IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-

DCA NO. 3D02-2092

NATHANIEL CHARLES JONES,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On November 6, 2000, at 9:00 at night, Officer Rubinson of the Miami-Dade Police Department was in a police cruiser responding to an armed robbery call. The call described the robbery suspects as "two black males in a white Acura." (Appendix [App.] p. 2) Rubinson saw a white car speeding towards him. He caught a glimpse of the driver as he drove in the opposite direction at 45 miles per hour. (App. p. 4) Rubinson turned his car around and pursued the white car until his cruiser crashed. (App. p. 2) When Rubinson was interviewed by the lead robbery detective just after

the chase, he said nothing about seeing the driver's face. (App. p. 3)

Shortly after the chase, Rubison saw a "career criminal auto theft" BOLO flier that had been distributed by auto theft detectives Villegas and Fernandez. The flier included a photograph identified as **Nathaniel Jones**. (App. p. 2) Later, Rubinson testified that he had thought he recognized Jones as the driver he had chased. However, Rubinson did not contact the lead robbery detective on the November 6th armed robbery case, and he did not file a supplemental report. (App. pp. 3-4)

In December 2000, Jones was charged with some unrelated burglaries. After he participated in a video taped lineup, the burglary charges were dropped. However, he was charged with committing the armed robbery on November 6, 2000, after one of the two victims identified him as the perpetrator. (App. p. 2)

In the Fall of 2001, Jones's attorney disclosed several alibi witnesses. On February 15, 2002, after deposing Jones's alibi witnesses, the assistant state attorney held a meeting in his office to discuss the case of State v. Jones. Although Mr. Jones was not charged with auto theft in connection with this case, detectives Villegas and Fernandez from the auto theft unit – who had arrested Jones several times – were invited to the meeting. Officer Rubinson was there, as well. (App. p. 2) After Rubinson confirmed that he had been involved in chasing the white car that was

speeding away from the scene of the armed robbery, the assistant state attorney showed Rubinson the video tape of the lineup conducted in December 2000. Detectives Villegas and Fernandez were instructed to sit in the same room with Rubinson as he viewed the tape. For the first time, Rubinson identified Jones as the person he had seen driving the speeding car 15 months previously. (App. p. 3)

Defense counsel was informed about the newly-discovered eye witness. The trial was continued, and a motion was filed to suppress the identification based on the unnecessarily suggestive manner in which it was obtained. (App. p. 3)

At the evidentiary hearing, Rubinson admitted that he knew that Jones had been charged in the case and he knew what Jones looked like from the BOLO when he attended the meeting; he admitted that he viewed the video tape after chatting with, and in the presence of, the two auto theft detectives who had arrested Jones previously several times. (App. p. 3) However, he insisted that he had identified Jones based solely on what he saw the night of the chase. Although he glimpsed the driver for only about a second that night, he explained that the cruiser's spotlight was on, as was the interior light of the white car. (App. p. 4) When questioned about his failure to inform the robbery detective that he suspected Jones might be the driver after seeing Jones's photo in the auto theft BOLO, he replied that he believed he did tell his Captain at that

time that he thought he recognized Jones. (App. pp. 3-4)

Detectives Fernandez and Villegas testified that they did not say or do anything to influence Rubinson's video tape identification of Jones. Fernandez denied stating, in Rubinson's presence, that he was "going to get [Jones] off the street for good." Villegas stated that he would say that he would like to get Jones off the street if he committed a crime. (App. p. 3)

The trial court suppressed the out-of-court identification. The court considered all of the circumstances of the case, including "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 defendant," and concluded that the identification was not "accurate or believable." (App. p. 4)

On appeal, in addition to reviewing the Biggers issue, see Neil v. Biggers, 409 U.S. 188 (1972), the court considered whether the trial court's ruling was legally correct for a reason not cited by the trial court but mentioned by defense counsel, i.e., because the identification procedure amounted to a **violation of the right to counsel**. After supplemental briefing, the court of appeal, en banc, held 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." The court overruled its earlier rulings to the contrary in Cox v. State, 219 So. 2d 762 (Fla. 3d DCA 1969) and State v. Gaitor, 388 So. 2d 570 (Fla. 3d DCA 1980), and relied on United States v. Ash, 413 U.S. 300 (1973). (App. p. 5)

