

2000

# Utah v. Gino Maestas : Brief of Appellant

Utah Supreme Court

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## Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :  
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 Plaintiff/Appellee, :  
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 v. :  
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 GINO MAESTAS, : Case No. 000094-SC  
 : Priority No. 10  
 Defendant/Appellant. :

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**BRIEF OF APPELLANT**

Interlocutory appeal from the Order entered January 5, 2000 by the Honorable Robert K. Hilder, Judge of the Third Judicial District Court in and for Salt Lake County, State of Utah, granting the State's motions to exclude expert testimony on eyewitness identification and to allow presentation of voluntary statements of Defendant during the State's case-in-chief.

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**JURISDICTIONAL STATEMENT**

This Court has jurisdiction over this interlocutory appeal pursuant to Utah Code Ann. § 78-2-2(3)(h) (1996). See Order granting interlocutory review in Addendum A.

**STATEMENT OF THE ISSUES, STANDARDS OF REVIEW  
AND PRESERVATION**

Issue 1: Whether the trial court abused its discretion in refusing to allow Maestas to introduce expert testimony in support of his identification defense where identification is the central issue, there is little evidence linking Maestas to the robberies, and the proffered testimony is material and relevant?

Standard of Review. Ordinarily, appellate courts review an order excluding expert testimony for an abuse of discretion. Gaw v. State Dep't. of Transportation, 798 P.2d 1130, 1133 (Utah App. 1990). "However, the trial court does not properly exercise that discretion where its decision is based upon a misconception of law." Id. at 1134 (citations omitted).



Preservation. This issue was preserved in the trial court. R. 640-41, 861-3, 864-68. A copy of the Findings of Fact and Conclusions of Law is in Addendum C. The Order, which addresses both issues raised in this appeal, is in Addendum B.

Issue 2. Whether the trial judge erred in allowing the state to use Appellant's incriminating statements made to a presentence investigator and the sentencing judge as evidence in its case-in-chief on retrial following reversal of Appellant's conviction?

Standard of Review. This first impression issue involves a question of law which is reviewed for correctness. See generally State v. Pena, 869 P.2d 932, 935-37 (Utah 1994) (legal questions are reviewed for correctness).

Preservation. This issue was preserved in the trial court. R. 631-35, 853-59, 860-62. The Findings of Fact and Conclusions of Law are in Addendum D.

### **RELEVANT STATUTES, RULES AND CONSTITUTIONAL PROVISIONS**

The text of the following statutes, rules and constitutional provisions is in Addendum E.

Utah Code Ann. § 77-17-13 (1999);  
Utah Code Ann. § 77-18-1(5)(d) (1999);  
Utah R. Evid. 702;  
U.S. Const. Amend. V;  
Utah Const. Art. I, § 12.

### **STATEMENT OF THE CASE**

Maestas was charged with and convicted by a jury of eight counts of aggravated robbery based on two incidents which occurred at a Top Stop convenience store and

Pizza Hut Restaurant. On April 9, 1999, this Court reversed those convictions because Maestas was deprived of his Sixth Amendment right to effective assistance of counsel at the original trial. See State v. Maestas, 1999 UT 32, 984 P.2d 376 in Addendum E.

On remand, Maestas faces trial on seven counts of aggravated robbery after the trial judge consolidated two of the counts. R. 830-31. The trial judge suppressed testimony identifying Maestas as the robber by three of the seven witnesses, but allowed the three witnesses to testify as to the details of what they had observed. R. 710, 711, 712. On January 5, 2000, the trial judge issued findings of fact and conclusions of law for each of the issues outlined above as well as a single order disposing of the two issues. The proceedings have been stayed pending the outcome of this interlocutory appeal. Gino is incarcerated at the Salt Lake County jail pending trial.

### **STATEMENT OF THE FACTS**

On February 20, 1995, Maestas was arrested shortly after two robberies occurred in downtown Salt Lake City. Officers were looking for a male Hispanic in a blue, late 70's Camaro. R. 363. An officer spotted a car that fit that description near the Pizza Hut which had been robbed. R. 363, 364. The hood was warm, and crumpled dollar bills and a jacket similar to that of the robber were inside the car. R. 364, 365.

Maestas and Mary Sisneros came out of an apartment. R. 367. One of them took something from the car to the apartment. R. 367. The pair drove out of the parking lot and were stopped by several officers. R. 367. The officers conducted a showup where a

handcuffed Maestas was surrounded by officers and police cars with activated lights and a spotlight trained on Maestas. R. 367, 369, 375. Most of the victims of the two robberies viewed Maestas under these suggestive circumstances. R. 369.

Officers searched the car and the Sisneros apartment and found the crumpled dollar bills, a jacket, a hat, and a neck gator. R. 396, 398. They found only \$53 even though more than \$200 was taken in the two robberies. R. 310, 400. The officers did not find the change or day planner pouch which were taken, a gun, or the bag the robber used. R. 372, 400, 401, 403. Moreover, the clothing Maestas wore when he was arrested did not match the description, and some of the witnesses did not believe the jacket and or hat were the ones worn by the robber. Maestas, 1999 UT 32, ¶36.

Maestas testified at the original trial that he had been at Mary Sisneros' apartment when the robberies occurred. R. 413. He arrived at about 5:00 p.m. or 5:30 p.m. and left a few minutes before 9:00 p.m. to go to the store. R. 413. He gave Mary \$10 he owed her, ate, helped clean up, and talked with Mary's nephew. R. 425, 429, 414. At times, Mary was in the back of the apartment. R. 425. According to one of the officers, Mary said Maestas could have left and she would not have known he was gone. R. 452-53. Mary verified that she had a party that night and Maestas was there. R. 438, 44, 445-46.

In addition to viewing Maestas at the showup, the witnesses have viewed him a number of times, including, at a minimum, at the lineup, the preliminary hearing, the original trial, and the suppression hearing. R. 882:134. Moreover, the witnesses sat

together outside the suppression hearing and discussed their memories, including the way the robber acted, his mannerisms and his physical characteristics. R. 882:50.

### 1. The Convenience Store Robbery

One count of aggravated robbery is based on a robbery which occurred at a convenience store at 488 East 100 South in Salt Lake City at about 8:00 p.m. R. 268. Paul Harbrecht, the only witness to that robbery, was at the counter reading a newspaper when a man in a baseball cap with a mask across the lower part of his nose and face entered, pulled out a "long barreled black gun like a pistol," and said, "I want your money." R. 268. The robber wore a two-tone jacket, but Harbrecht did not think the seized jacket was the jacket worn by the robber; he also did not think the cap seized from the Sisneros residence was the robber's hat. R. 268, 269, 272, 276-77. Harbrecht described the robber's speech as normal and his eyes as brown. R. 275-77. Maestas' eyes are green, and the Pizza Hut robber's speech was unusual. R. 415, 304, 320.

When the robber entered the store, he put a white backpack on the counter and asked for money. R. 269. That backpack was not found after Maestas was arrested. Maestas, 1999 UT 32, ¶36; R. 403. Harbrecht was preoccupied following the robber's instructions to open the till and put money in the backpack, and opening his own wallet while trying to retain his identification. R. 269-70, 274. After the robber left, Harbrecht ran outside and saw a mid-1980 Camaro in the distance. R. 272, 288. Maestas' Camaro was a 1970's model and blue in color, with the distinctive appearance of a low rider with

chrome wheels. R. 363-64, 415. Harbrecht, who had been the victim of three other robberies, gave a general description of the robber as a male Hispanic in his twenties, five feet seven to five feet nine inches tall, with dark short hair and dark eyes, wearing a white hat, blue Levis and a two-tone coat. R. 279, 882:53. Maestas was not wearing that clothing when he was arrested a short time later. R. 374, 388-89, 492, 882:62.

While Harbrecht was filling out the police report, he heard another robbery which was "basically . . . the same description" being reported over the police radio. R. 273, 280-81. The officer told Harbrecht that she might return to take him "to identify the person." R. 273. She later returned and told Harbrecht "that they had caught the suspect and she wanted [Harbrecht] to identify him." R. 273. She drove Harbrecht to where the suspect, Appellant, was being held. Maestas was in handcuffs, surrounded by police officers with a spotlight and headlights directed at him. R. 284, 375, 388.

Harbrecht identified Maestas at the suppression hearing as the robber, and indicated he was certain because he looked the same as the robber and Harbrecht remembered him from the previous trial. R. 882:61. The trial judge denied Appellant's motion to suppress Harbrecht's identification testimony at the second trial.

## 2. The Pizza Hut Robberies

The second robbery, which spawned six of the aggravated robbery charges, occurred at Pizza Hut located at 787 North Redwood Road at a little before 9:00 p.m. on the same night. R. 292. A man dressed in Levis, a jacket and hat, with a face mask

covering his head and the lower part of his nose and face, entered a restaurant and pulled a gun. R. 292-93, 305. Six people were in the restaurant at the time.

(a) Kurt Anderson. Anderson noticed the robber as Anderson walked towards the cash register. R. 294-5, 304. The robber stuck a black gun in Anderson's face and told him to put the cash register money in the bag. R. 295. Anderson's "life flashed before [his] eyes". R. 295. After Anderson told the manager, Jesse Baldwin, what was going on, Anderson got on the ground as the robber had requested. R. 296. While on the floor, Anderson was unable to see the robber. R. 296. Everything happened very quickly and he was actually dealing with the robber for only about a minute. R. 882:136.

Anderson viewed the robber for a total of about two minutes, at an angle from the side. R. 304. He was shaken up throughout the robbery. R. 882:126. He testified that the robber wore a bandanna and a hat. R. 822:137. He tried to remember the robber's features, but testified at the suppression hearing, "[t]here was some things I did try to picture. But I couldn't, so I just guessed on it." R. 882:138.

Shortly after the robbery, an officer told Anderson they had a suspect in custody and that they wanted him to "come down and give an on-sight identification."

R. 882:128. Anderson and Baldwin rode together in a police car to view the suspect.

R. 299, 301, 380, 882:128. A male suspect in handcuffs stood amid several officers and police cars with emergency lights activated and lights trained on the suspect. R. 299-300, 379. It was obvious to Anderson who he was being asked to identify. R. 882:142.

Anderson initially had a question as to whether Maestas was the robber. R. 300. When he got closer than twelve feet, he became more sure and eventually told officers that he was fairly convinced that the suspect was the robber, and that after viewing the jacket, that certainty increased. R. 882:131.

Anderson's showup identification was made after he and Baldwin discussed the similarities and differences between the robber and Maestas. R. 381-82. Baldwin spoke first, saying he remembered the eyes. R. 381. Baldwin also said he recognized the shoes; Anderson then agreed the shoes were similar. R. 882:143-44; 382. Baldwin told the officer he was positive. R. 882:144. After having this discussion and moving closer, Kurt "started getting a positive ID." R. 300-01.

Anderson filled out a witness report before going to the showup. R. 882:146. In that witness report, he indicated that he was unable to identify the suspect because he did not think he would be able to identify the robber. R. 882:146-47. At the suppression hearing, Anderson acknowledged that the only reason he recognized Maestas as the robber at the lineup "was because he had seen him at the show-up." R. 882:154. He later testified over objection, however, that he thought he would have been able to identify the robber even if he had not been subjected to the showup. R. 882:155. The trial judge denied Appellant's motion to suppress Anderson's identification testimony.

(b) Jesse Baldwin. Baldwin realized they were being robbed when Anderson and the robber approached him. R. 307. The robber was holding a gun and handed a bag to

Baldwin. R. 308. Baldwin was terrified and tried not to pay attention to the gun. R. 309; 882:139. Baldwin gave the robber \$160 to \$170 from the till. R. 310. The money was in small bills of \$20 or less and included \$15 in change. R. 303. No change was found and only \$53 were recovered from the vehicle or Sisneros' apartment. R. 400. Baldwin saw the robber for a total of 4 to 5 minutes, but during some of that time, the robber was around the corner or out of sight or Baldwin was focusing on the till or safe. R. 311, 312. According to Baldwin, the robber weighed 180 pounds, had small brown eyes, thick eyebrows, a deep voice with a slight accent, wrinkles in his forehead and around his eyes, and an odd gait. R. 319-21. When Baldwin was at the showup with Anderson, he initially had a slight question as to whether Maestas was the robber, but became more certain after he saw the coat. R. 317. The trial judge denied Appellant's motion to suppress Baldwin's identification of Maestas as the robber. R. 713.

(c) Shelby Kurys. Shelby was cleaning when he turned around and saw Baldwin walking with someone who was holding a gun to Baldwin's back. R. 353. They were about 15-20 feet away. R. 882:8. The lighting was very poor. R. 882:14. Shelby had only a four foot area to view Baldwin and the robber. When they moved beyond that area, he could not see them. He had them under observation for about 30-45 seconds. R. 882:9. The robber walked out of view towards the safe, then returned and told Shelby to get on the floor. R. 354; 882:10. Once Shelby was on the floor, he could not see much. R. 357. He and his wife, Leslie, were paying attention to each other and did not



pay much attention to the robber. R.882:11. He could not see the robber's shirt and could not remember the color of the robber's pants. R. 360. The robber's mask was black and covered the bridge of the robber's nose as well as his neck. R. 360. Shelby described the robber's eyebrows as thick and his eyes as brown or hazel. R. 360.

Shelby was not taken to the showup. R. 882:17. Shelby picked someone other than Maestas at the lineup. State's Exh. 3. Nevertheless, the trial court denied Maestas' motion to suppress Shelby's testimony identifying Maestas as the robber. R. 709.

(d) Leslie Kurys, Kara Hsaio, Candace Hsaio. Each of these witnesses gave testimony identifying Maestas as the robber at the first trial. The current trial judge has acknowledged that the identification testimony of these witnesses is constitutionally unreliable and has granted Maestas' motion to suppress that testimony. R. 710-11. He nevertheless has permitted these witnesses to testify regarding specific features, descriptions of the robber or his clothing, and other facts that they recall. R. 710.

(1) Leslie Kurys. Leslie was traumatized and her exposure to the robber was extremely brief since she first became aware of the robber when he turned her around and placed her on the floor. R. 710, 346, 348, 355. Because she was on the floor and was not looking at the robber for most of the time he was present, Leslie was not able to identify him. R. 710. Leslie did not look at the robber's eyes or face and picked someone else out of the lineup. R. 710, 358; State's Exhibit 3.

(2) Kara Hsaio. Kara could not see the robber well and looked at the gun or the

table rather than the robber. R. 882:85-87; 711. The lighting was dark and very poor. R. 882:85. All she could remember seeing was a gun and a dirty white bag that the robber was holding. R. 882:86. She was terrified and did not really look at the robber. R. 882:87, 89. She gave the robber four or five crumpled dollar bills. R. 882:86. Kara was taken with her mother to the showup after being told the officers had caught someone and they wanted her to identify him. R. 882:87, 92. It was evident to Kara at the showup who she was supposed to identify, but she could not recall whether she had actually made an identification that night. R. 882:93, 88. At the lineup, Kara selected three possible suspects. R. 334, 343, 882:89. At the motion to suppress hearing, she testified that she could not make an in-court identification. R. 882:89. She also testified that she pretty much did not remember anything although she had attempted to refresh her memory by reviewing her prior testimony and witness report. R. 882:96.

(3) Candace Hsaio. Candace, Kara's mother, was distracted by fears for her daughter and tried not to focus on the robber during the two to three minutes he was at their table. R. 712. She was very frightened and traumatized. R. 882:106-07. She remembered looking at the gun, which was pointed at her daughter. R. 882:100. The robber's face was covered except for the eyes. R. 882:107. Candace had noticed the robber's jacket earlier, before the robber approached her table. R. 882:107-08. She had focused on that jacket and noticed the shimmering effect it had. R. 882:108. She testified at the original trial that the jacket taken from Maestas's car was not the robber's jacket

and the hat was not the robber's hat. R. 329; 882:111. Candace gave the robber the pouch from her day planner which contained money. R. 882:100. That pouch was not found by police when Maestas was arrested shortly after the robberies. R. 401.

Candace rode to the showup with Kara in a police car. R. 882:103. Candace was not sure at the showup that Maestas was the robber. R. 882:103. Candace also viewed Maestas at the lineup but could not identify him as the robber. R. 882:104-05; 334, 343.

### **SUMMARY OF THE ARGUMENT**

Expert testimony. The trial court erred in denying Maestas the opportunity to introduce expert testimony in support of his identification defense. The trial judge's ruling is based on the third factor in State v. Rimmasch, 775 P.2d 388, 398-400 (Utah 1989)--whether the expert testimony would assist the trier of fact. The trial judge abused his discretion in precluding the use of expert testimony in this case where identification is the central issue, there is little other evidence linking Maestas to the robberies, and the proffered expert testimony is material and relevant. As this Court recognized in State v. Long, 721 P.2d 483, 488-89 (Utah 1986), jurors often have misconceptions as to the reliability of eyewitness identification testimony. The proffered expert testimony would assist the jury in reaching a fair and informed decision and should be admitted.

