IN THE SUPREME COURT OF FLORIDA

Case No. SC03-1363

Third DCA Case No. 3D02-2092

NATHANIEL CHARLES JONES,
Petitioner,

-vs-

THE STATE OF FLORIDA
Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

ANSWER BRIEF OF RESPONDENT ON THE MERITS

CHARLES J. CRIST, JR.
Attorney General

RICHARD L. POLIN
Bureau Chief
Florida Bar Number 0230987

ERIN KINNEY ZACK
Assistant Attorney General
Florida Bar Number 0326630

Office of the Attorney General
Department of Legal Affairs
Rivergate Plaza, Suite 950
444 Brickell Avenue
Miami, Florida 33131
(305) 377-5441

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INTRODUCTION

The Petitioner, Nathaniel Charles Jones, was the Defendant and the Respondent, the State of Florida, was the prosecution at trial. The State appealed the trial court's order granting a suppression motion and the Third District Court of Appeal reversed. The matter is before this Court on discretionary review. The symbol "R" refers to the record on appeal.

STATEMENT OF THE CASE AND FACTS

The Petitioner was charged by information on January 8, 2001 with robbery with a firearm and aggravated assault with a firearm. (R. 1-2). Presently at issue is whether a defendant has the right to have counsel present when a videotaped lineup depicting him is viewed by a witness.

Officer David Rubinson was on duty on November 6, 2000 when he received a priority call at approximately 9:00 PM reporting an armed robbery. (R. 65). The dispatch described two black males fleeing the scene in a white Acura. (R. 67). Rubinson was responding to the reported address when he noticed a vehicle coming towards him from the area of the robbery that matched the dispatch description. (R. 68, 70). His vehicle came within a few feet of the white car as it traveled past him in the opposite direction. (R. 70). Rubinson was able to see the driver's face because the car was illuminated by the patrol car's spotlight, headlights, and the Acura's interior

light. (R. 71-72). The driver was a black male with short dreds or braids a few inches long that stood up on his head. (R. 72-73). He had a narrow chin and a full face with puffy cheeks. (R. 73). The officer immediately made a u-turn and pursued the Acura. The chase ended when Rubinson crashed his patrol car. (R. 74).

Rubinson first identified the Petitioner from a BOLO form that was handed out at the station during a roll call approximately a week after the chase. (R. 74). The form was an officer safety bulletin that was totally unrelated to the instant case. It depicted photographs of six potentially dangerous "career criminals auto theft subjects" who were believed to be active in the Kendall District. (R. 29). The only reference to the Petitioner on the form besides his photograph was that he had "previously been arrested for shooting at a police officer." (R. 29). Rubinson notified his captain that he thought he recognized the Petitioner as the driver of the car that was involved in the armed robbery. (R. 75).

Rubinson came to the State Attorney's Office on February 15, 2002 to meet with Assistant State Attorney Jay Novick for a pretrial conference. (R. 48-49). Several other officers were present including Detectives Hernandez and Villegas from the auto theft division. (R. 49-50). Each officer explained his involvement in the Petitioner's robbery and assault case and the chase that followed. (R. 50).

Once it became apparent that Rubinson had been involved in the chase, the prosecutor brought a VCR and television into the room to play a videotaped lineup for him. (R. 56, 104-105, 125). Rubinson, Detective Hernandez, Detective Villegas, and the prosecutor were present. Rubinson pulled his chair close to the television, rested his chin on his hands, and concentrated on the television screen. (R. 56, 58, 127). The prosecutor instructed the detectives not to say anything and then played the video lineup. (R. 56, 105, 127). The record is uncontroverted that nobody said anything or gestured in any way while Rubinson watched the tape. (R. 56-59, 107, 127-128). Rubinson identified one of the individuals from the video lineup and Detectives Hernandez and Villegas left the room at the prosecutor's instruction without making any comments. (R. 108, 128). Rubinson was not told whether or not the individual who he had picked out of the lineup was the Petitioner. (R. 60). The prosecutor immediately phoned defense counsel and informed counsel that there was an officer who had identified someone from a videotape. (R. 61).