SUMMARY OF ARGUMENT

In State v. Jones, 2003 WL 21658258 (Fla. 3d DCA July 16, 2003), relying on United States v. Ash, 413 U.S. 300 (1973), the Third District Court of Appeal expressly construed a provision of the state and federal constitutions when it held that "a witness' viewing of a video taped lineup is not a crucial or critical state 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." The discretionary jurisdiction of this Court may be invoked to review this decision. See Fla. R. App. P. 9.030(a)(2)(ii).

Petitioner urges this Court to exercise its discretion and grant review. The right-to-counsel analysis in Ash was based on the federal bill of rights, which does not dictate the outcome in this case. This Court's obligations under federalist principles require the Court to conduct an independent analysis of the issue.

The Ash decision contains serious flaws in its analysis of this issue. Further,

it is based on assumptions about the reliability of eyewitness identification which were questionable even in 1973, and which have been completely discredited in the thirty years since then. For these reasons, Ash sets a standard so low that defendants in Florida routinely risk wrongful conviction because of problems during pre-trial identifications that could have been minimized by the presence of counsel.

ARGUMENT

ASH DOES NOT DICTATE THE OUTCOME IN THIS CASE, BECAUSE FLORIDA COURTS MUST ANALYZE CONSTITUTIONAL CLAIMS INDEPENDENT OF FEDERAL JURISPRUDENCE, WITH FEDERAL CASES SERVING ONLY TO SET A MINIMUM STANDARD. ASH, WHICH WAS DECIDED 30 YEARS AGO, SETS THE STANDARD TOO LOW, DENYING DEFENDANTS A RIGHT TO COUNSEL AT WHAT MAY BE THE MOST CRITICAL STAGE OF ALL

The right-to-counsel analysis in Ash was based on the federal bill of rights, which does not dictate the outcome in this case. As this Court explained,

> "The federal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous states by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation" Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992)[1]

[1] The Florida Constitution articulates only one exception to this rule. Article I, section 12 provides that the right to be free from unreasonable searches and seizures "shall be construed in conformity with the 4th Amendment of the United

This Court's obligations under federalist principles require the Court to conduct an independent analysis of the issue:

> When called upon to decide matters of fundamental rights, Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein. Traylor at 962-963, footnote omitted.

Florida courts have discussed the differences between federal and state constitutional requirements vis à vis many aspects of the right to counsel.[2] However, appellee is unaware of any other Florida decisions on the particular aspect of the right to counsel raised in this case. Here, the court of appeal construed the state and federal constitutions to deny a criminal defendant the right to counsel at what is arguably the most critical stage during the entire criminal process: when a victim or witness makes an identification from a photographic array or videotape. This decision is reviewable by this Court under Rule of Appellate Procedure 9.030(a)(2)(ii).

States Constitution, as interpreted by the United States Supreme Court."

[2] See, e.g., Traylor, supra (holding, inter alia, that a prime right embodied by the state right to counsel is the right to choose one's manner of representation against criminal charges, i.e., the right to conduct one's own defense as well as the right to assistance of counsel); Phillips v. State, 612 So. 2d 557, 558 (Fla. 1992) (determining the point when right to counsel attached under both federal and state constitutions); State v. Smith, 699 So.2d 629 (Fla. 1997) (analyzing whether defendant made valid waiver of right to counsel during custodial interrogation under both federal and state constitutions).

Petitioner urges this Court to exercise its discretion in this case, and to accept jurisdiction to consider whether the 1973 holding of Ash – that a criminal defendant has no right to counsel during any pre-trial identification other than a live line-up or show-up – sets a standard so low that defendants routinely risk wrongful conviction because of problems during pre-trial identifications that could have been minimized by the presence of counsel (or the functional equivalent thereof).

