

1999

# Utah v. Jacob Ross Hale : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
Plaintiff/Appellee, :  
v. :  
JACOB ROSS HALE, : Case No. 990939-CA  
Priority No. 2  
Defendant/Appellant. :

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**BRIEF OF APPELLANT**

Appeal from a judgment of conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999), and Aggravated Kidnaping, a first degree felony, in violation of Utah Code Ann. § 76-5-302 (1999), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

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**FILED**  
Utah Court of Appeals

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Clerk of the Court

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**JURISDICTIONAL STATEMENT**

This is an appeal from a judgment of conviction for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999), and Aggravated Kidnaping, a first degree felony, in violation of Utah Code Ann. § 76-5-302 (1999), in the Third Judicial District Court, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding. Jurisdiction is conferred on this court pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996). See Addendum A (Judgment and Conviction).

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

I. Did the trial court abuse its discretion in denying Appellant's motion for a mistrial where a juror overheard a bailiff yell out "guilty, guilty, guilty!", thereby impacting her ability and the ability of other jurors to sit as impartial fact finders and lending an air of impropriety to the proceeding?

Standard of Review: "A trial court's denial of a motion for a new trial, which is in effect a mistrial motion, will not be overturned on appeal absent an abuse of discretion. We presume the trial court exercised proper discretion unless the record

clearly shows the contrary." Logan City v. Carlsen, 799 P.2d 224, 225 (Utah App. 1990) (citations omitted).

II. Did the trial court violate Appellant's due process rights in refusing to suppress unreliable and tainted eyewitness identification evidence where its findings in support of the reliability of such evidence are legally insufficient?

Standard of Review: "'The constitutionality of an identification procedure presents a mixed question of fact and law.' On review, we give no deference to the trial court's determination that defendant's due process rights were not violated; however, we presume that the factual findings underlying that determination are correct." State v. Parra, 972 P.2d 924, 926-27 (Utah App. 1998) (quoting State v. Mincy, 838 P.2d 648, 657 (Utah App.1992)).

#### **PRESERVATION OF THE ARGUMENT**

Appellant Jacob Ross Hale's ("Hale") motion to suppress the eyewitness identification is preserved on the record for appeal ("R.") at 246. His motion for a new trial is preserved at R.247 [116-144].

#### **CONSTITUTIONAL PROVISIONS**

The following constitutional provisions are dispositive of the issues on appeal. Their texts are provided in Addendum B.

Article I, Section 7, Utah Constitution;  
Article I, Section 10, Utah Constitution;  
Article I, Section 12, Utah Constitution;  
Amendment VI, United States Constitution;  
Amendment XIV, United States Constitution.



## **STATEMENT OF THE CASE**

### **Nature of the Case, Course of the Proceedings, and Disposition in the Court Below.**

Hale was charged by information with one count of Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1999), and one count of Aggravated Kidnaping, a first degree felony, in violation of Utah Code Ann. § 76-5-302 (1999). R.5-6. An arrest warrant issued. R.1.

After a preliminary hearing in which the victim, Mitch Lewis ("Lewis"), identified Hale as one of his assailants, and then testified about his identification of Hale from a photo array and live line-up, R.245, Hale moved to suppress Lewis' identification. The trial court denied the motion. R.246[41-45].

Hale's case was set for trial. R.247. Before trial commenced, Hale moved for a mistrial on the basis that a juror overheard a bailiff state "guilty, guilty, guilty." R.247[116-44]. The court denied his motion. R.247[144]. The trial went forward, and Hale was convicted as charged. R.170,247. Hale timely appeals from the denial of his motion to suppress Lewis' identification and from the denied motion for a mistrial.

## **STATEMENT OF THE FACTS**

On March 19, 1999, around 11:00 a.m., Mitch Lewis ("Lewis") sat in his white honda in Sugarhouse Park eating lunch and reading the paper. R.247[146-52]. He glanced into the rearview mirror and saw two men walking toward his car. R.247[152]. He

went back to his paper, then glanced up again as the men passed within two to three feet of his car. R.247[153]. Lewis resumed reading, then looked up to see the men turn and approach his car after they walked about 100 feet beyond it. R.247[154]. The next time he looked at the men, they were standing outside his driver's side window. R.247[154].

Lewis described the men as white males, 18 to 20 years old, 5'10'' or 5'11'' tall. R.247[153,155]. They wore baggy pants and white tank tops. R.247[153]. One man had dark hair, a goatee, mustache and sunglasses. R.247[155]. The other, later identified as Justin Dongarra ("Dongarra"), had red hair and a red goatee. R.247[155].

The dark haired man asked Lewis where "Play It Again Sports" was located. R.247[156]. Lewis said he did not know. R.247[156]. The dark haired man revealed a gun and said, "well, you're going to take us there." R.247[156]. He ordered Lewis to unlock his door; Lewis complied. R.247[157]. The man then ordered Lewis out of the car. R.247[158]. Lewis stood by the man for a few moments. R.247[158]. Dongarra went to the front passenger side and rummaged through Lewis' belongings on the seat, including his wallet. R.247[157]. He took the cash that he found in the wallet. R.247[161].

With the gun still trained on Lewis, the dark haired man and Lewis got into the back seat; Dongarra got into the driver's seat. R.247[159]. Dongarra drove for one hour, eventually

heading east toward the canyons. R.247[160,173]. Dongarra drove into the Olympus Cove area and suggested that they stop.

R.247[160]. The other man said, "no . . . people will hear shots" and insisted that they go into Big Cottonwood Canyon.

R.247[163].

Meanwhile, the dark haired man, still pointing the gun at Lewis, went through Lewis' wallet. R.247[161]. He removed Lewis' driver's license. R.247[161]. Noting Lewis' address, he said, "I know where you live." R.247[161]. He took Lewis credit cards and asked Lewis for the pin numbers. R.247[161]. He told Lewis that the numbers had better be correct. R.247[162]. He asked Lewis if he had seen the movie "Pulp Fiction" and threatened that he would shoot Lewis in the leg if he tried to escape. R.247[163].

During the drive, Lewis avoided looking at the men so as not to anger them. R.247[190]. He focused on the gun pointed at him or looked for opportunities to escape. R.247[191-92]. He saw the dark haired man's face in profile. R.247[193]. The man wore sunglasses. R.247[194]. Lewis saw his eyes underneath the sunglasses and noticed his slow manner of blinking. R.247[195].

The men drove five miles up Big Cottonwood Canyon, eventually stopping by the side of the road. R.247[164-65]. The dark haired man handed the gun to Dongarra, telling him to keep it on Lewis. R.247[166-67]. He asked Lewis if he had a tire iron in the trunk. R.247[167]. The man exited the car and

looked in the trunk. R.247[167].

The man took the gun back from Dongarra and ordered Lewis out of the car. R.247[168]. Dongarra drove away. R.247[171]. The man ordered Lewis down a ravine, following behind. R.247[168,170]. Lewis did not see the man while descending because he was concentrating on keeping a foothold on the steep, rocky, snow-covered terrain. R.247[197]. The man ordered Lewis to sit on a rock. R.247[171]. The man stood three to five feet away. R.247[171].

Lewis and the man stayed in the ravine for one hour until Dongarra returned. R.247[173,199]. At that point, the man ordered Lewis further down the ravine. R.247[174]. He told Lewis to remove his shoes and throw them in the distance. R.247[174]. He warned Lewis to stay put for twenty minutes and left. R.247[176]. The entire encounter between Lewis and the men lasted about over two hours. R.247[173].

Lewis found his shoes and walked up to the road. R.247[176]. A passing motorist picked him up. Id. Lewis explained what happened and the motorist urged him to call the police. Id. Lewis refused, explaining that he was scared that his assailants would retaliate against him. Id. The motorist convinced Lewis to call the police, however, on his cell phone. R.247[177].

Lewis spoke with police the same day in a friend's office. R.247[177]. Lewis told the police that he was so traumatized

that he could not give a description of his assailants.

R.247[202]. Eventually, however, he gave the police a general description, omitting the fact that the dark haired man had a goatee. R.247[201].

Ten days later, Lewis viewed a photo array in the office of Detective Timmerman ("Timmerman"). R.247[178]. The twelve photos were of six men with dark hair, of the same race, similar age and coloring. R.247[179,202]. Timmerman told Lewis the suspect may not be in the array. Id. Lewis identified Hale, saying he was ninety percent sure. R.247[179,203]. Timmerman responded that he picked the right person. R.247[203].

Lewis viewed a live line-up on May 4, 1999, at the jail. R.247[180]. The line-up consisted of eight men. R.247[181]. Lewis was given an instruction card explaining that the suspect may not be in the line-up. Id. Initially, Lewis thought that his assailant was not in the line-up. R.247[204]. He then focused on the blinking of the men, and thereby identified Hale through a process of elimination. R.247[204-05].

Hale moved to suppress Lewis' identification of Hale as unreliable on account of the fearful situation in which it was made and Lewis' inability to actually view the man. R.246[39-41]. He similarly argued that the line-up identification was unreliable because it was tainted by Detective Timmerman's statement at the previous photo array confirming that he had the right man. Id. The trial court denied Hale's motion, finding

the identification to be constitutionally reliable and therefore suitable for the jury. R.246[41-45]. A Long instruction was submitted to the jury. See Jury Instruction No. 26 (included in jury instruction packet in unpaginated envelope in appellate record).

After the jury for Hale's trial was empaneled, but before trial commenced, the jury was standing by the courthouse elevator. R.247[116]. Two bailiffs, Officers Neil Twitchell ("Twitchell") and Manuel Galloway ("Galloway"), were standing nearby, engaged in a conversation. R.247[129-31]. Twitchell stated, "It's a good thing when they put the jury together that they don't instruct them on guilty, guilty, guilty." R.247[130]. Galloway responded in a loud voice "guilty, guilty, guilty!" R.247[131]. An attorney who was a co-worker of defense counsel overheard the exchange and notified the court. R.247[116].

The judge asked the jury as a group if they heard any remarks made by court personnel while standing by the elevator. R.247[119]. One juror replied, "[I heard] something to the effect of - 'they are guilty.' I'm not sure who said it, but somebody yelled it out.". R.247[120]. The juror said she understood the comment as a joke that did not pertain to Hale's case. Id. She assured that it would not interfere with her ability to sit as an impartial juror. R.247[120-21]. She also said that she did not discuss the remark with other jurors. R.247[120-22]. The other jurors denied hearing the remark.

