 245-53; V11, 1473-76). Being a statistician does not equate to being an expert in genetics or genetical statistics. (V4, 255). The protocol utilized by the FDLE lab is generally accepted in the scientific community. (V4, 270; V11, 1490). He is familiar with the data bases used by FDLE. (V4, 272; V11, 1504). Studies of FBI data bases have established that ethnic substructuring does not significantly affect the data. (V4, 283; V11, 1495). The NRC in 1992 expressed concern over ethnic substructure and therefore recommended use of the ceiling principle, a conservative calculation which benefits the defendant. (V4, 284-286, 289; V11, 1508-09). The product rule itself corrects for substructure in large populations. (V4, 287). The FDLE lab uses the FBI 2p rule. (V4, 288). A second NRC was asked to reexamine recommendations on population genetics and error rates. (V4, 290; V12, 1638). Dr. Chakraborty studied data bases, including the FBI's and determined that both Hardy-Weinberg and linkage equilibrium were not merely principles, that they actually applied. (V4, 292). The NRC Report of 1996 thus recommends use of the product rule for two banded patterns and

the 2p rule for single bands. (V4, 293; V11, 1510). The NRC saw no need to use the ceiling principle. (V4, 293).

The product rule was used in this case as a method of calculating probability. (V4, 294). Dr. Tracey examined the autorads, sizing sheets, and calculations in this case and determined the calculations were correct. (V4, 294-95; V11, 1511). He compared the results to those he obtained using his own data bases and found little difference in the results. (V4, 295; V11, 1511). The probability of another person matching the rapist's profile in the instant case was one in four to four and one-half billion using the product rule and one in ten million using the ceiling principle. (V11, 1511-12). There are approximately 51/2 billion persons on earth. (V11, 1513).

Dr. Tracey was familiar with Seymour Geisser's article relating to dependence of alleles, but stated that Geisser's position resulted from the manner in which he treated the probes which was not the way they were actually used. (V4, 338; V6, 575-79). For this reason, Geisser's analysis was irrelevant. (V4, 338). The NRC also recognized that Geisser's use of quantile bins was not a method used in DNA analysis. (V6, 579).

Dr. Ranajit Chakraborty, a professor of biological studies, population genetics, and biometry, testified that the laboratory protocols used in this case were generally accepted in the scientific community as reliable. (V6, 458). It is also generally accepted that the data base used by the FBI is of an adequate size. (V6, 466). He is familiar with the work of Dr.

Geisser and believed his concerns were not legitimate. (V6, 467). There is no support for Geisser's conclusions in the scientific community; there is no general acceptance of Geisser's work within the scientific community. (V6, 488-89). The 1996 NRC Report endorsed, without reservation, the validity and adequacy of the FBI data bases. (V6, 470). The NRC also found that there was no need to be concerned about dependence. (V6, 490). The VNTR's which were tested were in Hardy-Weinberg and linkage equilibrium. (V6, 473). With regard to statistical calculations, the NRC recommended the use of the straight product rule for two alleles per probe, as in this case, with a slight adjustment were only one allele appears. (V6, 491). The NRC stated that the product rule gave a conservative estimate; the change in position from the 1992 Report reflected the fact that more data was available and that the second panel had greater expertise in the area to address the question. (V6, 493-95). When a probability estimate gets so low that it is over the number or people in the world, "you can probably generate a probability of uniqueness that would point the finger to a specific person with a certain degree of confidence." (V6, 505-06). The National DNA Advisory Board enacted by Congress, of which Dr. Chakraborty is a member, has unequivocally accepted the recommendations of the latest NRC Report. (V6, 507).

The trial court denied the defendant's motion to preclude DNA evidence using a full Ramirez analysis finding the FDLE lab met quality assurances, followed an established accepted protocol,

utilized an adequate and accepted data base and used a generally accepted computer program. (V1, 134-144).

TRIAL EVIDENCE

At trial, C.R., 23, testified that she was accosted at 8:25 a.m. on an enclosed stairwell of a Koger Center building where she worked. (V9, 1047-48). As she passed a man on the stairs, he grabbed her left shoulder, turned her around, and told her to give him her money; he held a black semi-automatic handgun. (V9, 1048-49). The gun looked similar to her husband's nine millimeter. (V9, 1049). The man held the gun to her; they were facing each other. (V9, 1049). After taking her money, the defendant told her they were going to get into her car, that she would drive him to a stoplight where he would get out; he told her that if she screamed or tried to run, he would kill her. (V9, 1050). She believed him. (V9, 1050).

