

1979

# State of Utah v. Ralph Leroy Menzies : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH, :  
Plaintiff-Respondent :  
-v- :  
RALPH LEROY MENZIES, : Case No. 16324  
Defendant-Appellant :

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BRIEF OF APPELLANT

Appeal from the judgment and conviction of the crime of Aggravated Robbery in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Jr., Judge presiding.

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v.	:	
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Defendant-Appellant	:	

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, RALPH LEROY MENZIES, appeals from the conviction of the crime of Aggravated Robbery in the Third Judicial District Court, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, RALPH LEROY MENZIES, was found guilty by a jury before the Honorable Ernest F. Baldwin, Jr., Judge presiding, of the crime of Aggravated Robbery on February 6th, 1979, and was thereafter sentenced to be committed to the Utah State Prison for the indeterminate term as provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction and a dismissal. In ther alternative counsel seeks to have the matter remanded to the court and a new trial ordered in the above entitled matter.

## STATEMENT OF THE FACTS

In the evening of the 17th day of July, 1978, a Valfoa Lealaitafea was driving a taxi during the course of his regular employment. He stopped at a location on approximately Fourth East and Seventh South, in Salt Lake City, to pick up a fare. A person got into his taxi and shortly thereafter pulled or produced a weapon which he pointed at Mr. Lealaitafea.

The victim, Mr. Lealaitafea, subsequently identified the defendant, Ralpy Leroy Menzies, as the person who he picked up in his cab on that occassion. According to Mr. Lealaitafea's testimony, he was asked to turn over his money, and that he did so while the gun was pointed at him. After giving up most of his money, Mr. Lealaitafea attempted to grab the gun, at which point it went off, severely injuring his arm. The perpetrator of the crime left the taxi and escaped on foot.

While he was recuperating from his injury sustained in the robbery, the victim was shown a photographic array on two occassions. On the first of the two occassions, he selected the picture of the defendant, Ralph Leroy Menzies, as being someone who had a similar hair style. On the second occassion, he was once again shown a photographic array, which contained a picture of the defendant, and on that occassion he selected the picture of the defendant as the person who committed the crime. Subsequent to the two photographic identifications, the victim made several in court identifications of the defendant, Ralph Leroy Menzies.



was arrested on an unrelated charge. Following his arrest he was confined for a period in the Salt Lake County Jail. The State called Louis Jaramillo to the stand and he testified that on the holiday weekend, just before the twenty-fourth of July, he had the occassion to meet Mr. Menzies in jail. (R. 136) He further stated that during the period that they occupied the same cell together that he had occassion to talk to Mr. Menzies, and that Mr. Menzies stated that he had been involved in a robbery wherein a Samoan or Tongan cab driver had been robbed, and that he had had to "blow him away". (R. 138)

Detective William L. Abbott, police officer for Salt Lake City Police Department, testified that he had on two occassions showed photographs to the victim and that both of those photographic arrays included photographs of the Appellant, Ralph Leroy Menzies. Detective Abbott testified that on the first occassion the victim picked out the photograph of Ralph Leroy Menzies, but said only that the victim looked similar in some ways to the person who committed the crime, and that he had had similar hair and face. The Detective stated that the victim did not identify Mr. Menzies' photograph on that occassion. (R. 153) Detective Abbott testified that he took approximately seven photographs on that first occassion from a bulletin board which included ten or twelve photographs, and further, that he had not retained those photographs, and didn't remember which individual's pictures were involved in the first array.

Detective Abbott further stated that on the second occassion, the victim did make a positive identification of the Appellant as the perpetrator of the crime. On August 11th, 1978,

Detective Abbott stated that the second photographic array contained only one picture that had also appeared in the first photographic array, and that picture was the picture of Ralph Leroy Menzies, the Appellant.

## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN ALLOWING THE JURY TO RECEIVE THE IN COURT IDENTIFICATION OF THE DEFENDANT BY THE VICTIM VALFOA LEALAITAFEA TO BE CONSIDERED BY THE JURY

The appellant moved for suppression of the identification made by the victim in court and elsewhere based on the prejudice resulting from bias and prejudicial photographic arrays shown to the victim at an earlier time. A hearing on the appellant's motion was held before the Honorable David K. Winder on October 18, 1978. Following a hearing on the motion the court denied the defendant's motion to suppress the identification and allowed an in court identification by the victim to occur.

During the course of the motion to suppress the identification, counsel for the appellant called to the stand Detective Abbott who testified that on two occasions he showed photographic arrays to the victim in connection with this case. The victim failed to make any identification on the first occasion but did identify a photograph of the defendant on the second occasion.

