

1980

State of Utah v. Ralph Leroy Menzies : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Brad Rich; Attorney for Appellant;

Robert Hansen; Attorney for Respondent;

Recommended Citation

Brief of Respondent, *State v. Menzies*, No. 16323 (Utah Supreme Court, 1980).

https://digitalcommons.law.byu.edu/uofu_sc2/1638

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.
16324

RALPH LEROY MENZIES, :

Defendant-Appellant. :

----- : -----
BRIEF OF RESPONDENT

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

ROBERT B. HANSEN
Attorney General

MICHAEL D. SMITH
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

BRAD P. RICH

44 Exchange Place
Salt Lake City, Utah 84111

Attorney for Appellant

FILED

JUN - 5 1980

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE-----	1
DISPOSITION IN THE LOWER COURT-----	1
RELIEF SOUGHT ON APPEAL-----	2
STATEMENT OF THE FACTS-----	2
ARGUMENT	
POINT I: THE IN-COURT IDENTIFICATION OF THE ACCUSED WAS PROPERLY ADMITTED FOR THE JURY'S CONSIDERATION BASED ON THE INDEPENDENT RECOLLECTION OF THE VICTIM-----	4
POINT II: THE TRIAL COURT PROPERLY RULED THAT THE PRE-TRIAL IDENTIFICATION OF THE APPELLANT COULD BE ADMITTED FOR THE CONSIDERATION OF THE JURY-----	7
CONCLUSION-----	20

CASES CITED

Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967)-----	5,6
Simmons v. United States, 390 U.S. 377, 88 S.Ct. 1967, 19 L.Ed.2d 1247 (1968)-----	7-11,13,17
State v. Jenkins, 523 P.2d 1232 (1974)-----	11
State v. Perry, 27 Utah 2d 48, 429 P.2d 1349 (1972)-----	11,15
State v. Stewart, 544 P.2d 477 (Utah 1975)-----	18,19
State v. Vasquez, 22 Utah 2d 277, 451 P.2d 786 (1969)-----	5,6,7,20
State v. Volberding, 30 Utah 2d 257, 516 P.2d 357 (1973)-----	17-21
State v. Wettstein, 28 Utah 2d 295, 501 P.2d 1084 (1972)-----	11
State v. Wright, 557 P.2d 1 (Wash. 1976)-----	19,20
Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)-----	5
United States v. Coppola, 486 F.2d 882 (10th Cir. 1973)-----	16
United States v. Croft, 429 F.2d 884 (10th Cir. 1970)-----	15

TABLE OF CONTENTS
(Continued)

	Page
United States v. Keller, 512 F.2d 182 (1975)-----	12,15
United States v. Milano, 443 F.2d 1022 (10th Cir. 1971)-----	16
United States v. Munn, 507 F.2d 563 (1974)-----	16
United States v. Patterson, 447 F.2d 424 (1971)-----	15,16
United States v. Sanders, 479 F.2d 1193 (D.C. Cir. 1973)-----	12,13,14
United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)-----	4-6,20
United States v. Woodring, 446 F.2d 733 (10th Cir. 1971)-----	16
Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)-----	5

STATUTES CITED

Utah Code Ann. § 76-6-302 (1953), as amended-----	1
---	---

IN THE SUPREME COURT OF THE
STATE OF UTAH

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

----- : -----
BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by information and complaint with the crime of aggravated robbery in violation of Utah Code Ann. § 76-6-302 (1953), as amended.

DISPOSITION IN THE LOWER COURT

The appellant, Ralph LeRoy Menzies, was convicted by a jury before the Honorable Ernest F. Baldwin, Jr., of the Third Judicial District Court for Salt Lake County on February 6, 1979, and was thereafter sentenced to be committed to the Utah State Prison for an indeterminate term as provided by law.

RELIEF SOUGHT ON APPEAL

Respondent urges affirmance of the conviction and sentence of the lower court.

STATEMENT OF THE FACTS

On the 17th day of July, 1978, a Tongan, Valfoa Lealaitafea (hereafter victim), while employed as a taxi driver, went to the area of Fourth East and Seventh South to pick up a customer. A man, subsequently identified by the victim as the appellant, approached the taxi and entered from the right rear door of the vehicle. After the victim had driven a short distance, the appellant pulled a gun and pointed it directly at the victim. After stopping the vehicle, the victim was ordered to place his money in a paper bag, which he did. Then the victim was shot in the arm as he attempted to grab the gun away from the appellant. The appellant, still a passenger in the vehicle, broke out a window of the taxi and fled on foot. During the robbery, the victim repeatedly looked at his assailant and he did so with the intent of remembering the man at a later date (R.132).