During the drive, C.R. looked at the defendant and asked if he was going to hurt her. (V9, 1051). She described him as a black male, late teens to early twenties, about six foot tall and very thin, with very dark skin and close cropped hair wearing a flannel red, black and tan shirt layered over another shirt. (V9, 1051-52). C.R. identified the defendant as the man. (V9, 1052).

When they stopped at the apartment building indicated by the defendant, he made a point of pulling his sleeves over his hands before getting out of her car. (V9, 1053-54). The defendant led her to an water treatment area of the apartment complex, he

appeared to know where he was going. (V9, 1054-55). He made her empty her purse to see if she had anything else of value and called her a liar when she said she didn't have much because she paid the rent but could not produce a stub. (V9, 1054-55). He told her he would kill her if she lied to him. (V9, 1055).

The defendant told her to take off her clothes, although she begged him not to make her, that she wouldn't follow him. (V9, 1056). She did so because he told her he would kill her if she didn't. (V9, 1056). It was freezing out; she knew that she was going to die. (V9, 1057). She laid down on her clothes and closed her eyes because the defendant told her he would kill her if she didn't. (V9, 1057). During the rape, he put the gun to her head; she heard a click and he said that was the safety, that if she screamed or fought him he would kill her. (V9, 1058). She believed him. (V9, 1058).

She returned to the area with police officers who responded within minutes of her return to the office building. (V9, 1058-60). From there, she was taken to the police station and then to the Rape Crisis Center. (V9, 1061).

C.R. was shown a photo spread by Sgt. Terry, and thought she recognized someone. (V9, 1062). She did not identify this person because she was told not to unless she was positive. (V9, 1062). She stated when the man she and her family saw ran, they were told by someone in the complex that he had been chasing someone who had been robbing apartments. (V9, 1065). At the live lineup, C.R. recognized the defendant as soon as she walked

into the room; she was asked to go through the entire proceeding before she was allowed to positively identify the defendant. (V9, 1068). She felt sick and began shaking; she had no doubt it was him. (V9, 1069).

On cross-examination, C.R. testified that she did not recall seeing the defendant's teeth during the attack. (V9, 1078). She participated in the preparation of a composite, but told the artist that it didn't really look exactly like the perpetrator. (V9, 1088).

Officer Johnson, the first responder to the 911 call, testified that the water treatment center bordered on the woods. (V9, 1104, 1110-11). He matched one of two sets of shoe prints at the scene to the victim's shoes; the other set led off towards the tree line. (V9, 1114-15).

Evidence technician Doyle processed the victim's office building for prints in the areas indicated to him and took photographs of crime scene. (V9, 1123-27). He made casts of shoe prints indicated to him. (V9, 1130-31). Latent prints taken from the victim's car were found not to be of comparison value. (V9, 1132-1135, 1141-43).

Sgt. Terry spoke with C.R., who provided a description of her attacker, after she was brought to his office. (V9, 1146-49). He developed the defendant as a suspect in the case not long after it was assigned to him. (V10, 1153). The defendant's picture was included in a photo spread he prepared and showed to C.R. between February 2-4. (V10, 1154). Prior to showing it to

her, he told her not to identify anyone if she was not one hundred per cent sure. (V10, 1155). C.R. stated there was a possible suspect, but because she was not entirely sure, he told her not to make an identification. (V10, 1156).

The man C.R. tentatively identified in the back of a patrol car matched the general description of the perpetrator she gave the day of the attack, with the exception of his dread locks.[2] (V10, 1158-59). A live lineup was conducted 23 days after the attack. (V10, 1196);[3] when C.R. entered the room, before he could get started, she said she saw the man and wanted to point him out. (V10, 1162). Terry told her to wait until the entire process was complete. (V10, 1162). C.R. identified the defendant who was 18 years old, 6', and 170 lbs with dark brown skin. (V10, 1163, 1168). A blood sample was obtained and submitted to FDLE. (V10, 1168).

Shirley Zeigler, a senior FDLE lab analyst in Jacksonville, analyzed blood standards from C.R. and the defendant along with the sexual assault kit. (V10, 1233-52). The male fraction from the sexual assault kit matched the reference DNA of the defendant. (V10, 1253). Using the product rule, the probability of a match was 1 in 244 billion in the Caucasian data base, 1 in

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[2] Cosello Curtis was a dark brown skinned black male, between 18-22 years of age, who was between 160-170 lbs and about 6'. (V10, 1158).

