IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1363

DCA NO. 3D02-2092

NATHANIEL CHARLES JONES,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON THE MERITS (CORRECTED)

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STATEMENT OF THE CASE AND FACTS

The question raised in this case is whether showing a videotape, photograph, or other recorded image of a criminal defendant to an eyewitness for the purpose of securing an identification is a "crucial stage" of the prosecution, triggering the right to the presence of counsel under article I, section 16, of the Florida constitution. A copy of the opinion of the Third District Court of Appeal which answered this question in the negative is attached as an appendix (cited as "A."). Review of this pure question of law is de novo. Cf. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002).

This case involves an armed robbery and armed assault that occurred in Miami on the night of November 6, 2000. Before Nathaniel Jones was charged in this case, he had been arrested for auto theft several times by Detective Anthony Fernandez and his partner, Detective Angel Villegas. (Record ["R."] 110:14-16, 114:21-23, 136:17-19) Jones became a suspect in this case when Detective Villegas, who was not assigned to the investigation, gave Jones's name and photograph to the investigating officer after learning that a stolen car involved in the robbery had been abandoned somewhere near Jones's sister's house. (R. 31, 117, 133, 134, 135)

In December 2000, Jones participated in a live line-up. (See R. 31, ¶ 9) He was subsequently charged in this case. (R. 1-3) He filed a notice of alibi, indicating that his defense at trial would be "mistaken identity." Six alibi witnesses were deposed. (See

R. 32, ¶ 10)

In February 2002, soon before trial was set to begin, Assistant State Attorney Jay Novick summoned a number of people to his office to discuss this case. One of the topics discussed was Mr. Jones's alibi. (R. 89) Another was Mr. Jones's previous arrests for stealing cars. (R. 135-136) Several people were present at the meeting (R. 49), including detectives Fernandez and Villegas, and a police officer, David Rubinson (R. 48), who had chased a car fleeing from the scene of the robbery on the night of November 6, 2000, and had glimpsed the driver's face for a second or two.

Officer Rubinson had not indicated, either in his initial report or in a supplemental report, that he recognized the driver of the car. (R. 86) Nevertheless, in response to request from Mr. Novick, Rubinson stated he might possibly be able to identify the driver. (R. 55) At that point, everyone at the meeting was excused, with the exception of Villegas, Fernandez, and Rubinson. (R. 56) Although the detectives told ASA Novick they had nothing to do with the case and asked him if they could leave, he required them to stay. (R. 104, 105, 123, 124)

A videotape of the December 2000 line-up was shown to Rubinson, with Villegas and Fernandez seated nearby. (R. 58; 104-106; 127). As soon as Rubinson identified Nathaniel Jones as the man he had seen driving the get-away car, the detectives were told they could leave. (R. 107, 60)

Defense counsel was notified by telephone of the newly-acquired identification. (R. 61) After obtaining a continuance and deposing additional witnesses, counsel moved to suppress the identification from the video and any derivative in-court identification under Manson v. Brathwaite 432 U.S. 98 (1977). (R. 30-33)

A hearing was held at which three state's witnesses testified about the circumstances of the video identification, as summarized above. (R. 151-244) In addition, the witnesses testified that Officer Rubinson had looked only at the TV screen while the video was being played; no one spoke or made any gestures. (R. 59:5-17; 107; 128) There was also testimony that Officer Rubinson had seen Mr. Jones's photograph in a BOLO flier entitled "Officer Safety/Career Criminals/Auto Theft Subjects" prepared by Detective Fernandez in about November 2000, and that he saw the flier again on the day he viewed the video. (See R. 29; 74-75)

Regarding right to counsel, defense counsel argued:

> "What is the difference between placing a defendant in a live line-up [where counsel must be present] and them taking a videotape of that line-up and showing it to the witnesses in a closed hall of the State Attorney's Office without a court reporter present, without counsel being notified, without counsel being present, and leaving three police officers who get to view that videotape at the same time . . .?" (R. 254)

After taking the matter under submission, the court denied the motion to suppress, in part, ruling that Officer Rubinson would be permitted to make an in-court identification based on what he allegedly saw on November 2, 2000, and when he

viewed the BOLO flier (R. 39, 143) However, the court granted the motion as to Officer Rubinson's identification from the video, finding that identification to be unreliable, under the circumstances. (R. 34-39) In its written order (R. 139-144), the trial court cited several facts contributing to the unreliability of the video identification, including the presence of Villegas and Fernandez, who were described by the court as detectives "who had previously arrested the defendant several times for auto theft and appear[ed] to have a bias against defendant." (R. 142)

The state appealed, arguing that nothing suggestive happened during Rubinson's viewing of the videotaped lineup. Jones answered, contending that the lineup procedure itself was unduly suggestive. Jones also argued that the identification should be suppressed because it was made in violation of his right to counsel, under Cox v. State, 219 So. 2d 762 (Fla. 3d DCA 1969) (holding that a person who has been arrested and booked and has exercised his right to counsel is entitled to have counsel present when video tape of himself is shown to witness as a substitute for a lineup or other confrontation) and State v. Gaitor, 388 So. 2d 571 (Fla. 3d DCA 1980) (holding that, although Cox remains good law, it applies only to post-charge video taped lineups). (A. 4)

The state requested that the court of appeal recede from Cox and Gaitor in light of United States v. Ash, 413 U.S. 300 (1973). (A. 4-5) After supplemental briefing,

the court granted hearing en banc, receded from Cox and Gaitor, followed Ash, and held that a witness's viewing of a videotaped lineup is not a crucial or critical stage triggering a defendant's right to have counsel present under either the Florida constitution or the federal constitution. (A. 5)[1] The court acknowledged that it was not bound to construe our state constitution's Counsel Clause in the same way the Ash Court interpreted the Sixth Amendment. (A. 7-8, citing Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992)) However, the court found the reasoning of the Ash Court "persuasive," and perceived "no intent that [Florida's] Counsel Clause should be treated differently." (A. 8, citing Lebron v. State, 799 So. 2d 997, 1011 (Fla. 2001) (quoting Rose v. Dugger, 508 So. 2d 321, 322-323 (Fla. 1987), declining to construe Florida's double jeopardy provision differently from the construction of the Fifth Amendment of the federal Constitution announced in Richardson v. United States, 468 U.S. 317 (1984), after finding the view expressed in Richardson to be "logically correct" and seeing no "intent on the part of the people of Florida" that our double jeopardy provision should be construed differently)) The court also held that there was

[1] The Court also cited Stewart v. State, 549 So. 2d 171 (Fla. 1989), wherein this Court, citing Ash, held that a defendant's federal constitutional right to counsel was not violated when a detective monitored a conversation between the defendant and his grandmother, because there was no "significant encounter" between the prosecution and the accused during the conversation. The Stewart Court did not address the question of whether the defendant's right to counsel under the Florida constitution had been violated.

no basis for the trial court's conclusion that the lineup procedure was unnecessarily suggestive, because none of the witnesses testified that they perceived any "statement, gesture or visual suggestion" that influenced Rubinson's identification. (A. 10-11)

On October 30, 2003, this Court accepted jurisdiction of this case, and set oral argument for March 4, 2004. Mr. Jones remains incarcerated pending trial.

SUMMARY OF ARGUMENT

An order of suppression was reversed in this case. Because the state's witnesses – i.e., the only witnesses present at the identification – had testified that no person influenced the officer's identification "by statement, gesture or visual suggestion," the appellate court found no basis for the trial judge's legal conclusion that the identification was obtained in an unnecessarily suggestive manner, and was unreliable.