The victim was shown an array of seven photographs within a week of the incident, one of which was a picture of the appellant, Ralph L. Menzies. The victim identified that picture as being familiar and he stated the hair of

the individual in the photo was similar to that of his

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.

Machine-generated OCR, may contain errors.

assailant (R.128-129). About two weeks later the victim again was shown a series of eight photographs, including a more recent picture of appellant. From that array, he positively identified the appellant as the man who robbed and shot him on the 17th of July, 1978 (R.130).

Both photographic displays were conducted by Detective William L. Abbott of the Salt Lake City Police Department. On the occasion of the first showing, he testified that from ten or twelve pictures he had chosen seven, one of which was the appellants. The six additional pictures were chosen because they were similar to the appellant's picture in facial features as well as hair length and style. The second photographic array was a series of eight photographs taken from a group of two hundred photographs, and again each of the seven were chosen because of their likeness to the appellant in ethnic and racial features, hair color and facial characteristics. A second picture of the appellant, which was taken at a time sequence more contemporary with the incident, was included in the second lineup and Officer Abbott testified that the victim made a positive and absolute identification of the appellant during his review of the second series of pictures. On both occasions Detective Abbott handed the photographs to the victim and asked him to review them and see if any one

of the pictures was of the man that robbed him. After having identified the defendant at the second photographic lineup, the victim made several in-court identifications of the appellant.

While confined in the county jail on an unrelated matter, the appellant stated to several other inmates that he had been involved in a robbery and during the incident he had blown a Samoan or Tongan cab driver away. One of the other inmates, Louis Jaramillo, overheard the appellant and reported the information to a member of the Salt Lake City Police Department. He subsequently testified at the appellant's trial that the appellant had admitted robbing and shooting a taxi driver of Tongan or Samoan ancestry.

ARGUMENT

POINT I

THE IN-COURT IDENTIFICATION OF THE ACCUSED WAS PROPERLY ADMITTED FOR THE JURY'S CONSIDERATION BASED ON THE INDEPENDENT RECOLLECTION OF THE VICTIM.

Respondent urges the Court to affirm the lower court's conviction of the appellant based on the well-established rule of law that an in-court identification may be properly admitted if the basis of that identification is the observations of the suspect independent of the lineup identification. United States v. Wade, 388 U.S. 218,

87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). In setting forth the test to be applied, the court in Wade quoted from its decision in Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963):

Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Id. at 417.

The Court then set forth specific factors to be considered in applying the test, including the witnesses' opportunity to observe the criminal act, any discrepancies between the pre-lineup description and the defendant's actual description, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on prior occasions, and the lapse of time between the alleged act and the lineup identification. United States v. Wade, at 1938.

In adopting the holdings of the line of cases set forth above, the Supreme Court of Utah held that an in-court identification of the victim was admissible if the identification had an independent, original source.

State v. Vasquez, 22 Utah 2d 277, 451 P.2d 786 (1969).

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

When the State can successfully show that the in-court identification is a product of the witnesses' observations of the defendant at the time of the incident, the identification may be admitted even if the pre-trial identification procedures were procedurally tainted in the same way. United States v. Wade, supra; Gilbert v. California, supra; State v. Vasquez, supra.

In this case there is ample evidence to support the conclusion that the victim identified the appellant at the time of trial based solely on his observation of him at the time of the robbery. Mr. Lealaitafea testified that he saw the appellant enter his taxi through the right rear door. He again observed him when the appellant spoke to him, and at that time he saw the gun. After stopping the car, and placing his money in a bag the victim again got a close look at his assailant as he handed him the bag. Prior to the assailant's fleeing the vehicle, the victim looked at him at least on two additional occasions, and he testified that he studied the assailant's face carefully so that he could recognize him at a later date (R.132). The incident lasted about fifteen minutes and the victim testified that there was adequate light to allow him to make a positive identification.

of his assailant both at the time of the incident and at the trial. As in the Vasquez case, there was substantial and competent evidence to support the determination of the trial court that the identification testimony had an independent source and was therefore properly submitted to the jury for its consideration.

POINT II

THE TRIAL COURT PROPERLY RULED THAT THE PRE-TRIAL IDENTIFICATION OF THE APPELLANT COULD BE ADMITTED FOR THE CONSIDERATION OF THE JURY.