[3] Prior to testimony relating to C.R.'s lineup identification of him, the defendant renewed his pretrial motion to suppress. (V10, 1162)

4.9 billion in the Hispanic data base, and 1 in 4.9 billion in the black data base. (V10, 1267). Using the more conservative ceiling principle, the numbers were 1 in 10 million. (V10, 1268).

At trial, prior to P.W.'s testimony, the defendant renewed his pretrial objections and requested a limiting instruction which the court as to identity, despite the State's request that it be read for plan and opportunity as well. (V10, 1281-83).

P.W. testified that on the date she was attacked at around noon she had been sent to run an errand at Independent Life near Atlantic and Art Museum Drive,. (V10, 1284-85). As she returned to her car, she noticed a man rambling through the bushes, who placed a small black automatic gun in her back and demanded her purse. (V10, 1286, 1289). Since she didn't have a purse, he demanded her jewelry, but she didn't have any, so he became upset and told her to unlock the passenger door. (V10, 1286). No one else was around. (V10, 1286). He opened the door after pulling his jacket over his hand. (V10, 1287). The man was a black male, around 19-23, medium complexion, wearing a black and white striped skull cap, camouflage jacket, black pants, and black tennis shoes with white trim. (V10, 10888-89). P.W. identified the defendant as the man. (V10, 1289-90).

The defendant directed her to drive to Atlantic Garden Apartments; once there, he directed her to a fenced in area, walking behind her and poking her with the gun. (V10, 1291). There, he told her to pull up her blouse, bra, and skirt because

he said he wanted to see if she had any money; she complied. (V10, 1291). The defendant told her to take her clothes down, put her hands against the wall and not turn and look at him or he would kill her. (V10, 1292). She believed him. (V10, 1292). The defendant raped her and ejaculated; when it sounded as though he was walking away, she ran. (V10, 1293). She returned to her office and called the police. (V10, 1293). After going to the rape treatment center, she participated in the preparation of a composite drawing of the man which she was satisfied closely resembled him. (V10, 1294).

P.W. identified someone from a photo spread, who she did not get to see in person. (V10, 1296). On January 19, 1996, P.W. was shown photographs by the State Attorney; she did not recognize anyone in the first three, but identified the person in the fourth as the man who attacked her. (V10, 1296-97). When she saw the photo she turned it over because she was scared. (V10, 1297). She also looked again at the photo spread she had been shown; the man she picked out of the spread did not resemble his more current photo which the prosecutor showed her. (V10, 1298). On cross-examination, P.W. testified that at the time she was shown photographs by the prosecutor, she had been told that the DNA did not match the person whose photograph she selected, but that it did match another person. (V10, 1306).

Prior to N.B.'s testimony, the defendant renewed his pretrial objection and requested and obtained a limiting instruction. (V10, 1317). N.B. worked at Independent Life. (V10, 1318). The

morning of January 13, 1995, she was alone at a bus stop on Art Museum Drive when a young man approached and asked when the next bus was coming. (V10, 1318-19). The man, who was in his late teens or early twenties, slim, dark skinned, and about her height, was wearing a ball cap; he resembled someone she had seen on the same bus. (V10, 1320). When N.B. sat down to wait, the man stood over her placing a very dark grey semiautomatic gun to her side. (V10, 1320-21). The man, who N.B. identified as the defendant, told her to be quiet that all he wanted was her belongings. (V10, 1321). Although she told him he could take her purse, the defendant told her he would walk her across the street and take it there; he told her to put her arm around him while he did the same. (V10, 1323). He told her he would kill her if she didn't. (V10, 1323). She believed him. (V10, 1323).

The defendant took her to an empty unit at Atlantic Gardens Apartments where he directed her to take off her clothes. (V10, 1324). He pointed the gun at her, telling her he would kill her if she didn't comply, so she took off all her clothes except her bra and panties. (V10, 1325). The defendant emptied her purse on the floor and went through everything; his shirt was over his hands. (V10, 1325). He took her purple see-through pager, some cash and bill, telling her that he knew where she lived and that if no one came looking for him he would come by and drop off her pager. (V10, 1328). The defendant told her to take off the rest of her clothes and lie on the floor. (V10, 1326). He covered her face with his cap. (V10, 1326). She felt the gun against

her vagina; he probed with it and asked her questions about whether she had any diseases. (V10, 1326). The defendant then raped her; she was not sure if he ejaculated. (V10, 1327). After he left, N.B. walked home and called the police. (V10, 1327). A medical examination of N.B. revealed two contusions to the chest wall and vaginal contusions consistent with a gun being stuck into her vagina. (V10, 1362-64). N.B. assisted in the preparation of a composite drawing which she felt almost exactly resembled the person. (V10, 1329-30). That same day she was shown a photo spread from which she identified a photo. (V10, 1331-32).

