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 REPLY BRIEF

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ARGUMENT[1]

I.

THIS COURT PROPERLY CONCLUDED THAT THIS CASE MEETS THE CRITERIA FOR DISCRETIONARY REVIEW

In its answer brief, respondent "adheres to its position" that this Court has no authority to review this case because the district court's holding below does not "expressly construe a provision of the state or federal constitution." (AB. 25 n.2, quoting Fla. R. App. P. 9.030(a)(2)(A)(ii)) On pages 6 to 7 of its brief on jurisdiction, citing Armstrong v. City of Tampa, 106 So. 2d 407, 409 (Fla. 1958) and Ogle v. Pepin, 273 So. 2d 391 (Fla. 1973), respondent characterized the district court's opinion as "merely appl[ying] a clear-cut constitutional provision to the facts of this case."

Respondent is incorrect. As discussed more fully on the following pages, the literal requirements of Armstrong, to the extent they ever applied, were declared "no longer controlling" in 1969. While review will not be granted where the lower court "inherently construed" constitutional provisions without even mentioning the constitution, as in Ogle, or where the petitioner simply claims that the lower court's

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[1] This reply brief addresses only those points in the answer brief (AB.) which were not adequately argued in the initial brief (IB.). In response to all other points, petitioner relies on the arguments that were made in the initial brief, as well as those that will be made orally before this Court on April 21, 2004.

ruling has the effect of violating a constitutional right, this Court has often accepted jurisdiction in cases like this one. Although the lower court did not literally "explain or define" a constitutional provision, the court explicitly addressed a constitutional issue regarding the right to the presence of counsel that was unresolved and in doubt, making this case appropriate for review by this Court.

In Armstrong, the trial court had entered judgment upholding the validity of a municipal ordinance, and the plaintiff appealed directly to the Supreme Court. As one basis for jurisdiction, she argued that enforcement of the ordinance against her would violate various provisions of the state and federal constitutions.

At that time, the Court was in a "period of transition." The legislature had recently amended the Florida constitution to create three district courts of appeal. In the process, the jurisdiction of the supreme court was redefined to authorize, inter alia, direct appeals as a matter of right from "decrees directly passing upon the validity of a state statute . . . or construing a controlling provision of the Florida or federal constitution." 106 So. 2d at 408 (citing Art. V, § 4, Fla. Const. (effective 7/1/57)). T determine whether the final decree in Ms. Armstrong's case could be directly appealed to the Supreme Court under the amended constitution, the Court reviewed the decisions of other states with similar constitutional provisions, and concluded:

> We agree with those courts which hold that in order to sustain the jurisdiction of this court there must be an actual

> construction of the constitutional provision. ***That is to say, by way of illustration**, that the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision.* It is not sufficient merely that the trial judge examine into the facts of a particular case and then apply a recognized, clear-cut provision of the Constitution. . . . [¶] . . . . Any contrary view could conceivably result in bringing practically every erroneous decree or judgment directly to this court . . . because it could be contended that in practically every instance where error has been committed the offended party has in some measure been denied due process of law. 106 So. 2d at 409-410 (emphasis added).

The Court then transferred the case to the District Court of Appeal. Id. at 411.

In citing the above-quoted language to support its argument opposing jurisdiction in its brief on jurisdiction, respondent overlooked the fact that the language is given "by way of illustration," and does not state a requirement that the lower court must literally "explain, define, or otherwise eliminate existing doubts arising from a constitutional provision." See, e.g., Dade County v. Mercury Radio Service, Inc., 134 So. 2d 791 (Fla. 1961) (accepting jurisdiction in case where trial court's conclusion that ordinance was invalid rested simply on a reference to the constitutional provision preserving the superiority of state statutes); Board of County Commissioners v. Boswell, 167 So. 2d 866 (Fla. 1964) (same); Kirk v. Baker, 224 So. 2d 311, 317 (Fla. 1969) (stating "insofar as this particular point [that the order under review must literally undertake to explain or define the constitutional language] is concerned, Armstrong is no longer

controlling”).

Perhaps believing that Armstrong had been overruled completely, the appellant in Ogle v. Pepin, also cited by respondent, requested supreme court review of a court of appeal opinion that included no discussion or reference whatsoever to any constitutional provision or argument. Mr. Ogle suggested as a basis for jurisdiction that the district court had “inherently” construed the provisions of the state constitution. The Supreme Court rejected this suggestion. The Court explained that a judgment cannot construe a constitutional provision “inherently,” without making reference to it, noting, “By definition, it is apparent that some language is essential to construe a provision.” 273 So. 2d at 392.