The appellant urged the trial court to suppress the evidence concerning the victim's identification of the appellant at pre-trial photographic lineups because of an allegation of prejudice surrounding the procedures used at those lineups. His motion was denied. Although the appellant properly cites Simmons v. United States, 390 U.S. 377, 88 S.Ct. 1967, 19 L.Ed.2d 1247 (1968), as the leading case in the area of photographic lineups, he fails to apply its holding. In the Simmons case, the FBI agents obtained a series of pictures from the sister of one of the accused individuals. The pictures consisted mostly of group photographs and from that array the defendants were identified. The number and quality of photographs shown to the witnesses were not produced at trial; however the court noted the fact that both

the witnesses made their pre-trial identifications. In rejecting the appellant's contention that the use of the photographs was done in such a way as to be unduly prejudicial the court held:

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

Id. at page 384 (emphasis added).

In applying the standard to the facts of the Simmons case the court looked at several factors, to include the justification of the FBI in using the photographic array, the likelihood that the procedure used may have produced a misidentification based on the inability of the witnesses to identify the defendants, and whether the witnesses had been contradictory in their identification of the defendants at any stage of the proceeding. The court concluded that each witness had seen the defendants in a well-lighted setting for up to five minutes, no masks had been used by the defendants, and the witnesses were consistent throughout in their identification of the defendant Simmons. As a result the court refused to overturn the holding of the lower court admitting the pretrial identification.

Applying the holding and analysis used by the Court in Simmons to the case at hand results in a similar conclusion. At the time the photographs were shown to the victim, the perpetrator of the most serious crime was still unidentified. The police attempt to identify the robber by showing the victim a series of pictures was clearly as justifiable in this case as it was in Simmons. Additionally, the victim stated that he was with his assailant for at least 15 minutes in a setting which was sufficiently well lit to allow him to see the face of the robber clearly at least on five separate occasions during that time. Additionally, he stated that he concentrated on his assailant's face to insure his ability to identify that individual at a later date. The photographs of the appellant were shown to the appellant within six or seven days on the first occasion and about three weeks after the incident on the second, insuring the opportunity to identify the individual while his memory was fresh. On both occasions the victim viewed at least seven photographs which had been chosen from larger groups because of their similarity to the features of the appellant. Detective Abbott testified that at the time he showed the photo arrays to the victim, he asked him to look at them and see if the man who robbed him was one of the individuals included in the array (R.175).

There is no evidence to suggest that the victim was directed to the picture of the accused by any of the procedures employed by the police officer. While in Simmons the defendants were both included in several of the pictures shown to the witnesses, in the case at hand the victim saw one picture of the appellant in one array, and another picture of the appellant during the second lineup. The pictures of the appellant were substantially different, one being two years older than the other. In fact the victim did not think he had picked a picture of the same man in the lineups.

Under those circumstances the victim identified the picture of the appellant at the first lineup as being similar as to the hair style. At the second lineup the victim positively identified the appellant before even looking at all of the pictures. It is significant that the second photograph of the appellant, which was so clearly identified by Mr. Lealaitafea, had been taken more contemporaneous with the time frame of the robbery than the first photograph. Hence, although the victim was unsure as to the first photograph, the second photo matched absolutely his memory of his assailant. At the preliminary hearing and at trial there was absolutely no uncertainty on the victim's part that the appellant was the same individual

that robbed him and shot him on the night of July 17, 1978. The facts in this case are more compelling than those of the Simmons case, and clearly call for the conclusion that the procedures used during the pre-trial identification stage were not impermissibly suggestive and evidence thereof was properly admitted for the jury's consideration by the trial court.

In adopting the holding of the Simmons case, the Supreme Court of the State of Utah turned away from a rigid formula and held that each case must be reviewed individually and scrutinized carefully to insure that the identification procedures employed were not so suggestive as to preclude the witness from making an identification based on his own knowledge and observation, rather than as a result of the procedures themselves. State v. Perry, 27 Utah 2d 48, 429 P.2d 1349 (1972). In subsequent cases, with facts not at all unlike those of the case at hand, the Supreme Court of Utah has affirmed lower court decisions admitting evidence derived from the use of pretrial photographic lineups. State v. Wettstein, 28 Utah 2d 295, 501 P.2d 1084 (1972); State v. Jenkins, 523 P.2d 1232 (1974). In Wettstein, the Court held that even though the only picture shown with a mustache was that of the defendant, under all of the circumstances the trial court properly found that the identification was not

lower court's decision in this case to admit the testimony concerning the pre-trial identification of the accused is factually in harmony with the entire line of cases decided by the Utah Supreme Court concerning this question.

In his brief the appellant cites United States v. Keller, 512 F.2d 182 (1975), and United States v. Sanders, 479 F.2d 1193 (D.C. Cir. 1973), in support of his contention that the procedures used during the pretrial identification process were unduly prejudicial and the evidence derived therefrom should be excluded. However, both of the cases cited are distinguishable as to their facts, and are misapplied in the case at hand.