Admission of Statements Which Were Made as Part of Sentencing. Admission of Maestas' statements in the Statement of the Offense form which is included in the presentence investigation report violates Utah Code Ann. § 77-18-1(5) (1999) and the

Code of Judicial Administration which limit the use of presentence investigation reports and preclude the use of this report at Maestas' trial. Since Maestas' Statement of the Offense form is part of the contents of the presentence investigation report, the trial judge erred in allowing the state to introduce these statements at trial

Admission of Maestas' statements to the presentence investigator and at sentencing also violates Maestas' right against self-incrimination and his right to appear and defend appeal. Maestas did not knowingly and voluntarily waive the protection against self-incrimination when he made allocution statements at sentencing. Because Utah sentencing judges can consider whether a defendant takes responsibility for his crimes in assessing the harshness of a sentence, the statements were not voluntary. A knowing waiver did not occur since, among other things, Maestas was not informed of his right to appeal the original conviction and did not know that if the conviction was overturned, his allocution statements would be used against him at a future trial. The privilege was also not waived since the conviction was later overturned. Policy reasons also demonstrate that the privilege should not be considered waived as to future trials when a defendant speaks out at sentencing. If the privilege is considered waived under these circumstances, defendants who are appealing will not speak out at sentencing and trial judges will not be provided full and complete information when making sentencing decisions. In addition, the allocution statements were not a knowing and voluntary waiver of the privilege against self-incrimination since they were "the fruit of the

poisonous tree" as a result of the ineffective assistance Maestas received at trial.

If exercising the right to allocution at sentencing were considered a waiver of the privilege against self-incrimination at any future trial, defendants would be forced to choose between allocution and the right to a fair sentencing, and the right to appeal and a fair trial if the original conviction is overturned. If allocution statements are admitted in the state's case-in-chief following reversal on appeal, the right to appeal becomes meaningless where the defendant admits guilt at sentencing. Defendants who do not receive a fair trial initially will never receive a fair trial based solely on evidence gathered by the state if allocution statements following the flawed trial are admitted.

Any waiver of the privilege against self-incrimination which occurred in this case was limited to the hearing in which it was made. The scope of any waiver caused by Maestas' allocution statements did not extend beyond the sentencing hearing, and the statements are therefore inadmissible at retrial.

### **ARGUMENT**

#### **POINT I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MAESTAS THE USE OF AN EXPERT WITNESS TO ASSIST THE JURY IN UNDERSTANDING THE EYEWITNESS IDENTIFICATION TESTIMONY.**

Maestas filed a "Notice of Intent to Use Expert Witness." R. 640-41. See Addendum G. The notice indicates that Maestas intended to call Dr. David Dodd, a psychology professor at the University of Utah who "specializes in eyewitness memory,

cognition and language, and language development" (R. 640), as an expert

to testify relevant to eyewitness identification evidence, and particularly the unreliability of such evidence. Dr. Dodd would be expected to inform the jury of the general pitfalls and dangers of misidentification evidenced in the large body of empirical studies that have been conducted over the past 40 to 50 years. Additionally, Dr. Dodd will relate particular studies and concerns to the circumstances surrounding the identification of the defendant by the witness(es) in this case, and give his conclusions relevant to the reliability of the identification procedure employed in this case.

R. 640-41.

After the state objected (R. 674-78), Maestas filed a "Supplementary Report of Defense Expert . . . ," a copy of which is in Addendum G. R. 716-17. That supplementary notice indicates that "Dr. Dodd's testimony would not only describe the various general issues and pitfalls besetting identification testimony, but would also include specific analogies between the facts of this case and the circumstances and settings of specific studies of which he has knowledge." R. 716.

A letter from Dr. Dodd which accompanied the supplementary notice, a copy of which is in Addendum H, indicates that Dr. Dodd would testify generally about eyewitness testimony and the three stages of memory: acquisition, retention and retrieval.

R. 720. The letter further addresses studies and information regarding the impact on acquisition caused by disguises, identification based on clothing, lighting conditions, duration of observation, attention, weapon focus, and fear or stress. R. 720-22.

Dr. Dodd's letter also addresses the impact of suggestive events on retention and recent

studies which have been conducted in that area. R. 723-24. In regard to retrieval, the letter indicates that all of the factors which impact on retention and acquisition can impact on retrieval, and that the relationship between an individual's confidence in the identification and correctness of an identification can be extremely low. R. 724. The trial court denied Maestas' request that he be allowed to introduce expert testimony regarding eyewitness identification in support of his theory of the case. See trial court's conclusions in support of this order at R. 67-68 in Addendum C.

Utah R. Evid. 702 governs the admission of expert testimony. It states, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of opinion or otherwise." Utah R. Evid. 702.

A trial court has discretion in determining whether expert testimony is admissible. State v. Brown, 948 P.2d 337, 340 (Utah 1997). That discretion must be exercised, however, within the framework of the three-part test articulated in Rimmasch, 775 P.2d at 398-400. That test requires the trial court to determine whether: (1) "the scientific principles and techniques underlying the expert's testimony are inherently reliable" (State v. Crosby, 927 P.2d 638, 641 (Utah 1996)); (2) "the scientific principles or techniques at issue have been properly applied to the facts of the particular case by sufficiently qualified experts" (id.); and (3) "the proffered scientific evidence will be more probative

than prejudicial as required by rule 403 of the Utah Rules of Evidence." Id. (citing Rimmasch, 775 P.2d at 398 n.8). The last consideration is based on the requirement of Utah R. Evid. 702 that the evidence assist the trier of fact, or, in other words, that it be helpful. Rimmasch, 775 P.2d at 398 n.8; see also Gaw, 798 P.2d at 1133.

In this case, the state did not challenge the admission of the evidence under the first two Rimmasch prongs. R. 866; see findings and conclusions in Addendum C. The only issue before the trial court and this Court, then, is whether the evidence would be helpful, i.e., whether the expert testimony would be more probative than prejudicial. See Rimmasch, 775 P.2d at 398 n. 8.

In order to be "helpful," expert testimony must convey information which is not ordinarily within the knowledge of the average juror. See State v. Larsen, 865 P.2d 1355, 1361 (Utah 1993).

In determining "helpfulness," the trial court must first decide whether the subject is within the knowledge or experience of the average individual. Dixon [v. Stewart], 658 P.2d [591,] at 597 [(Utah 1982)]. It is not necessary that the subject matter be so erudite or arcane that the jurors could not possibly understand it without the aid of expert testimony, nor is it a requirement that the subject be beyond the comprehension of each and every juror. *See id.*

Larsen, 865 P.2d at 1361. In other words, "'expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror' . . . ." People v. Brooks, 490 N.Y.S.2d 692, 697 (N.Y. 1985) (further citations omitted).



In Larsen, this Court held that the trial court properly admitted expert testimony in a securities fraud case "because the technical nature of securities is not within the knowledge of the average layman or a subject within the common experience and would help the jury understand the issues before them." Id. (further citation omitted). Just as securities information is not average layman knowledge, correct information regarding the reliability of testimony is not within the knowledge of the average layman, as recognized by this Court in State v. Long, 721 P.2d 483, 490 (Utah 1986).

Recognizing that jurors do not have accurate and complete information regarding the reliability of eyewitness identifications, a number of courts in other jurisdictions have determined that expert testimony in this area "can provide significant assistance to the jury beyond that obtained through cross-examination and common sense." State v. Taylor, 749 P.2d 181, 184 (Wash. App. 1988) (citing *inter alia* United States v. Moore, 786 F.2d 1308 (5<sup>th</sup> Cir. 1986); United States v. Downing, 753 F.2d 1224 (3<sup>rd</sup> Cir. 1985); United States v. Smith, 736 F.2d 1103 (6<sup>th</sup> Cir. 1984); State v. Chapple, 660 P.2d 1208 (Ariz. 1983); People v. Brown, 726 P.2d 516 (Cal. 1985) (rev'd on other grounds, 107 S.Ct. 837 (1987); People v. McDonald, 690 P.2d 709 (Cal. 1984); Brooks, 490 N.Y.S.2d 692; State v. Buell, 489 N.E.2d 795 (Ohio 1986)). California courts have fashioned a test for determining whether a trial court abused its discretion in excluding expert testimony regarding the reliability of eyewitness identifications:

When an eyewitness identification of the defendant is a key element of the

prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.

McDonald, 690 P.2d at 727.<sup>1</sup> In the present case, expert testimony would be "helpful" to the jury since identification is the central issue, there is little other evidence linking Maestas to the crime, and the expert testimony related to factors which could have affected the accuracy of the identification. See McDonald, 690 P.2d at 727.

The trial court based its conclusion that the evidence would not assist the trier of fact on a determination that (1) the testimony would be an inappropriate lecture, (2) the trial court, not an expert witness, was responsible for educating the jury, (3) concerns regarding the unreliability of eyewitness identifications were adequately addressed through the use of a cautionary instruction and the suppression hearing, and (4) the jury

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<sup>1</sup> Washington courts apply a similar test under which an abuse of discretion in excluding expert testimony occurs "(1) where the identification of the defendant is the principal issue at trial; (2) the defendant presents an alibi defense; and (3) there is little or no other evidence linking the defendant to the crime." Taylor, 749 P.2d at 184. The added requirement in Washington that the defendant must present an alibi defense is unwarranted. Expert testimony assists the jury just as much in a case involving a wrongly identified defendant who was alone at the time of the crime as it does in a case where the defendant was with others who can corroborate his whereabouts. Moreover, a jury is assisted by such evidence in any case where a defendant chooses to put the state to its burden of proof but does not testify regardless of whether the defendant puts on an affirmative alibi defense. While Maestas did present an alibi defense, the better approach in determining whether a trial court abused its discretion in excluding such expert testimony is to not include that requirement.

might abdicate its responsibility if an expert testified. R.867-68. The trial court's conclusions were incorrect since educating the jury through expert testimony is an appropriate and helpful way for the defendant to present his theory of the case. The purpose of expert testimony is to educate the jury regarding an area with which it is likely to be unfamiliar. Expert testimony, even expert testimony which embraces an ultimate issue and is admissible under Utah R. Evid. 704, is admitted without the jury abdicating its role. See United States v. Langford, 802 F.2d 1176, 1183 (9<sup>th</sup> Cir. 1986) (Ferguson, J., dissenting) (pointing out that the rationale that expert testimony is inadmissible because it invades the province of the jury "has been discredited and rejected by scholars, the Federal Rules of Evidence and the Supreme Court.")<sup>2</sup> In addition, the use of a cautionary instruction and the court's consideration of whether to suppress the identification do not fully address the concerns regarding the fallibility of eyewitness identification and, while

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<sup>2</sup> Regarding the rejection of the usurping the jury role rationale, Judge Ferguson elaborated:

Dean Wigmore claimed that the jury function reasoning is a "mere bit of empty rhetoric." 7 J. Wigmore, Evidence Trials at Common Law Sec.1920, at 18 (J. Chadbourn rev. ed. 1978). The Federal Rules of Evidence have eliminated this rationale as a permissible objection to opinion evidence. Fed. R. Evid. 704(a) ("[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."); see also United States v. Rogers, 769 F.2d 1418, 1425 (9<sup>th</sup> Cir. 1985). The Supreme Court rejected similar arguments in Barefoot v. Estelle, 463 U.S. 880, 899, 103 S.Ct. 3383, 3397-98, 77 L.Ed.2d 1090 (1983) ("We are not persuaded that [psychiatric evaluations of dangerousness are] almost entirely unreliable and that the fact finder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings").

Langford, 802 F.2d at 1183-84 (Ferguson, J., dissenting).

necessary so as to adequately guide the jury and avoid a due process violation, do not provide a substitute for expert testimony.

Despite this Court's decisions in Long, Maestas and State v. Ramirez, 814 P.2d 774 (Utah 1991), recognizing the fallibility of identification testimony and factors affecting the reliability of such testimony, as well as the "dramatic transformation" which has occurred in "[c]ourts' treatments of expert testimony regarding eyewitness identification . . . in the past twenty years" (United States v. Smithers, 212 F.3d 306, 311 (6<sup>th</sup> Cir. 2000)), the trial judge in this case harkened back to two Utah cases decided almost twenty years ago to support his conclusion that expert testimony was not admissible. Although State v. Malmrose, 649 P.2d 56 (Utah 1982) (rev'd on other grounds, 721 P.2d 483 (Utah 1986) ) and State v. Griffin, 626 P.2d 478 (Utah 1981) held that the trial court did not abuse its discretion in excluding expert identification testimony under the circumstances of those cases, both cases were decided prior to the significant shift and divergent analytical course which emerged in Long. That significant shift and divergent analytical course require that relevant expert testimony be admitted in cases where eyewitness identification is a central issue and little other evidence links the defendant to the crime.

This Court's decisions in Long, Ramirez and Maestas were based on a review of the "empirical studies documenting the unreliability of eyewitness identifications [ ]" (Ramirez, 817 P.2d at 779 (citing Long, 721 P.2d at 488); Maestas, 1999 UT 32, ¶¶ 25-

28) and a determination that the unreliability of such evidence required an approach which diverged from prior practice. Ramirez, 817 P.2d at 780. In Long, this Court reviewed the research regarding human memory and eyewitness identification, recognizing "human perception is inexact and that human memory is both limited and fallible." Long, 721 P.2d at 488. Although the research shows that eyewitness identifications are often unreliable, "juries have a fundamental misunderstanding of the reliability of eyewitness identifications" and "because jurors do not appreciate the fallibility of such identifications, they often give eyewitness testimony undue weight." Maestas, 1999 UT 32, ¶¶26, 27 (citing Long, 721 P.2d at 490).

Although research has convincingly demonstrated the weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems. People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory process of an honest eyewitness. Moreover, the common knowledge that people do possess often runs contrary to documented research findings.

Maestas, 1999 UT 32, ¶27 (citation omitted).

The increased awareness as to the fallibility of eyewitness identification created by the studies referenced in Long as well as the concern that jurors' common beliefs about the reliability of an identification may actually be contrary to the research findings led this Court to reassess its approach to the use of cautionary eyewitness identification instructions. Long, 721 P.2d at 492. Because of the risk that eyewitness testimony would be given undue weight by uninformed and misguided jurors, this Court concluded "that,

at a minimum, additional judicial guidance to the jury in evaluating such testimony is warranted " and "abandon[ed] [the] discretionary approach to cautionary jury instructions," instead directing that "trial courts shall give such an instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense." Id.; see also Maestas, 1999 UT 32, ¶¶26-31; Ramirez, 817 P.2d at 778.

The concerns about the fallibility of eyewitness identification expressed in Utah case law since the Griffin and Malmrose decisions as well as recent studies regarding the significant number of wrongful convictions which have been based on faulty eyewitness identification testimony (see Andrew R. Tillman, Expert testimony on Eyewitness identification: The Constitution Says, "Let the Experts Speak," 56 Tenn. L. Rev. 735, 736 (1989); Gary L. Wells & Eric P. Seelau, Eyewitness Identification: Psychological Research and Legal Policy on Lineups, 1 Psychol., Pub. Pol. and the L. 765-791 (1995)) require that a trial judge take into account this Court's teachings and allow expert testimony regarding the reliability of eyewitness identification testimony in cases where identification is a central issue. Not only is such evidence "helpful" to a jury, it is essential to a defendant's ability to present a defense since without such testimony, a jury's misconceptions rather than relevant evidence could determine the outcome. See, generally, Washington v. Texas, 388 U.S.14, 19 (1967) (a criminal defendant has the right to present a defense).

Utah is not unique in grappling with the transformation in case law which has occurred as our understanding of this area has increased. In Smithers, the Sixth Circuit conducted an exhaustive analysis of the evolution of case law in this area and held that the trial court abused its discretion in refusing to allow the defendant to present expert testimony on the reliability of eyewitness identification. In reaching that conclusion, the Smithers court noted that in the 1970's when lawyers began raising this issue, "courts were uniformly skeptical about admitting such testimony, elaborating a host of reasons why eyewitness experts should not be allowed to testify." Smithers, 212 F.3d at 311. By the 1980's, the trend shifted toward allowing the use of eyewitness expert testimony. Id. (citing *inter alia* Moore, 786 F.2d at 1313; Downing, 753 F.2d at 1232; Smith, 736 F.2d at 1107; Buell, 489 N.E.2d 795). In fact, "several courts have held that it is an abuse of discretion to exclude such expert testimony." Id. at 4 (citing United States v. Stevens, 935 F.2d 1380, 1400-01 (3d Cir. 1991); Smith, 736 F.2d at 1107; Downing, 753 F.2d at 1232; Chapple, 660 P.2d 1208). "This jurisprudential trend is not surprising in light of modern scientific studies which show that, while juries rely heavily on eyewitness testimony, it can be untrustworthy under certain circumstances." Id.

Since the early 1980's, a number of decisions have recognized the problems associated with eyewitness testimony which were acknowledged by this Court in Long, and have held that a trial court abused its discretion in refusing to admit expert testimony in light of those problems. See e.g. Smithers, 212 F.3d at 311; Stevens, 935 F.2d at 1400-

01; Downing, 753 F.2d at 1232; Taylor, 749 P.2d at 184-85; McDonald, 690 P.2d at 709; Chapple, 660 P.2d at 1218-23; see also Smith, 736 F.2d at 1103 (expert eyewitness identification testimony met "helpfulness" requirement and was improperly excluded); Brooks, 490 N.Y.S.2d at 702 (expert testimony regarding reliability of eyewitness identification testimony is admissible). The trial judge abused his discretion in this case where identification is a central issue, there is little evidence other than the identification testimony linking Maestas to the crimes, and the defense sought to have Dr. Dodd testify regarding factors which could have affected the reliability of the identifications.

First, there is no question that identification is the central issue in this case. As this Court has already recognized, "[t]he only defense available to Maestas at trial was the unreliability of the eyewitness identifications." Maestas, 1999 UT 32, ¶25.