Detective Abbott testified that on the first occasion he showed to the victim a total of seven photographs. Included in that group of photographs was a photograph of the defendant. The detective selected the photographs to be shown to the victim from a group of 10 or 12 photographs which appeared on the bulletin

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board of the Detective Division. (T.171-2) The detective stated that he did not save the array of photographs that he used on that occasion, that he did not remember whose photograph were included other than the photograph of the appellant and one John Sloan, that he did not recall the appearance of the remaining individuals beyond the fact that they were white males with similar hair (T.164). On that occasion the victim made no identification from the photo array, but indicated that there was something familiar about the photograph of Ralph Menzies. (T.175) Detective Abbott then returned all of the photographs to the bulletin board from once they came, there exists no record of those photographs, who those photographs were of or where those photographs went following the showing to the victim in this case.

Approximately two weeks later Detective Abbott provided the victim with a second group of photographs. On this occasion there were eight photographs which the detective preserved after the photographic array. (T.177) On the second occasion these photographs were drawn from a group of approximately 200 photographs and were picked by the detective to represent similar individuals. So far as the detective was able to say only one of the photographs from the first line-up reappeared in the second photo array and that was the photograph of Ralph Menzies, the appellant. (T.179) On this occasion the victim identified the photograph of Mr. Menzies as being the person who had robbed him.

The victim subsequently appeared in court and identified the appellant in person at the preliminary hearing and at two

subsequent trials. It is the appellant's contention that based on the prejudice surrounding the exhibition of photographs that at the photographic identification on the occasion of the showing of the second photographic array should be suppressed and that the subsequent in court identification should be suppressed as well, for the reason that they are based on and stem from the original prejudicial photographic array.

The United States Supreme Court has considered the issue of identification from photo arrays in the case of Simmons v. United States, 390 U.S. 377, 88 S.Ct. 1967, 19 L.Ed. 2d 1247 (1968).

While the court in that case approved of the photographic line-up procedure, the court also pointed to significant potential dangers in the use of such photographic arrays. As the court stated in that opinion:

"It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs\* or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictures committed the crime. *Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification. (Italics added)* 390 U.S. at 383.

Subsequent to the Simmons case Utah State Supreme Court has confronted photo show-ups on several occasions. In the case

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. . . the circumstances of the individual case should be scrutinized carefully by the trial court to see whether in the identification procedures there was anything done that should be regarded as so suggestive or persuasive that there is a reasonable likelihood that the identification was not a genuine product of the knowledge and recollection of the witness, but was something so distorted or tainted that in fairness and justness the guilt or innocence of an accused should not be allowed to be tested thereby.

The Utah Supreme Court once again approved of police procedure involving a state line-up in the case of State v. Wettstein, 28 Utah 2d 295, 501 P.2d 1084 (1972) holding in that particular case:

There was substantial, confident evidence to support the determination of the trial court that the identification testimony had an independent source. Id. supra at page 297

More recently in the case of State v. Jenkins, 523 P.2d 1232 (1974), the Utah Supreme Court had occasion to once again approve the use of photographs but once again acknowledging the necessity that the photographic presentation be fair and impartial. Quoting from Justice Crockett's opinion in that case at page 1233:

It is true that either procedure (line-up or photographic arrays) is subject to being used either fairly or unfairly. The desirable objective and the requirement is that the identification should be conducted in a fair, reasonable and impartial manner with a view to protecting the innocent and finding the guilty.  
(Parenthesis added and footnotes omitted).

Other courts have examined the appropriateness of photographic arrays since the Simmons case cited supra. While the courts have generally found police procedure within acceptable guidelines, on several occasions various courts have found that photographic procedures did violate due process and in those cases identification

testimony was suppressed. In the case of United States v. Sanders, 479 F.2d 1193 (D.C. Cir. 1973) pre-trial identification evidence was suppressed where a photo display in which the defendant was the only one with facial hair and a stout appearance was followed by a line-up at which the defendant was the only one repeated from the photograph. The Third Circuit disapproved of eye-witness testimony in a case where a witness was asked to pick the photo of the person who looked "most like" the individual who committed the crime from a group of photos containing other individuals who were much younger and did not resemble the defendant. United States v. Keller, 512 F.2d 182 (1975).