In the Sanders case, the photographs presented to the witnesses included only two which showed an individual with any facial hair. One of these individuals had a mustache, very short sideburns and a slight goatee. That individual was also not dark in complexion. The picture of the defendant was the other showing a man with facial hair, and he had a heavy mustache, and sideburns down to his goatee or beard, which was full. He also had a much darker complexion and the picture showed him to be much heavier than the other individuals whose photographs were shown to the witnesses. At the lineup, the defendant was

the tallest man, and the only heavy-set stout person who had a full mustache and full goatee. United States v. Sanders, supra at 1196. Additionally, the defendant was the only individual to appear in both the photo array and the lineup and one of the witnesses stated that she was better able to identify the defendant because of the identification procedure. Under the circumstances presented and consistent with its holding in Simmons v. United States, supra, the Court held:

The initial photographic identification procedures were impermissibly suggestive . . . We have examined the photographs shown to the witnesses, and the photographs of the lineup. The stark fact is that appellant fairly leaps out of the pictures as the one person who is different. . . . When there is added to the equation the fact that these are distinctive characteristics attributed to the robber . . . and that he was the one man whose photograph had previously been shown to both witnesses, it was well-nigh inevitable that he would be chosen in the circumstances.

United States v. Sanders, supra at 1197 (emphasis added).

What the court objected to was the impermissibly suggestive pre-trial identification procedure taken as a whole, which was used in the case. Sanders does not stand for the proposition, as the appellant contends,

that if two lineups are conducted and the appellant's picture is the only one used in both, the subsequent identification is impermissibly tainted. That is but one of the factors that must be considered, and absent a combination of other factors which also taint the procedure, that circumstance alone would not require the exclusion of evidence of such a procedure. Except for the use of a picture of the appellant in both photographic arrays, the other factors present in Sanders are missing from this case, and it is therefore not applicable. The victim in the case before the Court had adequate opportunity to see his assailant; there were not impermissibly suggestive statements made by the police while conducting the photographic lineups; the evidence suggests that the pictures used in both lineups were chosen because of their similarity to the appellant, and the second group of photographs introduced at trial verify that fact; and finally the victim's description and testimony have remained consistent based on his observation of the appellant at the time of the robbery. Respondent therefore submits that the findings of the lower court are clearly consistent with the holding of United States v. Sanders and should be affirmed.

In the Keller case, the Court refused to allow a conviction to stand when the witness was unable to identify the defendant in court, and merely stated at the pre-trial identification stage that of the pictures he viewed, the defendant's picture looked most like the individual who committed the alleged crime. Clearly those facts, and the holding of the Court in that case do not apply in the present situation.

The Courts have been given substantial discretion in attempting to determine under what circumstances pretrial identification procedures are impermissibly suggestive. State v. Perry, supra. In United States v. Croft, 429 F.2d 884 (1970) the 10th Circuit held that it was not impermissibly suggestive for the police to show the witness two groups of photographs with a picture of the defendant in both. In that case the witness failed to identify the defendant from a group of three black and white photographs. At a subsequent array the witness was shown 3 color photographs and one black and white photograph. Two of those pictures were of the defendant and the witness successfully identified both. The Court did not find that improper, and noted in conclusion that the inability of one witness to identify the defendant reinforced the finding that the government's techniques were not overly suggestive. Id. at page 887. See also United States v.

Patterson, 447 F.2d 424 (1971). In United States v. Munn, 507 F.2d 563 (1974) a witness was shown seven photographs, each of which was a male caucasian, each was of the same general age grouping; each had considerable hair and of a similar color; four were clean shaven and three were not. The Court held that the array was not impermissibly suggestive and rejected the defendant's contention that it was. Several other 10th Circuit decisions have upheld a variety of procedures used in conducting pretrial identification procedures. United States v. Coppola, 486 F.2d 882 (1973); United States v. Woodring, 446 F.2d 733 (1971); United States v. Milano, 443 F.2d 1022 (1971). The courts have consistently upheld government procedures which have included a variety of procedures not dissimilar from the one used in the case at hand. The mere fact that the photograph of the defendant was included in both lineups does not make the procedure impermissibly suggestive and the appellant cannot cite any authority that it does. On the contrary, the cases squarely support the conclusion that under the circumstances, the steps taken during the pretrial identification stage were not unduly suggestive and evidence derived therefrom was properly admitted by the lower court.