The Petitioner filed a pre-trial motion to suppress Rubinson's identification because Detectives Hernandez and Villegas, who were allegedly biased against the Petitioner, were present while the video lineup was played. (R. 114, 136). The Honorable Jerald Bagley held an evidentiary hearing on the suppression motion on June 14, 2002. (R. 44-138). At the hearing, defense counsel asked if the detectives had

ever said that they were "going to get [Petitioner] off the street for good." (R. 112-113). Detective Hernandez denied ever having made such a statement. (R. 113). Detective Villegas explained that he might say that he would like to get the Petitioner off the street if the Petitioner committed a crime. (R. 133). Defense counsel did not present any evidence regarding the detectives' alleged bias against the Petitioner.

The trial court granted the Petitioner's motion to suppress the video lineup by order filed July 26, 2002, finding that the auto theft detectives' presence in the room where the videotaped lineup was being played was an unnecessarily suggestive procedure:

> With regard to Officer Rubinson's video identification of the defendant, the Court finds that, under all the circumstances of this case, the passage of months between the crime and the viewing of the video lineup, coupled with the presence of two auto theft detectives who had previously arrested the defendant several times for auto theft and appear to have a bias against the defendant, it does not make for an accurate or believable identification. Rubinson's video identification took place approximately fifteen (15) months after his initial encounter with the defendant on November 6, 2000, and his viewing of the six person photographic BOLO flyer one week later, respectively. Therefore, the Court finds that the criteria laid down in Biggers are not satisfactorily complied with here.

(R. 139-144).

The trial court granted the motion to suppress the out-of-court identification that resulted from Officer Rubinson's viewing of the videotaped lineup, but concluded

that Rubinson would be permitted to testify at trial regarding his observations of the Petitioner on the night of the chase as well as his identification of the Petitioner from the BOLO flyer. (R. 142).

The State filed a notice of appeal of the suppression order on July 31, 2002. The State argued that the suppression order should be reversed because the uncontroverted, consistent, and unimpeached evidence revealed that nothing suggestive occurred when Rubinson viewed the videotaped lineup. The Petitioner argued in his answer brief, among other things, that the identification was properly suppressed because his Sixth Amendment right to counsel was violated when the videotaped lineup was played outside defense counsel's presence. His argument was based on the Third District Court of Appeal's holdings in Cox v. State, 219 So. 2d 762 (Fla. 3d DCA 1969) (holding that a defendant has the right to counsel when a videotaped lineup is shown), and State v. Gaitor, 388 So. 2d 570 (Fla. 3d DCA 1980) (stating that Cox is still good law but limiting its holding to lineups that are shown after a defendant is charged). The State, in reply, suggested that the Third District recede from its Cox holding in light of United States v. Ash, 413 U.S. 300 (1973), in which the United States Supreme Court held that the Sixth Amendment right to counsel does not apply to photographic arrays and implicitly disapproved Cox in a footnote. The

parties filed supplemental briefs for en banc consideration of whether it should recede from Cox and Gaitor in light of Ash.

On July 16, 2003, the Third District reversed the suppression order, finding that the showing of a videotaped lineup is not a "critical stage" of the proceedings to which the right to counsel attaches, and that the identification procedure was not unnecessarily suggestive:

> I. Right to Counsel
>
> At issue is whether Jones had a right to have counsel present when the officer viewed the video taped lineup. We reject Jones' assertion that the absence of his counsel was a ground for granting the suppression motion. We hold that a witness' viewing of a video taped lineup is not a crucial or critical stage triggering a defendant's right to have counsel present under either section 16 of Article I of the Florida Constitution, or the Sixth Amendment of the federal constitution. In so holding, we follow Ash and recede from this court's earlier ruling to the contrary in Cox and Gaitor. Under the state constitution, a defendant's right to counsel's presence applies to each crucial stage of the proceedings; under the federal constitution, defendant is entitled to counsel at each critical stage of the proceeding. Smith v. State, 699 So. 2d 629, 638 (Fla. 1997), cert. denied, 523 U.S. 1008 (1998); Traylor v. State, 596 So. 2d 957, 968 (Fla. 1992); Ash. It is well settled that viewing a post-charge/ arrest live lineup is a critical or crucial stage, and that viewing a photographic display is not a critical or crucial stage. Here, however, we must determine whether the viewing of a video taped lineup constitutes such a stage of the proceeding.
>
> In Cox, this court held that a defendant is entitled to be represented by counsel when a video tape recording of a lineup is shown to a witness instead of a live lineup or other confrontation. Subsequently, we explained Cox stating that

> [i]n Cox v. State, this court held that a person who has been arrested and 'booked' is entitled to have counsel present when a video tape lineup in which he appears is shown to state witnesses as a substitute for a live lineup. In view of the holdings in Wade and Gilbert, ... this court took the view that what the police could not do directly, they should not be allowed to do indirectly through the miracles of modern science. Although Cox still remains good law, it must be read to apply only to post-charge video tape lineups.