Second, this Court has also already concluded that the other evidence in this case is not conclusive or overwhelming. Id. at ¶¶29-31, 34-36. This Court outlined the other evidence supporting the conviction as follows:

Harbrecht observed the robber getting into a Camaro-the same make of automobile driven by Maestas at the time of his arrest. Hot air and a warm hood indicated that the Camaro had recently been driven, contrary to Maestas' testimony that he remained at Sisneros' apartment all evening. Officer Cole recovered "several" crumpled dollar bills from the front seat of Maestas' Camaro--the robber took (exactly) five crumpled dollar bills from Kara Hsiao during the Pizza Hut robbery. Some of the witnesses identified the coat found in Maestas' car as the one worn by the robber. A search of Sisneros' apartment revealed a dark neck gator capable of being used as a mask and a hat that some of the eyewitnesses claimed the robber wore.



Id. at ¶35. Even more compelling to this Court in assessing prejudice, however, was evidence regarding what officers did not find to link Maestas to the robberies.

The foregoing circumstantial evidence is inconclusive when viewed in light of what the officers did *not* find. Each eyewitness testified that the robber used a gun. No gun was found. The Pizza Hut employees indicated that the robber stole at least \$15 in loose change. No change was found on Maestas or Sisneros, in his car, or in Sisneros' apartment. Only \$53 was recovered from Sisneros and/or from Maestas' car, whereas over \$200 was taken in the robberies. No money was found in the apartment. The officers also did not find the bags used in the robberies or the day planner pouch stolen from Candace Hsiao. Maestas was not wearing clothing consistent with the descriptions of the robber at the time of his arrest, nor did the searches of Maestas' car and Sisneros' apartment locate such clothing. Maestas' car, although the same make as the one used in the Top Stop robbery, was a low-rider with chrome wheels; it did not match the description of the car seen leaving the Top Stop as to year and color. On balance, we find that the circumstantial evidence against Maestas is not overwhelming or conclusive.

Id. at ¶36.

Third, the defense sought to present expert testimony which was relevant and material since it related to the factors which might have affected the reliability of the identifications in this case. As this Court recognized in Maestas,

[N]one of the identifications in this case were impervious to attack under the criteria set forth in *Long*. All of the witnesses had a limited opportunity to observe the robber; the robberies were completed quickly and the robber's face and head were covered. Additionally, at least some of the witnesses were making a cross-racial identification. Some of the witnesses testified to being very afraid or fixating on the weapon rather than on the robber. Furthermore, as set forth above, most, if not all, the witnesses' identifications were tainted by a highly suggestive show-up prior to the lineup in which they selected him.

Id. at ¶29. In addition, this Court appears to have approved the use of expert testimony in this case . In support of its determination that original counsel "did nothing to focus the jury's attention on the limitations of eyewitness identification," this Court pointed out that, among other things, "[c]ounsel did not present expert testimony regarding the unreliability of eyewitness identification." Id., ¶30.

Maestas has a due process right to present evidence in support of his theory of the case. See State v. Stephens, 667 P.2d 586, 589 (Utah 1983) (Stewart, J., dissenting) ("The right of a defendant to produce evidence in his own behalf is one of the most fundamental aspects of a fair trial"); Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 353, 34 L.Ed.2d 330 (1972) (same); Washington v. Texas, 388 U.S. at 19 (same). This Court has already recognized that the defense theory in this case was "that Maestas was mistakenly identified as the robber." Maestas, 1999 UT 32, ¶34. As defense counsel argued below, Dr. Dodd's testimony was the only means by which Maestas could fully and adequately present his defense. R. 717.

Dr. Dodd's expert testimony is the **only** means by which the defendant's theory of the case can be fully and adequately presented. Absent expert testimony and the inclusion by reference of the many particular studies that confirm the existence of serious pitfalls in eyewitness identification, the defense will have only the argument to the jury - which the jury will be instructed is not evidence. Expert witness testimony is especially important in a case like this one in that there is **no** direct evidence tying the defendant to the crimes, and eyewitness identification has been shown to be not only prone to error, such error has been shown to be exacerbated by the fact that jurors tend to actually over-emphasize the reliability and credibility of eyewitness identification. That is the reason

that special instructions are required in cases like this one. [ ]. However, jury instructions alone would be insufficient to safeguard against the pitfalls of I.D. testimony, because the jury will have nothing that is actually in evidence . . . .

R. 717.

Dr. Dodd's testimony is critical to Maestas' presentation of his defense. For example, while the instruction will tell the jury that it can consider whether the witness had an adequate opportunity to observe the robber and that a consideration of the extent to which the actor's features were visible and undisguised figures into that consideration, Dr. Dodd would give the jury evidence as to how disguises impact on identification. Specifically, Dr. Dodd's proffer indicates that he would discuss studies showing the level of incorrect identification when such a small part of the face is seen, the lower accuracy in identification which occurs when only part of the face is viewed because facial perception depends upon the ability to view the entire face, and information indicating that while it is possible that witnesses could accurately remember the eyes of the robber, such an accurate memory is "seemingly remote" when only the eyes are viewed. This testimony is material and relevant to the identification testimony the judge has allowed as well as to the testimony by witnesses whose identification testimony has been suppressed since some of those witnesses describe facial characteristics and eyes.

Dr. Dodd also proffered that he would testify regarding "weapon focus" and stress and fear, and the impairment on memory these can cause. Based only on the instruction,

the jurors might decide that weapon focus and stress and fear heightened the ability to make an accurate identification; Dr. Dodd's testimony would clarify that these actually can impair memory. See Long, 721 P.2d at 488-89.

Dr. Dodd also would testify regarding the impact of the showup on memory. This testimony includes not only information that the way in which the witness is asked to make the identification can be suggestive and cause an inaccurate identification to be made, but also that after an individual is subjected to suggestive influences, memories can "merge" and result in incorrect identifications. In this case, where most of the witnesses were subjected to the showup, this expert testimony would be particularly helpful.

The trial judge has suppressed the identification testimony of three individuals because those identifications were so unreliable that admitting them would have violated due process. R. 710-12. Nevertheless, the judge is allowing each of these witnesses to describe specific features she might recall about the robber. R. 710-12. In addition, the judge has admitted the identification testimony of four witnesses (R. 709-14) which is not "impervious to attack under the criteria set forth in Long." Maestas, 1999 UT 32, ¶29.

While the suppression order prevents the jury from hearing three witnesses give wholly unreliable identification testimony, the concerns regarding the unreliability of identification testimony nevertheless remain in this case. The three witnesses who cannot give identification testimony will be able to give descriptions which they may have arrived at due to suggestive influences or other memory impairing experiences. The other

four witnesses will be allowed to identify Maestas even though the reliability of those identifications can be attacked. The Ramirez hearing will have no impact on the jury's knowledge of factors that might affect the reliability of this remaining evidence. Therefore, the trial court's conclusion that the Ramirez hearing helped address the concerns that Appellant seeks to address with expert testimony is incorrect.

The trial court's conclusion that the use of a cautionary instruction coupled with the Ramirez hearing will adequately inform the jurors of the pitfalls of eyewitness testimony (R. 867) is likewise incorrect since the instruction merely tells the jury things it might consider and is not evidence, let alone evidence in support of Maestas' defense theory. For example, the typical cautionary instruction, as set forth in Long, 721 P.2d at 494 n.8, tells the jury it should consider whether the witness had the capacity to observe the person committing the crime, then tells the jury to consider whether the witness was impaired by stress or fright. Without expert testimony, an uneducated jury may well decide that a witness was under stress, but that the stress actually heightened the capacity to observe. Such a determination is contrary to the studies but allowed by the instruction. See Long, 721 P.2d at 488-89.

While the Ramirez hearing and the cautionary instruction did begin to address Maestas' concerns, they did not aid in presenting evidence regarding his theory to the jury. In this case where identification is the central issue, there is little other evidence linking Maestas to the robberies, and the expert's testimony is relevant and material, the

trial judge erred in refusing to allow Maestas to introduce expert testimony in support of his defense.

POINT II. THE TRIAL COURT'S RULING THAT THE STATE MAY INTRODUCE AS PART OF ITS CASE-IN-CHIEF AT RETRIAL APPELLANT'S INCRIMINATING STATEMENTS MADE IN THE PRESENTENCE REPORT AND AT SENTENCING VIOLATES MAESTAS' FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, RIGHT TO APPEAR AND DEFEND, RIGHT TO APPEAL, AND STATUTORY PROVISIONS.

After he was convicted at the original trial, Maestas took responsibility for the crimes and made incriminating statements in a Statement of the Offense form which he was asked to fill out as part of the presentence investigation, and to the trial judge at sentencing. R. 672-73, 537-38, 855; see Addendum H. The trial judge ruled that those statements are admissible in the state's case-in-chief on retrial. R. 853-858, 861-62.

There is no Utah case law, and very little case law elsewhere, addressing the issue of whether a criminal defendant's incriminating statements which are made as part of the sentencing process can be used against him at a subsequent trial after the case is reversed on appeal. See Harvey v. State, 835 P.2d 1074, 1093 (Wyo. 1992) ("Harvey") (Urbigkit, J., dissenting) (indicating that a similar issue was one of "total first impression"); but see State v. Drake, 552 A.2d 780 (Vt. 1988) (holding defendant's allocution statements are not admissible at subsequent criminal proceedings). The dearth of case law in this area may exist because the use of such sentencing statements after a defendant's conviction is overturned is so foreign to our system of justice and so

obviously conflicts with fundamental constitutional protections that prosecutors do not even attempt to use such statements, or if they do, that attempt is denied by the trial court. See e.g. Mitchell v. United States, 526 U.S. 314, 315, 119 S.Ct.1307, 143 L.Ed.2d 424, 430 (1999) (recognizing "the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power"). Allowing the state to use Maestas' allocution statements in its case-in-chief on retrial violates Maestas' Fifth Amendment protection against self-incrimination, rights to defend and appeal, and Utah Code Ann. § 77-18-1(5)(d) (1999).

A. UTAH CODE ANN. § 77-18-1(5)(d) (1999) PRECLUDES THE USE AT RETRIAL OF STATEMENTS MADE BY MAESTAS AS PART OF THE PRESENTENCE INVESTIGATION REPORT.

Utah Code Ann. § 77-18-1(5)(d) (1999) limits the use which can be made of a presentence investigation report and precludes the use of the statements made by Maestas as part of that report at trial. Utah Code Ann. § 77-18-1(5)(d) states:

(d) The contents of the presentence investigation report, including any diagnostic evaluation report ordered by the court under Section 76-3-404, are protected and are not available except by court order *for purposes of sentencing* as provided by rule of the Judicial Council or for use by the department.

Utah Code Ann. § 77-18-1(5)(d) (1999) (emphasis added).

The Statement of the Offense form filled out by Maestas "in response to AP&P's request for information relevant to preparation of the presentence report" (R. 855) was included in the presentence report and therefore is part of the contents that report. R. 177;

see Addendum H. Section 77-18-1(5)(d) mandates that the contents of presentence investigation reports are to be used solely for the purposes of sentencing. Pursuant to Section 77-18-1(5)(d), therefore, the Maestas' statement of the offense, found in the presentence report, cannot be used at retrial.

In addition, the Code of Judicial Administration further demonstrates that the contents of presentence investigation reports may not be used as evidence at trial. Pursuant to Utah R. Jud. Admin. 4-202.02(6)(C), presentence reports are "controlled judicial records." Access to "controlled judicial records" is limited, and any "person who receives a controlled judicial record may not disclose controlled information from that record to any person, including the subject of the record." Utah R. Jud. Admin. 4-202.03 (6)(D). Utah R. Jud. Admin. 4-202.03 is intended to "provide for or limit access to records created or maintained by the judicial branch." Subsection (6) limits the access to controlled judicial records as follows.

(6) *Controlled judicial records.* Upon request, the judicial branch shall disclose a controlled judicial record to the following:

- (A) counsel for the subject of the record in the proceeding;
- (B) the individual who submitted the record;
- (C) a physician, psychologist, or certified social worker upon submission of a notarized release from the subject of the record that is dated no more than 90 days prior to the date the request is made and a signed acknowledgment of the terms of disclosure of controlled information as provided below; or
- (D) any person to whom the record must be provided pursuant to a court order.



A person who receives a controlled judicial record may not disclose controlled information from that record to any person, including the subject of that record.

Utah R. Jud. Admin. 4-202.03(6)(D).

The plain language of Utah Code Ann. § 77-18-1(5)(d), which is bolstered by the Rules of Judicial Administration, precludes the use at retrial of the Maestas' statement of the offense which is contained in the presentence investigation report. The trial court's ruling that the Statement of Offense form filled out by Maestas at the request of the presentence investigator could be used at retrial requires reversal.

**B. THE STATE'S USE OF MAESTAS' STATEMENTS AT SENTENCING AND IN THE PRESENTENCE REPORT IN ITS CASE-IN-CHIEF ON RETRIAL VIOLATES THE FIFTH AMENDMENT; IT ALSO VIOLATES HIS RIGHTS TO ALLOCUTION AND APPEAL.**

The trial court's ruling that the state can use Maestas' statements which were made as part of the sentencing process after the original trial in its case-in-chief on retrial violates the Fifth Amendment since Maestas did not knowingly and voluntarily waive the right not to be compelled to give evidence against himself at a subsequent trial when he made those statements at sentencing. The scope of any waiver of the Fifth Amendment privilege was limited to the use of Maestas' statements for sentencing purposes, and the statements were tainted by the fruit of the poisonous tree since Maestas did not receive effective assistance of counsel at the original trial.

The Fifth Amendment to the United States Constitution mandates that "no

person . . . shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment protection applies at trial, at sentencing, and even while a case is on appeal following conviction (see Mitchell, 143 L.Ed.2d at 430), and precludes the use of statements made by Maestas as part of the sentencing process against him as part of the state's case-in-chief at a subsequent retrial. Although there is a presumption against waiver of a constitutional right (Johnson v. Zerbst, 304 U.S. 458 (1938)), the trial judge concluded that Maestas waived his right against self-incrimination at any subsequent retrial when he took responsibility for the crimes at sentencing even though there is nothing in the record suggesting that Maestas was informed that he had a right to appeal his convictions, or that he had any idea that his sentencing statements could be used against him at a subsequent trial if his conviction were reversed on appeal. The trial court's ruling conflicts with courts' "duty to ensure that the administration of justice in [Utah] operates as fairly as possible" and should be overturned. See Drake, 552 A.2d at 780 (holding that fairness requires that defendant's statements at sentencing not be admissible in subsequent criminal proceedings except for impeachment or rebuttal).

The marshaled evidence and findings in support of the trial court's conclusion that Maestas knowingly and voluntarily waived his privilege against self-incrimination at any subsequent trial is as follows<sup>3</sup>:

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<sup>3</sup> The determination as to whether Maestas knowingly and voluntarily waived his privilege against self-incrimination is a legal conclusion. See, generally, State v. Dutchie, 969 P.2d 422, 427 (Utah 1998) (trial court's determination of valid waiver of Miranda

1. Maestas testified under oath at the original trial that he did not commit the robberies. R. 854.

2. Maestas "tried to gain advantage with the jury by swearing under oath that he had not robbed the Top Stop or the persons at the Pizza Hut restaurant." R. 854.

3. There is nothing in the record suggesting that the presentence investigator used coercive tactics in requesting a statement of the offense from Maestas.

4. There is nothing in the record suggesting that the police, state, or court used coercive tactics to force Maestas to make a statement at sentencing. R. 856.

5. Maestas made his allocution statements in an effort to obtain leniency in sentencing. R. 856.

These findings do not support the larger incorrect conclusion made by the trial judge that the exercise of the right to allocution at sentencing constitutes a waiver of the right against self-incrimination at a subsequent retrial.

Maestas' allocution statements were not a voluntary waiver of the right against self-incrimination since the trial court could impose a harsher sentence if he did not confess to the crimes. This Court has upheld the practice of penalizing a defendant who does not take responsibility for his crimes or, conversely, rewarding with a lighter

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rights is reviewed for correctness). The trial court's "findings" that "[n]othing in the court record suggests that defendant's written statement [to the presentence investigator] was not voluntary" and Maestas' statement made at sentencing was voluntary are actually legal conclusions which should be reviewed for correctness. Moreover, those "findings" of voluntariness are erroneous because, among other things, the trial court could sentence Maestas more harshly if he did not take responsibility at sentencing.

sentence or better conditions the defendant who does take responsibility. See e.g. State v. Sibert, 310 P.2d 388, 393 (Utah 1957) (upholding trial court's imposition of a harsher sentence based in part on the defendant's failure to take responsibility for the crime); State v. Galli, 967 P.2d 930, 938 (Utah 1998) (defendant's acceptance of responsibility for the crimes weighed in favor of overturning the consecutive sentences). Since Utah sentencing judges can consider whether a defendant takes responsibility for a crime in assessing the harshness of the sentence to be imposed and can penalize a defendant who does not admit his guilt, allocution statements made at sentencing implicate the Fifth Amendment and are not a voluntary waiver of the right against self-incrimination. See Shumpert v. Dep't of Highways & Pub. Transp., 409 S.E.2d 771, 774 (S.C. 1991) (recognizing that waiver of the Fifth Amendment does not occur where exercise is "needlessly chilled" and incriminating statements are encouraged). Maestas' allocution statements were not voluntary regardless of whether the judge or presentence investigator used coercive tactics since the potential penalty for not taking responsibility creates an inherent coercion. The fact that Maestas made allocution statements to obtain leniency highlights the lack of voluntariness rather than demonstrating a valid waiver.