R.247[131].

The judge excused the jury and called in Twitchell and Galloway. R.247[124,129]. They admitted to the conversation, but asserted that they were generalized comments. R.247[130-31]. Twitchell stated that he did not recognize the people by the elevator as the jury for Hale's case, and was not aware that they overheard the remarks. R.247[130,131].

Hale moved for a mistrial, arguing that the statement tainted the jury. R.247[133-34]. He noted that it was uttered by a uniformed officer inside the courthouse, thereby giving the statement greater impact. R.247[134]. He further noted that neither a curative instruction nor the juror's assurance that she would sit impartially could cure the taint. R.247[133]. The court denied the motion. R.247[144]. No curative instruction was requested or given. See Jury Instruction Packet (included in unpaginated envelope in appellate record).

At trial, the State presented Tamara Douglas ("Douglas") as a witness in addition to Mr. Lewis. R.247[217-34]. Douglas testified that she is Dongarra's girlfriend, and was at the time of the incident. R.247[218]. She stated that Dongarra, Douglas, and she were at Lisa Salazar's ("Salazar") house at 10:00 a.m. or 12:30 to 1:00 p.m. R.247[220,232]. Dongarra and Hale left together an hour to hour-and-a-half later. R.247[221]. Hale carried a .22 automatic handgun. R.247[222].

According to Douglas, Dongarra and Hale returned at 10:00

p.m. in a white honda. R.247[223]. Dongarra drove the car. Dongarra, Salazar and Douglas went together in the car to a bank. R.247[224]. Douglas withdrew \$300 from an ATM using a stolen credit card that Dongarra gave her. R.247[223-24]. They returned to Salazar's house. R.247[225]. Dongarra left in the car again, then returned 45 minutes later with Hale. R.247[226]. Douglas admitted that she knew the car and credit cards in Dongarra's possession were stolen. R.247[231,234].

Douglas testified that she, Dongarra, Hale and Salazar abandoned the car in a canyon above Copperton a few days later. R.247[227]. Dongarra and Hale wiped their fingerprints from the car and removed the tires. R.247[228]. Lori Snarr, also a witness for the State, confirmed that she found a white honda abandoned in the canyon, explaining that there were no people around the car when she found it. R.247[214-15].

Douglas offered her testimony in exchange for a grant of immunity from prosecution for her fraudulent use of the stolen credit cards. R.247[217,229]; see Immunity Grant and Agreement (State Exhibit No. 9 contained in unpaginated envelope included in appellate record). She was aware that a fraud conviction carried with it a prison term and thousands of dollars in fines. R.247[230]. She was also aware that the State could revoke the offer if she did not testify truthfully in furtherance of its case against Hale. R.247[229-30]. She also stated that she knew Hale, but did not get along with him. R.247[228].



Hale presented two alibi witnesses, Salazar and Colby Arnn ("Arnn"). R.247[239-71]. Hale also testified. R.248[25-48]. Salazar stated that she and Hale were boyfriend and girlfriend on March 19, 1999. R.247[239]. Douglas, Dongarra and Salazar were at Salazar's house at 10:45-11:00 a.m. that day. R.247[242], 248[28]. Dongarra left, then Hale arrived. R.247[243]. Dongarra returned at 12:00-1:00 p.m. with a white honda that he said he bought for \$500. R.247[245].

Salazar stated that Dongarra and Douglas dropped her and Hale off at Arnn's apartment. R.247[247]. She and Hale remained there until 4:00 p.m. playing video games. R.247[248-51]. They left briefly to walk to a convenience store for something to drink. R.247[251]. Dongarra and Douglas returned to Arnn's apartment and picked them up. R.247[251].

Arnn confirmed that Salazar and Hale spent the afternoon at his apartment, arriving at 1:45 p.m. R.247[267]. He said they remained until 4:00 p.m. playing video games, except for a brief period when they walked to the convenience store. R.247[268-69].

According to Salazar, Douglas and Dongarra dropped her and Hale at Hale's house for a few hours. R.247[252-53]. They met up again at 7:00 p.m. R.247[253]. All four people went to a 7-11, where Douglas used a stolen credit card to make a purchase. R.247[253-54].

Hale similarly testified that he went to Salazar's house at

11:00 a.m. on March 19, 1999. R.248[28]. Dongarra and Douglas were there. R.248[29]. Dongarra left ten minutes later. R.248[30]. He returned at 1:00 p.m. with the white honda. R.248[31]. Dongarra told Hale that the car was stolen. R.248[32,45]. Dongarra, Hale and Douglas left in the car and went to a bank where Douglas withdrew money from the ATM using the stolen credit card. R.248[33-34]. They returned to Salazar's house and picked her up. R.248[34]. Dongarra drove them to Arnn's apartment, where he left Hale and Salazar at 1:30 p.m.. R.248[35]. He and Salazar remained at Arnn's until 4:00 p.m., when Douglas and Dongarra returned to pick them up. R.248[41].

#### **SUMMARY OF THE ARGUMENT**

The trial court erred in denying Hale's motion for a mistrial where a juror overheard a bailiff shout, "guilty, guilty, guilty." R.247[120,129,144]. The comment merited a mistrial because it was a consequential remark that led to an improvable juror taint, as well as gave rise to the appearance of improper proceedings.

The trial court likewise erred as a matter of law in denying Hale's motion to suppress constitutionally unreliable eyewitness identification evidence. R.246[41-45]. The totality of the circumstances establish that the identification was made in the midst of an extremely fearful situation which hampered the observer's ability to make a reliable identification. Moreover,

the identification was tainted by an officer's statement assuring the witness that he picked the right person from a photo array that occurred just before a live line-up in which the same witness identified Hale.

#### ARGUMENT

##### I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HALE'S MOTION FOR A MISTRIAL WHERE A JUROR OVERHEARD A BAILIFF YELL "GUILTY, GUILTY, GUILTY", AND THE ERROR PREJUDICED THE OUTCOME OF HALE'S TRIAL.

Both the United States and Utah constitutions guarantee the right to trial by a fair and impartial jury. U.S. Const. amends. VI & XIV; Utah Const. Art. I, §§ 10 & 12. "The right to a trial by a fair and impartial jury is an important one which should be scrupulously safeguarded." State v. Durand, 569 P.2d 1107, 1109 (Utah 1977) (citations omitted).

The Utah Supreme Court in State v. Pike, 712 P.2d 277 (Utah 1985), set forth the rule regarding juror contact with court personnel:

[A] rebuttable presumption of prejudice arises from any unauthorized contact during a trial between witnesses, attorneys or court personnel and jurors which goes beyond a mere incidental, unintended, and brief contact. . . . [W]hen the contact is more than incidental, the burden is on the prosecution to prove that the unauthorized contact did not influence the juror.

Id. at 280; see also State v. Erickson, 749 P.2d 620, 621 (Utah 1987).

The reasoning underlying Pike is twofold. First, it is impossible to prove juror taint. Pike, 712 P.2d at 280.

"[I]mproper contacts may influence a juror in ways he or she may

not even be able to recognize." Id.

"Another reason for the presumption is the deleterious effect upon the judicial process because of the appearance of impropriety." Id.

An improper juror contact creates an appearance of collusion or impropriety in the proceedings from which the judicial process may suffer in the eyes of the public. If improper juror contact is not prevented, a doubt may exist in the mind of the losing party, and the public as a whole, as to whether the defendant was given a fair trial.

State v. Swain, 835 P.2d 1009, 1011 (Utah App. 1992) (citation omitted).

Whether a statement is consequential and gives rise to an un rebutted presumption of prejudice is assessed on appeal in light of these two principles. See State v. Jonas, 793 P.2d 902, 909-10 (Utah App. 1990) (evaluating contested statement in light of Pike's two-fold rationale).

In the present case, Hale objected to the "guilty, guilty, guilty" comment as prejudicial, arguing that it subconsciously impacted the juror and compromised his right to a trial by an impartial jury. R.247[133]. Hale noted that the statement was made by a uniformed officer inside the courthouse and, therefore, the juror might give the comment added significance. R.247[134].

Judge Lewis below made no specific determination as to whether the bailiff's remark amounted to a consequential statement resulting in a presumption of prejudice under Pike. R.247[144]. The judge, however, acknowledged that the statement was highly improper and expressed her extreme displeasure that it

was made. R.247[117,118,123,125,126,131-32].

Without swearing in the jurors, the judge questioned them as to whether they heard the statement. R.247[119]. One juror indicated that she heard "something to the effect of 'they are guilty.' I'm not sure who said it, but somebody yelled it out." R.247[120]. The juror indicated that she understood it as a joke, that it did not interfere with her ability to be impartial, and assured that she did not speak about it to other jurors. R.247[120-21]. The judge further ascertained that the other jurors, who did not hear the remark, were not impacted by it. R.247[123]. The judge concluded by telling the jury that the remark "had nothing to do with this case, and that it should never have been made." R.247[123].

The judge then summoned Bailiffs Galloway and Twitchell. Without swearing them in, she questioned them about their conversation. R.247[129-31]. Twitchell explained that he stated to Galloway, "it's a good thing when they put the jury together that they don't instruct them on guilty, guilty, guilty, guilty." R.247[130]. Galloway said that he responded out loud, "guilty, guilty, guilty." R.247[131]. Both bailiffs stated that their comments did not pertain to Hale's case in particular. R.247[130-31]. Twitchell further noted that he did not recognize Hale's jury standing nearby, and was not aware of the charges against Hale. R.247[130-31].

Based on her questioning of the juror(s) and the bailiffs, the judge determined that the statement did not interfere with

Hale's right to a fair trial and did not impact the juror who heard it. R.247[144]; see Addendum C (Transcript of Proceedings Regarding Motion for Mistrial).

In the absence of a specific determination under Pike, this Court may address this issue on appeal where there is ample relevant evidence in the record. See Jonas, 793 P.2d at 908 (trial court did not address whether statement was inconsequential, but record contained sufficient information to rebut prejudice presumption such that issue was addressed on appeal). There is ample record evidence regarding the statement at issue in the case such that this Court may address the issue on appeal notwithstanding the absence of a specific determination by the court under Pike. Indeed, the trial court garnered the essential information for a Pike analysis because it established who made the comment, under what circumstances, what it pertained to, who heard it, and its impact upon the juror(s). R.247[116-44]; see, e.g., Erickson, 749 P.2d at 620-21 (reversing trial court's denial of mistrial based on record evidence of testimonies from parties involved in improper juror-witness contact).