This case stands in sharp contrast to Ogle. There is nothing “inherent” about the Third District’s analysis, set forth in 115 lines of discussion, frequently referencing Article I, section 16, on the issue of whether criminal defendants in Florida have the right to the presence of counsel at the showing of a videotaped lineup for identification purposes. (See IB., Appendix at 5-9)

The law regarding discretionary jurisdiction is essentially the same now as it was in 1973, when Ogle was decided. The 1980 amendment of the provision at issue here – substituting the word “expressly” for the word “directly,” and placing it in front of every word it defined, rather than at the beginning of the phrase – was essentially a

clarification and codification of existing law.[2] There have been no other amendments since that time. Thus, while the literal language of Armstrong is not controlling, neither will review be granted in a case where the court of appeal failed even to mention the constitution, as in Ogle v. Pepin, or ***merely applied a settled constitutional principle*** to the facts of the case. See, e.g., Page v. State, 113 So. 2d 557 (Fla. 1959) (finding no jurisdiction and transferring to district court of appeal where trial court rejected defendant's claim that prosecution for perjury in a former trial would constitute double jeopardy). Instead – in keeping with its role of resolving important legal issues on a statewide basis – this Court may accept review of any appellate decision that attempts to ***explain or amplify constitutional provisions***, in order to determine whether an evolution in constitutional law is proper. See Twenty-Five Years and Counting, supra, n. 2 at 1218-1219.

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[2] Regarding the 1980 amendments, see generally The Florida Bar, Florida Appellate Practice § 12.1 (2003) (citing A. England et al., Florida Appellate Reform One Year Later, 9 Fla. St. U. L. Rev. 221 (1981)). After the amendment, the provision at issue here stated that the Court "may review any decision of a district court of appeal that ***expressly*** declares valid a state statute, or that ***expressly*** construes a provision of the state or federal constitution, or ***expressly*** affects a class of constitutional or state officers . . . ." Art. V, § 3(b)(3), Fla. Const. (effective 4/1/80) (emphasis added). Commentators have expressed the view that the amendment merely codified prior case law. See Twenty-Five Years and Counting: A Symposium on the Florida Constitution of 1968, 18 Nova L. Rev. 1151, 1219 (Winter 1994) (citing A. England et al., Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reforms, 32 U. Fla. L. Rev. 147, 184 (1980)).

While "the line that separates 'explain or amplify' from 'mere application' has sometimes been hard to see," id. at 1220, the line is easy to see in this case. Here, there was no settled constitutional principle for the court of appeal merely to apply. There were doubts to eliminate, arising from the court's earlier holdings in Cox v. State, 219 So. 2d 762 (Fla. 3d DCA 1969) and State v. Gaitor, 388 So. 2d 571 (Fla. 3d DCA 1980), the logical and factual flaws in the 30-year-old United States Supreme Court decision in United States v. Ash, 413 U.S. 300 (1973), and the absence of any recent cases addressing the issue on state constitutional grounds. The district court's decision overruled its earlier decisions and explained in detail why, in its view, the showing of a videotaped lineup is a not a "crucial stage" under Florida's constitution. On October 30, 2003, as it has done in many other cases, this Court correctly determined that review is authorized.[3]

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[3] Compare State v. Jones, 849 So. 2d 438, 440-442 (Fla. 3d DCA 2003) (construing Art. I, § 16, Fla. Const. as not providing Mr. Jones a right to counsel at identification from video) with, e.g., Doe v. Malicki, 771 So. 2d 545 (Fla. 3d DCA 2000) (construing U.S. Const., Amend. I as not barring Ms. Doe's lawsuit against priest, church, and archdiocese), reviewed in Malicki v. Doe, 814 So. 2d 347 (Fla. 2002); Pearson v. Moore, 767 So. 2d 1235 (Fla. 1st DCA 2000) (construing Art. I, § 18, Fla. Const. as prohibiting Department of Corrections from refusing to give effect to Mr. Pearson's sentence imposed by circuit court), reviewed in Moore v. Pearson, 789 So. 2d 316 (Fla. 2001); Foster v. State, 596 So. 2d 1099 (Fla. 5th DCA 1992) (construing double jeopardy clause as permitting Mr. Foster's conviction of both robbery and aggravated battery, both arising out of a single course of criminal conduct), reviewed in Foster v. State, 613 So. 2d 454 (Fla. 1993).