The appellant's second argument concerning the issue of due process deprivations is based on the government's

inability to produce the photographs used at the first lineup. Detective Abbott testified that he picked seven photographs from a bulletin board containing roughly ten or twelve photographs. After presenting them to the victim for his inspection he returned the photographs to the bulletin board. As a result they were not available to the defense or the Court at the time of trial.

Although the appellant states in his brief that the issue here presented has not been decided, respondent cites for the Court's consideration the case of State v. Volberding, infra, and submits that it is dispositive of this issue. The facts are nearly identical and the court's ruling is exactly on point.

In that case the demand that the photographic array be reproduced could not be met because the pictures used had been returned to the Sheriff's files. In that case, as in the case at hand, there was no evidence of negligence on the part of the officer conducting the lineup nor was there a showing of any intentional suppression of evidence in order to undermine the rights of the defendant. The court in the face of an argument nearly identical to the one made by the appellant, reasoned that:

Such a claim must be evaluated in light of the totality of circumstances.

Defendant argues that such an evaluation cannot be made without reproduction of the display. Such a contention is without merit, particularly in light of Simmons, where the photographs displayed to witnesses were not produced to the court
. . . the two witnesses observed the defendant for approximately one hour and conversed with him. The photographic display was made the following day, while the memories of the witnesses were still fresh. There was justification to use this procedure, since defendant had not been apprehended. The foregoing factual circumstances concerning defendant's identification do not establish a denial of due process of law (emphasis added).

State v. Volberding, 30 Utah 2d 257, at 259, 516 P.2d 357 (1973).

Additionally in Volberding, supra, the Court rejected the appellant's argument that he was denied his right to conduct a meaningful cross-examination because of the unavailability of the photographic display at trial. Id. at page 259. Appellant contends that to uphold the lower Court's decision in this case would be tantamount to extending an invitation to law enforcement personnel to deliberately or recklessly destroy evidence after it had served its purpose. However, the court has addressed this issue and correctly held that a deliberate suppression or destruction of evidence by those charged with the prosecution constitutes a denial of due process. State v. Stewart, 544 P.2d 477 (Utah 1975). The

line of cases cited by the appellant are a restatement of that position which has been clearly resolved by the State Supreme Court. The respondent does not take issue with the holding in Stewart, but submits that in the case at hand, the decision in Volberding is dispositive of the issue and can be applied to this case without conflicting with cases dealing with deliberate or reckless destruction of the evidence, and without fear of promoting the willful destruction of evidence by those charged with the prosecutorial function.

Appellant cites the case of State v. Wright, 557 P.2d 1 (Wash. 1976) and urges the Court to adopt its holding in this case as a basis for reversing the lower court. Respondent contends that the issue as to suppression of evidence and its due process impact resolved by the court in Wright, supra, was compatibly resolved in Utah by virtue of the Stewart decision. Additionally it must be pointed out that the facts in Wright are such that even if the court concludes that Wright does not stand for the same proposition as Stewart, its facts are such that it should not be applied in the case before the court.

As pointed out by the Court in Wright, the evidence sought by the appellant in the present case was intimately related to the very existence of a homicide. Additionally, the court found:

. . . there was a reasonable possibility that the evidence destroyed by the police or at their direction was material to guilt or innocence and favorable to appellant.

State v. Wright, *supra*, at page 6.

Respondent does not see the same compelling circumstance in this case, that would warrant a similar conclusion reached in the Wright case. The photographic array at which the pictures were used, did not even result in a positive identification of the appellant. Their importance is further reduced by substantial evidence proving an independent basis for the victim's in-court identification of the accused. Assuming therefore, that even if the photographs had been produced and were found to be procedurally tainted, the evidence which appellant urges the court to exclude, would still be admissible based on its independent basis. United States v. Wade; State v. Vasquez, *supra*. Hence, Wright, *supra*, and the cases from other jurisdictions cited by the appellant are distinguishable in law and fact, and do not merit individual discussion in light of State v. Volberding, *supra*, which respondent respectfully submits is dispositive of appellant's due process argument.

CONCLUSION

Notwithstanding the failure of the government to produce the requested photographs at trial, the lower court

was well within its discretion in finding the appellant guilty in this case. The in-court identification was based on the victim's independent observations and recollections at the time of the robbery and not as a result of the pretrial identification procedure.

The procedure used by the police at both lineups was consistent with the due process requirements of the 14th Amendment, and the Supreme Court of Utah, in the case of State v. Volberding, supra, has already held that it is not necessary that the government reproduce the photographic array for the defense at trial.

For the above-stated reasons the repondent urges this Court to affirm the conviction and sentence of the accused.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

MICHAEL D. SMITH
Assistant Attorney General

Attorneys for Respondent