Gaitor, 388 So. 2d at 571 (citation omitted). In continuing to hold that Cox was good law, however, the Gaitor court failed to address the intervening Ash decision.

In Ash, 413 U.S. at 321, the Court held that defendant has no Sixth Amendment right to counsel when a witness views a photographic display in order to identify the perpetrator. The Court reasoned that

> [a] substantial departure from the historical test would be necessary if the Sixth Amendment were interpreted to give Ash a right to counsel at the photographic identification in this case. Since the accused himself is not present at the time of the photographic display, and asserts no right to be present..., no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary.
>
> ***
>
> We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required.

Ash, 413 U.S. at 317, 321.

We agree with the state that the video tape of the lineup is more appropriately analyzed as a photographic display rather than a live lineup.

There is no significant distinction between a photographic display and a video taped lineup. Both identification procedures - either photographic or video tape - serve as a substitute for viewing a suspect in a live lineup. Each procedure is merely a re-creation of a live lineup and the defendant is not present during the identification procedure. Therefore, there is no 'possibility that the accused might be misled by his lack of familiarity with the law.' Ash, 413 U.S. at 317. Accordingly, we conclude that Ash is applicable to this case. See Ash, 413 U.S. at 301 n.2; United States v. Amrine, 724 F.2d 84 (8th Cir. 1983); Bruce v. State, 268 Ind. 180, 375 N.E.2d 1042, 1086 (Ind.), cert. denied, 439 U.S. 988, 58 L. Ed. 2d 662, 99 S.Ct. 586 (1978); McMillan v. State, 83 Wis. 2d 239, 265 N.W.2d 553, 558 n.1 (Wis. 1978). See also United States v. Barker, 988 F.2d 77 (9th Cir. 1993); Merritt v. State, 76 S.W.3d 632 (Tx. Ct. App. 2002) (video tape of lineup is similar to a photographic display). As a result, we hold that Jones did not have a Sixth Amendment right to counsel's presence when Rubinson viewed the video taped lineup.

Jones correctly argues that we are not required to construe our state constitution's Counsel Clause in the same manner as the Supreme Court interprets the concomitant federal constitutional right. However, we find the reasoning of the Ash Court persuasive and perceive no intent that the Counsel Clause should be treated differently. See Lebron v. State, 799 So. 2d 997, 1011 (Fla. 2001), cert. denied, 535 U.S. 1036, 152 L. Ed. 2d 652, 122 S.Ct. 1794 (2002). In explaining the Ash decision, the Court stated:

> Although we have extended an accused's right to counsel to certain 'critical' pretrial proceedings, we have done so recognizing that at those proceedings, 'the accused [is] in a situation where the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality.'

United States v. Gouveia, 467 U.S. 180, 188-89, 81 L. Ed. 2d 146, 104 S.Ct. 2292 (1984) (citations omitted). Similarly, in this case, Jones was not confronted with the procedural system or his expert adversary the results of which could reduce the trial to a mere formality. See Traylor, 596 So. 2d at 967 (for purposes of Counsel Clause 'a 'crucial stage' is

any stage that may significantly affect the outcome of the proceedings'). The need for counsel to witness potentially suggestive procedures and to represent the defendant in an adversary confrontation is absent in this case. The former function is obviated by accurate reconstruction of the lineup and the latter function is unnecessary by virtue of defendant's absence. Thus, this was not a crucial or critical stage requiring counsel's presence. See Rodriguez v. State, 413 So. 2d 1303 (Fla. 3d DCA 1982) (court cited Ash and stated that there is no right to counsel at photographic displays – a non-critical stage); Griffin v. State, 370 So. 2d 860 (Fla. 1st DCA 1979) (same). See also Stewart v. State, 549 So. 2d 171, 173 (Fla. 1989) (relying on Ash, court held that defendant's post-first appearance conversations were not obtained in violation of his Sixth Amendment right to counsel as 'there was no point at which prosecution and accused interacted.'), cert. denied, 497 U.S. 1032, 111 L. Ed. 2d 802, 110 S. Ct. 3294 (1990).