II.

THE CASES CITED BY RESPONDENT DO NOT UNDERMINE PETITIONER'S ARGUMENT

Respondent asserts that "[t]he majority of jurisdictions around the country addressing this issue have adopted Ash and refused to extend the right to counsel to either photographic or videotaped identification procedures." (AB. 16-20, citing cases) Respondent also notes that this Court has previously "expressed an interest in following a majority of other jurisdictions" (AB. 23, citing Traylor v. State, 596 So. 2d 957 (Fla. 1992)), and has "mirrored" or "adhered to" or "deferred consideration of . . . thorny problems to" the United States Supreme Court when applying Florida's right to counsel. (AB. 21, 22, 23, citing cases). Thus, respondent concludes that this Court should affirm the district court's opinion following Ash. (AB. 25)

There are several problems with this argument. First, none of the jurisdictions cited by respondent critically reviewed Ash's legal analysis, or considered the effect of changes in our understanding of the process of eyewitness identification on the rationale of Ash. The federal jurisdictions, of course, had no choice but to "adopt" Ash. The state jurisdictions focused their attention on determining whether the identification method at issue was more like a live lineup or a photographic array, then applied Ash without considering, on state constitutional grounds, any alternative.

Even if the cited jurisdictions had made a reasoned decision to adopt Ash, Traylor

would provide no support for respondent's suggestion that this Court should assume a passive, "follow-the-leader" stance when confronting this thorny constitutional issue. Nor do the cited cases support the suggestion that this Court has historically "mirrored" or "adhered to" federal law, and should continue to do so.

Most of the authorities cited by respondent simply quoted the Ash Court's assumption that there is a right to the presence of counsel only where there is ***a physical "confrontation***" with the defendant – rebutted by Justice Brennan in his dissent in Ash, see IB. 18-20 – and its conclusion that the preservation of the identification photographs ***ensures reliable "reconstruction***" of the identification process, eliminating the need for counsel. (Addressed at IB. 22) Even the one law review article respondent cited (see AB. 20) simply summarized the current state of federal law in the area of identifications, with no analysis. See Andrew B. Kales, Identifications, 90 Geo. L.J. 1232 (2002) (31st Annual Review of Criminal Procedure).

In each of the federal cases respondent cited,[4] the reviewing court concluded that the particular identification method at issue was comparable to the photographic array in Ash rather than the line-up in Wade, for purposes of right-to-counsel analysis. Each

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[4] U.S. v. Otero-Hernandez, 418 F. Supp. 572, 574-575 (M.D. Fla. 1976) (ID from audiotape of voice) (AB. 20); U.S. v. Amrine, 724 F. 2d 84, 86-87 (8th Cir. 1983) (ID from videotape of lineup) (AB. 17); U.S. v. Barker, 988 F. 2d 77, 78 (9th Cir. 1993) (ID from photograph of lineup) (AB. 18).

court then followed Ash, as it was bound to do.

In this case, petitioner's argument assumed that an identification from a videotape is comparable to one from a photo, and would be governed by Ash if the case were in federal court. However, petitioner argued that Ash was wrongly decided, and that the results of three decades of research in the psychology of eyewitness identification undermine many of the Ash Court's assumptions. In construing Florida's constitution, this Court – unlike the federal courts cited – is in no way bound by Ash. See generally M. Sheridan & B. Delapena, Individual Liberties Claims, 19 Wm. Mitchell L. Rev. 683, 691-706 and authorities cited therein (1993).

In respondent's state cases,[5] the issue was, again, whether a certain identification method was more in the nature of a live lineup, governed by Wade, or a photographic display, governed by Ash. Each court concluded that the method was more like displaying a photograph, then applied Ash and found no constitutional violation. None

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[5] Bruce v. State, 375 N.E. 2d 1042, 1086 (Ind. 1978) (ID at live lineup that was videotaped) (AB. 19) (abrogated on another ground at 564 N.E. 2d 287, 289-290 (Ind. Ct. App. 1990); McMillian v. State, 265 N.W. 2d 553, 555-556 (Wis. 1978) (ID from videotape) (AB. 18); People v. Dominick, 182 Cal. App. 3d 1174, 1197 n. 15 (1986) (ID from videotape) (in dicta, citing People v. Rist, 16 Cal. 3d 211, 216-217 (1976) which cited Ash) (AB. 19); White v. State, 502 A. 2d 1084, 1088-1089 (Md. Ct. Spec. App. 1986) (ID from audiotape of voice) (AB. 19); (State v. Trottman, 701 So. 2d 581, 583 n.3 (Fla. 5th DCA 1997) (ID from audiotape of voice) (AB. 17); Merritt v. State, 76 S.W. 3d 632, 634-635 (Tex. Ct. App. 2002) (no right to counsel during videotaping of lineup; no ID made from videotape) (AB. 19).