Maestas' statements also were not a knowing and voluntary waiver of the right against self-incrimination in light of the fact that the conviction, which was the basis for the sentencing statements, was later overturned because Maestas received ineffective assistance of counsel. Statements which are made as part of plea bargaining or at a plea

hearing when the plea is later withdrawn are not admissible at trial. See Utah R. Evid. 410; Standen v. State, 710 P.2d 718 (Nev. 1985) (guilty plea which is later withdrawn is "deemed never to have existed" and is not admissible at a subsequent trial); State v. Jensen, 279 P. 506 (Utah 1929) (withdrawn plea no longer existed and therefore could not be used as evidence at a subsequent trial; admitting plea as evidence would put "petitioner in a dilemma utterly inconsistent with the determination of the court awarding him a trial"); Gunsby v. Wainwright, 596 F.2d 654, 655 (5<sup>th</sup> Cir. 1979) (sentencing statements which were made based on a belief that a legal plea was in place were not knowing and voluntary where plea was later withdrawn). Statements made at sentencing following a flawed trial are likewise not knowing and voluntary since they are made based on the existence of a conviction, and without knowledge that the conviction is flawed and will be overturned for a new trial.

Moreover, statements which are made at plea discussions and plea hearings are not admitted at a later trial after plea negotiations fail in order to promote plea discussions and openness during plea negotiations and at plea hearings. See State v. Pearson, 818 P.2d 581 (Utah App. 1991). The same policy for promoting openness exists in a sentencing hearing. In order to fully and fairly sentence an individual, a trial judge needs complete information, including information from the defendant as to whether he or she takes responsibility for the crime. If this Court were to uphold the trial court's ruling in this case, this policy would be undermined. Indeed, any defendant who was appealing his

or her case would simply assert the Fifth Amendment, and trial judges would be left without valuable information needed for a full and fair sentencing.

The "fruit of the poisonous tree" doctrine likewise demonstrates that statements made as part of the sentencing process are not admissible at retrial after a conviction is overturned on appeal. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 497 (1968); Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968); Harvey, 835 P.2d at 1096 (Urbigkit, J., dissenting). In Harrison, after the government introduced three illegally obtained confessions, the defendant testified in order to explain his statements. After the conviction was overturned on appeal, the government introduced the defendant's testimony at retrial. Although the lower court determined that the defendant had made a conscious decision to testify, the United States Supreme Court clarified that "[t]he question is not *whether* the petitioner made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." Harrison, 392 U.S. at 223 (emphasis in original). Rather than concluding that the defendant waived his Fifth Amendment privilege, the high Court held that the defendant's testimony was tainted by the underlying illegality and inadmissible. See Harrison, 392 U.S. at 222-23.

The same rationale applies to this case. Maestas admitted guilt as part of the sentencing process in order to ameliorate his sentence after the flawed conviction.

Maestas' statements to the presentence investigator and sentencing judge were tainted by the same illegality that caused a new trial to be ordered, i.e. the violation of Maestas' Sixth Amendment right to counsel, and are therefore inadmissible at retrial.

A knowing and voluntary waiver of the right against self-incrimination also did not occur due to the ineffective assistance of counsel Maestas received in this case. This Court has already concluded that he received ineffective assistance at trial. Nothing in the record suggests any awareness by Maestas at the original sentencing of the ineffective assistance provided by his original lawyer. In addition, nothing in the record suggests that Maestas was advised of his right to appeal, and Maestas was forced to file a petition for post-conviction relief in order to pursue his original appeal of right. Since original counsel was apparently not advising Maestas of his own ineffectiveness nor helping him pursue an appeal, Maestas' decision to speak at sentencing was not a knowing waiver of his right against self-incrimination. There is also nothing in the record suggesting that Maestas had any awareness that statements made at sentencing would be used against him at a subsequent trial if he were to prevail on appeal.

Maestas' statements at sentencing also were not a knowing and voluntary waiver of his right against self-incrimination because of the competing constitutional rights criminal defendants would be forced to choose between if, in fact, statements admitting guilt at sentencing were admissible at a later trial. See Simmons v. United States, 390 U.S. 377, 393-94, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) (Court considered "it intolerable

that one constitutional right should have to be surrendered in order to assert another"). In Simmons, the Court held that a defendant's testimony at a pretrial suppression hearing was not admissible at trial. It reasoned that in order to establish standing to raise a Fourth Amendment claim, a defendant "was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination" if defendant's testimony at the suppression hearing could be used against him at trial. Id. Since requiring a defendant to sacrifice one right in order to assert another was unconstitutional, the Court held that a defendant's testimony at a pretrial suppression hearing could be used only for the limited purpose of determining the issues raised in that pretrial motion.

The situation in this case is substantially similar to that in Simmons. If the trial judge's ruling is upheld, a defendant who is convicted of a crime and appealing that conviction must surrender either the right to speak on his behalf at sentencing on the original conviction or the right against self-incrimination as well as the right to a meaningful appeal.

While there has been some discussion in case law from this Court as to whether the right to allocution at sentencing is based on the due process clauses of the state or federal constitution<sup>4</sup>, there is no question that such a right exists in Utah. See State v.

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<sup>4</sup> Because Article I, section 12 of the Utah Constitution and Utah R. Crim. P. 22(a) guarantee the right to allocution, that right is part of the process due defendants in Utah. Although it is unnecessary to reach the issue of whether state and federal due process



Young, 853 P.2d 327, 370-73 (Utah 1993) (Durham, J., concurring and dissenting) (joined by Stewart, J., and Zimmerman, J., in the result). That right at the very least is found in Utah R. Crim P. 22(a), which gives a criminal defendant the right to make a statement and present any information in mitigation of sentence prior to sentencing. Moreover, following Young, this Court unanimously concluded that the right to allocution "is an inseparable part of the right to be present" which is found in Article I, section 12 of the Utah Constitution. State v. Anderson, 929 P.2d 1107, 1111 (Utah 1996). Because the Article I, section 12 guarantee of "the right to appear and *defend in person*" extends to sentencing (id.(emphasis added)), the right to allocution is constitutionally

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independently guarantee such a right, Maestas maintains that both constitutions guarantee a due process right to allocution. While federal due process is not violated when a judge fails "to ask whether the defendant would like to make a statement prior to sentencing," the United States Supreme Court expressly left open the issue of "whether denying allocution to a defendant who has affirmatively requested it is constitutional error." Young, 853 P.2d at 376 (Durham, J., dissenting and concurring) (citing Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962); see also Boardman v. Estelle, 957 F.2d 1523, 1526-27 (9<sup>th</sup> Cir. 1992) (further citation omitted). Various courts have held that due process is violated when a defendant is not allowed to exercise the right to allocution. See e.g. Ashe v. North Carolina, 586 F.2d 334, 336 (4<sup>th</sup> Cir. 1978); Boardman, 957 F.2d at 1530; United States v. Moree, 928 F.2d 654, 656 (5<sup>th</sup> Cir. 1991). A majority of this Court has held that a statutory right to allocution exists in Utah. See Young, 853 P.2d at 376 (Durham, J., dissenting and concurring) (concluding that statutory and constitutional right to allocution exists) (joined by Zimmerman, J., and Stewart, J., agreeing that statutory right to allocution exists and not reaching constitutional issues); see also State v. Lorrain, 761 P.2d 1388, 1390 (Utah 1988) (referring to "defendant's due process right of allocution" without analyzing the issue). The state due process clause, Article I, section 7, as well as the Article I, section 12 right to appear and defend in person, likewise guarantees a constitutional right to allocution. See Young, 853 P.2d at 377 (Durham, J., dissenting and concurring); State v. Anderson, 929 P.2d 1107, 1111 (Utah 1996).

guaranteed in Utah.

Maestas exercised his statutory and constitutional right to allocution in this case by speaking at sentencing in an effort to defend himself and obtain a less harsh sentence. The trial judge concluded that by exercising his right to speak at sentencing, Maestas sacrificed his right against self-incrimination. As the United States Supreme Court recognized in Simmons, requiring a criminal defendant to sacrifice one right in order to exercise another is intolerable and violates due process. Moreover, the existence of these competing rights further demonstrates that any decision made by Maestas to speak at sentencing was not knowing and voluntary.

In addition to forcing a criminal defendant to choose between the right to allocution and the right against self-incrimination, the trial judge's ruling forces a defendant to choose between the right to allocution and a fair sentencing, and the right to an effective appeal and a fair trial. See Harvey, 835 P.2d at 1097 (Urbigkit, J., dissenting) (pointing out that if allocution statements are admissible at future trial, right to meaningful appeal and fair trial if case is reversed are foreclosed). If a conviction is reversed on appeal after a criminal defendant admits guilt at sentencing and the state is allowed to introduce evidence of that admission, the state will have no difficulty obtaining a conviction. Use of the confession from the initial sentencing effectively nullifies the right to appeal since a new trial is a needless exercise in the face of such evidence. The trial judge's ruling that Maestas' allocution statements can be used at trial

is "utterly inconsistent" with this Court's decision to grant a new trial. See Gunsby, 596 F.2d at 655.

Moreover, in cases such as this where a conviction is overturned because the initial trial was not fair, a defendant has no hope of ever obtaining a fair trial based on the evidence apart from incriminating statements taken at sentencing if allocution statements are admissible at trial. Hence, pursuant to the trial judge's ruling, a defendant who chooses allocution also gives up his right to a fair trial and appeal. Such a sacrifice is intolerable and further demonstrates that Maestas did not knowingly and voluntarily waive his right against self-incrimination.

Any arguable waiver of the right against self-incrimination which may have occurred in this case was limited to a waiver for the purposes of the sentencing hearing. Courts have recognized in a variety of contexts in criminal proceedings that the scope of a waiver of the Fifth Amendment privilege is limited to the hearing in which the statement is made. See e.g. Mitchell, 526 U.S. 314 (defendant who pleads guilty does not waive privilege against self-incrimination for sentencing purposes); Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (incriminating statements which are made to psychiatrist during competency review do not waive Fifth Amendment); Simmons, 390 U.S. 377 (waiver of privilege in suppression hearing is limited to that hearing); United States v. Buonos, 693 F.2d 38, 39 (7<sup>th</sup> Cir. 1982) (statements made by a defendant at a bail hearing are not admissible at trial); United States v. Licavoli, 604 F.2d 613, 623

(9<sup>th</sup> Cir. 1979) (waiver of the right against self-incrimination is limited to the proceeding in which it occurs); State v. Loveland, 684 A.2d 272, 278 (Vt. 1996) (admissions by sex offender at sentencing and for completion of probation cannot be used against him in future criminal proceeding). A defendant who exercises his right to allocution at sentencing likewise waives the right against self-incrimination only for sentencing purposes. The "fair administration of justice" requires that a defendant's allocution statements not be admissible in a subsequent retrial. See Drake, 552 A.2d at 780.

Utah R. Crim. P. 24(d) also demonstrates that Maestas' allocution statements are not admissible on retrial. Rule 24(d) states: "[i]f a new trial is granted, the party shall be in the same position as if no trial had been held and the former verdict shall not be used or mentioned either in evidence or in argument." If statements made by a defendant as part of sentencing were used on retrial, a defendant would not "be in the same position as if no trial had been held." Even if the language of Rule 24(d) were limited to convictions which were overturned based on motions for new trial rather than appeal, due process and equal protection inequities would exist if defendants whose convictions were overturned on appeal were treated disparately.<sup>5</sup>

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<sup>5</sup> The fact that Maestas testified at trial does not change the analysis as to whether he waived his protection against self-incrimination when he made inculpatory statements as part of the sentencing process. Maestas is not arguing that the state could not introduce his trial testimony. Instead, he is arguing that the state cannot introduce incriminating statements made at sentencing for sentencing purposes. Just as the privilege against self-incrimination is not waived for sentencing purposes when a defendant pleads guilty, it is not waived for sentencing purposes when he testifies at trial. See Mitchell, 526 U.S. 314

In Harvey, 835 P.2d 1080-81, the Wyoming Supreme Court addressed an issue similar to the one in this case, and held that the state could use defendant's allocution statements as evidence in a future trial.<sup>6</sup> Harvey involved a high publicity case in Wyoming where the defendant was originally charged with kidnaping and sexual assault. Id. at 1076. The defendant was convicted by a jury and made allocution statements to the sentencing judge. Id. at 1080-81. The Wyoming Supreme Court reversed the convictions on speedy trial grounds, and the charges of sexual assault and kidnaping were dismissed. Id. at 1076. The state then charged Harvey with conspiracy to commit kidnaping and sexual assault based on the same incident. Id. At trial on the conspiracy charges, the state introduced defendant's allocution statements made following the kidnaping and sexual assault trial. Id. at 1080-81. The Wyoming Supreme Court upheld the convictions despite claims that Harvey's Fifth Amendment protection against self-incrimination was

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(defendant who pleads guilty does not waive privilege for sentencing purposes); Harrison, 392 U.S. at 222.

<sup>6</sup> In a rather cursory fashion, the Tenth Circuit upheld this decision in Harvey v. Shillinger, 76 F.3d 1528, 1535-36 (10<sup>th</sup> Cir. 1996). The Court concluded that Harvey conceded that his statements were voluntarily made, and that the statements were knowingly and intentionally made since Harvey was represented by counsel and made the statements under oath. By contrast, in this case, Maestas argues that his statements were not a voluntary waiver of his right against self-incrimination, that the statements were not a knowing waiver due to his deprivations of effective assistance of counsel, the tainted original conviction, his lack of knowledge as to his right to appeal, and other factors. Moreover, the Tenth Circuit did not consider the limited scope of the waiver and issued its decisions prior to Mitchell. The Tenth Circuit decision does not offer a compelling analysis for concluding that Maestas waived his right against self-incrimination at any future trial when he made allocution statements as part of the sentencing process.

violated. Id. at 1084.

In concluding that error did not occur in allowing the state to use the defendant's allocution statements as evidence, the majority took the simplistic view that "[a] defendant's choice to exercise his right to allocution is entirely voluntary." Id. at 1082. In Utah, however, a defendant's decision to speak at sentencing is not entirely voluntary since a defendant can be penalized for not taking responsibility at sentencing for the crimes for which he was convicted. See discussion supra at 36-37. The majority in Harvey recognized that if the trial judge could consider whether the defendant admitted guilt in assessing sentence, as is the case in Utah, the statements would not be voluntary. Harvey, 835 P.2d at 1083. The Harvey majority stated, "if the trial court were to require a defendant to confess to criminal activities in his allocution in return for a more lenient sentence, those statements would amount to 'genuine compulsion of testimony' in violation of the right against self-incrimination." Harvey, 835 P.2d at 1083 (citing Washington, 431 U.S. at 187, 97 S.Ct. at 1818; United States v. Rodriguez, 498 F.2d 302, 312 (5<sup>th</sup> Cir. 1974)). Hence, pursuant to the majority decision in Harvey, Maestas' statements to the sentencing judge were not a voluntary waiver of his right against self-incrimination since the sentencing judge was allowed to consider whether the defendant confessed to the crime in assessing the harshness of the sentence.

Moreover, the Harvey court did not consider whether the defendant *knowingly* waived his right against self-incrimination when he exercised his right to allocution at

sentencing. As outlined above, Maestas did not knowingly waive his right against self-incrimination when he exercised his right to defend himself and allocute at sentencing since he did not know that the conviction was flawed or that the statements would be used against him if his conviction were successfully appealed. Because of the simplistic approach employed by the majority, the possible penalty which exists in Utah if a defendant does not take responsibility at sentencing, and the failure to consider whether the defendant knowingly waived the privilege against self-incrimination, the majority decision in Harvey does not support the trial judge's ruling in this case.

The majority decision in Harvey is likewise not compelling because the issue arose in a different procedural context than the current case, in a state with different protections. First, the issue arose at a trial on new charges rather than at retrial after the defendant prevailed on appeal. The defendant's right to appeal was therefore not as directly impacted in Harvey as it was in this case where the ruling effectively eviscerated that right. Second, the applicable Wyoming rule of procedure requires the judge to ask the defendant if he wishes to make a statement in his own behalf; this contrasts with the Utah rule which mandates that the sentencing judge "shall afford the defendant an opportunity to make a statement." Utah R. Crim. P. 22(a). Finally, Wyoming does not appear to be a state like Utah where a sentencing judge is allowed to consider whether the defendant confessed to the crimes in assessing the harshness of the punishment.

Justice Urbigkit's dissent in Harvey provides a better framework for assessing

whether the use of Maestas' allocution statements violates the privilege against self-incrimination in this case. See Harvey, 835 P.2d at 1084-1104 (Urbigkit, J., dissenting). As Justice Urbigkit recognized, the majority opinion in Harvey creates a trap for defendants which undermines the right to appeal as well as the right to allocution. Id. at 1084 (Urbigkit, J., dissenting). Justice Urbigkit's analysis demonstrates that Maestas' exercise of his right to allocution did not constitute a knowing and voluntary waiver of his right against self-incrimination at any future trial if the case were reversed on appeal. See id. at 1084-1104 (Urbigkit, J., dissenting).

Justice Golden also dissented, indicating that he would reverse Harvey's conviction based on the use of the allocution statements as evidence in the state's case-in-chief. Id. at 1134-36 (Golden, J., dissenting). As Justice Golden pointed out:

I can find no fairness in what happened to Mr. Harvey as result of his allocution statement. I see only surprise and ambush. The sentencing court did not warn him that anything he said in allocution would be used against him in a criminal prosecution; in fact, it was only after Mr. Harvey made his statement that the sentencing judge informed him of his right to appeal the conviction on which, moments before, he had been sentenced. I am unable to find that Mr. Harvey made a knowing, intelligent, and informed waiver of his right to remain silent.