On January 18, 1996, she was shown some additional photos at the State Attorney's office where she viewed three photos. (V10, 1332-33). She did not recognize anyone in the first two photos, but recognized the third as the person who attacked her. (V10, 1333-34). Immediately upon seeing the photo, N.B. became ill and vomited. (V10, 1335). Later that day, she reviewed the photo spread from which she had previously picked a photo. (V10, 1336). The person whose photo she selected in the spread, did not resemble the other photos of him shown to her by the prosecutor; in the second photo he appeared a lot heavier, his skin tone was much lighter, and he had a gold tooth. (V10, 1336). The photo she picked in the spread closely resembled the photo of the defendant she identified in the prosecutor's office. (V10, 1337).

SENTENCING

At sentencing, the State moved for entry of a departure sentence based upon the defendant's unscored juvenile offenses, escalating pattern of criminal conduct, premeditation and calculation. (V13, 1787-1797). After hearing the state's argument for departure, the court orally announced that it was departing from the guidelines and would enter a written order setting forth its reasons within seven days. (V13, 1794). The defendant did not pose an objection to this procedure. (V13, 1794). The written order of departure, which the court noted bore the incorrect lower court case number, (V13, 1802), departed due to the fact that the defendant had previously been convicted of crimes scoring at level 8 and 9 while the primary offense herein was scored at level 7; the defendant had an extensive unscoreable juvenile record; the defendant's record revealed an escalating pattern of criminal conduct; and the evidence established premeditation and calculation. (S. 6-8).

SUMMARY OF ARGUMENT

There is no direct and express conflict on which to base discretionary jurisdiction and this Court should discharge review as having been improvidently granted.

The district court applied the correct analysis to the trial court's decision to admit eyewitness testimony. The evidence shows clearly that the trial court did not abuse its discretion in admitting the eyewitness testimony. The evidence also shows that the victims' identifications of the defendant were reliable and permissibly based on independent recollections of the offender at the time of the crimes. The DNA evidence was properly used to corroborate the witnesses identifications of the defendants and show beyond any reasonable doubt that the defendant was the criminal who committed the other crimes or acts. Assuming arguendo there was error in admitting the eyewitness identification, it was harmless beyond a reasonable doubt.

The district court did not err in refusing to address an unpreserved and nonprejudicial claim of sentencing error.

ARGUMENT

ISSUE I

A. WHETHER THIS COURT SHOULD EXERCISE DISCRETIONARY JURISDICTION TO REVIEW A DECISION OF A DISTRICT COURT OF APPEAL WHICH APPLIED THE APPROPRIATE LEGAL STANDARD IN DETERMINING WHETHER A TRIAL COURT REVERSIBLY ERRED IN DENYING A MOTION TO SUPPRESS? (Restated)

The defendant seeks to have this Court revisit the District Court of Appeal's decision which, after proper application of the applicable legal standard, found that although the method utilized in identifying the defendant was impermissibly suggestive, there was nevertheless no substantial likelihood of misidentification. He ignores the fact that Fla. R. App. P. 9.030 was extensively revised to reflect the constitutional modifications in the supreme court's jurisdiction as approved by the electorate on March 11, 1980, the impetus for which was recognition of the burgeoning caseload of the Court and the attendant need to make more efficient use of limited appellate resources. Consistent with this purpose, the appellate, discretionary, and original jurisdiction of this Court was restricted so that district courts of appeal will constitute the courts of last resort for the vast majority of litigants under amended Article V. See Article V, § 3(b), Florida Constitution. (1980); Notes to Fla. R. App. P. 9.030.

The defendant in this case, however, ignores the purpose behind limiting the jurisdiction of this Court and instead seeks

to be afforded a second appeal which is inappropriate and contrary to prior decisions of this Court. Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980) (quoting from Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958) (the district courts of appeal were not intended to be intermediate courts of appeal)); Chrysler Corp. v. Wolmer, 499 So. 2d 823 (Fla. 1986).

In seeking review in this Court, the defendant asserted that the District Court improperly approved the trial court's reliance upon Chaney v. State, 267 So. 2d 65 (Fla. 1972), which he asserts conflicts with another decision of this Court, Edwards v. State, 538 So. 2d 440 (Fla. 1989). As the following argument will show, the District Court applied the correct standard of law in assessing whether the identification procedure resulted in a substantial likelihood of misidentification, and, thus, this Court should determine that jurisdiction was improvidently granted and should be discharged.