of the courts was asked to consider the continuing viability of Ash under the state constitution. Only two of the courts even mentioned the state constitution at all.[6] Offering absolutely no critical analysis of the issue, the state cases cited by respondent cannot guide this Court in resolving the issue in this case.[7]

To support its contention that this Court "has embraced the reasoning of federal case law and aligned itself with the United States Supreme Court's well-reasoned right to counsel jurisprudence," respondent cites Traylor v. State, 596 So. 2d 957, 972 (Fla. 1992); Perkins v. State, 228 So. 2d 382, 390 (Fla. 1969); Chaney v. State, 267 So. 2d 65 (Fla. 1972); Stewart v. State, 549 So. 2d 171 (Fla. 1989); and Smith v. State, 699

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[6] See Trottman, 701 So. 2d at 583 n. 3 (addressing Fifth Amendment issue in body of opinion, but stating in a footnote, "We [also] conclude that defendant had no Sixth Amendment or Section 16 right to counsel at this stage of the investigation"); Merrit, 76 S.W. 3d at 634 ("[Appellant] argues his right to counsel under the Texas and federal constitutions was violated when he was denied counsel during the videotaped lineup").

[7] Respondent's reliance on Traylor to support its suggestion that this Court has in the past – and should in this case – defer to the opinions of other state courts is misplaced. In Traylor, the Court stated that the "right to choose one's manner of representation in a criminal trial has been recognized ***historically*** by both this Court and our state legislature as an obvious but important state right belonging to the accused." Id. at 967 (emphasis added, citing Florida statutes enacted in 1906 and cases decided in 1907 and 1918). The Court noted that this right was also explicitly recognized by the United States Supreme Court in Faretta in 1975, and is preserved in the constitutions of at least thirty-six other states. Id. at 968. The Traylor Court then went on to hold that this right is a "prime right" embodied by Florida's Counsel Clause, and to determine – completely independently of any other jurisdiction – the parameters of the right, such as when it attaches and when the defendant must be advised of it. Id. at 968-969.

So. 2d 629 (Fla. 1997). (AB. 21, 22-23)

According to respondent, Traylor confirms that Florida's right to counsel, like the Sixth Amendment right, attaches "only to confrontations." (AB. 21, citing 596 So. 2d at 972) Assuming respondent means "physical confrontations," only a strained reading of the Traylor opinion could suggest this limitation. The issue in Traylor was whether the defendant's confessions, ***made during a physical confrontation*** with a Florida police officer in Alabama, were obtained in violation of his state constitutional right to counsel. In answering that specific question, on page 972, the Court stated:

> "Because Traylor . . . requested counsel at the preliminary hearing and a lawyer was appointed, Florida police were constitutionally barred from initiating any crucial ***confrontation*** with him on that charge in the absence of his lawyer for use in a Florida court." (Emphasis added)

Thus, the Traylor court talked about a "crucial confrontation" not to limit the right to counsel to physical encounters but to describe the facts of the case under review.

Similarly, this Court relied on federal cases to support its decision in the remainder of the cited cases not because it was "aligning" itself with or "embracing" these cases but because the appellant was not requesting a ruling on state constitutional grounds. See Perkins, 228 So. 2d at 389 (stating that appellant's contentions of violation of right to counsel are grounded largely, if not exclusively, on application of Supreme Court's pronouncements in U.S v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967) and that Court preferred to defer consideration of

the “thorny problems” of the expansion of Wade and Gilbert to that Court); Chaney, 267 So. 2d at 67-68 (noting that, in support of his argument, appellant relied on rationale of Wade and Gilbert); Stewart, 549 So. 2d at 173 (noting that appellant argued that evidence of his conversation was obtained in violation of his sixth amendment right to counsel in violation of U.S. v. Henry, 447 U.S. 264 (1980)); Smith, 699 So. 2d at 638 (agreeing with appellant that right to counsel attached under both Amend. VI and Art. I, § 16 when he was questioned after indictment had already been filed, not because Court “embraced” or “aligned itself” with federal law – as ***right had attached even earlier under state law*** – but because appellant’s assertion was correct).