II. Lineup Procedure

In support of reversal, the state also argues that the video tape identification procedure was not unnecessarily suggestive. We agree. The test for suppressing an out-of-court identification is '(1) whether the police used an unnecessarily suggestive procedure to obtain the out-of-court identification; and (2) if so, considering all the circumstances, whether the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.' Rimmer v. State, 825 So. 2d 304, 316 (Fla.), cert. denied, 537 U.S. 1034, 154 L. Ed. 2d 453, 123 S. Ct. 567 (2002). In this case, we need not consider part two of the test because the procedures used by the police were not unnecessarily suggestive. Rimmer, 825 So. 2d at 316; Thomas v. State, 748 So. 2d 970, 981 (Fla. 1999).

The record provides no basis for the trial court's conclusion that the lineup procedure was unnecessarily suggestive. It is well-settled law that, absent inapplicable exceptions, a 'trial court is required to accept evidence which has not been impeached, discredited, controverted, contradictory within itself or physically impossible.' State v. Casey, 821 So. 2d 1187, 1188 (Fla. 3d DCA 2002); State v. G.H., 549 So. 2d 1148

(Fla. 3d DCA 1989); State v. Fernandez, 526 So. 2d 192, 193 (Fla. 3d DCA), cause dismissed, 531 So. 2d 1352 (Fla. 1988), and cases cited therein. As noted by the trial court in its order,

> Officer Rubinson testified that he appeared at the Office of the State Attorney for a pretrial conference on February 15, 2002, when he again saw the BOLO flyer and for the first time a video taped live lineup of the defendant. Officer Rubinson stated that present at the showing of the video lineup were Miami Dade Police Department auto theft detectives Tony Fernandez and Angel Vellegas, and Assistant State Attorney Jay Novick who played the video tape for him. He further explained that he identified number four, the defendant, as the driver of the white Acura on the night of November 6, 2000. He also testified that no one present in the room suggested whom he should identify nor did anyone tell him that he identified the defendant in this case.
>
> Detectives Fernandez and Vellegas both testified that they were present for the video showing, but (sic) of them neither participated in the identification procedure nor did they speak to officer Rubinson about his identification.

That testimony was not impeached, discredited, controverted, contradictory within itself or physically impossible. The trial court was required to accept the detectives' and officer's testimony; nothing in the record supports a finding contrary to their testimony describing the lineup procedure. All of the witnesses testified that no person attending the lineup did anything to help Rubinson identify Jones. They did not influence Rubinson's identification by statement, gesture or visual suggestion. Based on this testimony, no ground exists for the legal conclusion that the lineup was unnecessarily suggestive and influenced Rubinson's identification of Jones. See Thomas, 748 So. 2d at 981 (photographic lineup not unnecessarily suggestive where officer did not suggest which photograph witness should pick); Green v. State, 641 So. 2d 391 (Fla. 1994) (police did not use unnecessarily suggestive procedure where there is no indication officers directed witnesses' attention to particular photograph), cert. denied, 513 U.S. 1159, 130 L.

> Ed. 2d 1083, 115 S. Ct. 1120 (1995); Evans v. State, 781 So. 2d 493 (Fla. 3d DCA 2001) (same). Therefore, we hold that the procedure employed in obtaining the out-of-court identification was not unnecessarily suggestive. Accordingly, the trial court erred in granting the suppression motion on this basis.
>
> III. Conclusion
>
> In summary, we recede from Cox and Gaitor, follow Ash, and hold that Jones did not have a right to counsel when the officer viewed the video taped lineup and that the procedure for viewing the lineup at issue was not suggestive. We, therefore, reverse the suppression order.

State v. Jones, 849 So. 2d 438, 440-443 (Fla. 3d DCA 2003) (footnotes omitted).

The Third District Court of Appeal reversed the trial court's suppression order in a unanimous en banc opinion. The court receded from Cox and Gaitor, and followed Ash in holding that the petitioner did not have a right to counsel when the officer viewed the videotaped lineup. The court also held that the procedure for viewing the lineup was not suggestive.

The Petitioner sought discretionary review in this Court and the parties filed briefs on jurisdiction. This Court accepted jurisdiction on October 30, 2003. Jones v. State, 857 So. 2d 196 (Fla. 2003).