In light of the evidence on the record, the statement, "guilty, guilty, guilty," is a consequential remark giving rise to an un rebutted presumption of prejudice. See Pike, 712 P.2d at 280. The remark affected an improvable taint that is not likely to be appreciated or perceived by the jurors. Id. ("improper contacts may influence a juror in ways he or she may not even be able to recognize"). In addition, it lends an appearance of

impropriety to the proceedings. Id.

As an initial matter, the very substance of the remark - guilt - merits a mistrial. R.247[129]. Although the bailiffs' comments were not directed at Hale's case in particular, R.247[130-31], the comment, going to the crux of Hale's trial - guilt or innocence, "touched on [an] extremely sensitive issue." Carlsen, 799 P.2d 224, 226 (Utah App. 1990) (mistrial required where bailiff's comment to jury, although not related to the specific case, "touched on the extremely sensitive issue of sentencing"). The remark is not a mere "civilit[y]" such as "'Hello' or 'Good morning.'" Jonas, 793 P.2d at 909. Moreover, the words "guilty, guilty, guilty" are not the sort of "unavoidable" exchange that occurs between a juror and bailiff who acts as a "contact" person, answering appropriate juror questions and serving jurors' needs. Id. (no mistrial required where bailiff answered juror's question as to whereabouts of another juror who was dismissed).

Additionally, the remark merits a mistrial because it touches upon the guilt issue and, by extension, goes to the credibility of defense witnesses who established Hale's alibi defense. See Pike, 712 P.2d 281 (sanctioning remarks that "breed[] a sense of familiarity that could clearly affect the jurors' judgment as to credibility"). Hale, his girlfriend Lisa Salazar, and his friend Christopher Arnn testified that Hale was at Arnn's house during the hours that he allegedly kidnaped and lobbed Lewis at gunpoint. R.247[239-71], 248[25-48]. If

believed, their testimonies would have exonerated Hale from the charges against him. With the taint of the "guilty, guilty, guilty" comment in the minds of the jurors, however, they were prone to discredit the witnesses presented in support of Hale's alibi defense. R.247[129]; see Pike, 712 P.2d at 280. In fact, Hale was convicted as charged. R.170. Accordingly, the comment was "sufficient to warrant a presumption of prejudice" such that the trial court erred in denying Hale's motion for a mistrial. Pike, 712 P.2d at 281.

Indeed, the impact of the bailiff's statement is compounded given that the State's evidence against Hale is not strong. The only evidence purporting to tie Hale to the crime was presented through the testimonies of Lewis and Douglas.<sup>1</sup> R.247[146-207, 217-34]. As noted Point II, infra, Lewis' identification of Hale is incredible, if not constitutionally unreliable, given the fearful situation in which it was made and the likelihood of taint upon his second live line-up identification of Hale. Moreover, Douglas' testimony is incredible given her motive to taper her testimony to ensure that she received the State's promise of immunity from prosecution based on her fraudulent use of Lewis' credit cards. R.247[217,229-30]. Douglas' admitted animosity toward Hale, as well as her romantic relationship with

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<sup>1</sup> The State also presented Lori Snarr as a witness to establish that she found an abandoned white honda in Bingham Canyon. R.247[213-14]. However, her testimony did not link Hale to the crime because she testified that she did not see any people around the car at the time she spotted it. R.247[215].



Dongarra, further undermine the credibility of her testimony implicating Hale. See Immunity Grant and Agreement (State Exhibit No. 9 contained in unpaginated envelope included in appellate record); R.247[218,228]. Hence, in light of the weaknesses in the State's case against Hale, the comment likely shifted the minds of the jurors toward the guilty verdict in this case. See Pike, 712 P.2d at 280.

The comment's prejudicial impact is not diminished simply because the juror who overheard the comment, and the remaining jurors who learned of the comment during the court's questioning of them regarding the same, assured the court that it did not affect their ability to sit impartially. As noted in Pike, juror assurances are "not enough to rebut the presumption of prejudice." Id. The efficacy of the jurors' assurances here is further called into question because they were not made under oath. See Carlsen, 799 P.2d at 227 (mistrial required where bailiff's unsworn testimony alone showed absence of improper influence).

The bailiffs' related assurances likewise fail to ameliorate the prejudice in this case. Like the jury, the bailiffs were not sworn in when they explained that their statements had no relationship to Hale's trial. R.247[129-32]. In fact, their position as bailiffs, their uniforms, and their association with the court and the judicial system lent their comments added weight which would have impacted the juror(s) more than a similar statement from a person not so closely linked with the court or

Hale's case.

In reality, the words "guilty, guilty, guilty" likely left a subconscious impact upon the mind of a juror(s) in Hale's case. See Pike, 712 P.2d at 280; R.247[129]. "Improper contacts may influence a juror in ways her or she may not even be able to recognize." Id. In turn, their ability to sit as impartial fact finders was compromised in violation of Hale's constitutional right to a trial by a fair and impartial jury. See U.S. Const. amends. VI & XIV; Utah Const. Art. I, §§ 10 12; see also Pike, 712 P.2d at 280. The resulting "inherent difficulty in proving how or whether a juror has in fact been influence" underscores the need for a mistrial in this case. Pike, 712 P.2d at 280.

In sum, the trial court abused its discretion in denying Hale's motion for a mistrial. Carlsen, 799 P.2d at 227. The bailiff's "guilty, guilty, guilty" statement "touched on an extremely sensitive issue." Id. at 226; R.247[129]. In turn, it affected the jurors' ability to assess the credibility of Hale's alibi defense witnesses with the impartiality that is constitutionally required. See U.S. Const. amends. VI & XIV; Utah Const. Art. I, §§ 10 & 12; Pike, 712 P.2d at 280. The resulting possibility of improvable juror taint merits a mistrial in this case. Pike, 712 P.2d at 280. Moreover, mistrial is required on account of the fact that the remark lends an air of impropriety, giving rise to a doubt in Hale's mind, and in the

eyes of the public, that Hale received a fair trial.<sup>2</sup> Id.

II. THE TRIAL COURT ERRED IN DENYING HALE'S MOTION TO SUPPRESS LEWIS' UNRELIABLE AND TAINTED IDENTIFICATION TESTIMONY.

The trial erred in denying Hale's motion to suppress the unreliable and tainted identification evidence because it was constitutionally unreliable under the totality of the circumstances. See State v. Ramirez, 817 P.2d 774, 781 (Utah 1991) ("ultimate question to be determined is, whether under the totality of the circumstances, the identification was reliable"); State v. Parra, 972 P.2d 924, 926-27 (trial court's conclusion that identification is constitutionally reliable is a mixed question of law and fact).

Article I, Section 7 of the Utah Constitution guarantees that, "[n]o person shall be deprived of life, liberty or property, without due process of law." This provision requires that eyewitness identification evidence must be reliable under the totality of the circumstances. See Ramirez, 817 P.2d at 781.

The trial court must preliminarily assess the reliability of

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<sup>2</sup> "Of course, incidental or inconsequential contacts will not give rise to [the Pike] rule." Logan City v. Carlsen, 799 P.2d 224, 226 (Utah App. 1990) (citing Durand, 569 P.2d at 1109; State v. Jonas, 793 P.2d 902, 908-09 (Utah App. 1990)). In those cases, the burden is on the defendant to establish that he was prejudiced by the remark. See Durand, 569 P.2d at 1109 ("notwithstanding a showing of minor impropriety or irregularity, there should be no reversal of a conviction unless it appears that a party has been prejudiced") (citation omitted).

Assuming for the sake of argument only that "guilty, guilty, guilty" did not amount to a consequential remark, the prejudice to Hale would nonetheless require a mistrial in this case for the same reasons discussed supra Point I.

an eyewitness identification to determine whether such evidence can be presented to a jury in keeping with the defendant's rights under Article I, Section 7. Id. The following factors are pertinent to the reliability analysis:

(1) [T]he opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly. This last area includes such factors as whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observer's.

Id. (quoting State v. Long, 721 P.2d 483, 493 (Utah 1986)). The court's findings must be made on the record. See State v. Nelson, 950 P.2d 940, 944 (Utah App. 1997).

In this manner, the trial court acts as a "gatekeeper," preventing constitutionally unreliable eyewitness identification evidence from going to the jury. Ramirez, 817 P.2d at 778; see also Nelson, 950 P.2d at 944. The court's gatekeeper role is premised on empirical data establishing the fallibility of such evidence; a jury's tendency to be unaware of the inherent weaknesses of human recall and to give an identification undue weight; and the resulting potential for "erosion of constitutional guarantees." Ramirez, 817 P.2d at 778-80 (citing Long, 721 P.2d at 488-90 (discussing weaknesses of memory)).

Citing Ramirez, Long and Nelson, the court made the following findings on the record in support of the reliability of

the eyewitness identification:

- Lewis was an "unusually clear, articulate witness," R.246[41]; he was neither too young nor too old "to have good judgment and a sense of perspective." R.246[42].

- Lewis had "more than adequate opportunity to see, to remember, to form an opinion, [and] to look at the person . . . from a number of different angles, over a lengthy period." Id. "He not only saw the person from a distance, he saw the person close up. He not only saw the person from the position of being in the car looking outside of the car, he also had the opportunity to assess height and stature by standing next to the individuals." R.246[43].

- Although the man identified as Hale wore sunglasses throughout the encounter, Lewis was able to see the man's eyes underneath the glasses. R.246[42]. Lewis was therefore able to note the man's pattern of blinking. Id.

- Lewis' identification was consistent. He identified Hale in the photo array and the line-up. Id.

- Lewis was able to view the man prior to having any reason to fear him, "first in the rear view mirror, and as the persons stepped nearer the car itself, long before a weapon was displayed." R.246[43].

- Once the weapon was displayed, Lewis "cautious[ly] and careful[ly]" observed his assailants, "showing a calm, logical, intelligent approach." Id. Lewis "testified in a manner consistent with someone who paid careful attention and was

focused on what was occurring." R.246[44]. "[N]othing in the witnesses demeanor [] suggest[s] that any fear he might have felt has resulted in confusion. . . . [T]he witness's speech was calm, precise, logical, thoughtful, and clear, in his descriptions of what he observed and in his recollection." R.246[45].