Appellant suggests that the fundamental unfairness of the pre-trial photographic identification made of the defendant falls into the category of a police procedure which has a substantial risk of leading to the eventual mis-identification of a suspect in court. The appellant further suggests that it was precisely that kind of inappropriate, biased presentation in the form of a photo array to the victim in this case that lead to the identification of the appellant. The police procedure in the above entitled case was not in many cases upheld by this court and other appellate courts a simple matter of showing to a victim of an alleged crime several photographs of a similar nature to determine if the victim would select any one of the photographs as the perpetrator of the crime. Rather it must be remembered that in this case the police showed two sets of photographs to the victim. Only one of which photographs appeared in both photographic arrays and that was the photograph of the defendant.

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To further compound the unfairness of the procedure the police officer who showed the test failed to preserve the photographs from the initial photographic showing. Because of his actions the trial court as well as the appellate court will never be able to detect the potential bias and suggestiveness of that first photo array since it can never be reconstructed. However, it may be assumed from the officer's testimony that the seven photographs were selected from approximately 12 that the range of characteristics in terms of hair, facial hair, skin coloration, facial structure, etc. was very wide and that the selection of the photographs for that initial show-up did not provide a neutral setting for the display of the photograph of the appellant, who was at that time a suspect.

Further from the detective's testimony at the hearing to suppress the identification we know that as well as the victim's testimony at trial, we know that he was unable to identify the man who robbed him from that first set of photographs, which according to all accounts contained the photograph of the appellant. It was not until the occasion of the second photographic array that the victim identified the appellant's picture. That identification occurred from a group of photographs which contained only one photo in common with the earlier show-up. The factual situation presented here is much similar to the case of United States v. Sanders, supra wherein the court held that a line-up at which the defendant was the only person repeated from the earlier photographic array violated due process and suppressed testimony regarding the pre-trial identifications. Appellant suggests that



the photographic identification and the subsequent in-court identification based on the earlier identification was a violation of due process in two respects. First the pre-trial identification occurred as the victim was observing the second set of photographs which set contained only one photograph from the first array and that was the picture of the defendant, that itself is highly suggestive creating a potential hazard for misidentification.

Secondly, the destruction of the photos from the first photographic show-up prevents review either by the trial court or by the appellate court of any potential biases, inaccuracies or suggestiveness of that initial line-up. As the court said in Simmons at page 384:

"... We hold that each case must be considered on its own facts, and that convictions based on eye-witness identification at trial following a pre-trial identification by photograph will be set aside on that ground only if a photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

The appellant in this case has been deprived of the right to have that matter determined at a trial court by virtue of the police officer's destruction of these photographs upon which subsequent identifications are based. To allow such and identification stand would be to say to police officer that the cure for a biased and suggestive photographic array would be simple destruction of the photographs following the showing to the victim or witnesses. If such behavior were condoned by the courts it would be a mandate that constitutionally improper photo show-ups could be cured by the simple destruction of the evidence that would have showed its



constitutional infirmity.

The potentially favorable nature of the evidence from the missing photographs is apparent. The photos themselves could show clearly the broad variety and suggestive nature of the photographs on their face. No amount of testimony or analysis after the fact in the absence of those photographs could adequately capture the bias and suggestive nature for the jury as well as for the court.

Several general rules have been developed in the area of suppression of favorable evidence. The Utah Supreme Court in State v. Stewart, 544 P.2d 477 (Utah 1975), announced the rule governing nondisclosure of evidence favorable and material to criminal defendants:

" . . . (S)uppression or destruction of evidence by those charged with prosecution, including police officers, constitutes a denial of due process if the evidence is material to guilt or innocence of the defendant in a criminal case. . . . "

Id. at 478.

The rule in Stewart is even broader in scope than that of the leading United States Supreme Court case in the field of suppression of evidence, Brady v. Maryland, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194 (1963), in which the Court said:

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

Id. 373 U.S. at 87.

Stewart's extension of the duty to disclose to police officers has also been approved by the United States Supreme Court in its opinion in Giglio v. United States, 405 U.S. 150, 31 L.Ed.

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2d 104, 92 S.Ct. 763 (1972):

"Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government."

Id. 405 U.S. at 154. If the police were not burdened with a duty to disclose, the prosecutor could successfully claim that police officers, who did the principle investigation of a case, had withheld exculpatory information from him, and, therefore, that he had no duty to disclose the material. This would leave the defendant with no assertable claim when his right to a fair trial had been clearly abridged. To impede due process disclosure in this fashion would effectively abrogate the fundamental fairness objectives sought by the many constitutional decisions requiring disclosure of favorable and material evidence to the defendant. For this reason,

". . . The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of nondisclosure."

\* \* \* \* \*

"The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused. We cannot condone an attempt to connect the defendant with the crime by questionable inferences which might be refuted by undisclosed and unproduced documents in the hands of the police."

Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964).

The destruction of evidence case is akin to the above analysis. The Utah Supreme Court has not dealt with this exact situation, but in State v. Stewart, 554 P.2d 477 (Utah 1975) our Court did deal with a problem similar in nature. In that case,

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the defendant was convicted of Unlawful Distribution of a Controlled Substance and during the trial there was evidence presented that the undercover agent who purchased the narcotics had a tape recorder on his person during the transaction. That tape was requested during the trial by defense counsel and the request was denied.

In ruling on that contention our Court said that:

"While it is true that a deliberate suppression or destruction of evidence by those charged with the prosecution, including police officers, constitutes a denial of due process if the evidence is material to the guilt or innocence of the defendant in a criminal case, there is no showing in this case that the material recorded on the tape in question was vital to the issue of whether or not the defendant was guilty of the charge."

This was so, the court held, because the defendant specifically denied having made the sale and denied even having seen the undercover witness on the day the sale was supposedly to have occurred. Our court issued guidance in that case when it said:

"We think it advisable that those charged with investigation and prosecution of crime retain intact all records and other evidence pertaining to the case until it is finally disposed of. By adopting such a practice, a claim of unfairness by one charged with a criminal offense would be groundless."

Thus, our court has recognized that a destruction of evidence that is material to guilt or innocence is a denial of due process of law. In that case, however, there was no showing the tape would have been beneficial. The defendant there denied completely even having met the undercover agent on the date in question. In this case, the simplicity of the preservation of the photos in the original photographic show-up, as well as the importance of that evidence to show subsequent identification bias dictate that the failure to follow the advice of our Supreme Court should warrant one of the

remedies sought by the defendant.

In this case, of course, defendant has not shown that the evidence would have been favorable to him. Such a burden and task under the circumstances is obviously completely impossible as the evidence has been destroyed. Defendant contends that he need not "prove" the material would be favorable to him as he would in a situation where there was evidence merely suppressed, but not destroyed. In State v. Brewer, 549 P.2d 188 (Ariz. App. 1976), the Court dealt with a conviction in a fraud case. The defendant alleged that certain evidence was destroyed prior to the trial which may have tended to establish his innocence. The Court examined that contention and noted that the destroyed documents had been transcribed and that transcript had been made available to the defendant. The court in discussing the destruction of evidence said that to be in violation of due process;

"The State must know, or have reason to know, that the evidence being destroyed was either material or favorable to the accused."

Thus, in that case, there was no required showing that the material be favorable if it was destroyed. It would be enough if the defendant could show either that it was material or favorable and that the State knew or had reason to know of that materiality. Defendant submits that the very nature of the evidence in question must lead the court to the conclusion that the State through its' agent knew that the results of the photographic array (where identification is a crucial element of the offense) would be material. This is the case, the defendant contends, where as the court said in In Re

"The police or prosecution may disable the State from ever giving a defendant a fair trial if they have lost or destroyed or otherwise made unavailable vital defense evidence."

In Cameron, the California Court noted that if such a situation arose, a new trial should not be held, but the defendant should be discharged.

The State of Washington dealt with a similar case in State v. Wright, 557 P.2d 1 (Wash 1976). In that case the defendant was convicted of First Degree Murder for the killing of his wife. Her badly decomposed body was found in a room and had apparently been dead for approximately 3 weeks. After removing all of the clothing from the body, due to its' highly infected and unpleasant nature, the police burned all clothing before any analysis for blood or any other tests were performed. The police gave permission to a relative of the deceased to remove and burn the bedding and mattresses and other items from the room. This was all accomplished before the defendant had been appointed an attorney but after he was arrested and before any scientific tests of any kind were performed. In that case, the defendant prior to trial made a motion to dismiss the charge on the basis of a denial of due process of law. The court began by discussing "what is material" and reached the inescapable conclusion that such evidence could have been material, but that it was impossible to tell whether or not the evidence would be favorable to the defendant because it had been destroyed. The court quoted a leading case in the area, United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971). The Washington Court quoted as follows:

"The purpose of the duty [to disclose] is not simply to correct an imbalance of advantage whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which because of imbalance in investigative resources, will be exclusively in the hands of the government."

Further, quoting from Bryant, the Court said that:

"Before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation."

In Wright, the defendant point up several possibilities for the use of evidence and the court held that by so doing, he demonstrated a reasonable possibility that the evidence destroyed by the police was material to guilt or innocence and favorable.