SUMMARY OF THE ARGUMENT

The Petitioner argues that this Court should recognize a right to counsel under the Florida Constitution, Article I, section 16, for the playing of a videotaped lineup. The State submits that no such right exists under the Sixth Amendment of the federal constitution and none should be recognized by this Court under the Florida Constitution. The majority of jurisdictions around the country that have addressed this issue have concluded, like the Third District Court of Appeal below, that a videotaped lineup is analogous to a photographic array. Neither identification procedure involves the defendant's presence and therefore no "confrontation" between the defendant and the state exists from which the defendant must be protected. There is no intent apparent in the manner in which the Florida Constitution has been applied, or in Florida's unique state experience, that suggests that the right to counsel should apply to the viewing of a videotaped lineup. The State submits that the Third District Court of Appeal's unanimous en banc decision holding that there is no right to counsel for the playing of a videotaped lineup in Florida should be affirmed.

ARGUMENT

I. THERE IS NO RIGHT TO COUNSEL UNDER EITHER THE FEDERAL OR STATE CONSTITUTION FOR THE VIEWING OF A VIDEOTAPED LINEUP

A. There is no right to counsel at the viewing of videotaped lineups under the federal constitution.

The Petitioner presently argues that the Florida Constitution provides a right to counsel when videotaped lineups are played for witnesses. The State submits that no such right exists under the Sixth Amendment of the federal constitution and that none should be recognized by this Court under the Florida Constitution.

The Sixth Amendment of the federal constitution provides a right to counsel at all "critical stages" in the prosecution where "the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." United States v. Wade, 388 U.S. 218, 227 (1967). In order to determine whether a situation is a "critical stage" of the prosecution "calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." Id. The United States Supreme Court concluded that a live lineup is a "critical stage" because it is a confrontation between the State and defendant at which

there is a danger of suggestion and the procedure is difficult to reconstruct. As a result, "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." Wade, 388 U.S. at 232.

In United States v. Ash, 413 U.S. 300 (1973), the United States Supreme Court applied Wade to determine whether the display of a photo array is a "critical stage" requiring the assistance of counsel under the federal constitution. The court acknowledged that Wade requires counsel's presence at live lineups in order to perform two functions: to witness any potentially suggestive procedure, and to represent the defendant in a trial-like adversary confrontation. It found that neither of these concerns is present in the context of photo arrays. As to counsel's role in witnessing potentially improper procedures, the court noted that, "[i]f accurate reconstruction is possible, the risks inherent in any confrontation still remain, but the opportunity to cure the defects at trial causes the confrontation to cease to be 'critical.'" Ash, 413 U.S. at 316. As to the second concern, the Court noted that there is no trial-like confrontation in which counsel must participate because the defendant is not physically present when a photo array is shown:

> **Since the accused himself is not present at the time of the photographic display, ... no possibility arises that the accused might be misled** by his lack of familiarity with the law or overpowered by his

> professional adversary. **Similarly, the counsel guarantee would not be used to produce equality in a trial-like adversary confrontation**. Rather, the guarantee was used by the Court of Appeals to produce confrontation at an event that previously was not analogous to an adversary trial.

Id. at 317 (emphasis added).

Accordingly, the Court in Ash concluded that the Sixth Amendment right to counsel does not attach to the showing of a photographic array because the existence of photographs makes the procedure easy to recreate, and the defendant is not physically present for a true "confrontation" with the state.

The principles set forth in Wade and Ash make it clear that viewing a videotaped lineup is not a "critical stage" to which the Sixth Amendment right to counsel applies. First, a defendant is not physically present when a videotaped lineup is played so there is no "confrontation" requiring the assistance of counsel. See United States v. Cunningham, 423 F.2d 1269, 1274 n. 3 (4th Cir. 1970) (noting that a defendant has no right to have counsel present while witnesses are interviewed after viewing a live lineup because the right to counsel "extend[s] only to the period during which an accused is within sight of a potential identification witness"). Second, counsel need not be present to witness any potential impropriety because "[v]ideotaped lineups are readily reconstructibe; the videotape *is* the reconstruction." Poullard v. State, 833 S.W. 2d

273 (Tex. Ct. App. 1992) (holding that the Sixth Amendment right to counsel does not apply to the making of a videotaped lineup).