Id. at 1136 (Golden, J., dissenting).

There is likewise no fairness in the use of Maestas' allocution statements at retrial after this Court overturned his flawed conviction. Maestas' allocution statements were not a voluntary waiver of his right against self-incrimination since, among other things,



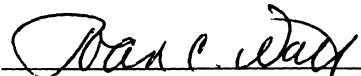
the trial judge could consider whether Maestas admitted guilt in assessing sentence. The allocution statements were not a knowing waiver of the right against self-incrimination since, among other things, Maestas did not know the conviction was flawed, was not advised of his right to appeal and did not know the statements would be used as retrial if his conviction were reversed on appeal. The allocution statements were the fruit of the poisonous tree, and any waiver of the right against self-incrimination which occurred was limited to a waiver of that right for the purposes of the sentencing hearing.

The trial court's ruling that Maestas' sentencing statements are admissible at retrial creates an unfair trap and ambushes criminal defendants. Maestas respectfully requests that it be reversed.

### CONCLUSION

Defendant/Appellant Gino Maestas respectfully requests that this Court reverse the trial judge's rulings and (1) allow Appellant the opportunity to introduce expert testimony in support of his identification defense, and (2) preclude the state's use of Appellant's statements made as part of the presentence investigation and at sentencing at retrial.

SUBMITTED this 21st day of August, 2000.

  
\_\_\_\_\_  
JOAN C. WATT  
Attorney for Defendant/Appellant

---

SCOTT C. WILLIAMS  
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be hand-delivered ten copies of the foregoing to the Utah Supreme Court, 450 South State Street, 5<sup>th</sup> Floor, P. O. Box 140210, Salt Lake City, Utah 84114-0210, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6<sup>th</sup> Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 21<sup>st</sup> day of August, 2000.

  
\_\_\_\_\_  
JOAN C. WATT

DELIVERED to the Utah Supreme Court and the Utah Attorney General's Office  
as indicated above this \_\_\_\_\_ day of August, 2000.

## ADDENDA

## ADDENDUM A

4/14/00

IN THE SUPREME COURT OF THE STATE OF UTAH

---00000---

State of Utah,  
Plaintiff and Appellee,  
vs.  
Gino Maestas,  
Defendant and Appellant.

No. 20000094-SC

—  
ORDER

This matter is before the Court upon a Petition for Permission to Appeal an Interlocutory Order, filed pursuant to Rule 5 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the Petition for Permission to Appeal Interlocutory Order filed on January 25, 2000 is granted.

FOR THE COURT:

March 13, 2000  
Date

Richard C. Howe  
Richard C. Howe  
Chief Justice

## ADDENDUM B

**FILED DISTRICT COURT**  
Third Judicial District

JAN 87 2009

SALT LAKE COUNTY

By \_\_\_\_\_  
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

STATE OF UTAH,	:	ORDER
Plaintiff,	:	CASE NO. 951900917
vs.	:	
GINO MAESTAS,	:	
Defendant.	:	

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Based on the Findings of Fact and Conclusions of Law on the State's Motion to Exclude Expert Testimony, and on the defendant's Motion to Exclude Allocution Statements, the Court now enters the following


**ORDER**

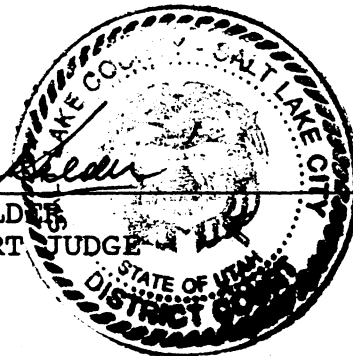
1. The defense may not present expert witness testimony of Dr. David H. Dodd regarding the acquisition, retention and retrieval of information relevant to the human memory process as it applies to issues of eyewitness identification.

2. The State may introduce as evidence in its case-in-chief at defendant's retrial statements made in anticipation of and at the time of the sentencing which resulted from his conviction at the 1995 trial, which was later reversed and remanded by the Utah Supreme Court.

3. Because the issues addressed in this ruling are substantial issues of first impression in Utah, and considering the history of the present case, interlocutory review of this ruling is warranted and desirable from this Court's point of view.

Dated this 5<sup>th</sup> day of January, 2000.  
~~December, 1999.~~

  
ROBERT K. HILDER  
DISTRICT COURT JUDGE





## ADDENDUM C

**FILED DISTRICT COURT**  
Third Judicial District

JAN 07 2000

SALT LAKE COUNTY

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

STATE OF UTAH,	:	FINDINGS OF FACT AND
	:	CONCLUSIONS OF LAW ON STATE'S
Plaintiff,	:	MOTION TO EXCLUDE EXPERT
	:	TESTIMONY ON EYEWITNESS
vs.	:	IDENTIFICATION
	:	
GINO MAESTAS,	:	CASE NO. 951900917
	:	
Defendant.	:	

-----

The above-entitled matter came on regularly for hearing on the 15<sup>th</sup> day of October, 1999. Present were the State of Utah, by and through its counsel, Roger S. Blaylock, the defendant and his counsel, Scott Williams. Evidence having been taken, Memoranda having been submitted, arguments having been made and the Court being fully advised in the premises, does hereby make its

**FINDINGS OF FACT**

1. On February 20, 1995, a Top Stop located at 488 East 100 South, and a Pizza Hut restaurant located 787 N. Redwood Road, were robbed by a Hispanic male with a handgun, or a facsimile thereof.

2. One eyewitness observed the robber and testified about his identity in the robbery at the Top Stop after identifying the defendant as the robber at a show-up, a lineup, a preliminary hearing, and at the trial.

3. Six eyewitnesses observed the robber and testified about his identity in the robbery of the Pizza Hut with two of them identifying the defendant at a show-up, four of them identifying the defendant at a lineup as the robber or one of two or three persons who could be the robber, two of them identifying the defendant as the robber at a preliminary hearing and four of them identifying the defendant as the robber at the trial.

4. No instruction was given during the first trial relating to concerns about or to conditions affecting the accuracy of eyewitness identification.

5. The conviction of the defendant on eight counts of Aggravated Robbery was overturned because "counsel's failure to request a cautionary eyewitness instruction rendered his performance constitutionally deficient" and required a new trial.

6. This Court has conducted a "Ramirez" hearing at which it reviewed testimony of seven eyewitnesses to evaluate the admissibility of their identifications of the defendant in light of circumstances surrounding each victim's identification of the defendant.

7. This Court in performing its gate keeping function relating to eyewitness identification has issued a ruling excluding the identification of three witnesses, Leslie Kurys, Kara Hsiao and

Candace Hsiao, based on circumstances surrounding each victim's identification.

8. This Court is prepared, upon request from defendant through counsel, to present the jury with thorough instructions on the concerns about and factors affecting accuracy of eyewitness identification as set forth in the Long case.

9. The eyewitness identification expert the defendant proposed to call, Dr. Dodd, would testify generally about the unreliability of eyewitness identification and specifically about the unreliability of individual victim's testimony relating to their identification of the defendant as the robber of the Top Stop and the robber of persons at the Pizza Hut.

10. The general factors and concerns relating to eyewitness identification that Dr. Dodd would testify about will be addressed in the Long instruction given the jury by this Court.

11. Dr. Dodd's testimony would amount to a lecture to the jury relating to the unreliability of eyewitness identification.

12. The State did not challenge the scientific principles or techniques upon which Dr. Dodd's testimony would be based, and the scientific reliability of the proposed evidence is not at issue.

The Court having entered its Findings of Fact, does now enter its

**CONCLUSIONS OF LAW**

1. It is the Court's obligation to educate the jury as to the law relating to a specific case.

2. Educating the jury is not a function to be delegated to an expert who would, in fact, merely lecture the jury.

3. Determining the quality of the evidence is the province of the finder of fact, the jury, and not normally the province of the Court.

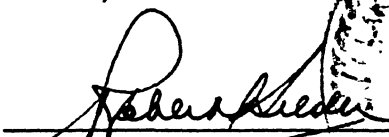
4. Only in questions of eyewitness identification and in no other circumstance does the Court specifically comment to the jury on the quality of the evidence.

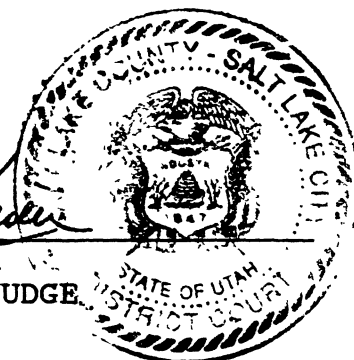
5. The Court has or will address defendant's eyewitness concerns in two ways: first, by way of the Ramirez hearing already conducted and, second, by giving a Long eyewitness identification instruction, if requested.

6. Giving the defendant a third means to explore the eyewitness identification issue by allowing an expert to testify on the unreliability of eyewitness testimony would have a significant tendency to cause the jury to abdicate its role as a fact finder at least with respect to any issues that must be decided based on eyewitness testimony.

7. Defendant will not be allowed to call an expert to lecture the jury about the unreliability of eyewitness identification testimony.

Dated this 5<sup>th</sup> day of January, 2000.  
~~December, 1999.~~

  
\_\_\_\_\_  
ROBERT K. HILDER  
DISTRICT COURT JUDGE



## ADDENDUM D

FILED DISTRICT COURT  
Third Judicial District  
JAN 05 2000  
SALT LAKE COUNTY  
By \_\_\_\_\_ Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

STATE OF UTAH,	:	FINDINGS OF FACT AND
Plaintiff,	:	CONCLUSIONS OF LAW ON STATE'S
vs.	:	MOTION TO ALLOW PRESENTATION
	:	OF VOLUNTARY STATEMENTS OF
	:	DEFENDANT DURING STATE'S
	:	CASE IN CHIEF
GINO MAESTAS,	:	
Defendant.	:	951900917

-----

The above-entitled matter came on regularly for hearing on the 15<sup>th</sup> day of October, 1999. Present were the State of Utah, by and through its counsel, Roger S. Blaylock, the defendant and his counsel, Scott Williams. Evidence having been taken, Memoranda having been submitted, arguments having been made and the Court being fully advised in the premises, does hereby make its

FINDINGS OF FACT

1. On February 20, 1995, a Top Stop convenience store located at 488 East 100 South, and a Pizza Hut restaurant located at 787 N. Redwood Road, were robbed by a Hispanic male with a handgun or a facsimile thereof.

2. On June 19 through June 20, 1995, the defendant stood trial for an Aggravated Robbery committed at the Top Stop and seven Aggravated Robberies committed at the Pizza Hut.



3. On June 19, 1995, the defendant, after taking an oath to testify truthfully, took the witness stand and denied any involvement in the robberies at the Top Stop and the Pizza Hut on February 20, 1995. His testimony included the following:

Q: (By Mr. Johnston) Mr. Maestas, on 20 February 1995, were you at a family party at Mary Sisneros' home from approximately 5:00 p.m. to 9:00 p.m.?

MR. BLAYLOCK: It's been asked and answered

THE COURT: Overruled

Q: (By Mr. Johnston) Did you rob the Top Stop on 20 February, 1995?

A: No, I didn't.

Q: Did you rob the Pizza Hut on February 20?

A: No, I didn't.

MR. JOHNSTON: Thank you.

4. Defendant tried to gain an advantage with the jury by swearing under oath that he had not robbed the Top Stop or the persons at the Pizza Hut restaurant.

5. On June 20, 1995, the defendant was convicted by a jury of eight counts of Aggravated Robbery with sentencing set for July 21, 1995, pending the preparation of a Presentence Investigation Report pursuant to Utah Code Ann., Section 77-18-1(5).

6. On July 10, 1995, in response to AP&P's request for information relevant to preparation of the presentence report the defendant wrote out, signed and gave Agent Albert J. Whitehorse a statement admitting robbing the Top Stop and persons at the Pizza Hut "to get me some money to go get high...I went to the gas station first and I then went to the restaurant. I went in the restaurant and seen a young man at the counter so I told him to give me the money and the rest of the people I told them to lay down. I took the money...."

7. Nothing in the court record suggests that defendant's written statement dated July 10, 1995 was not voluntary.

8. At the sentencing on July 21, 1995, counsel for defendant stated to the Court and to all present, "He has indicated to the probation officer that, in fact, he did commit the crimes that he has been convicted of, and he is extremely sorry for the impact that it has had on the victims, on the community, and upon his family...."

9. On July 21, 1995, the defendant stated to the Court and to all present, "I had admitted to the robberies that I done, I do have remorse for the victims, you know, and I regret doing what I did...I committed robbery before. I done time in prison. I got caught up in drugs, which I have never had any offense for, and I

got caught up in them, and I committed these robberies...I would like some leniency from the court on that...."

10. Defendant's statement made in open court July 21, 1995, was voluntary and nothing in the court record suggests that the statement was the result of any coercion by the police, the State or the Court.

11. Defendant <sup>tried</sup> ~~tired~~ to obtain leniency from the sentencing judge, the Honorable Pat Brian, by admitting in open court that he had in fact robbed the Top Stop, that he had in fact robbed the persons at the Pizza Hut restaurant and that he had "remorse for the victims."

12. There is no evidence that either the Court or the State promised defendant a more favorable sentence if he confessed and came clean.

13. Defendant was granted a new trial because "trial counsel's failure to request a cautionary eyewitness instruction rendered his performance constitutionally deficient and prejudiced Maestas" and not because of any action by the prosecution during the trial.

14. Defendant's admissions were analogous to voluntary confessions given to a third party following trial.

15. There is no evidence that defendant had ever been informed prior to his sentencing of his right to appeal his

conviction, of his right to remain silent at sentencing, or that any statements he made in anticipation of or at the time of sentencing might be usable against him at any later proceeding on this case.

The Court having entered its Findings of Fact does now enter its

**CONCLUSIONS OF LAW**

1. Allocution, the right to speak directly to a court prior to sentencing, was originally granted defendants because they were not represented by counsel and had no other opportunity to argue for leniency.

2. Utah Code Ann., Section 77-18-1(7), provides a defendant a right of allocution stating that "At the time of sentence, the court shall receive any testimony, evidence, or information the defendant or the prosecuting attorney desires to present concerning the appropriate sentence...."

3. Defendant's right to allocution is not a constitutional right spelled out in the U.S. Constitution or the Utah Constitution and is not on the same level as defendant's Fifth Amendment right against self-incrimination.

4. Defendant's admissions in writing and in open court were voluntary and not obtained through government coercion or misconduct, therefore, even if the "fruit of the poisoned tree"

doctrine would otherwise apply, that doctrine has no bearing on this case.

5. Defendant's statements were analogous to voluntary confessions made to third parties following trial and therefore do not implicate the Fifth Amendment.

6. Rule 24(d) of the Utah Rules of Criminal Procedure does not require the exclusion of new evidence which comes to light after a defendant is granted a new trial.

7. A defendant's admissions to probation officers, relatives or other third parties constitute new evidence admissible at a defendant's retrial.

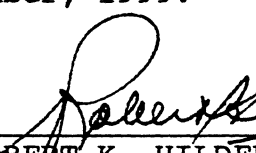
8. There was no constitutional violation as defendant was not required to give up one constitutional right to protect another constitutional right to exercise his right to allocution.

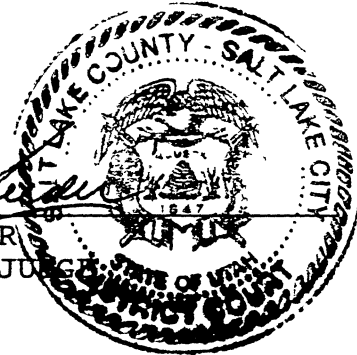
9. To the extent the Fifth Amendment may be implicated, defendant initially waived his right to remain silent when he took the stand, swore an oath to tell the truth and testified at the trial. He further waived that right, if it applied, when he voluntarily exercised his right to allocution at sentencing.

10. There is no constitutional or statutory reason or case precedent to exclude defendant's admissions as they are relevant evidence a jury is entitled to hear.

11. After establishing the appropriate foundation, the prosecution will be allowed to use defendant's admissions in the prosecution's case in chief.

Dated this 5<sup>th</sup> day of January, 2000, ~~December, 1999~~.