The court then went on with the more difficult task of fashioning a remedy. They noted there have been situations where the prosecution has made "an earnest effort" to preserve the materials, but noted this was not the case. Even though the evidence was not destroyed for the specific purpose of hindering the defense, the motive of the prosecution or the police is not determinative. The purpose of the duty of preservation "is not to punish the police, but to insure a fair trial for the accused." The court noted the destruction was intentional as there was no effort made to preserve the evidence and further noted that neither "administrative convenience nor inadequate facilities justifies a failure to preserve potential evidence." Therefore, the defendant was denied due process of law. The court noted that usually in a suppression type case a new trial can be ordered and the defendant can be given the suppressed evidence. Of course, that is not possible in this case, so the court saw no alternative other than to reverse the conviction and dismiss the charges, then went on to discuss some of the practical problems that would be

be created for police and gave suggestions as how to handle that.

Defendant contends that his case is very much similar in that the evidence was clearly intentionally abandoned even though there is no contention made that it was done as a purpose to hinder defense. Administrative ease is not a sufficient reason for denying evidence. There is no possible way defendant can now show that the evidence would have been favorable, but it clearly was material and it might have been favorable. Defendant contends this court should follow the Wright rationale and hold that the destruction of such evidence denies defendant due process of law and dismiss the charges against him.

In State v. Trimble, 402 P.2d 162 (N.M. 1965) the court dealt with a destruction of evidence case much weaker than defendant's. In that case the defendant, a minister, was convicted of First Degree Murder. It was defendant's theory at trial that he acted in self defense. He claimed to have in his possession a letter and some tapes which he was about to show the victim when the victim attacked the defendant and necessitated the shooting. After the shooting the police obtained a search warrant and obtained the letter and tapes and thereafter these were never seen again. The defendant claimed they were helpful to his defense of self defense in that they would have contained what he said they did and corroborated his trial testimony. The State argued that the existence of the letter and the tape were explained by defendant on the stand and his testimony was not contraverted and so there was not prejudice.

The court initially began by saying that the situation was similar

to the suppression of favorable evidence by the State, although not exactly alike. The court went on to hold over the argument of the State that even though the suppression was not willful, the same rule applies. The court noted that the presence and existence of the letter and its' assistance to defendant in corroborating his version were, "too apparent for argument." Therefore, under the facts of the case, the court had no alternative, but to reverse and set aside the sentence.

The situation in defendant's case is like the situation brought to light in the California case of People v. Hitch, 527 P.2d 362 (Cal. 1974). In that case a person was convicted of driving while under the influence of alcohol and the results of a breathalyzer test were admitted at this trial. The defendant sought to analyze the test ampoules which had been used while the breath test had been given by police officers. Those had been destroyed after the test by the police officer. California Court began its' analysis and said that the results of such test clearly constitute material evidence and went on to say that evidence;

"Substantially affecting the credibility of the results of the test would appear to be material and the suppression of such evidence would deny defendant a fair trial."

They noted, of course, that the critical evidence was not before them so it was not for the court to determine whether the evidence was or was not favorable to the issue of the defendant's guilt or innocence. The court likened the

situation in that case to a situation where an undercover informant

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is known by the police on a drug sale, but the name is not revealed for the defendant to locate and interview the witness. The court noted that in those situations where the defendant has shown a reasonable possibility that the informant could give favorable evidence his identity must be disclosed or the case dismissed. Similarly, the court in Hitch said that given the availability of the test ampoule and its contents there is a reasonable possibility that it would constitute favorable evidence on the issue of guilt or innocence and if that is shown then such evidence must be disclosed. If the evidence was available, it clearly must be disclosed. The court in that case gave prospective effect only to their rule because of the immensity of cases dealing with a breathalyzer and test ampoules in California alone. The rule to be followed would be that the test results would be suppressed on the part of the State if the evidence were not preserved and discoverable by defense.

In fashioning a remedy defendant contends that the court must weigh the significance of the lost or destroyed evidence and the conduct which lead to that destruction. Further, the court should consider the ease or difficulty of retaining such evidence in determining what remedy ought to apply. The evidence and materiality has already been discussed and is, as the court in Trimble, said; "too apparent for argument." Similarly the case of preservation of the evidence is apparent. There is simply no justification for the failure to preserve this critical identification evidence.

## CONCLUSION

In conclusion, the case law is clear that the showing of photographic arrays is subject to the constitutional requirements of due process of law. The evidence which would have revealed that clearly has been destroyed by the police who had custody of it. The principles of due process mandate that in the absence of the preservation of such evidence, dismissal of the case against appellant is the only affective remedy. Appellant therefore requests that the case against him be dismissed.

Respectfully submitted this \_\_\_\_ day of March, 1980.

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