Preservation

The State also directs this Court's attention to a fact which receives slight mention in the defendant's brief. The defendant, in the lower appellate court, abandoned any challenge to the legal validity of the identification of C.R.. Below, his basis for suppress as to the identification of C.R. was founded upon his claim that he was improperly seized and compelled to appear in a lineup in which she identified him. Below, the sole challenge asserted with regard to the alleged suggestive identification procedures utilized was to the collateral crime

victims P.W. and N.B.. Here, the defendant seeks to discredit the identification by C.R. through his attack that the trial court improperly relied upon other evidence of guilt in finding that the identifications by the collateral crimes victims were reliable despite the suggestive procedures employed. Thus, the basis for reversal urged before this Court was never presented to the trial court and as such, is not preserved for appellate review. F.S. 924.051.

ISSUE I.B

IF THIS COURT FINDS IT DOES HAVE JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT BELOW, DID THE DISTRICT COURT ERR IN AFFIRMING THE JUDGMENT OF THE TRIAL COURT ADMITTING EYEWITNESS IDENTIFICATION OF PETITIONER BY THE RAPE VICTIMS?

Standards of Review

A trial court is afforded broad discretion with respect to the admission of evidence and a ruling on the admission or exclusion of evidence will not be reversed absent a showing of abuse of that discretion. Welty v. State, 402 So. 2d 1159 (Fla. 1981); Hansen v. State, 585 So. 2d 1056 (Fla. 1st DCA 1991). Furthermore, rulings denying motions to suppress evidence, as in this case, come to an appellate court clothed with a presumption of correctness, and a reviewing court will interpret the evidence and reasonable inferences therefrom in a manner most favorable to the trial court's ruling. San Martin v. State, 717 So. 2d 462, 469 (Fla. 1998) (“A trial court's ruling on a motion to suppress comes to this Court clothed with a presumption of correctness and, as the reviewing court, we must interpret the evidence and reasonable inferences and deductions derived therefrom in a

manner most favorable to sustaining the trial court's ruling.”); Livingston v. Johnson, 107 F.3d 297, 310 (5th Cir. 1997) (“We reiterate the presumption of correctness afforded factual findings underlying the determination of the admissibility of identification testimony.”).

The appropriate test in determining whether to introduce an out-of-court identification was first enunciated in Stovall v. Denno, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed.2d 1178 (1967) in which the Court stated that it must be determined, under the totality of the circumstances, whether the confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law. In Florida, the test has been phrased as: "(1) did the police employ an unnecessarily suggestive procedure in obtaining an out-of-court identification; and (2) if so, considering all the circumstances, did the suggestive procedure give rise to a substantial likelihood of irreparable misidentification. Grant v. State, 390 So. 2d 341, 343 (Fla. 1980), cert. denied, 451 U.S. 913, 101 S. Ct. 1987, 68 L. Ed. 2d 303 (1981) (quoting Manson v. Brathwaite, 432 U.S. 98, 110, 97 S. Ct. 2243, 2250, 53 L. Ed.2d 140 (1977)).”

Unnecessary suggestiveness in the identification process does not alone constitute a violation of due process, for, as the Manson Court found, reliability is the key. Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed.2d 401 (1972). The evaluation, under Neil, which involves a totality of the circumstances

analysis, requires consideration of factors such as: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the prior description of the criminal, the level of certainty at the time of the confrontation, and the length of time between the crime and the confrontation. This Court, in Edwards specifically recognized that in making this determination, the trial court could consider "any other factors raised by the totality of the circumstances that bear upon the likelihood that the witness' in-court identification is not tainted" by the prior suggestive procedure. Edwards v. State, 538 So. 2d at 443.

Against this, the court must consider any other factor including the failure of the witness to identify the defendant on prior occasions or her identification of another person. Edwards v. State, 538 So. 2d 440 (Fla. 1989). The degree of danger of misidentification which is required for exclusion of the evidence is appropriately high, so as to not deprive the jury of evidence which is reliable despite the suggestive procedure and to permit the jury to employ the traditional methods for testing the weight of evidence. Thus, the defendant is afforded the opportunity to use cross-examination, impeachment, rebuttal testimony, and closing argument to attempt to persuade the jury that the identification was mistaken. Macias v. State, 673 So. 2d 176 (Fla. 4th DCA 1996).