The Petitioner presently argues that federalist principles do not mandate that Florida courts adopt Ash's common-sense approach to out-of-court identification procedures that do not involve the defendant's presence. The Petitioner correctly observes that this Court is not obligated to construe the Florida Constitution in the same manner that the United States Supreme Court has construed the Sixth Amendment right to counsel. However, the view expressed in Ash is logically correct and there is no intent on the part of the people of Florida that Florida's right to counsel should be construed differently. Therefore, the Respondent submits that this Court continue to follow the case law interpreting the federal constitution's Sixth Amendment right to counsel to find that the Florida Constitution does not provide counsel for the viewing of videotaped lineups.

B. Jurisdictions around the country have equated videotaped lineups with photographic arrays following Ash.

The majority of jurisdictions around the country addressing this issue have adopted Ash and refused to extend the right to counsel to either photographic or videotaped identification procedures. The Third District Court of Appeal's opinion receding from Cox and Gaitor brings Florida law in line with reasoning adopted by the

United States Supreme Court as well as nearly every other jurisdiction that has addressed the issue.

Courts around the country have analogized videotaped lineups to photographic arrays, concluding that showing a videotaped lineup is not a "critical stage" implicating the right to counsel. For example, the Eighth Circuit Court of Appeals' decision in United States v. Amrine, 724 F.2d 84 (8th Cir. 1983), is directly on point. That court considered whether a defendant's right to counsel is violated where the actual lineup occurred prior to the filing of formal charges but was shown after the charges were filed. The court found that a video lineup is more similar to a photographic array than to a live lineup. It relied on Ash for the proposition that there is no possibility that a defendant might be misled without counsel because the defendant was not present for the showing of a video lineup. It also noted that none of the reasons cited in Wade for requiring counsel at a live lineup applies to videotaped lineups because the videotape preserves the identification procedure. This means that counsel can raise any alleged improprieties without having been personally present. Therefore, the Eighth Circuit concluded that the Sixth Amendment does not provide a criminal defendant the right to counsel when a video lineup is shown. See also State v. Trottman, 701 So. 2d 581 (Fla. 5th DCA 1997) (citing Amrine in a footnote to support its conclusion that a

defendant had no Sixth Amendment right to counsel when the victim identified his voice during a pre-arrest interview).

The Ninth Circuit reached a similar conclusion in United States v. Barker, 988 F.2d 77 (9th Cir. 1993), in which it held that the defendant had no right to have counsel present when a witness was shown a photograph of a lineup following his indictment. The Sixth Amendment right to counsel was not implicated when a photograph of the lineup was shown because "[h]ere, as in Ash, the defendant is not present when the photograph of the lineup is shown and thus cannot be 'misled' or 'overpowered,' and the 'adversary mechanism remains as effective for a photographic display as for other parts of pretrial interviews' whether the photos concerned are of a lineup or an array of suspects." Barker, 988 F.2d at 78.

The Supreme Court of Wisconsin addressed the applicability of the Sixth Amendment right to counsel to the recording and viewing of a lineup in McMillan v. State, 265 N.W.2d 553 (Wis. 1978). In McMillan, police audio- and video-taped a lineup before the defendant was charged. Some time after the defendant was charged, the videotaped lineup was shown to the victim. The court noted that "[a] videotape recording is, in effect, a combination of a photograph and a voice recording, with the added element of movement." Id. at 558. The court held that "the presence of counsel at either the taping or the viewing of an audio-video recording is not constitutionally

mandated" because there is no "trial like confrontation" like a live lineup, and that accurate reconstruction is possible without counsel's presence. Id.

In 1986, a California Court of Appeal similarly concluded in People v. Dominick, 227 Cal. Rptr. 849 (Cal. Ct. App. 1986), that a defendant is not denied his right to counsel when a videotaped lineup is shown to a victim. In that case, police showed a videotaped lineup to a victim in the hospital. The court found that the right to counsel did not attach because "it clearly appears to us that such a procedure is one of photographic identification." Id. at 1197 n. 15; see also Merritt v. State, 76 S.W.3d 632, 634-35 (Tex. App. 2002) (noting that "a video lineup is similar to a photo array, which does not implicate the Sixth Amendment right to counsel"); Bruce v. State, 375 N.E. 2d 1042, 1086 (Ind. 1978) (noting that an identification proceeding preserved on video tape is not a 'critical stage' within the meaning of Wade because "[t]he existence of a video tape recording will insure accurate reconstruction of the line-up and deter abuses no less effectively than the witnessing of the procedure by the suspect's counsel"); White v. State, 502 A.2d 1084, 1088 (Md. Ct. Spec. App. 1986) (analogizing an audiotaped voice lineup to a photo array and finding that no right to counsel exists for an audiotaped voice lineup because "the defendant is not present, so confrontation is not a problem, and the procedure is capable of exact repetition, so that defense counsel can later review it"); United States v. Otero-Hernandez, 418