As will be fully briefed once this Court accepts jurisdiction, the Ash decision contains serious logical flaws in its analysis of United States v. Wade, 388 U.S. 218 (1967). Further, it is based on assumptions about the reliability of eyewitness identification which were questionable even in 1973, and which have been completely discredited in the thirty years since then. The concerns of the Ash dissent take on an almost prophetic quality when considered in light of research on eyewitness identification over the past 30 years, which confirms the unreliability and suggestability of eyewitnesses,[3] as well as the experience of numerous defendants who have been

[3] See, e.g., Adult Eyewitness Testimony: Current Trends and Developments (David F. Ross et al. eds., 1994); Gary L. Wells, et al., Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads, Law and Human Behavior, Vol. 22, No. 6 (1998).

wrongfully convicted on the basis of errors in eyewitness identifications.[4]

In its reply brief in the lower court in this case, the State cited out-of-state cases to support its position that Ash should be followed. Two of the state cases cited, both decided 25 years ago, concluded that the existence of a tangible photograph or videotape makes it possible for defense counsel to "reconstruct" the pre-trial identification and "cure" any defects at trial. See Bruce v. Indiana, 375 N.E. 2d 1042 (1978) and McMillian v. State of Wisconsin, 265 N.W. 2d 553 (1978). Another case, People v. Dominick, 182 Cal. App. 3d 1174, 227 Cal. Rptr. 849 (1986), addressed the question of right to counsel, which was "toyed with" on appeal, in a footnote. The court concluded that a videotape "clearly appears" to be akin to a photograph, and there is no right to counsel at the showing of a photograph, in part because the evidence of the identification procedure is "preserved."

This notion that the evidence of the identification procedure is "preserved" and

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[4] See, e.g., E. Connors, T. Lundregan, N. Miller, & T. McEwen, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial (U.S. Dep't of Justice, Office of Justice Programs, Report No. NCJ161258, 1996) (all 28 mistaken convictions studied, involving defendants were subsequently cleared with DNA evidence, were predicated on mistaken eyewitness identifications); C.R. Huff, A. Rattner, & E. Sagarin, Convicted But Innocent: Wrongful Conviction and Public Policy (1996) (mistaken eyewitness identifications were implicated in 60% of the more than 500 erroneous convictions studied).

the defense can "duplicate" a photographic identification, just as the defense can duplicate the State's scientific analysis of fingerprint or blood evidence, reflects a serious misunderstanding of the issue in this case. The defense can duplicate fingerprint or blood analysis only because the accused's tests can be made independently of those of the Government. With respect to eyewitness identifications, whether corporeal or photographic, once suggestion by the Government has tainted the identification, its mark is "virtually indelible." See Ash, supra, at 336 n. 15 (dissent).

Another fallacy on which Ash is based is the notion that, because a photographic line-up does not involve the "physical presence of the accused at a trial-like confrontation with the Government," it therefore is not a critical stage where the accused is entitled to counsel. Ash at 343-344. As the dissent in Ash pointed out, there is no basis in logic or law for concluding that the Wade holding is limited to identifications involving physical confrontation. The decisions in Wade and Gilbert v. California, 388 U.S. 263 (1967) – as well as an honest appraisal of the realities of eyewitness identifications – compel the conclusion that a pretrial photographic or videotaped identification, like a live lineup or show-up, is an extremely "critical stage" of the prosecution where the presence of counsel (or the functional equivalent) is required in order to avoid serious prejudice and preserve the defendant's basic right to a fair trial

at which the witnesses against him may be meaningfully cross-examined.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court exercise its discretionary jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Reply Brief of Petitioner on the Merits has been furnished by mail to Erin K. Zack, Assistant Attorney General, Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this _____ day of July 2003.

_____
BILLIE JAN GOLDSTEIN, APD

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.

_____

BILLIE JAN GOLDSTEIN, APD