> Essentially what we are dealing with is the competency to make the identification after that witness has been subjected to the suggestiveness of the identification procedure. In order to warrant

> exclusion of the identification, the identification procedure must have been so suggestive, and the witness' unassisted ability to make the identification so weak, that it may reasonably be said that the witness has lost or abandoned his or her mental image of the offender an has adopted the identity suggested. Simmons v. United States, 390 U.S. at 383-84, 88 S.Ct. 967.[4] In making this determination of threshold trustworthiness, the trial judge must consider the totality of the circumstances surrounding the extrajudicial identification. Baxter v. State, 355 So. 2d 1234, 1238 (Fla. 2d DCA 1978).

In analyzing the evidence presented at the motion to suppress the out-of-court and in-court identifications of N.B. and P.W., the collateral crimes witnesses and C.R., the victim in the instant case, the court clearly and correctly applied the Neil v. Biggers standard, a fact acknowledged by the District Court. Both courts clearly recognized the State's concession that the pretrial identifications of the collateral crimes victims were suggestive, and went on to complete the analysis to determine whether the suggestiveness of the initial identification tainted the second pretrial and trial identifications. Defendant was afforded every opportunity to cross exam and discredit the victims' identification of defendant including, of course, the DNA evidence linking him to these other crimes.

The trial court made the following findings of fact which are supported by the evidence: 1) Both P.W. and N.B. had an extended period of time in which to view the defendant, in that they were initially accosted at one location before being directed by the

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[4] Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

defendant to another location, each crime took place during daylight hours, and the defendant made no effort to disguise or hide his face until the actual rape; (V2, 260-70, 297-310). 2) P.W.'s description of the defendant was consistent with the defendant with the exception of height and the composite drawing she helped police prepare bears a resemblance to the defendant. N.B.'s description is also generally consistent with the defendant with the exception of height, which N.B. stated she was not very good at estimating, (V2, 260-70, 297-310); 3) Both were resolute in their ultimate identifications of the defendant (V10, 1289-90, 1296-97, 1321, 1333-34); 4) Both had previously identified another individual, however, the court made the finding of fact that the composite drawings prepared by the victims were more consistent with the defendant's appearance than that of Ellis;[5] and 5) the fact that DNA testing matched the defendant in all of the cases [6]. (V1, 152-160).

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[5] The defendant's picture was not included in the photo spread shown to the collateral crimes victims. (V11, 1375). Both testified that the photo in the spread resembled the defendant's picture, not the photos of Ellis. (V3, 14-17, 18, 36, 44; V10, 1296-98, 133-37). The State notes that the defendant asks this Court to reweigh the evidence and points out that credibility determinations and the weight to be accorded evidence are matters strictly within the purview of the trier of fact. The State also refutes the contention that this Court should, or for that matter may, consider evidence which the defendant did not place before the District Court as a basis for disagreement with the lower court's ruling.

[6] Using the product rule the probability of a match to someone other than the defendant was 1 in 120,000,000 and 1 in 339,000 using the ceiling principle for each collateral crime

Regardless of the suggestiveness of informing the witnesses that DNA had identified one of the persons in the photospread, the emotional reactions and the emphatic and reasoned certainty of the victims subsequent identifications remove any doubt that those identifications were reliable and permissibly based on independent recollections of the offender at the time of the crimes.

The facts thus support the trial court's finding on this issue. The clear language of Neil v. Biggers and Manson v. Brathwaite which require a totality of the circumstances analysis in assessing reliability of the identification. The reliability requirement mandated by due process is to ensure that there is no misidentification. Although the defendant contends that the trial court impermissibly relied upon DNA evidence in support of its ultimate conclusion, he is incorrect in asserting the court may not consider expert testimony on DNA in its ruling. While Biggers enumerated factors for a trial court to utilize in assessing the reliability of an identification obtained by suggestive procedures, the list was never intended to be seen as all-inclusive; rather, these factors serve as a guideline to assess reliability based on the totality of circumstances. Macias v. State, 673 So. 2d 176, 181 (Fla. 4th DCA 1996), citing Biggers, 409 U.S. at 199-200, 93 S. Ct. at 382-383; Grant v.

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victim. (V4, 1439-40). In C.R.'s case the probability was 1 in 4.9 billion. (V10, 1267). The probability that the DNA would match in all three cases while not testified to is incredibly high.

State, 390 So. 2d 341, 343 (Fla. 1980), cert. denied, 451 U.S. 913, 101 S. Ct. 1987, 68 L. Ed.2d 303 (1981); Edwards.