  
\_\_\_\_\_  
ROBERT K. HILDER  
DISTRICT COURT JUDGE



86

## ADDENDUM E

**77-17-13. Expert testimony generally — Notice requirements.**

- (1) (a) If the prosecution or the defense intends to call any expert to testify in a felony case at trial or any hearing, excluding a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure, the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial or ten days before the hearing.  
(b) Notice shall include the name and address of the expert, the expert's curriculum vitae, and a copy of the expert's report.
- (2) (a) The expert shall prepare a written report relating to the proposed testimony.  
(b) If the expert has not prepared a report or the report does not adequately inform concerning the substance of the expert's proposed testimony including any opinion and the bases and reasons of that opinion, the party intending to call the expert shall provide to the opposing party a written explanation of the expert's anticipated testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony, followed by a copy of any report prepared by the expert when available.
- (3) (a) As soon as practicable after receipt of the expert's report, the party receiving notice shall provide to the other party notice of witnesses whom the party anticipates calling to rebut the expert's testimony, including the name and address of any expert witness and the expert's curriculum vitae. If available, a report of any rebuttal expert shall be provided to the other party.  
(b) If the rebuttal expert has not prepared a report or the report does not adequately inform concerning the substance of the expert's proposed testimony, or in the event the rebuttal witness is not an expert, the party intending to call the rebuttal witness shall provide a written explanation of the witness's anticipated rebuttal testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony, followed by a copy of any report prepared by any rebuttal expert when available.
- (4) (a) If the defendant or the prosecution fails to meet the requirements of this section, the opposing party shall be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony.  
(b) If the court finds that the failure to comply with this section is the result of bad faith on the part of any party or attorney, the court shall impose appropriate sanctions.
- (5) (a) For purposes of this section, testimony of an expert at a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure constitutes notice of the expert, the expert's qualifications, and a report of the expert's proposed trial testimony as to the subject matter testified to by the expert at the preliminary hearing.  
(b) Upon request, the party who called the expert at the preliminary hearing shall provide the opposing party with a copy of the expert's curriculum vitae as soon as practicable prior to trial or any hearing at which the expert may be called as an expert witness.



**77-18-1. Suspension of sentence — Pleas held in abeyance — Probation — Supervision — Presentence investigation — Standards — Confidentiality — Terms and conditions — Restitution — Termination, revocation, modification, or extension — Hearings — Electronic monitoring.**

(5)(d) The contents of the presentence investigation report, including any diagnostic evaluation report ordered by the court under Section 76-3-404, are protected and are not available except by court order for purposes of sentencing as provided by rule of the Judicial Council or for use by the department.

## UTAH RULES OF EVIDENCE

### **Rule 702. Testimony by experts.**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

## AMENDMENT V

### **[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **Sec. 12. [Rights of accused persons.]**

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

## ADDENDUM F

1999 UT 32

STATE of Utah, Plaintiff and Appellee,

v.

Gino MAESTAS, Defendant  
and Appellant.

No. 970298.

Supreme Court of Utah.

April 9, 1999.

fendant was weak. U.S.C.A. Const.Amend.  
6.Jan Graham, Att'y. Gen., Kenneth A.  
Bronston, Asst. Att'y. Gen., Roger S. Blay-  
lock, Deputy District Att'y, Salt Lake City,  
for AppelleeJoan C. Watt, Salt Lake Legal Defender,  
for Appellant

DURHAM, Associate Chief Justice:

Defendant was convicted in the Third District Court, Salt Lake Department, Pat B. Brian, J., of eight counts of aggravated robbery, and defendant appealed. The Supreme Court, Durham, J., held that: (1) defendant was denied effective assistance of counsel, and (2) defense counsel's omissions prejudiced defendant entitling him to new trial.

Reversed and remanded.

### 1. Criminal Law ⚖️1134(3)

Defendant's claims of ineffective assistance of counsel on direct appeal, are reviewed as a matter of law. U.S.C.A. Const. Amend. 6.

### 2. Criminal Law ⚖️641.13(2.1)

Defense counsel's failure to request cautionary instruction regarding eyewitness testimony at aggravated robbery trial amounted to ineffective assistance of counsel, where there was question about the reliability of eyewitness identification of defendant as robber; show-up identification occurred at night, defendant was handcuffed and surrounded by police cars with their lights shining on him, none of the witnesses ever saw the full face of robber, and most of the witnesses had limited opportunity to observe robber. U.S.C.A. Const.Amend. 6.

### 3. Criminal Law ⚖️1166.10(1)

Defense counsel's failure to request cautionary instruction regarding eyewitness testimony at aggravated robbery trial prejudiced defendant requiring reversal, where instruction would have highlighted weaknesses in identifications of defendant as robber and circumstantial evidence against de-

¶1 Gino Maestas appeals from convictions on eight counts of aggravated robbery. Maestas asserts that he was denied effective assistance of counsel, as guaranteed by the Sixth Amendment to the United States Constitution and article I, section 7 of the Utah Constitution, because his trial counsel failed to (1) request a cautionary eyewitness identification instruction, (2) move to suppress the allegedly unreliable eyewitness identifications, (3) move to sever charges stemming from robberies at two different locations, (4) request a jury instruction limiting the use of double hearsay, and (5) move to consolidate two robbery counts based on the taking of property from one individual. Maestas argues that the above omissions entitle him to a new trial.

¶2 On February 2, 1995, a lone assailant robbed a Top Stop convenience store located at 488 East 100 South, and a Pizza Hut restaurant located at 787 North Redwood Road, within a period of one hour. According to the testimony at trial, a man entered the Top Stop just after 8:00 p.m., wearing a mask, a baseball cap, and a two-tone blue coat. The man walked to the counter, pulled out a gun, and demanded that the clerk, Paul Harbrecht, give him the money from the cash register. The robber also demanded that Harbrecht give up his wallet. Harbrecht complied, placing all the money from the cash register, approximately thirty-five dollars, and six dollars from his own wallet into a small off-white backpack that the robber placed on the counter. The robber allowed Harbrecht to keep his wallet and his identification. The robbery lasted approximately two minutes.

¶3 Harbrecht testified at trial that he pushed the store's "panic button" to alert police to the robbery, then ran outside to watch the robber flee. The robber jogged down the street for approximately half a block, then got into a gold-colored mid-80's Camaro. Harbrecht stated that he was not afraid during the robbery because he had been robbed only four months earlier. He concentrated on the robber's exposed features—his eyes, eyebrows, and nose. Officer Rose Marie Jones responded to the robbery call. Harbrecht described the robber as a Hispanic male in his twenties, between 5'7" and 5'9" inches tall, with short dark hair and dark eyes. He stated that the robber was wearing a white hat, blue Levis, and a two-tone blue coat. Although the lighting outside was poor, Harbrecht opined that the robber escaped in a gold-colored Camaro.

¶4 While Officer Jones was filling out the robbery report, she and Harbrecht heard another robbery being reported over her police radio involving a perpetrator with a description similar to the Top Stop robber. Officer Jones responded to that call. As she left, she told Harbrecht that she might return to pick him up so he could identify the suspect. Later, Officer Jones did just that, stating, "they had caught a suspect and [she] wanted [Harbrecht] to identify him." She drove Harbrecht to where other officers had stopped Maestas. Maestas was surrounded by police officers, wearing handcuffs, and standing with a spotlight and headlights directed towards him. Harbrecht identified Maestas as the individual who had robbed the Top Stop a short time earlier.

¶5 The second robbery (which accounts for seven of the eight counts of aggravated robbery) occurred at a Pizza Hut restaurant on Redwood Road at approximately 8:55 p.m. The robber wore Levis, a bluish-green and gray jacket, brown hiking boots and a hat; a dark mask covered his head and the lower part of his face. The robber entered the restaurant and pulled out a gun. The robber approached Pizza Hut employee Kurt Anderson, pushed the gun against Anderson's chest, and demanded that he place the money from the cash register into a bag. Anderson was scared, and his "life

flashed before [his] eyes." Anderson gave the bag to the Pizza Hut manager Jesse Baldwin and told him they were being robbed. The robber then ordered Anderson to the floor. From the floor, Anderson could no longer observe the robber or his interactions with the restaurant patrons. He did, however, hear the robber demand, in a Spanish accent, the money from the cash register and the safe, and from the other restaurant patrons. Anderson later described the robber as wearing a bluish-green and gray jacket and hiking boots and walking with a "limp."

¶6 With Anderson on the floor, Baldwin complied with the robber's request, placing approximately \$170 from the cash register, including \$10 in loose change, into the bag. During the delay, while the safe's timing cycle was operating, the robber collected money from the store employees and two restaurant customers. Anderson gave the robber six dollars from his wallet and Baldwin gave him between \$15 and \$20. The robber allowed both Anderson and Baldwin to keep their wallets.

¶7 Baldwin observed the robber for a total of approximately four minutes, sometimes from as far away as forty feet. Baldwin described the robber as in his twenties, weighing 180 pounds, with dark brown eyes, thick eyebrows, and a wrinkled forehead. He stated that the robber spoke with an accent, walked with a distinctive gait, and had an "odd" posture. According to Baldwin, the robber wore a black mask which extended all around his head, a white baseball cap, a "green, greenish-gray, greenish blue" coat, and navy-blue or black pants.

¶8 Shortly after the robbery, Officer Richard Findlay took Anderson and Baldwin to view a possible suspect located about a block from the restaurant. Maestas was handcuffed and standing in a spotlight between several patrol cars with their emergency lights activated. Anderson and Baldwin discussed the similarities and differences between Maestas and the robber. Baldwin thought the eyes were the same as the robber's. Anderson thought Maestas wore the same shoes. Both Anderson and Baldwin identified the jacket taken from Maestas' car

as the one worn by the robber. Although initially unsure, after viewing the jacket, both identified Maestas as the robber.

¶9 Candace Hsiao and her daughter Kara were customers in the Pizza Hut during the robbery. They testified that while they were eating and talking, a Hispanic male wearing a black muffler over his head and face approached, pointed a gun at them, and asked for their purses. Candace and Kara were terrified. Candace "blocked out" everything except the gun. Candace gave the robber \$15 in cash and bills and the money pouch in her day planner. Kara gave him five crumpled dollar bills.

¶10 Kara described the robber as wearing a white sweatshirt and hiking boots. According to Kara, the robber was polite and spoke with a slight accent. Later, at the show-up, neither Candace nor Kara could positively identify Maestas as the robber.<sup>1</sup>

¶11 Pizza Hut employees Shelby and Leslie Kurys were cleaning their work stations when Shelby saw the robber with a gun pointed at Anderson's back. The robber ordered Shelby and Leslie to the ground and asked for their wallets and wedding rings. The couple refused to give up their rings and did not have wallets. They did not see much because they remained on the floor until the robber left. However, they noted that the robber had a black mask, thick eyebrows and brown or hazel eyes. Both Shelby and Leslie described the robber as having a distinctive gait.

¶12 At the line-up, after viewing Maestas at the show-up, Harbrecht, Anderson, and Baldwin all identified Maestas as the robber. Candace and Kara Hsiao did not choose Maestas from the line-up, although they did identify him as a possibility. Leslie and Shelby Kurys both chose individuals other than Maestas from the lineup.

¶13 At trial, Harbrecht, Baldwin, and Anderson, all of whom had viewed Maestas at the show-up, identified Maestas as the robber. Kara and Candace Hsiao, who also

had seen Maestas at the show-up but could not pick him out of a line-up, testified that they thought, but were not sure, that Maestas was the person who robbed them. Leslie and Shelby Kurys, after choosing different individuals from the line-up, identified Maestas as the robber at trial. There were similar inconsistencies at trial in the testimony identifying the coat recovered by police from Maestas' car as that worn by the robber. Some witnesses recognized it, others did not.

¶14 At trial, in addition to the eyewitness accounts described above, the following evidence was offered: Officer Donald Cole testified that shortly after the Pizza Hut robbery he received a description of the suspect: "male Hispanic, dark hair, dark eyes, wearing a . . . blue and green jacket." An updated description included the fact that the suspect might be driving a blue late 70's Camaro. [id] Approximately 3 ½ blocks from the Pizza Hut, Officer Cole observed a blue Camaro parked in an apartment driveway. The hood felt warm, indicating that the car had recently been driven. From outside the car, Officer Cole observed crumpled dollar bills on the passenger seat and a blue and green jacket in the backseat.

¶15 Officer Cole then saw two people exit the apartment and get into the Camaro and drive off. Officer Cole stopped the car a few blocks away. Between five and seven other officers assisted him in the stop. Maestas was driving the Camaro; Mary Sisneros was the passenger. About \$53 was recovered from the Camaro and officers found a blue and green jacket in the back seat. According to Officer Cole at trial, "all" the robbery victims positively identified Maestas as the robber and "all" recognized the jacket as the one worn by the robber.

¶16 Officer Cole transported Maestas to the police department, while other officers conducted a search of Sisneros' apartment. The search located a dark neck gator, a head band, and a hat. No money or clothing matching the robber's was found.

1. The record is unclear regarding whether Candace or Leslie and Shelby Kurys were at the show-up. Officer Cole testified at trial that he had Officer Findlay transport the Pizza Hut victims to the show-up. Officer Cole further testi-

fied that all the Pizza Hut victims positively identified Maestas as the robber at the show-up. Thus, although not specifically mentioned in the record, a reasonable inference is that all the victims participated in the show-up.

¶ 17 Maestas testified in his own defense that on the evening of the robberies, he went to a family party at Sisneros' residence. He claimed he arrived at the apartment at approximately 5:30 p.m. and remained there until about 9:00 p.m. During that time, Maestas testified, he helped Sisneros clean up from dinner and watched some television. He claimed he did not leave the apartment at all during the evening until the time of his arrest. Maestas also pointed out that, in contrast to the descriptions offered by the eyewitnesses: (1) at the time of the robbery, he weighed only 135–40 pounds, not 180; (2) he had green, not brown, eyes; (3) he did not speak with an accent; and (4) he did not walk with a limp or a distinctive gait. Furthermore, Maestas testified that he was wearing sweat pants and a hooded sweatshirt at the time of his arrest, not the clothing described by the robbery victims, and that he had not changed his clothes that evening.

¶ 18 Sisneros corroborated Maestas' testimony, confirming that he was at her home from approximately 5:30 p.m. until 9:00 p.m., that he helped her clean up after dinner, watched television, drank some beer, and that he did not leave during that interval.

¶ 19 On rebuttal, Detective Dalling testified that Sisneros told him that she had spent a considerable amount of time that evening cleaning other parts of the apartment and, therefore, she would not necessarily have known if Maestas had left the apartment. Detective Dalling also testified that, during the search, he found food throughout the kitchen, giving it the appearance that it had not been cleaned. Sisneros claimed at the trial that she did not remember telling the above to Dalling.

## I. STANDARD OF REVIEW

[1] ¶ 20 Because new counsel represents Maestas in this appeal and because we believe the record is adequate to review his claims of ineffective assistance of counsel on direct appeal, we will review those claims as a matter of law. See *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998). To establish that he received ineffective assistance of counsel, Maestas must show that his counsel "rendered deficient performance which fell below

an objective standard of reasonable professional judgment" and that "counsel's deficient performance prejudiced him." *Id.* To do this, Maestas must "identify specific acts or omissions that fell outside the wide range of professional assistance and illustrate that, absent those acts or omissions, there is a 'reasonable probability' of a more favorable result." *Id.* (quoting *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah 1994)). To determine whether there is a reasonable probability of a more favorable outcome, we consider "the totality of the evidence taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record." *State v. Hovater*, 914 P.2d 37, 39–40 (Utah 1996). Finally, in reviewing counsel's performance, we give trial counsel wide latitude in making tactical decisions and not question those tactical decisions unless there is no reasonable basis supporting them. See *Taylor v. Warden*, 905 P.2d 277, 282 (Utah 1995).

¶ 21 Maestas asserts that he received ineffective assistance of counsel because his trial counsel failed to seek suppression of the blatantly suggestive eyewitness identifications and because counsel failed to request a cautionary eyewitness instruction at trial, which would have informed the jury of the weaknesses inherent in such identifications. Maestas argues that the case against him turned on the eyewitness identification; thus, had the jury received an appropriate instruction, it is probable that they would have returned a more favorable verdict. Alternatively, Maestas suggests that had trial counsel moved to suppress the eyewitness identifications made by the robbery victims at the show-up, the trial court would have granted that request with respect to at least some of the eyewitnesses, thus reducing the number of eyewitnesses identifying him at trial and significantly diluting the strength of the State's case against him.

## II. FAILURE TO REQUEST CAUTIONARY EYEWITNESS INSTRUCTION

¶ 22 Maestas asserts that trial counsel performed deficiently by failing to request a

cautionary instruction regarding the eyewitness testimony.

[2] ¶23 The original identification in this case occurred at night with Maestas handcuffed and surrounded by police cars with their lights shining on him. The officers told the eyewitnesses that they had caught a suspect. Additionally, Harbrecht heard a report over the radio that the suspect was involved in another robbery, increasing the likelihood that he would believe Maestas also committed the robbery to which he was a witness. Furthermore, the suggestive nature of the show-up in this case is compounded by the fact that none of the witnesses ever saw the full face of the robber. All the witnesses testified that in both the Top Stop and Pizza Hut robberies the robber wore a mask covering his nose and mouth, and a cap covering his head.

¶24 There are additional factors that call into question the plausibility of the individual eyewitness identifications in this case. Most of the witnesses had limited opportunity to observe the robber. Many were frightened. Baldwin and Anderson discussed Maestas' similarities to and differences from the robber at the show-up, suggesting that either Baldwin's or Anderson's degree of certainty that Maestas was the robber was bolstered by comments made by the other. The descriptions given by the eyewitnesses also varied widely. The robber was described by different witnesses as having wrinkles, weighing 180 pounds, having a limp, having no limp, speaking with an accent or no accent, having brown eyes or green. The witnesses also disagreed about the clothing the robber wore. Some claimed the jacket found by police in Maestas' car was the one worn by the robber; others were unable to identify it. Some could identify the hat confiscated from Sisneros' apartment; others could not. Finally, and perhaps most persuasively, only three of the seven eyewitnesses could positively identify Maestas in a line-up when asked to choose among him and six other Hispanic males.

¶25 The only defense available to Maestas at trial was the unreliability of the eyewitness identifications. Our cases have summarized the empirical studies questioning the

reliability of eyewitness identification. See *State v. Ramirez*, 817 P.2d 774, 779-80 (Utah 1991); *State v. Long*, 721 P.2d 483, 488-92 (Utah 1986). "The studies all lead inexorably to the conclusion that human perception is inexact and that human memory is both limited and fallible." *Long*, 721 P.2d at 488.