Yet, as the United States Supreme Court recognized when it first considered this issue, "suggestion [during the identification of a defendant] can be created intentionally or unintentionally in many subtle ways," United States v. Wade, 388 U.S. 218, 229 (1967), not only by statement, gesture, and visual suggestion. It is possible Officer Rubinson was unaware of subtle suggestions communicated – perhaps through body language, tone of voice, or facial expression – by the prosecutor or the detectives. Had competent counsel – schooled in the detection of suggestive influences – been present

at the time of the identification, counsel could have witnessed any suggestiveness, or perhaps prevented it. But counsel was not present. According to the court of appeal, that stage of the prosecution was neither "critical" nor "crucial," and Mr. Jones had no right to the presence of counsel at that time.

In reaching this conclusion, the court of appeal relied on United States v. Ash, 413 U.S. 300 (1973), a case decided over thirty years ago, just before social scientists began publishing the results of empirical studies demonstrating that certain factors create serious risks of misidentifications when witnesses view the types of lineups and photo arrays normally used by law enforcement agencies in this country. The court acknowledged that it was not bound to construe our state constitution's Counsel Clause in the same way the Ash Court interpreted the Sixth Amendment, but found the reasoning of the Ash Court "persuasive," and perceived "no intent that [Florida's] Counsel Clause should be treated differently."

While the reasoning of Ash may seem persuasive, a careful analysis of the Ash opinion reveals serious flaws. Its holding – that a defendant has a right to the presence of counsel at a pre-trial identification only if the defendant is physically present, witnessing the manner in which the identification is obtained, but not if the defendant is absent and the identification is obtained in secret – is counterintuitive, and is based on an overly narrow reading of Wade and its predecessors. The right to counsel at pre-

trial identification proceedings that Wade described is not a "pure" right to counsel. Instead, the presence of counsel is necessary to protect other constitutional rights: the right to confront and cross-examine witnesses and, ultimately, the right to a fair trial.

Further, the Ash Court's dicta – that the "adversary process" protects defendants from unfair prejudice in the area of photographic identifications just as it does in the case of other statements made by witnesses during pre-trial interviews – are based on a number of invalid assumptions. Research since 1978 has established the unique nature of eyewitness identifications as a form of evidence, as well as the inherent unreliability of the methods currently used by law enforcement to obtain identifications, belying the Ash Court's assumptions.

Having no persuasive reason to adopt the federal standard for right to counsel in this situation, this Court must determine what the people of Florida "intend" vis à vis the parallel provision in Florida's constitution, by conducting a careful review of factors that inhere in Florida's own unique state experience. This review will shed light on the evolving attitudes within the state regarding the values which the constitutional provision protects.

A review of Florida's unique state experience establishes that Florida citizens are increasingly concerned about wrongful convictions in this State, many of which were based on mistaken identifications. While the Legislature and the Court have approved

measures to facilitate the post-conviction exoneration of some wrongfully-convicted persons via DNA testing, these measures are no substitute for constitutional protections that assure fair trials and guard against the conviction of innocent persons in the first place. Requiring the presence of counsel during pre-trial identifications will advance this important societal value, and will be consistent with Florida's long history of providing a broader and more meaningful right to counsel than provided by the federal constitution and by many other states.

Florida's Counsel Clause cannot be given the same narrow interpretation given to the Sixth Amendment by the Ash Court in 1973. Because the erroneous identification and subsequent conviction of an innocent person often results when a recorded image of a criminal defendant is shown to an eyewitness using current police procedures – and because this identification cannot be meaningfully confronted and tested at trial – the pre-trial identification is a "crucial stage" of the prosecution at which the right to the presence of counsel must attach.

ARGUMENT

FLORIDA'S CONSTITUTION MUST PROVIDE A RIGHT TO THE PRESENCE OF COUNSEL AT ALL POST-ARREST IDENTIFICATIONS IN CRIMINAL CASES, TO ENSURE MEANINGFUL ADVERSARIAL TESTING OF THIS UNIQUE KIND OF EVIDENCE AT TRIAL AND REDUCE THE RISK OF CONVICTING INNOCENT PERSONS

I. The Reasoning of Ash Is Not Persuasive

A. The Ash Court's Holding – That the Right to the Presence of Counsel Announced in Wade Is Limited to Pre-trial Identifications Where the Defendant Is Physically Present – Is Logically Flawed

1. The Wade Decision

In United States v. Wade, 388 U.S. 218 (1967), the Court addressed the issue of "whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel." 388 U.S. at 219-220. In a 6-3 decision, the Court held that the lineup was a "critical stage" at which the defendant was "as much entitled to counsel as at the trial itself." 388 U.S. at 237, quoting Powell v. Alabama, 287 U.S. 45, 57 (1932).

Although this particular language suggests that the Wade decision was grounded in the Sixth Amendment "pure" right to counsel, the remainder of the opinion belies that suggestion. In explaining the function of counsel at the lineup, the Court referred repeatedly to the role of counsel as protector of another Sixth Amendment right: the rights of confrontation and cross-examination, and a fair trial.

The Court noted that the most recent cases on the right to the presence of counsel before trial involved the role of the attorney as protector of the privilege against

self-incrimination,[2] but emphasized that nothing in the opinions of those cases linked the right to counsel exclusively to the protection of Fifth Amendment rights. 388 U.S. at 226. During pre-trial identifications, the Court explained, the presence of counsel would protect a different right: the defendant's right to adequately confront the evidence and witnesses against him at a fair trial. The Court formulated a general test for whether the presence of counsel is constitutionally required before trial as follows:

> [W]e [must] scrutinize any pretrial confrontation of the accused to determine ***whether the presence of his counsel is necessary to preserve his 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, and must analyze whether potential substantial prejudice to defendant's right inheres in the particular confrontation and the ability of counsel to help avoid that prejudice. 388 U.S. at 227, emphasis added.

Applying this test to Mr. Wade's case, the Court concluded that substantial prejudice inheres in the process by which pre-trial identifications are elicited because that process "is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." 388 U.S. at 228. The Court's concern was supported by an exhaustive review of published case studies and

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[2] The Court cited Massiah v. United States, 377 U.S. 210 (1964); Escobedo v. State of Illinois, 378 U.S. 478 (1964); Miranda v. State of Arizona, 384 U.S. 436 (1966).

scholarly literature, as well as examples from opinions of criminal cases involving all types of pre-trial identifications. See 388 U.S. 228-233 & nn.6-23.

Citing the literature, the Court observed that a "major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." 388 U.S. at 228.

The Court expressed concern that a mistaken identification before trial might – in the absence of other evidence of guilt – determine the result of the trial, i.e., the conviction of an innocent person, observing that "it is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on." 388 U.S. at 229.

The Court did not assume that police procedures were intentionally designed to prejudice the defendant. Instead, the Court noted that "the fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief pre-occupation is with the problem of getting sufficient proof . . . involves a danger that this persuasion may communicate itself even in a doubtful case to the witness in some way." 388 U.S. at 235, quoting Glanville Williams & H.A. Hammelmann, Identification Parades, Part I, Crim. L.Rev. 479, 483 (1963).

Despite the fact that Mr. Wade was present at his identification and, in theory, could have observed and reported suggestiveness to counsel, the Court concluded that the presence of counsel was nevertheless required. The Court noted, inter alia, that the accused "is hardly in a position to detect many of the more subtle 'improper influences' that might infect the identification." As a result, without the presence of counsel, "the defense can seldom reconstruct the manner of mode of lineup identification for judge or jury at trial." 388 U.S. at 230. "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." 388 U.S. at 231-232.

The Court rejected the Government's argument that a pre-trial identification is comparable to the analysis of fingerprints, blood, or other trace evidence at which defense counsel is not present. The Court explained, "Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for meaningful confrontation of [trace evidence] through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts." 388 U.S. at 227-228.

Justice White dissented, joined by Justices Harlan and Stewart. Their primary

objection was to the imposition of such a "broad prophylactic rule" without evidence of widespread "improper police procedures" at lineups or "dissembling" by the police and witnesses regarding the circumstances surrounding the identification. They also expressed concern about delays that would be caused by implementation of the rule announced by the majority. See 388 U.S. at 250-259.