- "There are no race issues that confuse or make difficult the issue of [Lewis'] identification." R.246[43].

- Lewis testified that the lighting was good during the encounter. R.246[44].

- Lewis provided a description . . . "not only relative to height and lighting, but as to the coloring of the defendant, his stature, his facial hair, the color of his head hair, [and] certain specific characteristics about his eyes." R.246[48].

- "There are no problems with [Lewis'] capacity to make observations, no problems with his mental state. He . . . had [] adequate . . . sleep [and] was not under the influence of drugs that would have interfered with his capacity to observe, to remember." R.246[44].

- The identification process was not a suggestive "show-up. But rather the more standard and permissible process of first commencing with the description, followed by a photo-spread."

Id. The photo spread was reliable because it consisted of photos of six similar people. Id. The line-up also consisted of "eight individuals with similar coloring, stature, similar race, etc." Id.

- "The mere fact that officer Timmerman may have said to

[Lewis], after his identification, and after his description, that he had picked a person that they also believed might be the individual, . . . did not in any way taint that identification. It was not prior to; it was subsequent to the identification." R.246[46].

- Both the array and the line-up were "close in time" to the event and, therefore, Lewis' "memory would [not] have been impaired." Id.

- "There was no impermissible suggestion prior to the photo-spread or the line-up such as, 'the person's in the spread' . . . or 'the person's in the line-up.' Rather, it was a general statement, 'we'd like you to look at this and see if you can identify the person or persons that were involved.'" Id.; see also Addendum D (Transcript of Court's Findings Regarding Suppression Motion).

The trial court's determination that Lewis' identification was reliable is in error because the evidence, fully marshaled and viewed in a light most favorable to the court's decision, is "legally insufficient" to support its findings in support thereof. Decorso, 1999 UT 57, ¶ 41, 993 P.2d 837 (appellant bears burden of "marshal[ling] the evidence supporting the trial court's finding that [the] identification was reliable and then show that such evidence was legally insufficient to support that finding").

The following evidence was presented at the preliminary hearing and/or suppression hearing:

- On March 19, 1999, Lewis had a good night's sleep. .  
R.246[6]. He was not under the influence of drugs or alcohol.  
Id. He took prescription drugs that morning, but they did not  
interfere with his ability to observe and perceive events.  
R.246[7]. He wore corrective glasses that day and testified that  
they improved his vision. Id.

- It was a clear, sunny day. R.246[8].

- As Lewis sat in his car in Sugarhouse Park, he saw two men  
in his rear view mirror walking toward his car. R.246[9-10].  
Lewis saw them as they passed within several feet of his car.  
R.246[10-11]. Lewis saw the men again as they walked back toward  
his car. Id. He was able to view the men's faces. Id. Lewis  
then saw the men looking in his window. R.246[12]. He saw their  
faces again. Id.

- Lewis noted when the men looked in his window that one  
wore sunglasses. Id. They did not wear hats, masks, or facial  
coverings. Id.

- The man with the sunglasses asked Lewis where a local  
sports shop was. R.246[12-13]. After Lewis said he did not  
know, the man revealed a gun. R.246[13]. The man said, "well,  
you're going to take us there anyway." Id.

- The man ordered Lewis out of the car and into the back  
seat. R.246[14]. The man sat in the backseat next to Lewis,  
about four or five inches away. R.246[15-16].

- The second man, Dongarra, drove the car one hour, while  
the dark-haired man remained in the back with Lewis. R.246[16].



- The dark-haired man always wore his sunglasses.

R.246[16]. Lewis saw the man's eyes underneath the glasses from the side. R.246[17]. Lewis noticed the man had a peculiarly slow manner of blinking. Id.

- The car stopped by the road in Big Cottonwood Canyon. Id. The dark-haired man ordered Lewis out of the car and down a ravine. R.246[18]. Dongarra drove off; the man and Lewis remained together in the ravine for one hour. R.246[19]. There was ample light in the ravine. Id. Lewis viewed the man's face from a distance of six feet. R.246[19,30]. The man left Lewis in the ravine. R.245[13].

- Lewis identified Hale out of a photo array ten days later. R.246[20,23]. The array consisted of six photos of men of similar race, coloring, age, and stature. R.246[21-22]. After the array, Detective Timmerman stated, "you picked the right one." R.246[33].

- Lewis identified Hale again in a live line-up conducted in May, 1999 at the police station. R.246[24-25]. The line-up consisted of eight men of similar race, hair color, and age. Id. Lewis was told by an officer that the suspect may or may not be in the line-up. R.246[24]. He identified Hale on account of his slow blinking pattern. R.246[29].

This evidence, even when viewed in a light most favorable to the court's findings, does not support the court's determination that Lewis' identification was constitutionally reliable under the totality of the evidence. See Ramirez, 817 P.2d at 781;

Decorso, 1999 UT 57, ¶ 41, 993 P.2d 837. First, Lewis' "opportunity to view the actor during the event," his "degree of attention to the actor at the time of the event," and his "capacity to observe the event, including his or her physical and mental acuity," was severely compromised, if not entirely nullified, under the circumstances. Ramirez, 817 P.2d at 781 (first through third factors).

Lewis' fear during these events clouded his perception, thereby rendering his identification unreliable. As noted in Long, "when an observer is experiencing a marked degree of stress, perceptual abilities are known to decrease significantly." 721 P.2d at 489. Lewis testified that this was a very traumatizing event for him. R.246[26]. He feared for his life during the entire encounter. Id. In fact, he was so traumatized that he initially told police that he could not provide a description of his assailants. Id. Indeed, Lewis had reason to be frightened for his life; he testified that the gun was always pointed at him, and he feared that it would be fired. R.246[27].

Lewis' fear actually obstructed his physical ability to see the man he identified as Hale. Lewis testified that he was looking at Dongarra, not the man with the gun, as he rifled through his wallet while still parked in Sugarhouse Park. R.246 [35]. Throughout the car ride, he avoided staring at his assailants, out of fear for his life, so as not to anger them. R.246[29]. He was also focused on the gun which was constantly trained on him. R.246[27]. He was similarly focused on keeping

track of where Dongarra was driving. Id. Consequently, he never looked at the men beyond an occasional "glance." R.246[29].

The Court in Long noted the scientific term ascribed to this process whereby an observer is blocked by fear from perceiving certain critical facts during a traumatizing event: "selective perception." 721 P.2d at 489.

[T]he human brain cannot receive and store all the stimuli simultaneously presented to it. This forces people to be selective in what they perceive of any given event. To accomplish this selective perception successfully, over time each person develops unconscious strategies for determining what elements of an event are important enough to be selected for perception. The rest of the stimuli created by the event are ignored by the brain.

Id. Given that so much was happening to Lewis all at once, as he himself testified, his attention was focused on the gun and saving his life. R.246[26-27]. He therefore could not have adequately processed other details of the event, such as his assailants' features, to provide a reliable identification. See Long, 721 P.2d at 489. Indeed, as noted in Long, Lewis' process of "selective perception" likely left out details that were critical to the identification of Hale for trial purposes.

To the extent that court proceedings may focus on events that were not of critical importance to the observer at the time they occurred, then, the observer may have absolutely no memory of the facts simply because he or she failed to select the critical information for perception.

Id. (footnote omitted).

Physical barriers similarly obscured Lewis' view of the dark-haired man. Lewis testified that the man wore dark sunglasses throughout the encounter. R.246[28]. He could only

see the man's face from the side while in the car. Id. Moreover, Lewis did not view the man as he walked down the ravine because the man followed behind, and Lewis did not look back because he was concentrating on keeping a foothold on the steep, rocky, snow-covered terrain. R.246[18,29].

In addition, the trial court's finding that Lewis had an opportunity to view the man identified as Hale prior to having a reason to be afraid is not supported in the evidence. Lewis testified that he saw the men in his rearview mirror, again as they passed his car, and then as they walked back toward his car. R.246[9-11]. However, his attention was not focused on them at this point. He was reading his paper and eating his lunch, and only glanced up occasionally to watch them. R.246[11]. Lewis also testified that it was not unusual for people to be in the park so he did not take particular notice of the men. Id. Moreover, he could not see the mens' heads as they passed by because his view was cut off by the doorframe of his car. Id.

Likewise, although both men looked into Lewis' car window and the dark-haired one asked where the sporting goods store was, that encounter in and of itself is not a reliable basis for the identification. R.246[12-13]. The question period lasted no longer than the time it took for the question to be asked and answered; the man pulled the gun immediately afterwards. Id. That Lewis was not particularly observant in this brief time is evinced by the fact that he could not remember whether or not the man wore the sunglasses when he asked the question. R.246[13].

Hence, contrary to the trial court's finding, Lewis did not have adequate time or opportunity to see prior to being afraid to make a reliable identification of Hale. R.246[42].

Lewis' identification is similarly unreliable under the fourth Ramirez factor, "whether the witness' identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion." 817 P.2d at 781. In the first instance, Lewis' identification was not spontaneous. In fact, he had to be coaxed into reporting the incident to police, let alone giving a description of the assailants, by the motorist that picked him up in the canyon. R.245[50]. His hesitancy continued even when he spoke with police as he explained to the officers that he was so traumatized he might not be able to offer a description. R.246[26].

Lewis' identification of Hale lacked spontaneity for the added reason that his photo array and line-up identifications did not occur until ten days (March, 29, 1999) and six weeks (May 4, 1999), respectively, after the event occurred. See Ramirez, 817 P.2d at 783 (length of time between event and identification is relevant to reliability analysis); R.246[20,24]. Such a lapse in time affects the ability to adequately recall details. As noted in Long, "[r]esearch demonstrates that both the length of time between the witness's experience and the recollection of that experience, and the occurrence of other events in the intervening time period, affect the accuracy and completeness of recall." 721 P.2d at 489.

Lewis' identification also lacks consistency. Once he finally gave a description to the police one hour after the incident, he omitted the fact that the dark-haired man had a goatee, R.245[29]; Lewis, testified with certainty at his preliminary hearing, however, that the man did have a goatee. R.245[20]. Lewis' inconsistency continued into the line-up identification where he initially thought that the man was not present. R.246[28]. He identified Hale only after tentatively concluding that Hale's blinking resembled that of his assailant. R.246[[28-29].