¶26 In *Long* we concluded that, if requested, a trial court must give a cautionary eyewitness identification instruction in every case where identification is a central issue. See *id.* at 492. Our conclusion was based on research showing that juries have a fundamental misunderstanding of the reliability of eyewitness identifications. We noted that because jurors do not appreciate the fallibility of such identifications, they often give eyewitness testimony undue weight. See *id.* at 490.

¶27 Although research has convincingly demonstrated the weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems. People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory process of an honest eyewitness. Moreover, the common knowledge that people do possess often runs contrary to documented research findings. See *id.* at 490.

¶28 Our decision in *Long* leads to the conclusion that, unless obvious tactical reasons exist to forego an instruction, trial counsel faced with seven eyewitnesses who, with varying degrees of certainty and consistency, all identify his client as the perpetrator, should request a cautionary eyewitness instruction. Such an instruction would, as pointed out in *Long*, apprise the jury of the inherent limitations in eyewitness identification. See *Long*, 721 P.2d at 492.

¶29 The State asserts that competent counsel may have reasonably refrained from requesting a cautionary instruction because the instruction would "bolster" the stronger eyewitness identifications, making the jury more likely to convict Maestas. See *id.* at 492 n. 5. The State's argument is unpersuasive. First, none of the identifications in this case were impervious to attack under the criteria set forth in *Long*. All of the wit-



nesses had a limited opportunity to observe the robber; the robberies were completed quickly and the robber's face and head were covered. Additionally, at least some of the witnesses were making a cross-racial identification. Some of the witnesses testified to being very afraid or fixating on the weapon rather than on the robber. Furthermore, as set forth above, most, if not all, the witnesses' identifications were tainted by a highly suggestive show-up prior to the lineup in which they selected him.

¶ 30 Trial counsel did nothing to focus the jury's attention on the limitations of eyewitness identification. He did not educate the jury with respect to the factors set forth in *Long*, which affect eyewitness identification, nor did he argue how each of those factors could have affected particular eyewitnesses. Counsel did not present expert testimony regarding the unreliability of eyewitness identification. In sum, the record is devoid of evidence or argument that would adequately inform the jury regarding the problems inherent in eyewitness identifications.

¶ 31 Furthermore, in addition to failing to request a cautionary instruction, defense counsel did not object to Detective Dallings' inaccurate testimony regarding eyewitness identification. Detective Dalling explained the discrepancies in the eyewitnesses' descriptions of the robber by testifying without foundation that it is possible to identify a person when a witness sees the person, but to be unable to describe the person accurately. Defense counsel did not cross examine Detective Dalling regarding this statement, or in any way attempt to correct the impression of the reliable nature of eyewitness identification that the detective's testimony presented.

¶ 32 In sum, under the facts of this case, trial counsel rendered objectively deficient performance by failing to request a cautionary eyewitness identification instruction that would have informed the jury of the unreliability of eyewitness identifications.<sup>2</sup> The rec-

ord does not reveal any reasonable tactic that would ameliorate or explain that deficiency.

### III. PREJUDICE

¶ 33 The State asserts that even if we find that Maestas' trial counsel rendered objectively deficient performance in failing to request a cautionary eyewitness instruction, Maestas was not prejudiced by that failure. The State claims that any error was harmless because there was an "abundance" of evidence supporting Maestas' conviction.

[3] ¶ 34 We conclude, however, that the absence of a cautionary instruction seriously undermined the fairness of this trial. See *State v. Young*, 853 P.2d 327, 367 (Utah 1993). Counsel's omission went to the heart of the defense—the theory that Maestas was mistakenly identified as the robber. An appropriate jury instruction would have highlighted the weaknesses in the remaining identifications for the jury, which might well have changed the verdict.

¶ 35 We do not find the other evidence supporting the conviction conclusive. Harbrecht observed the robber getting into a Camaro—the same make of automobile driven by Maestas at the time of his arrest. Hot air and a warm hood indicated that the Camaro had recently been driven, contrary to Maestas' testimony that he remained at Sisneros' apartment all evening. Officer Cole recovered "several" crumpled dollar bills from the front seat of Maestas' Camaro—the robber took (exactly) five crumpled dollar bills from Kara Hsiao during the Pizza Hut robbery. Some of the witnesses identified the coat found in Maestas' car as the one worn by the robber. A search of Sisneros' apartment revealed a dark neck gator capable of being used as a mask and a hat that some of the eyewitnesses claimed the robber wore.

¶ 36 The foregoing circumstantial evidence is inconclusive when viewed in light of what the officers did *not* find. Each eyewitness testified that the robber used a gun. No gun was found. The Pizza Hut employees indicated that the robber stole at least

2. We do not wish to imply that in every case in which eyewitness identification is an issue, trial counsel's performance is per se deficient if a cautionary instruction is not requested. The

facts in another case might provide a plausible justification for such a tactic. The record in this case, however, does not

\$15 in loose change. No change was found on Maestas or Sisneros, in his car, or in Sisneros' apartment. Only \$53 was recovered from Sisneros and/or from Maestas' car, whereas over \$200 was taken in the robberies. No money was found in the apartment. The officers also did not find the bags used in the robberies or the day planner pouch stolen from Candace Hsiao. Maestas was not wearing clothing consistent with the descriptions of the robber at the time of his arrest, nor did the searches of Maestas' car and Sisneros' apartment locate such clothing. Maestas' car, although the same make as the one used in the Top Stop robbery, was a low-rider with chrome wheels; it did not match the description of the car seen leaving the Top Stop as to year and color. On balance, we find that the circumstantial evidence against Maestas is not overwhelming or conclusive. Thus, absent defense counsel's deficient performance, there is a reasonable likelihood that a more favorable result would have been reached.

¶ 37 We hold that trial counsel's failure to request a cautionary eyewitness instruction rendered his performance constitutionally deficient and prejudiced Maestas. Maestas is entitled to a new trial. Reversed and remanded.

Chief Justice HOWE, Justice STEWART, Justice ZIMMERMAN, and Justice RUSSON concur in Associate Chief Justice DURHAM's opinion.



1999 UT 40

STATE of Utah, Plaintiff and Appellee,

v.

Douglas A. LOVELL, Defendant  
and Appellant.

No. 930439.

Supreme Court of Utah.

April 23, 1999.

Rehearing Denied June 22, 1999.

Defendant pled guilty to the aggravated murder and waived his right to be sentenced

by a jury. The District Court, Weber County, Stanton M. Taylor, J., sentenced defendant to death, and defendant appealed. After remand for trial court to conduct evidentiary hearing on conflict of interest with defense counsel, the Supreme Court, Durham, Associate C.J., held that: (1) lengthy personal and business relationship between defense counsel and prosecutor did not result in actual conflict of interest; (2) failure to inquire into defendant's letter, regarding dissatisfaction with counsel or possible self-representation, was harmless; (3) relying on same facts for two aggravators was harmless beyond reasonable doubt; and (4) counsel was not ineffective in failing to challenge constitutionality of death penalty statute.

Affirmed.

#### 1. Criminal Law ⚖️641.5(.5)

The right to conflict-free representation is guaranteed by the Sixth Amendment. U.S.C.A. Const.Amend. 6.

#### 2. Criminal Law ⚖️1134(3), 1158(1)

Supreme Court defers to the trial court's findings of fact following remand for evidentiary hearing on claim of conflict of interest with counsel, but treats issue as a question of law. Rules App.Proc., Rule 23B.

#### 3. Criminal Law ⚖️641.5(.5)

Defendant's Sixth Amendment right to effective assistance of counsel was not violated by lengthy personal and business relationship between defense counsel and prosecutor, who jointly owned real estate and who had practiced together, absent any showing of actual conflict that adversely affected defendant, either in general manner of approaching case or seeking plea bargain to avoid death penalty. U.S.C.A. Const.Amend. 6.

#### 4. Criminal Law ⚖️641.5(.5)

Actual conflict of interest, not mere appearance of impropriety, is required to show ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

## ADDENDUM G

SCOTT C. WILLIAMS (6687)  
Attorney for Defendant  
SALT LAKE LEGAL DEFENDER ASSOCIATION  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-5444

**FILED DISTRICT COURT**  
Third Judicial District

SEP 07 1999

SALT LAKE COUNTY

By \_\_\_\_\_  
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH,  
SALT LAKE DEPARTMENT

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STATE OF UTAH,	:	NOTICE OF INTENT TO USE
	:	EXPERT WITNESS
Plaintiff,	:	
	:	
v.	:	
	:	
GINO MAESTAS,	:	Case No. 951900917FS
	:	JUDGE: HILDER
Defendant.	:	

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Defendant, Gino , by and through his attorney of record, Scott C. Williams, hereby provides notice pursuant to 77-17-13 U.C.A. of his intent to call Dr. David H. as an expert witness at trial in the above captioned matter if the defendant does not prevail in his Motion to Suppress Eyewitness Identification.

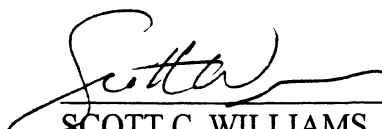
Dr. Dodd is a professor of Psychology at the University of Utah and specializes in Eyewitness Memory, Cognition and Language, and Language Development. In this case, the defense will call him to testify relevant to eyewitness identification evidence, and particularly the unreliability of such evidence. Dr. Dodd would be expected to inform the jury of the general pitfalls and dangers of misidentification evidenced in the large body of empirical studies that have been conducted over the past 40 to 50 years. Additionally, Dr. Dodd will relate particular studies and concerns to the circumstances surrounding the identification of the defendant by the

witness(es) in this case, and give his conclusions relevant to the reliability of the identification procedure employed in this case.

The defense cannot afford to employ Dr. Dodd before the outcome of the Motion to Suppress. If defendant does not prevail in that Motion, Dr. Dodd will be immediately retained, will review the case in detail, and will issue a report which will be immediately forwarded to the prosecution. Attached hereto is a copy of Dr. Dodd's most recent curriculum vitae.

This Notice is sufficient to satisfy the preliminary requirements of 77-17-13.

RESPECTFULLY SUBMITTED this 8 day of September, 1999.

  
SCOTT C. WILLIAMS  
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I mailed/delivered a true and correct copy of the foregoing , postage prepaid, this 8 day of ~~July~~ <sup>September</sup>, 1999, to Roger Blaylock, Assistant Salt Lake District Attorney, located at 2001 South State, S3700, Salt Lake City, Utah 84109-1210.



## ADDENDUM H

SCOTT C. WILLIAMS (6687)  
Attorney for Defendant  
SALT LAKE LEGAL DEFENDER ASSOCIATION  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111  
Telephone: (801) 532-5444

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IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH,

SALT LAKE DEPARTMENT

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STATE OF UTAH,	:	SUPPLEMENTARY REPORT OF
	:	DEFENSE EXPERT Dr. DAVID DODD
Plaintiff,	:	and RESPONSE TO PLAINTIFF'S
	:	OPPOSITION TO DEFENDANT'S
v.	:	USE OF EXPERT
GINO MAESTAS,	:	Case No. 951900917FS
	:	JUDGE: HILDER
Defendant.	:	

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COMES NOW defendant, Gino Maestas, by and through his attorney of record, Scott C. Williams, hereby provides the attached supplementary report of defense expert witness Dr. David H. Dodd relating the specific nature of his proposed testimony in the above captioned matter.

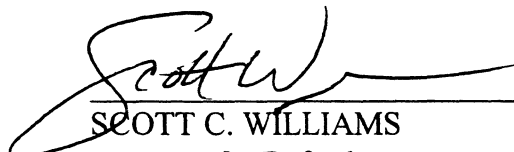
It should be noted that Dr. Dodd's testimony would not only describe the various general issues and pitfalls besetting eyewitness identification testimony, but would also include specific analogies between the facts of this case and the circumstances and settings of specific studies of which he has knowledge. Thus, Dr. Dodd will not simply be "lecturing to the jury" on the subject of purely generalized issues and concerns related to eyewitness identification. He will, instead, be providing testimony that is essential to the need on the part of the defense to fully explain and demonstrate both the general problems, and the particular problems as they are

manifested in the specific facts of this case and the circumstances of the identification of the defendant by various witnesses.

Dr. Dodd's expert testimony is the **only** means by which the defendant's theory of the case can be fully and adequately presented. Absent expert testimony and the inclusion by reference of the many particular studies that confirm the existence of serious pitfalls in eyewitness identification, the defense will have only argument to the jury—which the jury will be instructed is not evidence. Expert witness testimony is especially important in a case like this one in that there is **no** direct evidence tying the defendant to the crimes, and eyewitness identification has been shown to be not only prone to error, such error has been shown to be exacerbated by the fact that jurors tend to actually over-emphasize the reliability and credibility of eyewitness identification. That is the reason that special instructions are required in cases like this one. (See, the opinion reversing and remanding this case on appeal, as well as Long and Ramirez.) However, jury instructions alone would be insufficient to safeguard against the pitfalls of I.D. testimony, because the jury will have nothing that is actually in evidence to inform the issues and give them guidance in applying the instructions to the case.

In consideration of such circumstances, this Court should allow the defense to call Dr. Dodd as an expert witness at trial for the purposes related in this Supplement and the original Notice previously filed.


RESPECTFULLY SUBMITTED this 14 day of October, 1999.

  
SCOTT C. WILLIAMS  
Attorney for Defendant



CERTIFICATE OF SERVICE

I hereby certify that I mailed ~~delivered~~ a true and correct copy of the foregoing ,  
postage prepaid, this 14 day of October, 1999, to Roger Blaylock, Assistant Salt Lake District  
Attorney, located at 2001 South State, S3700, Salt Lake City, Utah 84109-1210.

A handwritten signature in black ink, appearing to read "Scott W. Blaylock", is written over a horizontal line.

Dr. David H. Dodd  
Associate Professor  
Department of Psychology  
University of Utah  
Salt Lake City UT 84112

October 13, 1999

Mr. Scott C. Williams  
Attorney  
Salt Lake Legal Defender Association  
424 East 500 South, Suite 300  
Salt Lake City, Utah 84111  
Re: State v. Maestas

Dear Mr. Williams:

What follows is my preliminary opinion on the Maestas case, formed on the basis of my knowledge of the research on eyewitness perception & memory. My knowledge of the case is formed entirely by two transcripts entitled "Evidentiary Hearing on Motion to Suppress Eyewitness Identification (Volume I & II) dated August 30, 1999 & September 8, 1999. It would be useful at a later date to review all other relevant materials, such as police reports following the robberies, reports of the lineup (with appropriate photos), etc. Additional information could only add to the list of issues that are of concern with the identifications of witnesses.

To date, I have testified in more than 20 trials in Utah and Colorado; my CV is previously provided to you. The expert testimony I have provided focuses on factors particular to a specific case that could influence the accuracy of an eyewitness. In the Maestas case the central issue is the accuracy of the identification of the perpetrator. In preparation for testimony, I usually review police reports, eyewitness transcripts from preliminary hearings, photospreads or pictures of lineups, etc. Then I review and consider the research that is most relevant to the particulars of the case. In this case, I have followed this process.

My testimony in relation to this case would probably include the following:

1. Eyewitness testimony is dependent upon human perception & memory, it is therefore potentially unreliable. The human brain is not a videotape machine that can permanently record an image that remains unchanged on the tape. Many factors that control the degree of unreliability have been studied in the existing research; relevant research reports now number in the hundreds.

2. Eyewitness experts typically divide the process of memory into three broad stages:

**acquisition, retention, and retrieval.**<sup>1</sup> Acquisition is the stage in which the relevant information is encoded through the senses, primarily vision and audition. Retention is the holding of memory over time, a process influenced by the simple passage of time and by other related events that may alter the original memory. Retrieval is calling up those memories, including reporting what is remembered and recognizing whether this is the same face.

3. Acquisition is the most critical and depends heavily upon many conditions, especially opportunity to acquire the information (including distance from the perpetrator and lighting conditions), duration or time, attentional processes, emotional state, etc. Reviewing the specifics of this case leads me to offer several relevant factors:

a) Disguises. This is clearly one of the most important factor in this case. In these robberies, the robber covered a large part of his face with a "face mask" and concealed the hair with a hat; that is very significant for the probability of later identification. The research is quite clear that even minor changes can appreciably reduce the likelihood of identification; for example, a change as minimal as an initial observation with glasses and later attempted identification without glasses will have a decided effect. In a research report by Simmonds et al.,<sup>2</sup> they noted that one of the identification targets was well disguised by a fur hood, that is, later identification was very unlikely is conducted without the hood (9%) than with the hood (54%). The robber in the present case is greatly more effectively disguised and even less likely to be correctly identified since so little of the face was seen.

Facial perception depends upon the whole face; thus the greater the degree of disruption of the entire face the less likely the face can be accurately acquired. Certain features are considered to be most easily and rapidly acquired: i) age (young vs. older/lined), ii) facial shape (long, oval vs. round, pudgy), and iii) hair (short vs. long). Of these, approximate age may be observable in lines around the eyes and/or forehead. The other two features are difficult to acquire with the disguise described. And any acquisition of the total face is inconceivable.