2. The Facts of Ash and the Court of Appeal Analysis

At the time the Wade decision was announced in 1967, Charles Ash was awaiting trial on five counts related to an August 1965 bank robbery in Washington D.C. See United States v. Ash, 461 F. 2d 92, 95 (D.C. Cir. 1972); United States v. Ash, 413 U.S. 300, 302-303 (1973). Before Ash was indicted, four witnesses had tentatively identified him as one of the robbers, from black and white "mug shots." Although one of the witnesses had said that he would be more sure of his identification if he saw the gunman in person, see 461 F.2d at 95, no live lineup was held. Instead, the day before trial in May 1968, an FBI agent and the prosecutor showed five color photographs to the witnesses.

The trial judge held a hearing on the suggestiveness of the pretrial photographic displays. Without making a clear ruling on suggestiveness, the court held that the Government had demonstrated that the in-court identifications would be based on observations of the suspects other than the intervening observation. 413 U.S. at 303-

304. Ash was convicted, and he appealed. 461 F. 2d at 95; 413 U.S. at 304-305.

The Court of Appeals concluded that the right to the presence of counsel announced in Wade also applied to photographic identifications. The Court observed that many of the same dangers of mistaken identification inherent in an uncounseled "corporeal" lineup identification are present during a photographic identification as well. According to the Court of Appeal, these dangers include (1) the possibilities of suggestive influence or mistake; (2) the difficulty of reconstructing suggestivity which, the court concluded, would be even greater when the defendant is not even present; and (3) the tendency of a witness's identification, once given under these circumstances, to be "frozen." 461 F.2d at 100.

The court acknowledged that these difficulties may be "somewhat mitigated" by preserving the photographs, and by examining the participants as to what went on during the identification, but concluded that, under Wade, these would not suffice to offset the constitutional infringement wrought by proceeding without counsel. The court concluded that "the presence of counsel avoids possibilities of suggestiveness in the manner of presentation that are otherwise ineradicable." 461 F. 2d at 100-101.

3. The Supreme Court Holding in Ash

a. Majority and Concurrence

The United States Supreme Court, whose membership had undergone a dramatic

change in the few years since Wade was decided, reversed the decision of the Court of Appeals in a divided decision.[3] After reviewing the history of the right to counsel in this country, as the Wade Court had, the majority noted that the right to counsel had been extended to certain pre-trial events where counsel could assist the accused when "he was confronted, just as at trial, by the procedural system, or his expert adversary, or by both." 413 U.S. at 310. The Court cited, as examples of these "trial-like confrontations," Massiah v. United States, 377 U.S. 210 (1964); Miranda v. State of Arizona, 384 U.S. 436 (1966); and many of the other cases cited by the Court in Wade, as well as the Wade case itself.[4]

Focusing exclusively on this "pure" right-to-counsel aspect of the Sixth

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[3] Five new justices had been appointed the Court since Wade: Justices Marshall, Blackmun, Powell, Rehnquist, and Stevens. The dissenting votes in Ash were cast by Justice Brennan, who had authored Wade; Justice Douglas, who had concurred in Wade's holding that there is a right to counsel at a lineup; and Justice Marshall.

[4] The Ash majority opined that there were two additional reasons for concluding that the Wade decision was limited to "trial like confrontations" between a live defendant and the prosecution: (1) the "structure" of the Wade opinion, which discussed the dangers of mistaken identification and the difficulty of reconstructing suggestiveness at trial only ***after*** concluding that a lineup constituted a trial-like confrontation, requiring the assistance of counsel. 413 U.S. at 314; (2) the "careful limitation" of the Wade Court's language to "confrontations." The majority noted that the Wade Court had "narrowly defined the issues under consideration," and had not mentioned photographic identifications. Id. at 315 n.9.

Amendment guarantee, the Court concluded that a "substantial departure" from the historical test would be necessary to interpret the Sixth Amendment as providing a right to counsel at a photographic identification:

> 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 [at a photo identification]. 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. 413 U.S. at 317, emphasis added.

On this basis, the Court concluded that the Sixth Amendment does not grant the right to counsel at photographic identification procedures. 413 U.S. at 321.

Justice Stewart, who concurred in the result, disagreed with the majority as to its reading of Wade. In his view, Wade's requirement of the presence of counsel did not turn on the fact that a lineup is a trial-type situation, or on the possibility that counsel could give advice or assistance to his client at the lineup itself. Instead, he believed that, under Wade, counsel is necessary at a lineup in order to ensure a meaningful confrontation and the effective assistance of counsel at trial. See 413 U.S. at 324.

b. The Dissent and Other Critiques

Justice Brennan, who was the author of the Wade opinion, wrote a scathing dissent in Ash, describing the majority opinion as "wholly unsupportable in terms of

such considerations as logic, consistency, and, indeed, fairness," 413 U.S. 326, and "a triumph of form over substance." Id. at 338.

Justice Brennan criticized the majority's historical analysis of cases from which they had concluded that a stage of the prosecution cannot be considered a "critical stage" unless the defendant is physically present, stating that "the decisions relied upon by the Court represent, not the boundaries of the right to counsel, but mere applications of a far broader and more reasoned understanding of the Sixth Amendment than that espoused today." 413 U.S. at 339. He described the majority view of the Sixth Amendment as "crabbed" and "wooden." 413 U.S. at 338, 341 n. 19, 342.

The crux of Justice Brennan's dissent was this: that the fundamental premise underlying all of the Supreme Court's pre-trial right to counsel cases is that a stage of the prosecution is critical if it is one at which the presence of counsel is necessary to protect the fairness of the trial itself, and that this established conception of the Sixth Amendment guarantee is not dependent on the physical presence of the accused. 413 U.S. at 339-340.[5] Upon release of the Ash opinion, Justice Brennan was immediately

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[5] Justice Brennan scoffed at the majority's "effort to justify its contention that Wade itself in some way supports the Court's wooden analysis of the counsel guarantee" by pointing to the so-called "careful limitation" of the language in

Wade to "confrontations." He explained that the Wade Court (i.e., Justice Brennan himself, as opinion author) had interchangeably used such terms as "lineup," "confrontation" and "pretrial identification" in the opinion because those terms described the particular facts of the Wade case, which happened to involve a

joined in his criticism by legal scholars and others; the criticism continues to this day.[6]

Petitioner submits that there is no principled way to distinguish between the Ash Court's own description of the function of counsel at the live lineup in Wade and the function counsel would serve at a display of photographs or other images of the defendant. To the extent that counsel was protecting the defendant from being "taken advantage of" by the prosecution in Wade, see 413 U.S. at 312, so would counsel do that at a photo display. One need not be physically present to be the victim of disadvantage. In both situations counsel would be able to "remove disabilities of the accused." See id. In both situations counsel would "compensate for the defendant's deficiencies," although the deficiency would be different. In the case of the lineup,

it would consist of the defendant's inability to ***effectively*** tell the jury at trial what had happened during the lineup, due to "dimmed memory," or diminished credibility, or

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lineup, and not because the terms had some independent significance. He reminded the majority that the Wade dissenters had recognized that Wade logically applies, not only to lineups, but 'to any other techniques employed to produce an identification . . . .'" 413 U.S. at 341 n. 19, citing Wade, 388 U.S. at 251.

[6] See, e.g., Rouse, Are We in Focus on Photo Identification?, 7 U. San Fran. L.Rev. 419 (1973); Comments, 26 Vand. L.Rev. 3123 (1973); Grano, Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?, 72 Mich. L.Rev. 717 (1974); Note, 26 Stan. L.Rev. 399 (1974); Pamela R. Metzger, Beyond the Bright Line: a Contemporary Right-to-Counsel Doctrine, 97 NW. U.L.Rev. 1635, 1651-1652 (2003).

unwillingness to waive his privilege against self-incrimination. <u>See</u> 413 U.S. at 312-313. In the case of the photo display, the deficiency would consist of the defendant's inability to tell the jury what had happened ***at all***, because he wasn't there.