F.Supp. 572 (M.D. Fl. 1976) (holding that the right to counsel does not apply to the playing of an audiotaped voice spread because an audiotape, like a photograph, is permanent and does not involve the defendant's presence); See Andrew B. Kales, Identifications, 90 Geo. L.J. 1232, 1235 (2002) (noting that "[t]he right to counsel established in Wade does not encompass identification procedures that occur before the start of adversarial judicial proceedings or procedures that do not require the defendant's presence....").

The only jurisdiction that has chosen not to align itself with the rest of the country is Michigan. Michigan's supreme court decided People v. Anderson, 205 N.W.2d 461 (Mich. 1973), just prior to the United States Supreme Court's issuance of Ash on June 21, 1973. In Anderson, the Michigan Court applied Wade to photographic identifications and formulated the following rules:

> 1. Subject to certain exceptions, identification by photograph should not be used where the accused is in custody.
>
> 2. Where there is a legitimate reason to use photographs for identification of an in-custody accused, he has the right to counsel as much as he would for corporeal identification procedures.

Anderson, 205 N.W. 2d at 476.

The court expressed no opinion on "the situation where photographs are taken of a corporeal lineup that was fair in all respects and where the accused was

represented by counsel and these photographs are later shown to witnesses who had not observed the lineup." Id. at 476 n. 22.

Michigan next addressed the issue post-Ash in People v. Jackson, 217 N.W.2d 22 (Mich. 1974). After considering Ash and Kirby, the court decided to adhere to its Anderson view that, "both before and after commencement of the judicial phase of a prosecution, a suspect is entitled to be represented by counsel at a corporeal identification or a photographic identification unless the circumstances justify the conduct of an identification procedure before the suspect can be given an opportunity to request and obtain counsel and that, except in exigent circumstances, photographs of a suspect known to be in custody or who can readily be produced for a lineup may not be displayed to witnesses." Jackson, 217 N.W.2d at 24.

By contrast, this Court has not extended the right to counsel to pre-indictment lineups or to photographic arrays. Rather, this Court has embraced the reasoning of federal case law and aligned itself with the United States Supreme Court's well-reasoned right to counsel jurisprudence. See, e.g., Traylor v. State, 596 So. 2d 957, 972 (Fla. 1992) (confirming that Florida's, right to counsel, like the Sixth Amendment right to counsel, attaches only to "confrontations"). Respondent submits that this Court, like the majority of the jurisdictions addressing the issue, should hold that

videotaped lineups are equivalent to photographic arrays to which Florida's right to counsel does not apply.

C. This Court should apply Ash to the playing of videotaped lineups under Florida's counsel clause

This Court has historically applied United States Supreme Court case law to Florida's right to counsel at lineups. Although federalist principles provide this Court the opportunity to grant broader protections under Florida's constitution than those provided under federal law, it has repeatedly chosen to mirror the United States Supreme Court's reasoning when applying Florida's right to counsel. Florida case law is replete with instances where Florida's counsel clause adheres to the United States Supreme Court's Sixth Amendment holdings. See, e.g., Perkins v. State, 228 So. 2d 382, 390 (Fla. 1969)(following Wade and Gilbert in holding that the right to counsel applies only to post-indictment lineups); Chaney v. State, 267 So. 2d 65 (Fla. 1972) (holding that, under Wade, Gilbert, and Kirby v. Illinois, 406 U.S. 682 (1972), defendant's due process rights were not violated where the victim identified defendant, before he was charged, from a single photograph and a live lineup outside of counsel's presence); Stewart v. State, 549 So. 2d 171 (Fla. 1989) (citing Ash and Wade in holding that the right enunciated in United States v. Henry, 447 US 264 (1980), only applies during significant encounters between the prosecution and the accused); Smith

v. State, 699 So. 2d 629 (Fla. 1997) (holding that both the Sixth Amendment and Article I, Section 16, rights to counsel had attached during post-indictment questioning, however, finding that the trial court did not abuse its discretion by admitting the resulting statements because defendant never invoked the right to counsel, and his Miranda waiver was valid).