As to the suggested memory of the eyes of the robber & the eyes of Mr. Maestas as similar, it can be noted that this is a possibility, though seemingly remote. A fair test of that possibility could best come from a lineup (corporal or photographic) in which similar men all wear the noted disguise.

b) Identification based on clothing. As Simmonds et al. (cited above) report, the use of clothing also improves identification since such elements provide additional cues. Yet such additional cues provide risk of false identification; as Simmonds et al. point out, if the suspect is dressed in clothes similar to the perpetrator and others in a lineup are dressed differently, the suspect is likely to be selected, whether or not the suspect is the perpetrator. Indeed, it would be ideal to conduct a lineup in which all members are dressed in clothes similar to those described.

The accuracy of the identification of the clothing itself is a difficult puzzle as well. Under normal daylight conditions with adequate time to observe a piece of clothing, such as the coat at

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<sup>1</sup>cf. Loftus, E. F. & Doyle, J. M. (1997) Eyewitness Testimony: Civil and Criminal (Third Edition). Charlottesville, VA: Lexis Law Publishing

<sup>2</sup>Simmonds, D. C. V., Poulton, E. C., & Tickner, A. H. (1975) Identifying people in a videotape recording made at night. Ergonomics, 18, 607-618.

issue, identification should be quite accurate. Here the identification accuracy is unclear, though some witnesses claim that Mr. Maestas's coat is not the one worn by the robber. Even for those making a claim of identification of the coat, it is unclear whether this was a result of seeing the same coat at the crime and then at the showup or that the showup provided a chance to acquire a memory for a new, but somewhat similar, coat.

c) Lighting conditions. Everyone knows that "you can't see in the dark." Nonetheless there are aspects that are not common knowledge, at least consciously so. As light levels reduce, visual acuity diminishes as does the ability to perceive colors accurately. Both results relate to our dual retinal system; daylight vision relies predominantly on the acuity & color capacity of the cones in the center of the retina and night vision relies predominantly on the rods that are neither color perceptive nor show high acuity. As a result, the ability to see a face to the level of detail necessary to "learn" the face accurately enough for later identification is greatly reduced in darker conditions. Simmonds et al. (cited above) have shown a severe reduction in accuracy for a videotaped recording made at night relative to a comparable recording made in daylight.

d) Duration of observation. The shorter the period of time to view a face that has not been seen before the less likely someone can later identify that face (e.g., Laughery et al.<sup>3</sup>) In addition, reports of time elapsed are commonly serious overestimates in typical eyewitness situations (cf. Loftus et al.<sup>4</sup>). In the present case, it seems unlikely that the entire interaction in either robbery took place over more than 1 minute total.

In a research scenario<sup>5</sup> quite similar to key elements of the present case, customers (assistants of the experimenter) visited small convenience stores and held a somewhat unusual interaction with the clerk (checker). For example, in half of the cases, these customers paid for a purchase of 80 - 90 cents with nothing but pennies, counting them all out for the clerk; subsequently they asked the clerk for directions to a local place. The visit lasted between 3 and 4 minutes. The original plan for the experiment called for a return 24 hours later with a photographic lineup; however during piloting, identification of the clerks from subsequent photo lineup was chance, apparently indicating that no one could make a correct identification from memory. When the time between the visit and the identification was shortened to two hours, accuracy was still only 34% (compared to a chance level of 17%). The duration of opportunity to observe was longer than appears to be true of this case.

e) Attention. Another central consideration is the amount of time during which the eyewitness attended to the face. The witnesses generally spent some of their time looking at various aspects of the situation, such as their money. During this period of time, their visual processing was occupied with these tasks.

f) Weapon focus. This term refers to a witness's tendency to concentrate his/her attention on a weapon, such as a gun or knife; thus the witness is looking at the barrel of a gun rather than

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<sup>3</sup>Laughery et al. (1971). Recognition of Human Faces: Effects of Target Exposure Time, Target Position, Pose Position, and Type of Photograph, *J. Applied Psychol.*, 55, 477.

<sup>4</sup>Loftus et al. (1987). Time Went By So Slowly: Overestimation of Event Duration By Males and Females. *Applied Cognitive Psychol.*, 3.

<sup>5</sup>Brigham et al. (1982). Accuracy of eyewitness identifications in a field setting. *J. Personality & So. Psychology*, 42, 673-81.

at the face. This phenomenon is well established; see Loftus & Doyle, op cit. Indeed research monitoring eye movements demonstrates clearly that this is the case. Impairments of memory have been found for both those with a weapon pointed at them and for those who are bystanders.

g) Stress and fear. A traumatic event involving serious threat of harm to a witness has the strong likelihood of disrupting normal mental processes, including the encoding of information about the events and people involved (see discussion in Loftus & Doyle, op cit.). Note that several of the witnesses describe themselves and/or are described by others as extremely frightened by the gun that was waved at them in a threatening manner. In general, higher levels of stress/fear tend to interfere with mental functioning and have been shown to result in a strong concentration on a narrow set of information in the environment, especially on a weapon if one is present.

**Retention.** Events during the time in which a memory is retained up to the final recall (at the time of trial) have the potential for altering the memory. Of greatest concern are events that provide witnesses with strong suggestions about what they remember.

a) Suggestion. Suggestive events often have very powerful influences on the retention of information, including memory for faces; a large body of research<sup>6</sup> shows that suggestion can result in changes in "memory." Suggestion takes various forms; any time a witness sees faces (or representations of faces), there is a potential for suggestion. The critical consideration for judging whether an identification is a recognition based on a memory and whether it is likely to be a result of suggestion involves the circumstances of that identification, in particular whether an identification is fairly conducted. A showup has the greatest potential for providing a suggestive recognition. The showup clearly offers some advantage to police trying to quickly solve a crime and arrest a probably guilty suspect. But within the procedure is a great risk that the act of presenting the suspect in a way that says to the witness: "This is the person who committed the crime" rather than "Is this the person?" Once the witness agrees that this is the person, the memory of the suspect shown up will alter the existing memory in a fairly permanent way so that the two "memories" are merged. The show up viewing of the suspect is, as here, with better lighting, more time to observe, etc. than was the observation at the time of the crime. There is now a very large body of research on suggestion effects, including the "contamination of facial memory." (Cf. Jenkins & Davies<sup>7</sup>) by suggestion.

A very recent paper highlights the dangers of eyewitness identification in questionable circumstances.<sup>8</sup> In this paper, Wells et al. argue that "...false eyewitness identification is the primary cause of the conviction of innocent people." They reviewed the first 40 cases in which a previously convicted person was exonerated based on subsequent DNA evidence. In each of the

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<sup>6</sup>Cf. Loftus & Doyle, op cit., chapters 3 and 4.

<sup>7</sup>Jenkins, F. & Davies, G. (1985) Contamination of facial memory through exposure to misleading composite pictures. Journal of Applied Psychology, 70, 164-176.

<sup>8</sup>Wells, Small, Penrod, Malpass, Fulero, & Brimacombe, (1998, in press). Eyewitness identification procedures. Law and human behavior.

cases, the crime was serious and the convicted person had served time in prison, some on death row, prior to the exonerating DNA evidence. The cases were not selected in any way other than being the first 40 cases in which such evidence was used to clear the convicted person. In 90% of these cases (36 of 40), eyewitness identification evidence was central to the conviction. In their recommendations about improved procedures, they discuss *Neil v. Biggers*, 1972<sup>9</sup> and *Manson v. Braithwaite*, 1977<sup>10</sup> in which the U. S. Supreme Court emphasized these criteria: a) opportunity to observe, b) degree of attention, c) accuracy of original description, d) level of certainty at the identification procedures, e) time between the crime and the identification procedure. (Note that these are remarkably like those proposed by the Utah Supreme Court in *State v. Ramirez*.<sup>11</sup>) Wells et al. show the relevance and, additionally, some limitations of these standards; then they proceed to argue for eyewitness procedures that avoid the sorts of suggestion that contributed to the false convictions reported in their article. The serious problems presented by showups are specifically discussed by Wells et al.

Beyond the fact of a showup in this case is the peculiarity of using the showup on multiple witnesses. Since the showup offers an enormous risk of contamination of the eyewitness identification process, there is a serious question as to why several witnesses would be brought to participate in the showup. If we assume that the purpose is efficiency of identifying someone to be charged, one witness is quite adequate for that purpose. In addition, concerns about the suggestive influences of a showup are highlighted if those who later identify the suspect in a lineup are all witnesses who participated in the showup and those who later fail to identify the suspect are all witnesses who did not participate in the showup.

An additional suggestive factor presents itself in the *Maestas* case. Whenever witnesses are allowed to collaborate in making an identification, the risk of suggestion is also increased. Loftus & Greene<sup>12</sup> demonstrated that a witness can be strongly influenced by the opinion of others. In the research study, a witness sees a face, then hears a description of the face with an erroneous detail, and then attempts a description and/or identification. Indeed, when given the misleading detail, 70% of witnesses picked ("recognized") a face with that erroneous feature whereas only 13% of those not so misled picked a face with that detail.

It is also well established that an erroneous "recognition," once made, will be maintained in later identifications. Gorenstein & Ellsworth<sup>13</sup> found that, once an erroneous choice was made,

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<sup>9</sup>*Neil v. Biggers* 409 U. S. 188 (1972)

<sup>10</sup>*Manson v. Braithwaite* 432 U. S. 98 (1977).

<sup>11</sup>*State v. Ramirez*, 817 P. 2d 774 (Utah, 1991).

<sup>12</sup>Loftus, E. F. & Greene, E. (1980) Warning: Even memory for faces can be contagious. Law & Human Behavior, 4, 323 - 334.

<sup>13</sup>Gorenstein, G. W. & Ellsworth, P. C. (1980) Effect of choosing an incorrect photograph on a later identification by an eyewitness. Journal of Applied Psychology, 65, 616-

witnesses stuck with that choice when the right choice was available & were thus much less likely to pick the correct choice. The Maestas case then presents the likelihood that a false identification made to a suggestive showup will continue to be made in a lineup.

Finally, it should be noted that, in the general literature on suggestive influences on the eyewitness's memory, it is those memories that are weakest at the time of acquisition that are also those most vulnerable to suggestion. This is not a surprise. Consider the converse, namely a case where the perpetrator is well known to the witness or is well "learned" through interaction over a long period of time with full view of the face under adequate lighting, limited stress, etc. The witness is highly likely to resist a suggestion that it is someone else's face that belongs to the perpetrator. Clearly suggestion must operate on a weak memory, which is exactly the circumstance of this case.

5. **Retrieval.** All of the previous is important to retrieval at an end point (such as a trial) since the process of remembering is a function of both the quality of information originally acquired by the witness and upon intervening time and events. If memory is poor or altered by intervening events, it will not improve for later retrieval. Indeed, when reports are limited and/or inconsistent, especially about central details of what happened, it is likely that some intervening process (forgetting, suggestion, or distortion) has occurred. Further, if there is an error in an earlier identification process, the resulting mistake will be believed by the witness and form the basis of subsequent incorrect retrieval.

Finally, it is well established in the research that the relationship between the witness's confidence and the witness's correctness is extremely low when the acquisition conditions were poor<sup>14</sup>. These are the same acquisition conditions that lead a witness to be vulnerable to suggestion in the first place. But now the witness who is wrong comes to be highly convinced that this person, whose identity was "suggested" to them, is the right person. The research shows the witness who is highly confident is nearly as likely to be wrong as is the witness who is uncertain about whether he/she is correct if the conditions of the original acquisition minimize the opportunity for adequate acquisition. At least part of this effect seems to reflect a growing confidence over repeated interviews and testimony. Interestingly, there are research reports indicating that, as the eyewitness's confidence improves, the account of the event improves, and the confidence is explained by the witness also reporting improved lighting, longer time to observe, etc.<sup>15</sup>

Sincerely,

David H. Dodd, Associate Professor of Psychology, Associate Dean

<sup>14</sup>Wells & Murray (1984) Eyewitness confidence. In: Wells & Loftus (Eds.), Eyewitness testimony: Psychological perspectives.

<sup>15</sup>Cohen, as described and cited in Loftus & Doyle, op cit.

## ADDENDUM I



I. STATEMENT OF THE OFFENSE: This statement should contain your version of what happened related to the offense and should include your reasons for your involvement and how you feel about what happened.

first of all I would like to say that the thought of doing something like this never crossed my mind. I tell that I wish I would also like to note: I had a job and I have always kept a job up till the time of my arrest & my version of what happen. I was not by the way and I came to the restaurant and gas station. I had a play gun so I thought I would get me some money. I to go get back I went to the gas station first and I then went to the restaurant I went in the restaurant and seen a young man at the counter. So I told him to give me the money and the rest of the people I told them to leave & I then took the money. I knew no one would get hurt as I said be for the gun was (not real) I left and about 10 or 15 min later I was in police custody. The reason I did that was to go get back and have some extra money till I got paid that was the first time I have been that in my thing long.

I am Victor Sorey I put them people through that and I see your family is going through this I regret I have never this. I know that if I was wrong no matter how I look at it I wish I could change it. if I could change it I would of asked for help if to get off drugs now that I can get help I am going to do my best to get it. My life is going to change for the better I have a family to take care of and I have some that the part in the right way but now I made a mistake but when I am released from prison I plan to help put any one in that situation again for I know that I that this not get you no where in life and I should of realized that. But I changed the life of the victims and also the life of my family and also my life I regret it more than anything I plan to pay for all the right things.

(Thank you for your time and understanding)

DATE:

7/10/95

SIGNATURE:

Victor Sorey

PAGE 3  
PRESENTENCE INVESTIGATION REPORT  
MAESTAS, GINO

**C. DEFENDANT'S VERSION OF OFFENSE:**

"first of all I would like to say that the thought of Doing Something like this never crossed my mind till that night & would also like to NOTE: I had a job and I have alwas keep a job up till the time of my arrest & my version of what happen. I was out by my self and I came to the restaurant. and gas station I had a play gun so I thought I would get me some money to go get high I went to the gas station first and I then went to the restaurant I went in the restaurant and seen A young man at the counter. So I told him to give me the money and the rest of the people I told them to lay down, I took the money I knew none would get hurt as I said be for the gun was (not real) I left and about (10 or 15 min) later I was in police custody

The reason I did that was to go get high and have some extra money till I got paid that was the first time I have done that or anything rong.

I am Very Sorey I put them people through that and sorey my family is going through this I regreet I have done this. I know that it was wrong no matter how I look at it I wish I could change it. if I could change it I would of asked for help to get off drugs now that I can get help I am going to do my best to get it.

My life is going to change for the better I have a family to take care of And I have done that in the past in the right way. But now I made a Mistake but when I am released from prison I plan to never put anyone in that sitution again for I know that that does not get you no where in life and I should of Realized that Befor I chaned the life's of the victims and also the lifes of my family and also my life I regreet it more than anything I plan to change for all the Right Resons.

(Thank you for your time and understanding)"

Signed: Gino Maestas

Dated: 07-10-95

**D. SOURCE OF INFORMATION:**

The defendant, Gino Maestas.

**E. CO-DEFENDANT STATUS:**

There are no co-defendants identified in this matter.

EXHIBIT B

1 it didn't even take into account the fact we were talking about  
2 firearm enhancements. Those weren't considered in the matrix.  
3 Even without that, the time indicated for the prison was 56  
4 years. The Court heard the evidence. These are serious  
5 matters. The statement made by Mr. Maestas that he did this  
6 because he wanted to have some money so he could do some drugs  
7 should -- you know, offends the State a lot. For that reason,  
8 he then goes and puts people in peril, and puts them in a  
9 position where they think they are going to die. He does this  
10 with eight different people.

11 Your Honor, I suggest that the Court view this very  
12 seriously. The question of whether or not to run these  
13 consecutive or concurrent, I think, is an important question.  
14 There is a lot of time the Court can assess on the firearm  
15 enhancements. That's a minimum of one year, to run  
16 consecutive, could be as much as five years. Because of the  
17 nature of these offenses, the fact that the number of them and  
18 all of the factors involved here, the prior record of this  
19 defendant, this isn't the first time he committed aggravated  
20 robbery, would suggest there is no question commitment should  
21 be involved, and it should be run consecutive.

22 THE COURT: Anything the defendant would like to say  
23 before sentence is imposed?

24 THE DEFENDANT: Yeah. I would like to state to the  
25 Court that the presentence report is unfair, like I know I had

1 admitted to the robberies that I done, I do have remorse for  
2 the victims, you know, and I regret doing what I did, but the  
3 56 years is kind of -- isn't fair on my behalf. I can be a  
4 changed person. I was, like he said, I committed robbery  
5 before. I done time in prison. I got out, and I completed the  
6 programs and everything. I got caught up in drugs, which I  
7 have never had any offense for, and I got caught up in them,  
8 and I committed these robberies, and my intents wasn't to hurt  
9 anybody. I wasn't going to hurt anybody. In the trial, I was  
10 being nice about it, it is wrong what I did, but I wasn't  
11 threatening anybody, to kill anybody, or anything. My  
12 intention wasn't to hurt anybody. I would like some leniency  
13 from the Court on that. 56 years, that's my whole life, the  
14 rest of my life in prison. I can be changed. I have showed  
15 that before.

16 THE COURT: Anything further?

17 THE DEFENDANT: No.

18 THE COURT: Do both sides submit? Is there any legal  
19 reason why sentence should not be imposed?

20 MR. JOHNSTON: No.

21 MR. BLAYLOCK: No.

22 THE COURT: The defendant stands convicted of eight  
23 counts of first-degree felony. The gun enhancement provision  
24 still exists, does it not?

25 MR. BLAYLOCK: It does.