From the moment an individual is accused in a criminal case, he is confronted by the power of the state. What determines whether a particular aspect of this confrontation a "critical stage" is not whether the defendant is physically present in a room with an agent of the state, but whether the state is doing something that might "derogate from the defendant's right to a fair trial," <u>Wade</u>, 388 U.S. at 226, if counsel were not present on his or her behalf. The right to counsel protects the defendant's constitutional rights, not the defendant's body.

B. The Ash Court's Dictum – That No Special Safeguards Are Required When "Interviewing" Witnesses About an Identification – Is Based on Erroneous Assumptions About Identification Evidence

1. <u>The Supreme Court Dicta in Ash</u>

a. <u>The Majority and the Concurrence</u>

In dicta, the <u>Ash</u> majority announced, "***Even if*** we were willing to view the counsel guarantee in broad terms as a generalized protection of the adversary process, we would be unwilling to go so far as to extend the right to a portion of the prosecutor's trial-preparation interview with witnesses." 413 U.S. at 317, emphasis added. Thus, according to the Court, an identification is just a part of a witness

interview, and the "American adversary system" gives defense counsel the equal ability to construct photographic identifications, seek witnesses, and "interview" them by conducting additional photographic identifications. Id. at 318.

In response to the argument that requiring counsel might compel the police to observe more scientific procedures which would minimize the dangers of suggestion, the Court concluded that "pretrial photographic identifications . . . are hardly unique in offering possibilities for the actions of the prosecutor unfairly to prejudice the accused." 413 U.S. at 320 (noting that the prosecutor may improperly subvert the trial in many ways, including withholding evidence, manipulating testimony, and contriving the results of lab tests). The primary safeguard against abuses, according to the Court, is the "ethical responsibility" of the prosecutor. If that safeguard fails, review remains available under due process standards. Id. at 320. In conclusion, the majority was "not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required." Id. at 321.

Justice Stewart concurred, concluding that there are few possibilities for unfair suggestiveness with a photographic array, and those are rather "blatant" and easily reconstructed at trial, since the photographs that were used can be demonstrated at

trial, and the witness can easily recount at trial any comment or gesture the prosecuting

authorities might have used to single out the defendant's picture. 413 U.S. at 324-325.

b. The Dissent and Other Critiques

Justice Brennan argued that the risks of mistaken identification are even greater in the context of a photographic identification than at a live lineup, due to the inherent limitations of two-dimensional photography, along with the fact that the defendant is not present to observe irregularities in the procedures. 413 U.S. at 332, 336, 337.

Further, he observed that simply preserving the identification photographs and presenting them at trial would not "reconstruct" the manner and mode of the identification. First, the photographs "cannot in any sense reveal to defense counsel the more subtle, and therefore more dangerous, suggestiveness that might derive" from any comments or gestures that were made when the photographs were displayed. Further, defense counsel cannot rely on the witnesses themselves to expose these sources of suggestion, as they are not '"apt to be alert for conditions prejudicial to the suspect,"' and are not '"likely to be schooled in the detection of suggestive influences."' 413 U.S. at 335, quoting Wade, 388 U.S. at 230 (describing the same problem with witnesses at lineups).

Finally, Justice Brennan criticized the majority's assertion that these problems are somehow minimized because the defense can interview the witness and

"duplicate" the photographic identification. He noted the critical difference between scientific analysis of evidence such as blood and hair, which can be tested independently by both parties, and identification evidence which, once tainted by suggestion, cannot be independently tested again. 413 U.S. 336, n. 15.

3. The Social Science Research

It has been said that mistaken identifications pose "conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished." McGowan, Constitutional Interpretation and Criminal Identification, 12 Wm. & Mary L.Rev. 235, 238 (1970). See also C. Ronald Huff et al., Convicted but Innocent: Wrongful Conviction and Public Policy 66 (1996). As the authorities cited by the Wade Court reflect, the dangers of mistaken identification in criminal cases have been widely recognized and discussed for decades.[7]

Yet, until the late 1970's, there was no published research to explain the anecdotal evidence, i.e., to investigate, in a scientific manner, the particular factors contributing to these miscarriages of justice. Since that time, scientific studies of

[7] See, e.g., E. Watson, The Trial of Adolph Beck (1924); F. Gorphe, Showing Prisoners to Witnesses for Identification, 1 Am. J. Police Sci. 79 (1930) (published originally in France in 1929 in Revue Internationale de Criminalistique); Edwin M. Borchard, Convicting the Innocent; Sixty-Five Actual Errors of Criminal Justice (1932); John H. Wigmore, The Science of Judicial Proof §§ 251-252 (3d ed. 1937); William Paul, Identification of Accused Persons, 12 Australian L. J. 42 (1938).

eyewitness identification have proliferated. A review of the results of these studies reveals that the assumptions on which the Ash Court relied are unfounded. The risks inherent in the methods used in this country to elicit identifications from witnesses are, in fact, unique, requiring "an extraordinary system of safeguards."

One of the primary assumptions of the Ash Court was that interviewing a witness in order to obtain an identification was a process that could be duplicated by the defense in order to obtain independent results. In fact, researchers have found that the feedback given during the first "interview" has a profound effect on the identification that is made, and also affects the certainty of the witnesses, i.e., what the Wade Court called "freezing." See Loftus (1979) (finding that witnesses extract and incorporate new information after the witnessed event, then testify about that information as thought they had actually witnessed it); Luus & Wells, 1994; Wells & Gradfield, 1998, 1999 (finding that eyewitnesses who make a mistaken identification but are told they identified the actual suspect undergo "confidence inflation."[8]

Additional assumptions, implicit in the Court's observation that "pretrial photographic identifications are hardly unique in offering possibilities for the prosecutor

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[8] The research cited in this section is described more fully in Wells, et. al, From the Lab to the Police Station, American Psychologist 581-598 (June 2000). The full citations for the published research are listed on pages 596-598 of that article.

to unfairly prejudice the accused" are that erroneous identifications are usually the result of intentional misconduct, and that the prosecutor initiates or is aware of the misconduct. In fact, the research indicates that, for the most part, suggestiveness is unintentional, and it arises from actions of the police or the witnesses themselves, not prosecutors. Dr. Elizabeth Loftus explains that there is "pressure that comes from police who want to see the crime solved; there is also a psychological pressure . . . on the part of the victim who wants to see the bad guy caught and wants to feel that justice is done." "DNA Testing Turns a Corner as Forensic Tool," Law Enforcement News (Oct. 15, 1995).

Another assumption was that any cue that would be suggestive enough to influence an identification would be "blatant," noticed by the witnesses, and reported by him or her on cross-examination. In fact, the research shows that many experimental subjects who denied that feedback influenced them were just as influenced as those who admitted that they might have been influenced. Gary L. Wells, Mistaken Eyewitness Identification, p. 4.

Regarding the Ash Court's belief that unreliable identifications will be successfully challenged on due process grounds, see section II.B.4.b., supra.

II. Since 1838, Floridians Have Expected Their Constitution to Assure Fair Trials at Which Only the Guilty Are Convicted; Only Through Florida's Counsel Clause Can This Expectation Be Met

A. In Construing Florida's Bill of Rights, This Court Determines What Constitutional Protections the People of Florida Want Based on an Independent Examination of the History, Policy, and Precedent of Florida's Own Unique State Experience

It is an often quoted observation regarding federalism that, in any given state, the federal constitution represents the "floor" for basic freedoms; the state constitution represents the "ceiling." See Traylor v. State, 596 So. 2d 957, 962 (1992) citing Stewart G. Pollock, State Constitutions as Separate Sources of Fundamental Rights, 35 Rutgers L.Rev. 707, 709 (1983).