At minimum, Lewis' line-up identification is unreliable in light of the foregoing, and for the added reason that it is the product of impermissible suggestion. See Ramirez, 817 P.2d at 781. After Lewis identified Hale in the photo array on March 19, 1999, Officer Timmerman said he had the right person. R.246[33]. Several weeks later, Lewis attended a live line-up in which he identified Hale again. R.246[25]. Lewis was not certain about the line-up identification, thinking the suspect was not included. R.246[28]. However, as noted above, he eventually identified Hale after concluding that his blinking resembled that of the dark-haired man. R.246[29].

In State v. Perry, this Court sanctioned a similar statement from a police officer to an observer, holding that the subsequent show-up in that case was suggestive. 899 P.2d 1232, 1238 (Utah App. 1995). The officer in that case told the witness, prior to her identification, that the "police had apprehended the

registered owner of the car that she had seen that night and that he matched her description of the assailant." Id. Timmerman's statement likewise tainted Lewis' subsequent line-up identification because it influenced his ability to independently recall the event. Id. Moreover, as a law enforcement officer, Timmerman's statement carried added weight, and therefore an added "potential for distortion" because Lewis looked to the police to help him identify and apprehend his assailants. Long, 721 P.2d at 490 (noting that "subtle and perhaps unconscious" responses to an observer's recall of events "can significantly influence what a witness 'remembers'").

As a final matter, the trial court erred in denying Hale's motion to suppress the identification evidence given the extremely fearful "nature of the event being observed and the likelihood that [Lewis would not] perceive, remember and relate it correctly." Ramirez, 817 P.2d at 781. As discussed supra, Lewis testified that this was a traumatizing event in which he feared for his life. R.246[26]. As noted in Long, the human brain is not capable of receiving so many stimuli all at once, so it "selective[ly] perceives" only the elements that are most important to the observer. 721 P.2d at 489. In this case, Lewis was most concerned with his life and so was concentrated on the one thing that could end it immediately - the gun that was constantly pointed at him. R.246[26-27]. Lewis, therefore, was not paying sufficiently careful attention to his assailants to provide a reliable identification; his brain effectively


"ignore[d]" that aspect of the incident. See Long, 721 P.2d at 489. Indeed, as he testified, he was avoiding staring at the men so as not to anger them. R.246[29].

In sum, the trial court erred in concluding that Lewis' identification of Hale was constitutionally reliable. See Utah Const. Art. I, § 7; Ramirez, 817 P.2d at 781. In fact, the court's findings supporting its reliability determination are not supported by the totality of the circumstances. See Ramirez, 817 P.2d at 781; Decorso, 1999 UT 57, ¶ 41, 993 P.2d 837.

#### CONCLUSION

In light of the foregoing, Hale respectfully requests this Court to reverse the lower court's denial of his suppression motion and his motion for a new trial, and remand for further proceedings.

SUBMITTED this 4<sup>th</sup> day of May, 2000.

  
CATHERINE E. LILLY  
Attorney for Defendant/Appellant



CERTIFICATE OF DELIVERY

I, CATHERINE E. LILLY, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Third Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 4<sup>th</sup> day of May, 2000.

  
CATHERINE E. LILLY

## ADDENDA

## ADDENDUM A

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

FILED DISTRICT COURT  
Third Judicial District

THE STATE OF UTAH

JUDGMENT, SENTENCE 11 15 1999

(COMMITMENT) SALT LAKE COUNTY

Plaintiff,

vs.

Jacob Ross Hale

D.O.B. 12-12-80

Defendant.

By M. Smith Deputy Clerk  
Case No. 991906795  
Count No. I  
Honorable L. Lewis  
Clerk MSS  
Reporter Video 11:01 am  
Bailiff  
Date 10-15-99

☐ The motion of \_\_\_\_\_ to enter a judgement of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☒ a jury; ☐ the court, ☐ plea of guilty; ☐ plea of no contest; of the offense of F1 - agg robbery, a felony of the \_\_\_\_\_ degree, ☐ a class \_\_\_\_\_ misdemeanor, being now present in court and ready for sentence and represented by L. Remal, and the State being represented by P. Barker, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

- ☐ to a indeterminate term not to exceed one year. ☐ at defendant's election.  
☒ to a maximum mandatory term of 5 years and which may be life; and 1 year additional for gun enhancement to run consecutive to sentence on count 2 and count 1.  
☐ not to exceed five years;  
☐ of not less than one year nor more than fifteen years;  
☐ of not less than five years and which may be for life;  
☐ not to exceed \_\_\_\_\_ years;  
☐ and ordered to pay a fine in the amount of \$ \_\_\_\_\_;  
☐ and ordered to pay restitution in the amount of \$ \_\_\_\_\_ to \_\_\_\_\_  
☐ such sentence is to run concurrently with \_\_\_\_\_  
☒ such sentence is to run consecutively with count 2 and enhancements  
☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Court(s) \_\_\_\_\_ are hereby dismissed.  
☐ Defendant is granted a stay of above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of \_\_\_\_\_, pursuant to the attached conditions of probation.  
☐ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☐ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this judgment and commitment.  
☐ Commitment shall issue

DATED this 15 day of Oct, 1999

APPROVED AS TO FORM:

DISTRICT COURT JUDGE

Defense Counsel

Deputy County Attorney

Page 1 of 2

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

THE STATE OF UTAH

Plaintiff,

vs.

Jacob R Hale

DOB 12-12-80

Defendant.

JUDGMENT, SENTENCE

(COMMITMENT)

Case No. 9919016795 M Snod

Count No. II

Honorable Lewis

Clerk MGS

Reporter Video 11:01 am

Bailiff

Date 10-15-99

☐ The motion of \_\_\_\_\_ to enter a judgement of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☒ a jury; ☐ the court, ☐ plea of guilty; ☐ plea of no contest; of the offense of Agg Kidnapping, a felony of the 1 degree, ☐ a class \_\_\_\_\_ misdemeanor, being now present in court and ready for sentence and represented by L Bernal, and the State being represented by P Parker, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

☐ to a indeterminate term not to exceed one year. ☐ at defendant's election.

☒ to a maximum mandatory term of 10 years and which may be life; and 1 year additional for gun enhancement to run consecutive to enhancement on count 2.

☐ not to exceed five years;

☐ of not less than one year nor more than fifteen years;

☐ of not less than five years and which may be for life;

☐ not to exceed \_\_\_\_\_ years;

☐ and ordered to pay a fine in the amount of \$ \_\_\_\_\_;

☐ and ordered to pay restitution in the amount of \$ \_\_\_\_\_ to \_\_\_\_\_

☐ such sentence is to run concurrently with \_\_\_\_\_

☒ such sentence is to run consecutively with count 1, and enhancements

☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Court(s) \_\_\_\_\_ are hereby dismissed.

☐

☐ Defendant is granted a stay of above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of \_\_\_\_\_, pursuant to the attached conditions of probation.

☐ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☐ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this judgment and commitment.

☐ Commitment shall issue

DATED this 15 day of Oct, 19 99

APPROVED AS TO FORM:

DISTRICT COURT JUDGE

Defense Counsel

Deputy County Attorney

Page 2 of 2

## ADDENDUM B

### **Utah Constitution Article I, Section 7 - Due Process**

No person shall be deprived of life, liberty or property, without due process of law.

### **Utah Constitution Article I, Section 10 - Trial by Jury**

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

### **Utah Constitution Article I, Section 12 - Rights of Accused Persons**

In criminal prosecutions the accused shall have the right . . . 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.

### **United States Constitution Amendment VI - Rights of Accused**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

### **United States Constitution Amendment XIV - Due Process**

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## ADDENDUM C



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

\* \* \* \* \*

THE STATE OF UTAH,	)	<b><u>ORIGINAL</u></b>
	)	
PLAINTIFF,	)	
	)	
VS.	)	
	)	CASE NO. 991906795 FS
JACOB ROSS HALE,	)	
	)	
DEFENDANT.	)	

\* \* \* \* \*

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
(DAY ONE, JURY TRIAL)

BEFORE THE HONORABLE LESLIE A. LEWIS

SALT LAKE CITY, UTAH

AUGUST 23, 1999

FILED DISTRICT COURT  
Third Judicial District

JAN 25 2000

SALT LAKE COUNTY  
By R. Shupe County Clerk

**FILED**  
Utah Court of Appeals

REPORTED BY GAYLE B. CAMPBELL FEB 24 2000 CSR

Julia D'Alesandro  
Clerk of the Court

2000000000



1 WERE BEHIND ME. THERE WAS THREE OF THEM THERE THIS  
2 MORNING. I JUST DIDN'T TURN AND LOOK. I DIDN'T  
3 WANT TO MAKE A BIG DEAL ABOUT IT AND MAKE IT WORSE  
4 THAN IT COULD HAVE BEEN.

5 THE COURT: I WOULD LIKE TO KILL THEM.

6 MS. CLARK: I WOULD THINK THEY WOULD KNOW  
7 BETTER.

8 THE COURT: BUT WE DON'T KNOW WHO THEY  
9 WERE?

10 MS. CLARK: I CAN REMEMBER TWO OF THE  
11 THREE.

12 THE COURT: OKAY. WELL, ALL I CAN DO IS  
13 ASK IN A VERY CAREFUL WAY WHETHER THEY HEARD  
14 ANYTHING FROM THE BAILIFFS AT THE DOOR, JOKING ABOUT  
15 GUILT OR INNOCENCE, OR ANYTHING OF THAT NATURE.

16 MY GUESS IS THEY DIDN'T HEAR ANYTHING, OR  
17 MY HOPE IS, LET ME TELL YOU, THAT WON'T HAPPEN  
18 AGAIN. I'M APPALLED.

19 MS. CLARK: I WAS SPEAKING TO OFFICER  
20 ROWLEY, THINKING I'M GOING TO TAKE THE STAIRS  
21 BECAUSE IT WAS A BIG PANEL.

22 THE COURT: THIS IS GOING TO A A REAL  
23 BROUHAHA. THIS APPALLS ME. IF YOU HAVE LOW I.Q.  
24 PEOPLE, IT'S ONE OF THE THINGS THAT CAN OCCUR. BUT  
25 YOU CERTAINLY DO NOT EXPECT THIS.