Thus, the consideration of factors outside those listed by Biggers is permissible. This conclusion is amply supported by the fact that the concern in Stovall and its progeny is to avoid a violation of due process resulting from misidentification. As the Court recognized in Baxter v. State, 355 So. 2d 1234 (Fla. 2d DCA 1978), the existence of other independent evidence of guilt negated any 'very substantial likelihood of misidentification.' In Washington v. State, 653 So. 2d 362 (Fla. 1994), this Court noted that the likelihood of misidentification was lessened where other co-workers identified Washington. Chaney is even more compelling in that this Court supported its findings by noting that a fingerprint belonging to Chaney corroborated the witness' identification of him.

Thus, decisions of this and other Courts of this State support the consideration of the type of scientific evidence relied upon here, in determining whether an identification is reliable. Where, as in this case, the probability of someone other than the defendant being a match to the sample in C.R.'s case is approximately 1 in 4.9 billion[7], with a total of 5.5 billion persons on the planet, there can be no danger of misidentification, particularly where, as here the defendant's

[7] Note that Zeigler testified to a 1 in 4.9 billion figure, while Dr. Tracey testified that he calculated the odds at 1 in 4.5 billion. (V11, 1511-12).

DNA matched all three victims and he does not either challenge the validity of the DNA evidence or the identification of him by the substantive crime victim. In fact, nothing in the record substantiates a claim that C.R.'s identification of him was based in any fashion on the identifications of him by P.W. and N.B..

An identification obtained from a suggestive procedure may be introduced if found to be reliable **apart** from the tainted procedures. Here the identifications resulting from a suggestive procedure are reliable because they were based upon the witnesses' independent recollection of the offender at the time of the crime. The in-court identification by C.R. is not challenged, nor was the line-up identification challenged on the grounds of suggestiveness. Her identification was never challenged as having been tainted in any way by the procedures used in the identifications of the collateral crimes victims. Additionally, the identifications of the collateral crime victims were clearly not tainted by any suggestiveness. Also pertinent to this claim is the fact that the defendant showed the collateral crimes victims the pictures and photo spread at the pretrial hearing, so if indeed he is correct in asserting that taint resulted from impermissible procedures, he himself is responsible for having spread the taint. As such, he should not be permitted to benefit from error which he helped to create. Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983) (Under the invited-error doctrine, a party may not make or invite error at trial and then take advantage of the error on appeal.).

In sum, the trial court did not err in admitting the identifications evidence and the district court did not err affirming the admission of the reliable evidence.

ISSUE I.C

ASSUMING ARGUENDO THERE WAS ERROR IN ADMITTING THE EYEWITNESS IDENTIFICATIONS, WAS THE ERROR HARMLESS?

Finally, even if the defendant were correct with regard to the trial court's ruling denying suppression of the collateral crimes victims' identification of him, it is clear that any error is merely harmless. State v. DiGuillio, 429 So. 2d 1129 (Fla. 1986)[8]; Satcher v. Pruett, 126 F.3d 561 (4th Cir. 1997). In this case, the court repeatedly instructed the jury, prior to each collateral crime victim's testimony, as well as, at the conclusion of the evidence, as to the limited purpose for which they might consider the evidence. The defendant also availed himself of full cross-examination as to the collateral crimes victims' prior identification of Ellis so as to challenge the credibility and reliability of their identifications of him. The same is true of the testimony of C.R..

Additionally, the evidence established that the victim of the substantive crime, C.R., had an extended opportunity to observe

[8]The state uses the constitutional error analysis set out in DiGuilio for simplicity because the state can show beyond a reasonable doubt that the error, if any, was harmless. The state recognizes, however, that this Court now has under review cases presenting the issue of whether a lesser harmless error standard is applicable when the error is not constitutional, as here. See, e.g., Jones v. State, case no. 93,805.

the defendant during daylight hours and in her case, he also did nothing to hide his face. (V9, 1047-1052). C.R. also identified the defendant as her assailant without having positively identified any prior individual and she was certain during her identification of the defendant. Her description of the defendant was also consistent with his appearance.

Substantive and collateral crimes bore sufficient indicia of similarity to establish identity of the perpetrator. In any event, the DNA evidence, which was unchallenged in appeal below, also establishes the defendant's guilt and does so to a statistical probability which would exclude any other person in the population of this planet.

For all of these reasons this Court should decline to substitute its judgment for that of the courts below and affirm.