One of the primary reasons for this difference between state and federal bills of rights is that they each serve distinct, complementary purposes. The federal Bill of Rights secures, "as a uniform minimum, the highest common denominator of freedom that can be administered throughout all fifty states." Traylor at 962. On the other hand, the bills of rights of the states – as interpreted by state courts – serve to express the "common yearnings for freedom" within each individual state. Ultimately, it is the responsibility of the state's highest court to determine the scope of the provisions of its own constitution, because "no court is more sensitive or responsive to the needs of the diverse localities within a state, or the state as a whole," than that court. See Traylor

at 962.[9]

In view of this special function of state constitutions, the Traylor Court concluded that state courts should "focus primarily on factors that inhere in their own unique state experience" when called upon to construe their constitutions. The Court identified for consideration such factors as "the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law." Traylor at 962.[10]

B. Florida Citizens Have Long Expected Constitutional Protections that Assure Fair Trials and Guard Against the Conviction of Innocent Persons, Yet the Current Protections Against Mistaken Identifications Are Inadequate

1. Florida's Early History, The Express Language of the

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[9] See generally Developments in the Law – The Interpretation of State Constitutional Rights, Part II. State Constitutional Rights in the Federal System, 95 Harv. L.Rev. 1331, 1347-1356 (1982) (examining the central differences between state and federal constitutional institutions which mandate a distinctive and independent role for state constitutional law).

[10] See also State v. Jewett, 146 Vt. 221, 225-228, 500 A.2d 233, 236-237 (1985) (discussing various approaches to state constitutional arguments); Developments in the Law – The Interpretation of State Constitutional Rights, Part II. State Constitutional Rights in the Federal System, 95 Harv. L.Rev. 1331, 1356-1366 (1982) (proposing a model to guide state courts in elaborating an independent body of state constitutional law); Developments in the Law – The Interpretation of State Constitutional Rights, Part III. Criminal Procedure, 95 Harv. L.Rev. 1367, 1384-1394 (1982) (analyzing two dominant methods of state constitutional interpretation).

Constitutional Provision, and Its Formative History

By the time the settlers in the federally-owned territory of Florida drafted their first constitution in 1838, "the nature of the country as a single federal union had been well established in both its identity and authority." See Harry Lee Anstead, Florida's Constitution: A View From the Middle, 18 Nova L.Rev. 1277, 1280, 1279 (1994). Unlike the constitutions that were enacted in each of the original thirteen colonies after they declared independence from England, Florida's constitution was drafted after the federal constitution was adopted. It was accompanied by a statement "claiming the right of admission into the Union, as one of the United States of America, consistent with the principles of the Federal Constitution . . . ." See Fla. Const., Art. I., preamble (1838). This fact may explain why, initially, many of the provisions in Florida's Declaration of Rights closely resembled the provisions of the federal Bill of Rights.

Like the federal constitution, Florida's first constitution contained a declaration that expressed the importance of certain rights which, taken together, should assure fairness and accuracy in criminal trials. The right to counsel was one of them; the right to confront witnesses and evidence against the accused was another. Those provisions have been re-enacted, with only minor modifications, in every Florida constitution since

1838.[11]

While the wording of some constitutional provisions makes the intention of the citizens quite clear, see, e.g., Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (1985) (comparing explicit privacy provision in Article I, section 23 with federal constitutional right), Florida's counsel clause is not one of those provisions. It is presently contained in the portion of section 16 of Article I which provides, simply, "In all criminal prosecutions the accused shall, upon demand . . . have the right . . . to be heard in person, by counsel, or both . . . ." Thus, while the counsel clause expressly provides a right to choose one's manner of representation, other aspects of the right to counsel are not explicitly addressed. To determine the scope and application of the right to counsel in Florida, one must review relevant case law, statutes, and rules of court.

2. Attitudes Toward the Right to Counsel as Reflected in Pre-Existing and Developing State Law

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[11] See Art. I, § 10, Fla. Const. (1838) ("That in all criminal prosecutions, the accused hath a right to be heard by himself or counsel, or both . . . [and] to be confronted with the witnesses against him"); Art. I, § 10, Fla. Const. (1861) (same); Art. I, § 10, Fla. Const. (1865) (same); Art. I, § 8, Fla. Cont. (1868) (". . . . in any trial, by any court, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions") (no express right of confronta- tion); Art. I, § 11, Fla. Const. (1885) ("In all criminal prosecutions, the accused . . . shall be heard by himself, or counsel, or both . . . [and] to meet the witnesses against him face to face.") available at http://www.fsu.edu/crc/conhist/contents.

Florida was one of the first jurisdictions in the country to provide a state public defender system to represent indigent defendants and to adopt broad post-conviction relief procedures, only weeks after Gideon v. Wainwright, 372 U.S. 335 (1963), was decided. See Graham v. State, 372 So. 2d 1363, 1365 (1979) (citing Ch. 63-409, Laws of Fla., authorizing a public defender system); In re Criminal Procedure Rule 1, 151 So. 2d 634 (Fla. 1963) (establishing predecessor to current Rule 3.850). Since that time, numerous cases, statutes, and rules have demonstrated that the Florida and federal constitutional rights to counsel are not co-extensive in a variety of procedural contexts, with Florida providing a broader right. Even where Florida provides the same right, many of our rules and cases ensure a more meaningful right by requiring the court and the state to take affirmative steps to inform the defendant of the right at all critical stages. A few examples are noted here:

– See Fla. R. Crim. P. 3.160(e) (1968) (requiring trial court to advise, at arraignment, any person charged with a crime of the right to counsel and, if financially unable to obtain counsel, of the right to be assigned court-appointed counsel.

– See State v. Weeks, 166 So. 2d 892, 897 (1964) (although no "organic" right to counsel in post-conviction proceedings, counsel after the direct appeal may be essential to satisfy due process requirements; all doubts resolved in favor of indigent

defendant); Graham v. State, 372 So. 2d 1363, 1365 (Fla. 1979) (right to counsel on motion for post-conviction relief); Hooks v. State, 253 So. 2d 424 (Fla. 1971) (right to counsel on petition for writ of certiorari).

– See Fla. R. Crim. P 3.111(a) (right to counsel attaches when accused "person is formally charged with an offense, or as soon as feasible after custodial restraint, or at first appearance before a committing magistrate, which occurs earliest") (adopted from the ABA Standards for Criminal Justice , which applied to situations that had not been held to be "critical stages" within the meaning of the Sixth Amendment). See Fla. R. Crim. P. 3.111(a) (1972), Committee Note; 1 ABA Standards §5-5.1 (1980), Commentary. Compare Kirby v. Illinois, 406 U.S. 682, 689-690 (1972) (right to counsel under the Sixth Amendment attaches only with initiation of "judicial criminal proceedings").

– See § 925.035(4), Fla. Stat. (added by Ch. 77-243, Laws of Fla.) (right to counsel in clemency proceedings for death penalty cases). See also Remeta v. State, 559 So. 2d 1132, 1135 (1990) (holding that this statutory right carries with it the right to *effective* assistance of counsel, and invalidating a $1,000 statutory limit on attorney's fees)

– See State v. Hicks, 478 So. 2d 22, 23 (Fla. 1985) (holding that a person subject to probation revocation in Florida has an absolute right to counsel) (adopting

reasoning of district court, Hicks v. State, 452 So. 2d 606, 608 (Fla. 4th DCA 1984), that "as a policy matter" an entitlement to counsel is essential to ensure reasonable fairness in revocation proceedings). Compare Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973) (declining to adopt a per se rule of entitlement to appointment of counsel at all federal probation revocation hearings).

– See State v. Ull, 642 So. 2d 721, 724 (Fla. 1994) (indigent defendant not facing incarceration can successfully block the discharge of appointed counsel by showing that he or she will be substantially disadvantaged by the loss of counsel). See also Rule 3.111(b)(1) (2002) (amended, based on Ull, to require court to make an explicit finding that defendant will not be substantially disadvantaged before discharging appointed counsel after the filing of an "order of no incarceration" in a misdemeanor case). See also Committee Notes to the 2002 amendment (providing list of factors to consider in determining whether due process rights would be violated by discharge of counsel, and stating that the court should "resolve any doubts in favor of the appointment of counsel. . . ."