1                   WERE THERE ANY WOMEN BAILIFF'S THERE? IT  
2 WAS ALL MEN?

3                   MS. CLARK: THREE GUYS. THERE WEREN'T ANY  
4 WOMEN.

5                   THE COURT: IF THIS PANEL INDICATES IN ANY  
6 WAY THEY HEARD, WE'LL DEAL WITH IT. BUT THEY WILL  
7 BE PAYING THE COST OF THE JURY PERSONALLY. THAT  
8 INCENSES ME. DON'T THEY HAVE ANY JUDGMENT?

9                   MS. CLARK: I DON'T KNOW IF OFFICER ROWLEY  
10 HEARD IT.

11                  THE COURT: WE HAVE MADE A RECORD OF WHAT  
12 YOU SAID. I WILL ASK HIM. BUT THIS WILL TAKE CARE  
13 OF IT. WE'LL GET ON IT THE RECORD RIGHT AWAY.  
14 THANK YOU, KIM FOR --

15                  MS. CLARK: DO YOU WANT ME TO STAY?

16                  THE COURT: I DON'T THINK SO, UNLESS  
17 COUNSEL DO. I THINK YOU'VE MADE CLEAR WHAT HAPPENED  
18 ON THE RECORD. I AM JUST SORRY IT HAPPENED. BUT  
19 GIVEN THE CALIBER OF PEOPLE WE HIRE AT THE DOORS--

20                  LET'S GO IN AND SEE WHAT WE CAN DO. NO ONE  
21 WANTS A MISTRIAL, I AM ASSUMING, IF WE CAN AVOID IT.

22                  MS. REMAL: NO, NOT IF WE CAN AVOID IT.  
23 BUT I'M CONCERNED IF ANYONE OVERHEARD IT.

24                  THE COURT: WE'LL GO SEE.

25                  (PROCEEDINGS PROCEED IN OPEN COURT.

1 COUNSEL PRESENT, DEFENDANT PRESENT.)

2 THE COURT: YOU ARE WELCOME TO BE SEATED  
3 AGAIN. THANK YOU. FOR THE RECORD, I HAVE PUT THE  
4 QUESTION JUST NOW TO OFFICER ROWLEY, WHO HEARD  
5 NOTHING, BUT INDICATED HE WAS AT THE BACK OF THE  
6 JURY, SORT OF SHEPHERDING THEM FORWARD. SO THAT'S  
7 AN INDICATION THIS WAS NOT HEARD BY EVERYONE.  
8 NOTHING MORE THAN THAT.

9 (JURY BROUGHT INTO COURTROOM AND  
10 PROCEEDINGS CONTINUE.)

11 THE COURT: TAKE YOUR ORIGINAL SEATS, IF  
12 YOU WOULD, UNLESS YOU'VE ALL DECIDED TO SWITCH  
13 PLACES.

14 ALL RIGHT. THANK YOU, LADIES AND  
15 GENTLEMEN. GOOD TO SEE YOU BACK. I HOPE YOU HAD A  
16 GOOD LUNCH. LET ME JUST ASK YOU: DID ANY OF YOU  
17 DISCUSS THE CASE OR FORM ANY OPINIONS OVER THE NOON  
18 HOUR, OR ALLOW ANYONE ELSE TO DISCUSS IT WITH YOU?

19 IF ANYONE DID, PLEASE RAISE YOUR HANDS. NO  
20 HAN ARE RAISED. ONE ADDITIONAL QUESTION: IT'S COME  
21 TO MY ATTENTION THAT ONE OR TWO OF THE BAILIFFS THAT  
22 DO THE MONITORING AT THE DOORS ON THE MAIN FLOOR BY  
23 THE METAL DETECTORS MAY HAVE MADE SOME JOKING  
24 REFERENCE TO CASES IN GENERAL AS YOU ALL WERE  
25 WALKING BY TO GET TO THE ELEVATORS.

1 DID ANYONE HEAR ANY REFERENCE TO THIS CASE,  
2 GUILT, NON-GUILT, INNOCENCE, WHATEVER, FROM ANY OF  
3 THE OFFICERS AT THE METAL DETECTOR THIS MORNING?

4 DID ANYONE HEARING ANYTHING? IF SO, RAISE  
5 YOUR HANDS. OUR THIRD PROSPECTIVE JUROR HAS RAISED  
6 HER HAND. AND THAT'S MS. MURRAY. MS. MURRAY, WHAT  
7 DO YOU RECALL HEARING.

8 JUROR: SOMETHING TO THE EFFECT OF-- "THEY  
9 ARE GUILTY." I'M NOT SURE WHO SAID IT, BUT SOMEBODY  
10 YELLED IT OUT.

11 THE COURT: DO YOU UNDERSTAND THAT THIS WAS  
12 JUST A JOKING COMMENT.

13 JUROR: YES.

14 THE COURT: YOU DID NOT UNDERSTAND IT TO BE  
15 PERTAINING TO THIS OR ANY OTHER PARTICULAR CASE; IS  
16 THAT RIGHT.

17 JUROR: YES.

18 THE COURT: FROM YOUR EXPRESSION,  
19 MS. MURRAY, I'M ASSUMING THAT YOU FELT IT WAS KIND  
20 OF A SILLY REMARK AND DID NOT PERTAIN TO THIS CASE;  
21 IS THAT CORRECT?

22 JUROR: YES.

23 THE COURT: HAS THAT IN ANY WAY INTERFERRED  
24 WITH YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS  
25 CASE.

1 JUROR: NO.

2 THE COURT: AND YOU DID NOT UNDERSTAND IT  
3 TO REFER TO THIS CASE IN PARTICULAR; IS THAT  
4 CORRECT?

5 JUROR: THAT'S CORRECT.

6 THE COURT: ALL OF YOU SHOULD UNDERSTAND  
7 THAT THE BAILIFFS AND THE OFFICERS WHO WERE AT THE  
8 MENTAL DETECTORS HAD HAVE NO IDEA WHICH CASES ARE  
9 BEING TRIED IN WHICH COURT.

10 AND EVEN IF THEY DID KNOW WHICH CASES ARE  
11 BEING TRIED IN WHICH COURTS, THEY KNOW NOTHING ABOUT  
12 ANY OF THE CASES. IT WOULD BE TO SAY THERE ARE  
13 ABOUT FOURTEEN JUDGES ON THIS FLOOR, AND THAT SOME  
14 OF THE CASES ARE CRIMINAL, SOME OF THEM ARE CIVIL.  
15 THEY ALL INVOLVE DIFFERENT FACTS.

16 AND THERE CERTAINLY IS NEVER ANY  
17 CONVERSATION BY THIS COURT OR MY STAFF WITH ANY OF  
18 THOSE PEOPLE, NOR DO THEY SHARE COPIES OF THE  
19 PLEADINGS OR ANYTHING OF THAT NATURE.

20 COUNSEL, YOU CERTAINLY HAD NO CONVERSATION  
21 WITH ANYONE AT THE PORTALS, ABOUT THIS CASE OR ANY  
22 OTHER?

23 MR. PARKER: THE STATE DID NOT, YOUR HONOR.

24 MS. REMAL: I DID NOT.

25 THE COURT: ALL RIGHT. DO YOU WANT ME TO

1 ASK ANY FOLLOW-UP QUESTIONS OF THE JURORS, MR.  
2 PARKER.

3 MR. PARKER: NO, YOUR HONOR.

4 THE COURT: MS. REMAL?

5 MS. REMAL: ONLY, YOUR HONOR, WHETHER OR  
6 NOT THERE WAS ANY RESPONSE BY ANYBODY TO WHAT  
7 MS. MURRAY OVERHEARD BY ANOTHER BAILIFF OR ANY OTHER  
8 PERSON.

9 THE COURT: ALL RIGHT. MS. MURRAY, DID YOU  
10 HEAR ANY OTHER COMMENT IN RESPONSE TO THAT, OR IN  
11 ADDITION DO THAT.

12 JUROR: NO.

13 THE COURT: BY ANYBODY?

14 JUROR: NO.

15 THE COURT: AND YOU DIDN'T DISCUSS THIS  
16 WITH ANY OF YOUR FELLOW JURORS, OBVIOUSLY. JUST  
17 SORT OF THOUGHT WAS A SILLY COMMENT THAT YOU HEARD,  
18 AND IT WAS NOT TAKEN SERIOUSLY BY YOU IS WHAT I  
19 UNDERSTAND YOU TO BE SAYING; IS THAT CORRECT?

20 JUROR: YES.

21 THE COURT: ALL RIGHT. AND AGAIN, LET ME  
22 TELL EACH AND EVERY ONE OF YOU THAT YOU KNOW THE  
23 WORK THAT OCCURS IN THIS BUILDING, WHETHER IT'S A  
24 CIVIL CASE OR CRIMINAL CASE, OR DOMESTIC CASE, IT'S  
25 IMPORTANT WORK, AND I THINK THAT SOMETIMES SOME



1 PEOPLE DON'T GIVE IT THE SERIOUSNESS IT DESERVES  
2 BECAUSE THEY TRY TO LIGHTEN THE MOOD. THE REFERENCE  
3 MS. MURRAY HEARD WAS NOT IN CONNECTION WITH THIS  
4 CASE IN PARTICULAR, AND IT SOUNDS LIKE IT WAS AN  
5 ABSOLUTELY STUPID, INSENSITIVE REMARK, CERTAINLY  
6 SHOULD NEVER HAVE BEEN MADE.

7 BUT I THINK IT'S SAFE TO SAY THAT IT HAD  
8 NOTHING TO DO WITH THIS CASE, AND THAT IT SHOULD  
9 NEVER HAVE BEEN MADE IN ANY EVENT.

10 BUT I WANT TO BE SURE THAT ALL OF YOU  
11 UNDERSTAND THAT IF YOU FEEL ITS IMPACTS, YOU,  
12 MS. MURRAY, OR ANY OF YOU IN HEARING ABOUT IT, I  
13 WANT TO KNOW NOW. DO ANY OF YOU FEEL LIKE IT'S HAD  
14 ANY EFFECT ON YOU?

15 (NO VERBAL RESPONSE.)