ISSUE II

WHETHER THE DISTRICT COURT ERRED IN DECLINING TO REVIEW AN UNPRESERVED AND NON-PREJUDICIAL CLAIM OF SENTENCING ERROR? (Restated)

The defendant contends that he is entitled to reversal of his departure sentence and to entry of a guidelines sentence because although the court entered a written order of departure in a timely fashion, the court failed to orally articulate its reasons for the departure. The State, however, asserts that he is not entitled to relief.

Preservation

The record shows that the state presented reasons for departure from the guidelines to the sentencing court. The record also reflects, and the defendant concedes, that following the argument by the state, the trial court announced it would depart and would prepare a written order setting forth its reasons. Following this decision, the defendant failed to object when the trial court did not orally recite the specific reasons for departure.

The District Court below declined to address this issue because it was not preserved due to the defendant's failure to either object at the time of sentencing or file a motion to correct illegal sentence pursuant to Fla. R. Crim. P. 3.800(b) within thirty days thereof. In so holding, the Court relied upon Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.00, 675 So. 2d 1374 (Fla.

1996); Johnson v. State, 697 So. 2d 1245 (Fla. 1st DCA), review denied, 703 So. 2d 476 (Fla. 1997); and Williams v. State, 697 So. 2d 164 (Fla. 1st DCA), review denied, 700 So. 2d 689 (Fla. 1997).

Merits

Even if the question of the propriety of the trial court's entering a departure sentence without orally articulating its reasons could be addressed despite the defendant's failure to objection, the defendant may not prevail.

Fla. R. Crim. P. 3.701(d)(11) provides that "[a]ny sentence outside the permitted guideline range must be accompanied by a written statement delineating the reasons for the departure." Furthermore, F.S. 921.001(5) also indicates the need for written orders of departure.

While the defendant is correct in his assertion that the 1994 revisions to Fla. R. Crim. P. 3.702(d)(18) refers to oral articulation of the reasons, the court rule does not take precedence over a statute as the rule merely is the procedural implementation of the statute.

A trial court commits per se reversible error when it orally pronounces reasons for departure from sentencing guidelines at a sentencing hearing but does not contemporaneously file written reasons for departure as required by the statute. State v. Colbert, 660 So. 2d 701 (Fla. 1995); Webster v. State, 500 So.2d 285, 288 (Fla. 1st DCA 1986) (oral statements made by the judge at sentencing will not satisfy sentencing guidelines

requirements of written reasons for departure). This is because, in evaluating the correctness of reasons set forth as a basis for departure, courts must look solely at the written reasons, since oral reasons pronounced by a trial judge at sentencing are often incomplete and not well thought out and they are ineffective in and of themselves to sustain a departure sentence. State v. Jackson, 478 So. 2d 1054 (Fla. 1985), receded from on other grs, 513 So.2d 664 (Fla. 1987); Sanders v. State, 621 So. 2d 723 (Fla. 5th DCA 1993).

Undersigned counsel has not found, nor does the defendant cite to, one case which stands for the proposition that the failure to orally pronounce reasons for a departure sentence mandates reversal and imposition of a guideline sentence where the court complies with its statutory duty to provide written reasons . The only case on point is Lee v. State, 486 So. 2d 709 (Fla. 5th DCA 1986) in which the court rejected the challenge that the trial court's failure to verbally express its reasons for departure constituted reversible error. The court held:

> Appellant's third argument is that the trial court erred in not verbally expressing his reasons for departure at the time of sentencing. He contends this was error because the committee note to Rule 3.701(d)(11) provides that "Reasons for departure shall be articulated at the time sentence is imposed." (Emphasis added.) This issue has apparently never been decided by the appellate courts, but we believe that the rule was not intended to be applied as appellant suggests. Although appellant may have "been deprived of the opportunity to challenge the reason for departure at his sentencing hearing," and may have been forced "to use a post-conviction motion or an appeal to challenge what may be improper reasons," as contended in his brief, he had not been prejudiced. The primary purpose of the requirement that reasons for departure

> be articulated is to provide meaningful appellate review. See State v. Jackson, 478 So. 2d 1054 (Fla. 1985).

Thus, no error is shown given the rationale of Jackson. This Court must affirm.

CONCLUSION

Based on the foregoing, the State respectfully submits the Court should find that jurisdiction does not exist, or, in the alternative, affirm the District Court's ruling below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Steven A. Been, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this _____ day of February, 1999.

_____
Giselle Lylen Rivera
Attorney for the State of Florida

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