– See Fla. R. Crim. P. (1999) (setting minimum standards for attorneys in capital cases "to help ensure that competent representation will be provided to capital defendants in all cases") See also Bruce A. Green, Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment, 78 Iowa L.Rev. 433, 433 (1993) (lower standards

in other states).

These examples illustrate Florida's commitment to providing a right to counsel whenever it is required to assure the fairness of the criminal justice process. This commitment to fairness is one of the important societal values this constitutional provision reflects. See Stephens v. State, 748 So. 2d 1028, 1032 (1999) (quoting Strickland v. Washington, 466 U.S. 668, 685 (1984) (the constitution "recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.").

3. Recent Events That Have Shaped State Law and Popular Opinion: Exonerations

In the 1990's, in cases across the country, the use of improved DNA testing techniques confirmed what the experimental literature had demonstrated: that current police procedures for eyewitness identifications sometimes yield erroneous results, and that eyewitness testimony, even when erroneous, can be highly persuasive to jurors. Exonerations of persons who had been imprisoned for years for crimes they did not commit finally focused public attention on the problem, and brought pressure on the system to undertake the reforms suggested in the psychological literature.

Probably the first official recognition of the problem of wrongful convictions came in June of 1996, when the National Institute of Justice released a report which "documents cases in which the search for truth took a tortuous path." National

Institute of Justice, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial iii (1996) (hereafter cited as "NIJ Case Studies") available at http://www.ojp.usdoj.gov/nij/for96.html. The report reviewed twenty-eight cases of wrongfully-convicted persons who successfully challenged their convictions using DNA tests on existing evidence. They had served, on average, seven years in prison before being exonerated. NIJ Case Studies at iii.

All of the cases reviewed, except for homicides, involved victim identification both prior to and at trial. Many cases also had additional eyewitness identification, either placing the defendant with the victim or near the crime scene. Many of the defendants presented an alibi defense, frequently corroborated by friends or family. NIJ Case Studies at 15.

The first "policy implication" of these exonerations discussed by the authors of the report is the unreliability of eyewitness testimony. According to the authors, "[i]n the majority of the cases, given the absence of DNA evidence at the trial, eyewitness testimony was the most compelling evidence. . . . This points conclusively to the need in the legal system for improved criteria for evaluating the reliability of eyewitness identification." NIJ Case Studies at 24.

None of the cases cited in the NIJ Case Studies is from Florida. However, the University of Miami Wrongful Convictions Project ("UMWCP") reports that Florida

has one of the highest rates for wrongful convictions in the nation. According to a press release dated February 27, 2003, and posted on the UMWCP website, "Since 1973, over 24 Florida death row prisoners have been exonerated through the use of DNA and scientific practices not available at the time they were convicted."

The Center for Wrongful Convictions at Northwestern University School of Law (Chicago) website also provides information about persons exonerated in Florida, including Frank Lee Smith, Bradley Scott, and Joseph Green, all of whom had been convicted based on eyewitness testimony. Mr. Smith was convicted in 1987 in Broward County and sentenced to death for the rape and murder of an 8-year-old girl, based on the testimony of three eyewitnesses. He was exonerated by DNA testing in 2001, eleven months after he died of pancreatic cancer.

Obviously, failures of the criminal justice system like these cause irreparable harm to defendants and their families. Additionally, they harm all the citizens of this state. Florida citizens bear the financial burden of incarcerating innocent defendants, often for many years, as was the case for Frank Lee Smith. Further, when the innocent are convicted, Florida citizens continue to be preyed upon by the actual perpetrators of the crimes. As more and more of these erroneous convictions come to light, Florida citizens lose confidence in, and respect for, the criminal justice system as a whole.

As illustrated by the NIJ Case Studies and the cases of Frank Lee Smith, Bradley

Scott, Joseph Green, and other former Florida prisoners, the error of mistaken identification can sometimes be "remedied," after the fact, by post-conviction DNA testing. In 2001, the Florida legislature, by a unanimous vote, added section 925.11 to the Florida Statutes. See Ch. 2001-97, § 1, Laws of Fla. The provision gave all persons convicted after a trial the right to seek DNA testing of crime scene evidence by October 1, 2003 or two years after the conviction becomes final, whichever is later. It opened a new window of opportunity to persons whose time frames for filing post-conviction motions had lapsed. See CS/SB 366, Senate Staff Analysis and Economic Impact Statement, Mar. 13, 2001, p. 6. Also in 2001, this Court approved the adoption of new Rule of Criminal Procedure 3.853, to implement section 925.11.

4. Protections Against Mistaken Identifications

Releasing a wrongfully convicted person after years in prison is not an adequate remedy for the problem of mistaken identifications. Further, in many cases no physical evidence is available for DNA testing. A better solution to the problem of mistaken identifications is one that minimizes the chances of error in the first place. a

Changes to Police Procedures

As early as the late 1980's, psychologists began to make research-based recommendations about how to improve the accuracy of lineup-based identifications. See, e.g., G. L. Wells, Eyewitness Identification: A System Handbook. (1988) In

1996, the American Psychology/Law Society (AP/LS) appointed a subcommittee to review scientific evidence and produce a consensus position paper on the best procedures for constructing and conducting lineups and photospreads for eyewitnesses to crimes. In 1998, the results of the subcommittee's efforts were approved by the Executive Committee of AP/LS and were published. See Gary L. Wells, et al., Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, Law and Human Behavior, Vol. 22, No. 6 (1998).

In October 1999, the National Institute of Justice released a similar proposal for improved procedures for the collection and preservation of eyewitness evidence in the criminal justice system. See National Institute of Justice, Eyewitness Evidence: A Guide for Law Enforcement (1999), cited hereafter as "NIJ Guide," available at http://www.ncjrs.org/pdffiles1/nij/178240.pdf. The NIJ Guide was developed over the period of a year by a technical working group (TWG) of law enforcement, legal practitioners, and researchers in the field of eyewitness identification from across the United States and Canada, including Professor Wells.[12]

The NIJ Guide was heralded as one of experimental psychology's "greatest research-to-action achievements." Kathryn Foxhall, Suddenly, a Big Impact on

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[12] The planning panel of the TWG included a professor from Florida International University in Miami, Florida. The TWG itself included two law enforcement officers from Tampa, Florida. See NIJ Guide at v, vi.

Criminal Justice, Monitor on Psychology (Vol. 31, No. 1, Jan. 2000). It includes recommendations on how to compose photo lineups and live lineups (e.g., have only one suspect at a time in a lineup; ensure that "fillers" be people who fit the general description the witness has given), how to instruct witnesses prior to viewing a lineup (e.g., tell the witness that the perpetrator may not be in the lineup), how to conduct the identification procedure itself (e.g., interview the witness with open-ended questions and avoid questions that would lead the witness), and how to record the results (e.g., record the witness's confidence statement before providing any feedback).

The NIJ Guide takes an important first step toward reducing the number of persons wrongfully convicted based on eyewitness identifications. However, according to its critics, it fails to address several important problems associated with identifications. See Donald P. Judges, Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement, 53 Ark. L.Rev. 231 (2000); Gary L. Wells et al., From the Lab to the Police Station; a Successful Application of Eyewitness Research, American Psychologist 581 (June 2000).