16 THE COURT: ALL RIGHT. AND THEY'RE SHAKING  
17 THEIR HEADS IN THE NEGATIVE.

18 IS THERE ANYTHING FURTHER, MS. REMAL, THAT  
19 YOU WOULD LIKE ME TO ASK ABOUT THAT.

20 MS. REMAL: NO FURTHER QUESTIONS.

21 THE COURT: ALL RIGHT. AND I WILL MAKE  
22 SURE THAT THE PEOPLE AT THE PORTALS UNDERSTAND THAT  
23 THEY NEED TO BE CAREFUL ABOUT ANY LEVITY OR  
24 ATTEMPTS AT LEVITY, AND THAT IS NOT HUMOROUS IN A  
25 GENERIC FORM AT ALL. ALTHOUGH IT WAS NOT APPARENTLY

1 IN RELATION TO THIS CASE, ABOUT WHICH NO ONE COULD  
2 OF HAD HAD ANY INFORMATION. IT'S INAPPROPRIATE.

3 MS. REMAL: MAY WE APPROACH THE BENCH?

4 THE COURT: YES, CERTAINLY.

5 (BENCH CONFERENCE OFF THE RECORD.)

6 THE COURT: LADIES AND GENTLEMEN, I'M GOING  
7 TO SUGGEST THAT WE TAKE A SHORT BREAK AT THIS  
8 MOMENT. AND I'M GOING TO ASK THE BAILIFF TO ESCORT  
9 YOU TO THE JURY ROOM, AND ASK YOU NOT TO DISCUSS THE  
10 CASE, EVEN WITH ONE ANOTHER. I THINK IT WILL ONLY  
11 TAKE US ABOUT FIVE OR TEN MINUTES. AND YOU'D COME  
12 RIGHT BACK AFTER THAT.

13 BAILIFF: SURE.

14 (JURY EXITS COURTROOM.)

15 THE COURT: I'M GOING TO ASK EVERYONE  
16 EXCEPT MR. BELTRAN TO LEAVE THE COURTROOM, PLEASE,  
17 OTHER THAN COUNSEL AND THE DEFENDANT. IF YOU WOULD  
18 PLEASE STEP OUT. YOU DON'T HAVE TO, DETECTIVE  
19 TIMMERMAN. OKAY.

20 (COURTROOM CLEARED AS ORDERED.)

21 YOU DON'T HAPPEN TO KNOW, STEVE, WHO WAS  
22 DOWNSTAIRS AT THE DOORS THIS MORNING?

23 BAILIFF: THE OFFICERS THAT ARE DOWN THERE,  
24 NO.

25 THE COURT: (ON PHONE) THIS THE JUDGE

1       LEWIS.   HOW ARE YOU DOING?   GOOD.   I NEED TO KNOW  
2       WHO WAS AT THE DOOR, AND I GUESS WHAT WE'RE TALKING  
3       ABOUT IS THE DOORS ON THE MAIN FLOOR AT THE EAST  
4       ENTRANCE AS YOU COME IN FROM THE DOMED AREA, THAT  
5       AREA, THIS MORNING.

6               AND I NEED TO HAVE THEM COME UP TO MY  
7       COURTROOM NOW.   THERE IS A REAL ISSUE WITH THIS  
8       JURY.   ONE OF THE ATTORNEYS IS ASKING FOR A MISTRIAL  
9       BECAUSE APPARENTLY AT LEAST ONE OF THE BAILIFFS AT  
10      THE DOORS MADE SOME COMMENT ABOUT "GUILTY, GUILTY,  
11      GUILTY" AS MY JURORS WERE PASSING BY THIS MORNING.  
12      I WANT THE THREE OFFICERS UP HERE NOW, TO SEE IF WE  
13      NEED TO DECLARE A MISTRIAL.

14             THIS WAS THIS MORNING AS THE JURORS WERE  
15      BEING BROUGHT UP TO MY COURTROOM ON THE ELEVATORS,  
16      AND THERE WERE THREE MALE BAILIFFS.

17             I DON'T KNOW WHO THEY WERE.   SO IF THERE'S  
18      ANY QUESTION, I WANT THEM ALL BROUGHT UP.   AND I  
19      NEED TO HAVE THAT DONE RIGHT NOW.   OKAY?   THANK YOU.

20             I WANT THEM RIGHT IN MY COURTROOM.   I HAVE  
21      GOT A A JURY WAITING, AND I'M LOOKING AT A MISTRIAL  
22      ISSUE.   THANKS.   BYE.

23             (COURT CONCLUDES PHONE CONVERSATION.)

24             THE COURT:   THIS OF COURSE UPSETS ME, BUT  
25      YOU SHOULD UNDERSTAND, MR. HALE, THAT YOUR ATTORNEY

1 HAS RAISED AN IMPORTANT ISSUE FOR US TO DEAL WITH.

2 I DON'T WANT FOR YOU TO BE PREJUDICED IN  
3 ANY WAY. NOW, FOR WHAT IT'S WORTH, AND THIS IS NOT  
4 THE LAST WORD ON THE SUBJECT, BECAUSE I WANT TO HEAR  
5 FROM THESE THREE OFFICERS. I AM APPALLED THAT THEY  
6 WOULD HAVE MADE SUCH A COMMENT, ANY OF THEM, OR ALL  
7 OF THEM. BUT I HAVE TALKED TO OFFICER HALL, WHO IS  
8 THE BAILIFF TODAY, AND HE WAS DOWN THERE BASICALLY  
9 BRINGING UP THE JURORS. HE HEARD NOTHING.

10 IS THAT A FAIR COMMENT, OFFICER HALL?

11 BAILIFF: THAT'S RIGHT.

12 THE COURT: HE WAS AT THE BACK, AS I  
13 UNDERSTAND IT, SO IT WAS AS HE WAS SHEPHERDING THE  
14 JURORS UP. OBVIOUSLY, ONLY ONE OF THEM HEARD  
15 ANYTHING. AND THAT JUROR, TO MY MIND, DID NOT TAKE  
16 IT SERIOUSLY, DID NOT EQUATE IT WITH THIS CASE AT  
17 ALL.

18 BUT I DO WANT TO MAKE SURE THAT WE HAVE AN  
19 ADEQUATE UNDERSTANDING OF WHAT WAS SAID, SO THAT WE  
20 CAN PUT IT INTO PERSPECTIVE.

21 BUT IT'S IMPORTANT FOR YOU TO UNDERSTAND,  
22 MR. HALE, THAT YOUR ATTORNEY HAS MADE A MOTION THAT  
23 SHE FEELS IS APPROPRIATE, AND I THINK IT'S AN  
24 APPROPRIATE MOTION TO BE BROUGHT BEFORE THE COURT.  
25 I HAVE NOT DECIDED HOW I'M GOING TO RULE, BUT I

1 WANTS TO SEE WHAT THESE OFFICERS HAVE TO SAY FOR  
2 THEMSELVES. WE'LL BRING THEM UP AND TRY TO GLEAN A  
3 BIT MORE INFORMATION. BUT IF I WERE TO GRANT THE  
4 MOTION FOR A MISTRIAL, MR. HALE, YOU'D GO BACK TO  
5 JAIL, AND THIS WOULD DELAY YOUR TRIAL. I DON'T KNOW  
6 HOW LONG IT WOULD DELAY THE TRIAL.

7 LET'S LOOK, MICHELLE, AND SEE WHEN WE COULD  
8 DO IT. WE CAN'T DO IT THIS WEEK BECAUSE WE CAN'T DO  
9 THE TRIAL IN ONE DAY, AND ALL WE SET ASIDE WERE TWO  
10 DAYS. LET ME THINK A MINUTE. WHAT WERE WE DOING  
11 WEDNESDAY OF THIS WEEK?

12 THE CLERK: WE HAVE A MOTION TO SUPPRESS  
13 HEARING ON IN-CUSTODY MATTER. MINOR'S SETTLEMENT,  
14 ONE HOUR MOTION FOR SUMMARY JUDGMENT,

15 THE COURT: SO WE'VE MATTERS ALL DAY THEN.

16 THE CLERK: YES.

17 THE COURT: WHAT HAVE WE GOT NEXT MONDAY.

18 THE CLERK: AN IN-CUSTODY CRIMINAL CASE.  
19 SET FOR TWO DAYS.

20 MR. PARKER:

21 THE COURT: ALL RIGHT.

22 MS. REMAL: YOUR HONOR, BEFORE WE DISCUSS  
23 NEXT WEEK, I WILL BE ON VACATION. MY NIECE IS  
24 FLYING IN THURSDAY NIGHT, AND WE'LL BE GONE NEXT  
25 WEEK.

1 THE COURT: SO THAT IS NOT VIABLE. I AM  
2 NEVER GOING TO DENY AN ATTORNEY VACATION,  
3 PARTICULARLY ONE WHO DOES CRIMINAL WORK, WHO I'M  
4 EXPERIENCED ENOUGH TO KNOW BURNS THE CANDLE AT BOTH  
5 ENDS AND WORKS VERY VERY HARD. I'VE NEVER DENIED  
6 ANY LAWYER A VACATION; CERTAINLY NOT A CRIMINAL  
7 LAWYER.

8 THE CLERK: SEPTEMBER 7 OR SEPTEMBER 27  
9 BOTH OF THOSE OR NOT IN-CUSTODY.

10 THE COURT: SEPTEMBER 7 IS AVAILABLE, WHICH  
11 IS A COUPLE WEEKS AWAY, TO STATE THE OBVIOUS.

12 SO IF WE CONTINUE IT, THAT'S WHAT WE'RE  
13 LOOKING AT DOING NOW. I'M GOING TO WAIT, MR. HALE,  
14 TO ASK HOW YOU FEEL ABOUT THIS UNTIL WE'VE HEARD  
15 FROM THE OFFICERS IN QUESTION. THEY WILL BE PAYING  
16 THE COSTS OF THE JURY ALSO, IF WE NEED TO DO A  
17 MISTRIAL.

18 AND THERE WILL BE REPERCUSSIONS IN TERMS OF  
19 HOW THEY ARE TREATED. AND THAT'S NOTHING TO DO WITH  
20 THIS CASE, BUT I WANT TO GIVE YOU A CHANCE TO THINK  
21 ABOUT IT. WITH THAT IN MIND, EVERY DAY IN JAIL IS,  
22 I AM SURE, A PERIOD OF TIME THAT FEELS A LOT LONGER  
23 THAN 24 HOURS. AND I WANT YOU TO HAVE A CHANCE TO  
24 VISIT WITH MS. REMAL ABOUT HER PERSPECTIVE ON IT,  
25 BECAUSE SHE'S VERY EXPERIENCED AND WISE ATTORNEY.

1 AND, FRANKLY, IF SHE'S MAKING A MOTION FOR A  
2 MISTRIAL, I MAY WELL GRANT IT.

3 (OFFICERS ENTER COURTROOM.)