There is nothing in Florida's unique state experience that suggests that Florida should not follow Ash. As stated above, this Court has consistently aligned Florida's counsel clause with Sixth Amendment case law. There is nothing unique about photographic arrays or videotapes in Florida as opposed to other states. Furthermore, this Court has acknowledged the United States Supreme Court's expertise in dealing with right to counsel matters and has also expressed an interest in following a majority of other jurisdictions. See e.g., Traylor, 596 So. 2d 957 (noting that a defendant's right to choose to be heard either himself or through counsel has been recognized by the federal court, Faretta v. California, 422 U.S. 806 (1975), and at least 36 states); Perkins, 228 So. 2d at 390 (noting this Court's "preference for deferring consideration of the thorny problems attending the expansion of the Wade and Gilbert rationale to that judicial body possessing the greater experience in resolving problems impacted with such difficulties").

Indeed, Florida law has previously analogized photographs and videotapes. For example, Florida treats photographs and videotapes identically for evidentiary purposes. § 90.951, Fla. Stat. (Florida Evidence Code defining videotapes as "photographs" for evidentiary purposes). This Court has acknowledged that, "[a]fter all, moving pictures are but a reproduction of a rapidly taken series of photographs...." Gulf Life Insurance Co. v. Stossell, 179 So. 163, 164 (Fla. 1938) (Brown, J., concurring specially with the majority opinion that moving picture films that are properly authenticated should be admitted under the same rules as photographs). There is no reason to create an artificial distinction between photographs and videotapes when they are displayed to witnesses for the purposes of identification.

Clearly, the viewing of a videotape does not implicate Florida's right to counsel because, like a photographic array, it does not involve the defendant's presence and no confrontation occurs. The United States Supreme Court's Ash opinion is well-reasoned and logically sound. Respondent respectfully suggests that this Court should follow the United States Supreme Court and the majority of the other jurisdictions that have addressed the issue by holding that no right to counsel exists for the viewing of videotaped lineups.

Although this Court has recognized that there is authority, in appropriate circumstances, to construe the Florida Constitution's provisions in a manner different

from the comparable provisions of the United States Constitution, Traylor, 596 So. 2d at 962-63, the issue raised in the instant case does not present any reason for doing so. There is nothing distinctive in the language of the clauses of the two constitutions, or any apparent history related to the enactment of the Florida constitutional provision, which would mandate a different result. While the Petitioner herein has alluded to some issues that have resulted in differential treatment, none of those situations have any relevancy to the issue before this Court.[1]

The Third District Court of Appeal's opinion receding from Cox and Gaitor and following Ash should be affirmed.[2]

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[1] See, e.g., Graham v. State, 372 So. 2d 1363 (Fla. 1979) (discretionary right to counsel at post-conviction proceedings); Hooks v. State, 253 So. 2d 424 (Fla. 1971) (discretionary right to counsel for discretionary review proceedings in this Court); State v. Ull, 642 So. 2d 721 (Fla. 1994) (right to counsel in misdemeanor proceedings). Other instances alluded to by the Petitioner herein were not based on any mandate from the Florida Constitution. See, e.g., State v. Hicks, 478 So. 2d 22, 23 (Fla. 1985) (while there was no constitutional right to counsel in all probation revocation proceedings, such a right was accorded for policy reasons related to administrative needs).

[2] The State adheres to its position, as stated in its brief on jurisdiction, that this Court lacks jurisdiction because the Third District's holding below, State v. Jones, 849 So. 2d 438 (Fla. 3d DCA 2003), does not "expressly construe a provision of the state or federal constitution." Fla. R. App. P. 9.030(a)(2)(A)(ii). Therefore, the State respectfully suggests that review was improvidently granted in this case.

CONCLUSION

Based upon the arguments and authorities cited herein, the Respondent respectfully requests that this Court affirm the Third District Court of Appeal's reversal of the trial court's suppression order.

Respectfully Submitted,

CHARLES J. CRIST, JR.
Attorney General

RICHARD L. POLIN
Bureau Chief
Florida Bar Number 0230987

ERIN KINNEY ZACK
Assistant Attorney General
Florida Bar Number 0326630

Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of the Respondent on the Merits was sent via U.S. mail to Billie Jan Goldstein, Assistant Public Defender, 1320 NW 14th Street, Miami, FL 33125, this ___ day of January, 2004.

ERIN KINNEY ZACK
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure.

ERIN KINNEY ZACK
Assistant Attorney General