The national response to the NIJ Guide's recommendations has been varied. At least three states are attempting to implement the recommendations statewide. In 2001, *New Jersey* became the first state to officially adopt the NIJ Guide recommendation. See N.J. Dept. of Law and Public Safety, Office of the Attorney General, Guidelines

for Preparing and Conducting Photo and Live Lineup Identification Procedures, April 18, 2001, available at http://www.iastate.edu/faculty/gwells. (Note that, unlike the situation in Florida, where local police departments operate largely autonomously, in New Jersey the Attorney General has authority to order all police in the state to adopt particular procedures.) In 2002, the *Illinois* Commission on Capital Punishment released a report that included six recommended changes to lineups and photospreads, based on the NIJ Guide and the AP/LS recommendations. The report is available at http://www.psychology.iastate.edu/faculty/gwells/Illinoisrecommendations.pdf. In September of this year, *North Carolina*'s "Actual Innocence Commission" voted to recommend many of the NIJ procedures for all the state's law enforcement agencies, after studying the problem for almost a year. See Matthew Eisley, Better ID Sought in Criminal Inquiries, The News Observer (Raleigh, NC), Sept. 13, 2003, B1.

There are scattered reports of states attempting, unsuccessfully, to implement these changes by way of legislation. In New York, for example, a bill mandating sequential lineups was defeated in 2001, despite the fact that four of the defendants in the NIJ Case Studies had been wrongfully convicted in New York. Additionally, courts have tried to implement changes. In 2001, Brooklyn Supreme Court Justice Robert Kreindler ordered one of the city's first sequential lineups in a pre-trial hearing in a murder case. In response to that decision, the District Attorney's Office indicted the

defendant without the lineup identification, then got the trial judge to approve using a standard police lineup. See Sean Gardiner, Moving to Stop Wrong Convictions, Newsday (N.Y.) Dec. 10, 2002.

Finally, there are reports of local police departments in cities scattered across the country implementing one or more of the NIJ recommendations. See, e.g., Richard Willing, Police Lineups Encourage Wrong Picks, Experts Say, U.S.A. Today, Nov. 25, 2002 (citing changes in cities in California, Iowa, New Mexico, and New York).

Counsel for Petitioner is unaware of any jurisdiction in Florida that has adopted the NIJ recommendations. Even in Broward County – now infamous for the posthumous exoneration of Frank Lee Smith – local authorities who were asked whether they would follow New Jersey's lead replied, "Just because they're doing it in New Jersey doesn't mean they're going to do it here." Jim Leljedal, Broward County Sheriff's spokesman, explained that they would "keep an eye" on the methodology to "see if it proves more effective." See Nancy L. Othon, Florida Retains Witness Routine; Side-By-Side Photo Identification to Stay, Sun-Sentinel (Fort Lauderdale, Fla.), Aug. 13, 2001, at 1B (2001 WL 22749074). In Pinellas County, no procedural changes are planned, despite a review revealing that at least a dozen innocent people had been arrested since 1997 after an eyewitness – most often a police officer – misidentified them. In response to the review, Pinellas Sheriff Everett Rice stated,

"Cops need to understand that they have to be more careful. But they make thousands of arrests a year, and mistakes happen." According to Sheriff Rice, when mistakes occur, "It's the defendant's attorney's job to find these things out." See William R. Levesque, Police Can Be Dead Certain, And Wrong, St. Petersburg Times, Apr. 6, 2003, 1B.

It is unlikely that improved police procedures for eyewitness identifications will be adopted throughout the state of Florida in the near future. At present, the only possible remedy for the problem of mistaken identification consists of challenges to the identification before and during trial, discussed in the next section.

b. Suggestiveness Challenge Before Trial

As noted previously, the Ash majority believed that adequate safeguards were available under due process standards to prevent unfairly obtained identifications from being introduced at trial. 413 U.S. at 320, citing Simmons v. United States, 390 U.S. 377 (1968). The current test for excluding impermissibly suggestive identifications, articulated in Neil v. Biggers, 409 U.S. 188 (1972) and Manson v. Brathwaite, 432 U.S. 98 (1977), is the standard the appellate court applied in this case in finding that the identification of Mr. Jones from the video would be properly admitted at trial.

Under the two-pronged Biggers test, exclusion of testimony concerning a pretrial identification is not required even if the identification was obtained by a police

procedure that was both ***suggestive*** and ***unnecessary***, i.e., if testimony at the suppression hearing satisfies the first prong of the test. Because "reliability is the linchpin in determining the admissibility of identification testimony," see Brathwaite at 114, the crucial question is whether, under the circumstances, there is a very ***substantial likelihood of misidentification***, which the second prong of the test is designed to determine. The factors to be considered in evaluating the reliability of the identification include:

> [T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Grant v. State, 390 So. 2d 341, 343 (Fla. 1980), quoting Neil v. Biggers.

A review of the results of experiments examining factors contributing to mistaken identification strongly suggests there are basic flaws in both prongs of the Biggers test.[13]

Although the Biggers Court acknowledged that a one-person showup is a suggestive procedure, the Court provided no guidance for assessing the suggestiveness of other identification procedures. Since Biggers, research has established that

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[13] This argument is adapted from ideas presented in a draft document (unpublished) by Gary Wells entitled "What is Wrong with the Manson v. Brathwaite Test of Eyewitness Identification Accuracy?" available at http://www.psychology.iastate.edu/faculty/gwells.

suggestive identification procedures, ***even seemingly subtle ones***, can be very powerful contributors to mistaken identification. Lineup composition, instructions prior to viewing, previous erroneous viewings of the defendant, and unintentional behaviors of the investigator conducting the identification are all powerful sources of suggestiveness. Most courts, unaware of this research, will find nothing suggestive about procedures that in fact do influence witnesses identification decisions.

Further, the methods used for discovering the truth under certain circumstances, such as cross-examination of a dishonest witness, will not be effective in dealing with an identification witness at a suppression hearing who is honestly mistaken, and is unaware of the subtle factors that influenced his or her decision. Justice Stewart's concurrence in Ash, with his reference to the "overt influences that a witness can easily recount and that would serve to impeach the identification testimony," see 413 U.S. at 325, completely overlooks the fact, now scientifically documented, that most common suggestive factors – and their impact on witness decision-making – are not apparent to the untrained witness.

Finally, research raises three serious questions about the usefulness of the Biggers factors to determine reliability. First, most of the factors are what psychologists call "self-report variables," which are, in general, unreliable. See, e.g., R. E. Nisbett & T. D. Wilson, Telling More Than We Can Know: Verbal Reports on

Mental Processes, 84 Psychological Review 231-259 (1977). For example, regarding the "opportunity to view" factor, research has shown that eyewitnesses' estimates of the amount of time they viewed the perpetrator during the crime are greatly overestimated, see, e.g., H. R. Shiffman and D. J. Bobko, Effects of Stimulus Complexity on the Perception of Brief Temporal Intervals, 103 Journal of Applied Psychology 156 (1975), especially when there is stress or anxiety at the time of the viewing. The proportion of time that a person's face is occluded is also greatly underestimated by eyewitnesses. See G. L. Wells & D. M. Murray, What Can Psychology Say About the Neil v. Biggers Criteria for Judging Eyewitness Identification Accuracy?, 68 Journal of Applied Psychology 347-362 (1983).

In addition, psychological research shows that the Biggers factors themselves do not correlate particularly well with accuracy of identification. For example, experimental evidence does not show a close correspondence between the prior description given by the eyewitness and the likelihood that the identification is accurate. See, e.g., M. A. Piggot & J. C. Brigham, Relationship Between Accuracy of Prior Description and Facial Recognition, 70 Journal of Applied Psychology, 547-555 (1985). Similarly, although jurors are strongly influenced by testimony from a confident eyewitness, there is little correlation between the certainty of the witness and reliability. See Penrod & Cutler, Witness Confidence and Witness Accuracy: Assessing Their

Forensic Relation, 1 Psych. Pub. Pol. & Law 817, 825 (1995) ("under the conditions that typically prevail in short criminal encounters . . . witness confidence is largely unrelated to accuracy, and confidence in having made a correct identification is, at best, only modestly associated with identification accuracy").