As previously observed, 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. (See IB. 30-32, listing examples) Respondent states that none of these examples “have any relevancy to the issue before this Court.” (AB. 25) Petitioner submits that they do illustrate Florida’s commitment to providing a right to counsel whenever it is required to assure the fairness of the criminal justice process, which was the purpose of mentioning them.

(IB. 32-33)

III.

THE ANDERSON CASE PROVIDES A MODEL FOR THE COURT'S ANALYSIS IN THIS CASE

Respondent states that Michigan is the only jurisdiction that has chosen not to "align itself" with the rest of the country with respect to the issue in this case (AB. 20), and that Michigan extends the right to counsel even at pre-indictment lineups, while Florida does not. (AB. 21) In fact, the right to counsel during photo identification procedures was also announced in Pennsylvania before Ash, see Commonwealth v. Whiting, 266 A.2d 738, 740 (1970), and continued to be applied after Ash. See Commonwealth v. DeHart, 516 A. 2d 656, 665 (Pa. 1986) (noting that the Whiting standard "is more favorable to the accused than the federal standard"). Further, in both Florida and Michigan it is normally the arrest of the defendant, not the indictment, that triggers the right to counsel at an identification. See Fla. R. Crim. P. 3.111(a); People v. Kurylczyk, 505 N.W. 2d 528, 533-534 (Mich. 1993) (holding that counsel is not required at pre-custodial, investigatory photographic lineups; right attaches with custody).

Describing how Michigan adopted and retained its right to counsel at photo identifications, respondent states that the Michigan Court "applied Wade . . . and formulated [certain] rules" just before Ash, then addressed the issue after Ash and

decided to "adhere to its [prior] view." (IB. 20, citing People v. Anderson, 205 N.W. 2d 461 (Mich. 1973); People v. Jackson, 217 N.W. 2d 22 (Mich. 1974), disapproved on another point at 597 N.W. 2d 148, 155 (Mich. 1999))

The Anderson Court's opinion reveals far more than a routine application of Wade. The Court conducted a scholarly legal analysis of Wade, as well as Gilbert v. California, 388 U.S. 263 (1967), Stovall v. Denno, 388 U.S. 293 (1967), Simmons v. U.S., 390 U.S. 377 (1968), and Kirby v. Illinois, 406 U.S. 682 (1972), see 205 N.W. 2d 465-468, followed by a detailed discussion of scientific and legal authorities on problems in eyewitness identification, see 205 N.W. 2d 469-472, supplemented by an extensive appendix discussing additional references and surveying psychological factors identified as major causes of the problem. See 205 N.W. 2d at 479-494.

Regarding its approach to legal decision-making, the Anderson Court explained that certain factors in eyewitness identification in criminal cases "have such widespread and deep-rooted impact on everyday police work, prosecution and criminal procedure rules that this opinion must . . . consider the scientific and historical data behind [three of the] factors in order to promote the fullest understanding and acceptance of the resulting rules of law." 205 N.W. 2d at 468.

After completing its review of scientific and legal authorities, the Court stated,

> [W]e find that there are serious problems concerning the accuracy of eyewitness identification and that real prospects for error inhere in the very

> process of identification completely independent of the subjective accuracy, completeness or good faith of witnesses. For almost 100 years these problems have occupied the energy of some very astute judges, prosecutors and scholars who have consistently identified the problems. We cannot blink at the evidence of the problem and must make a forthright effort to insure that evidence of eyewitness identification is as reliable as possible. 205 N.W. 2d at 472.

The Court approved the rule, previously announced by the Michigan court of appeals, that an accused in custody has a right to have counsel present at a photographic identification, noting support for this position in other jurisdictions. 205 N.W. 2d at 472-476. A year later, "[a]fter due consideration of the . . . Ash opinion[]," the Court adhered to this view. See People v. Jackson, 217 N.W. 2d at 27.

Petitioner submits that the need for legal rules and constitutional protections that are grounded in scientific and historical realities is as great in this case as it was in Michigan in 1973 and 1974, and urges this Court to take a similar approach to resolving the important issue presented here.

CONCLUSION

For these reasons, and for the reasons set forth in his brief on the merits, 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 a state constitutional right to the presence of counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Petitioner's Reply Brief 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 February 2004.

____

BILLIE JAN GOLDSTEIN
Assistant Public Defender

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
Assistant Public Defender