Third, recent research reveals that suggestive procedures during the identification process directly lead to an upward distortion in the witness's responses on the reliability factors, i.e., level of certainty, opportunity to view the perpetrator during the initial encounter, degree of attention at that time, and so on. See S.L. Bradfield, G. L. Wells, E. A. Olson, E.A., The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy, 87 Journal of Applied Psychology 112-120 (2002); G. L. Wells & A. L. Bradfield, 'Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 Journal of Applied Psychology 360-376 (1998); G. L. Wells & A. L. Bradfield, Distortions in Eyewitnesses' Recollections: Can the Postidentification Feedback Effect Be Moderated?, 10 Psychological Science 138-144 (1999). In this research, eyewitnesses to simulated crimes who were given positive feedback ***after*** making a mistaken identification had significantly higher scores on questions about their certainty ***at the time of the identification***, their ability to view, their degree of attention, and so on, and also denied that the feedback influenced their

answers. In other words, a witness participating in a suggestive identification procedure is more likely to provide answers that yield a high "score" on the reliability prong of the Biggers test.

This research strongly suggests that the Biggers test does not provide an adequate safeguard against the introduction of mistaken identifications at trial.

c. Suggestiveness Challenges During Trial

When an identification is admitted at trial, there are four ways the defense can attempt to counter it: (1) by voir dire, to select jurors willing to consider a defense of mistaken identity; (2) by cross examination of testifying eyewitnesses; (3) by expert testimony; and (4) by special jury instructions. In Florida, none of these methods is likely to result in the acquittal of a wrongfully-identified defendant.

The same problems with ***cross-examination of the identification witness*** at the suppression hearing, discussed above, also apply to cross-examination at trial. Mistaken identification is a genuine error, often due to factors of which even the eyewitness herself is unaware. In addition, defense counsel, having no idea what went on during the identification, has little basis for effective cross-examination.

In Lavado v. State, 492 So. 2d 1322 (Fla. 1986), this Court held that defense counsel had a right to question prospective jurors during ***voir dire*** about their willingness and ability to accept a defense of voluntary intoxication. Courts across

Florida apply this holding in a variety of ways, some apparently believing that it applies only where the defense is unusual or likely to be disfavored by a large segment of the public; many trial courts restrict voir dire on the theory of the defense, believing that it amounts to "pretrying the case." See, e.g., Ingrassia v. Thompson, 843 So. 2d 986 (4th DCA 2003). Even where such voir dire is permitted, it is of limited value, as research has shown that characteristics that are identifiable before trial do not predict jurors' biases regarding eyewitness identification evidence. See D. J. Narby & B. L. Cutler, Effectiveness of Voir Dire as a Safeguard in Eyewitness Cases, 79 Journal of Applied Psychology 724-729 (1994).

Offering ***expert testimony*** is not a viable option for most defendants in Florida. In Johnson v. State, 438 So. 2d 774 (Fla. 1983), this Court affirmed the trial judge's exclusion of expert testimony about general factors affecting a witness's accuracy as well as the suggestiveness of the lineup in Mr. Johnson's case, stating:

> ***We hold that a jury is fully capable of assessing a witness' ability to perceive and remember, given the assistance of cross-examination and cautionary instructions, without the aid of expert testimony [footnote omitted] We find no abuse of discretion in the trial court's refusal to allow this witness to testify about the reliability of eyewitness identification***. Johnson at 777, emphasis added.

Fifteen years later, in McMullen v. State, 714 So. 2d 368 (1998), the Court explained that Johnson did not categorically hold that expert testimony on eyewitness

identification was inadmissible, as some courts erroneously believed. 714 So. 2d at 372, quoting McMullen v. State, 660 So. 2d 340, 342 (Farmer, J., concurring specially and expressing this view). Instead, the Court explained that Johnson merely left the decision about such expert testimony to the sound discretion of the trial court, noting that this "discretionary view" has been adopted by the overwhelming majority of federal and state courts. Id. at 372, 370. Despite this Court's clarification of Johnson, trial courts continue to cite the language of Johnson, and to concur with its view that jurors' common sense – guided by the standard jury instructions – will allow them to properly consider eyewitness testimony.[14] For this reason – and in view of the fact that expert testimony is expensive and is subject to limitations even when it is permitted, see, e.g., Rogers v. State, 511 So. 2d 526 (Fla. 1987) – the effectiveness of this "safeguard" against mistaken identification is minimal at present.

There is apparently no recent case law in Florida regarding the necessity of cautionary ***jury instructions*** as to factors now known to affect eyewitness identification testimony. In Nelson v. State, 262 So. 2d 1017 (Fla. 3d DCA 1978) the court of appeal, after affirming the trial court's exclusion of expert testimony on

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[14] As Justice Anstead pointed out in his dissent in McMullen, research indicates that the average juror actually knows very little about factors affecting the accuracy of eyewitness identifications; in fact, several "common sense" assumptions about the reliability of eyewitness identifications have been directly contradicted by psychological research. 714 So. 2d at 377.

eyewitness identification by Dr. Elizabeth Loftus, also affirmed the court's refusal to give a jury instruction based on United States v. Telfaire, 469 F. 2d 552 (1972). The court found that the subject was "within the ordinary experience of jurors," and that the standard instruction adequately covered the factors to be considered by the jury in evaluating the credibility of an eyewitness. Nelson at 1021, 1022.

In view of the fact that Biggers factors apparently do not correlate with witness reliability (see supra argument II.B.4.b.), it is likely that a jury instruction that accurately stated the relevant factors would be found not to be a "correct statement of the law."

C. Because Current Identification Procedures May Result in the Erroneous Identification and Subsequent Conviction of an Innocent Person, and Because They Cannot Be Adequately Challenged Either Before or During Trial, The Pre-Trial Identification is a Crucial Stage of the Prosecution at Which the Presence of Counsel is Constitutionally Required

In Traylor v. State, 596 So. 2d 957, where the question was whether the defendant's confession had been obtained in violation of his right to counsel under the Florida constitution, the Court concluded that once the right to counsel attaches, the defendant must be advised of the right at the commencement of each crucial stage of the prosecution. For the purpose of this advisement, the Court defined crucial stage as "any stage that may significantly affect the outcome of the proceedings." Id. at 968.

As the preceding arguments have demonstrated, the pre-trial identification of the

defendant by an eyewitness, whether from a live lineup or a recorded image, is – under current police practices and the current state of due process law – a crucial stage of the prosecution at which only the presence of counsel can protect the defendant's right to confront the witnesses and evidence against him in a meaningful way, and to be tried fairly.

The presence of counsel will pose minimal administrative difficulty; it has been successfully implemented in Minnesota since 1973. See People v. Anderson, 205 N.W. 2d (Mich. 1973) (holding that, subject to certain exceptions, identification by photograph should not be used where the accused is in custody; where there is a legitimate reason to use photographs for the identification of an in-custody accused, he has the right to counsel just as he would for corporeal identification procedures); see also People v. Winters, 571 NW 2d 764, 767 (Mich. App. 1997) (recognizing Anderson as the law in Michigan, but declining to extend it to identification conducted before initiation of adversary judicial criminal proceedings).

CONCLUSION

For the foregoing reasons, petitioner requests that this Court reverse the decision of the court of appeal, and hold that showing a videotape, photograph, or other recorded image of a criminal defendant to an eyewitness for the purpose of securing an identification is a "crucial stage" of the prosecution, triggering the right to the

presence of counsel under article I, section 16, of the Florida constitution.

Respectfully submitted,

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BILLIE JAN GOLDSTEIN
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Petitioner's Brief on the Merits (Corrected) has been furnished by mail to Erin K. Zack, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this _____day of January 2004.

____

BILLIE JAN GOLDSTEIN

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this brief was typed using 14-point proportionately spaced Times New Roman font, pursuant to Florida Rules of Appellate Procedure, Rules 9.100(1) and 9.210.

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BILLIE JAN GOLDSTEIN

APPENDIX