4 THE COURT: OKAY. LET'S SEE, WE HAVE TWO  
5 OFFICERS PRESENT. CAN I GET YOU GENTLEMEN TO STATE  
6 YOUR NAMES FOR THE RECORD.

7 OFFICER: NEIL TWITCHELL.

8 THE COURT: ALL RIGHT.

9 OFFICER: MANUEL GALLOWAY.

10 THE COURT: MR. TWITCHELL AND MR. GALLOWAY,  
11 WERE YOU AT THE DOORS THIS MORNING WHEN MY JURY  
12 PASSED BY?

13 OFFICER GALLOWAY: YES.

14 OFFICER TWITCHELL: YES.

15 THE COURT: DID EITHER OF YOU SAY ANYTHING  
16 IN A JOKING MANNER OR A SERIOUS MANNER THAT COULD  
17 HAVE BEEN OVERHEARD BY MY JURY OR SOMEONE IN MY JURY  
18 ABOUT "GUILTY, GUILTY, GUILTY"?

19 OFFICER GALLOWAY: JOKING MANNER.  
20 CONVERSATION BETWEEN ME AND HIM.

21 THE COURT: WHO SAID IT?

22 OFFICER TWITCHELL: I DID.

23 THE COURT: OFFICER TWITCHELL, WHAT EXACTLY  
24 DID YOU DO?

25 OFFICER TWITCHELL: I SAID TO OFFICER

1 GALLOWAY, "YOU KNOW, IT'S A GOOD THING WHEN THEY PUT  
2 THE JURY TOGETHER THAT THEY DON'T INSTRUCT THEM ON  
3 GUILTY, GUILTY, GUILTY, GUILTY."

4 THE COURT: WHAT DID YOU MEAN?

5 OFFICER TWITCHELL: PARDON ME?

6 THE COURT: I DON'T EVEN UNDERSTAND WHAT  
7 YOU SAID.

8 OFFICER TWITCHELL: THE JURY WAS WALKING  
9 BY. AND I SAID, "IT'S A GOOD THING WHEN THEY START  
10 THE JURY OUT THAT THEY DON'T START THEM OUT BY  
11 SAYING, REMEMBER, GUILTY GUILTY GUILTY GUILTY, SO  
12 THE PEOPLE--

13 OFFICER GALLOWAY: IT DIDN'T PERTAIN--

14 OFFICER TWITCHELL: IT'S GOOD THING THEY  
15 DON'T START THE JURIES OUT-- OTHERWISE-- IS WHAT WE  
16 WERE SAYING. HE IS ASKING ME, WHY DO WE HAVE SO  
17 MANY JURORS WHEN THEY TAKE THEM UP TO START WITH.

18 THE COURT: DID YOU REFER TO THIS CASE?

19 OFFICER GALLOWAY: NO.

20 OFFICER TWITCHELL: NO. I DIDN'T KNOW WHO  
21 THE JURY WAS GOING BY.

22 THE COURT: SO YOU WEREN'T REFERRING TO--

23 OFFICER TWITCHELL: I HAD NO IDEA WHO THE  
24 JURY WAS FOR OR WHAT IT WAS PERTAINING-- WHO THE  
25 JURY WAS.



1 THE COURT: THE NATURE OF THE CHARGES?

2 OFFICER TWITCHELL: NO.

3 THE COURT: IT WAS IN THE CONTEXT OF-- SAY  
4 IT AGAIN. REPEAT IT AGAIN, IF YOU WOULD.

5 OFFICER TWITCHELL: I SAID, "IT'S A GOOD  
6 THING THEY DON'T START THE JURY OUT WHEN THEY ARE  
7 DOWN IN THE ROOM BY SAYING, 'REMEMBER, GUILTY,  
8 GUILTY, GUILTY, GUILTY.'"

9 THE COURT: ALL RIGHT. AND OFFICER  
10 GALLOWAY, IS THAT THE WAY YOU REMEMBER IT?

11 OFFICER GALLOWAY: IT IS, MA'AM.

12 THE COURT: DID YOU MAKE ANY RESPONSE?

13 OFFICER GALLOWAY: I JUST SAID -- I WAS  
14 LAUGHING. I WENT, "GUILTY, GUILTY, TO HIM." THAT'S  
15 IT.

16 THE COURT: YOU SAID, "GUILTY, GUILTY"  
17 BACK.

18 OFFICER GALLOWAY: YES. HE SAID, "GUILTY,  
19 GUILTY, GUILTY." I GOES, "GIILTY, GUILTY, GUILTY,"  
20 NOT LOOKING AT THE JURORS OR NOTHING.

21 THE COURT: DO YOU UNDERSTAND, FIRST OF  
22 ALL, THE RAMIFICATIONS THAT THIS HAS? DO YOU  
23 UNDERSTAND THAT ONE OF MY JURORS HEARD THIS?

24 OFFICER TWITCHELL: NO, I DID NOT.

25 THE COURT: I AM TELLING YOU NOW. DO YOU

1 UNDERSTAND THAT A LAWYER OVERHEARD IT AND CALLED IT  
2 TO OUR ATTENTION? DO YOU UNDERSTAND THE  
3 SIGNIFICANCE OF THIS?

4 OFFICER TWITCHELL: I CAN SEE WHERE THAT  
5 WOULD BE A PROBLEM.

6 THE COURT: IT'S A HUGE PROBLEM. AND YOU  
7 BOTH STRIKE ME AS INTELLIGENT OFFICERS WHO ARE VERY  
8 CONCERNED ABOUT DOING A GOOD JOB. I HAVE SEEN  
9 ENOUGH OF BOTH OF YOU TO KNOW YOU ARE EXTREMELY  
10 CONSCIENTIOUS IN DOING YOUR DUTY, AND YOU ARE VERY  
11 GENTEEL AND CIVIL WITH THE PUBLIC, AND WITH  
12 ATTORNEYS, AND THE PEOPLE WHO USE THE BUILDING. BUT  
13 THIS IS A VERY SERIOUS MATTER.

14 MS. REMAL, IT SEEMS TO BE CLEAR NOW THAT  
15 THIS WAS IN THE CONTEXT OF GENERAL COMMENT ABOUT HOW  
16 IMPORTANT IT WAS THAT JURORS NOT BE TOLD ANYTHING  
17 ABOUT NOT GUILTY OR GUILTY GUILTY GUILTY, BUT  
18 APPARENTLY THOSE WORDS WERE USED. APPARENTLY THE  
19 ONE JUROR WHO HEARD IT HEARD THE WORD GUILTY. I  
20 DON'T-- THE JUROR WAS CLEAR THAT SHE DID NOT FORM  
21 AN OPINION AS A RESULT OF THAT, NOR DID SHE  
22 CORRELATE THOSE REMARKS OR THOSE WORDS-- I SHOULD  
23 SAY, WITH THIS CASE, OR TAKE THEM TO HEART.

24 ALL RIGHT. DO YOU HAVE A MOTION?

25 MS. REMAL: MAY I CONFER WITH MR. HALE FOR

1 JUST A MOMENT HERE.

2 THE COURT: YES. YOU CERTAINLY MAY.

3 (COUNSEL CONFERS WITH DEFENDANT OFF THE  
4 RECORD.)

5 THE COURT: DETECTIVE BELTRAN, IF YOU WOULD  
6 DO THE SAME THING WITH THIS INDIVIDUAL.

7 MS. REMAL: YOUR HONOR, I DO HAVE A MOTION.

8 THE COURT: THE MOTION IS?

9 MS. REMAL: IT IS MY MOTION FOR A MISTRIAL,  
10 YOUR HONOR, BASED ON THE OFFICERS' UNDERSTANDING.  
11 IT DOESN'T APPEAR AS THOUGH THEY WERE INTENTIONALLY  
12 OR MALICIOUSLY TRYING TO CAUSE A PROBLEM.  
13 UNFORTUNATELY, USING THE WORDS "GUILTY, GUILTY,  
14 GUILTY", THOSE ARE THE WORDS THAT THE JUROR  
15 OVERHEARD. ALTHOUGH SHE INDICATED THAT SHE DIDN'T  
16 TAKE IT SERIOUSLY.

17 MY CONCERN WITH JURORS, ALWAYS, AND I KNOW  
18 THE APPELLATE COURTS HAVE TALKED ABOUT THIS JUST IN  
19 TERMS OF VOIR DIRE, IS THAT WE KNOW THAT PEOPLE TRY  
20 VERY HARD TO FOLLOW INSTRUCTIONS, WE KNOW THEY TRY  
21 VERY HARD TO BE GOOD JURORS, BUT THAT THERE'S  
22 SOMETIMES INFLUENCES THAT HAVE AN UNCONSCIOUS OR  
23 SUBCONSCIOUS INFLUENCE ON PEOPLE, EVEN THOUGH THEY  
24 MAY TRY TO SET THINGS ASIDE.

25 THIS IS A CASE WHERE THERE'S AN

1 IDENTIFICATION ISSUE, AND MY CONCERN IS THAT IF IT  
2 COMES TO A CLOSE DECISION BY JURORS, THAT THEY MAY  
3 BE INFLUENCED BY THAT. PARTICULARLY THE JUROR WHO  
4 OVERHEARD. MY SPECIAL CONCERN IS THAT THIS IS NOT A  
5 COMMENT MADE BY SOME LAY PERSON, CITIZEN, THEY HAVE  
6 NO IDEA WHO THEY ARE, BUT BY UNIFORMED OFFICERS WHO  
7 HAVE AN OFFICIAL CAPACITY HERE IN THIS BUILDING.  
8 NOT AT PART OF OUR STAFF, BUT IN THE BUILDING.

9 AND MY CONCERN IS THAT THEY MAY THINK THE  
10 OFFICERS MUST KNOW SOMETHING, THEY WORK IN THIS  
11 BUILDING EVERY DAY, THEY SEE WHAT HAPPENS. AND FOR  
12 THOSE REASONS, I MOVE FOR A MISTRIAL.

13 THE COURT: MR. PARKER, DO YOU WANT TO  
14 RESPOND?

15 MR. PARKER: WELL, I DO, YOUR HONOR. I  
16 ACKNOWLEDGE, FIRST OF ALL THE LAW IS AS MS. REMAL  
17 INDICATES. AND THAT IS, THAT THERE IS SOME FEELING,  
18 I BELIEVE, IN THE COURTS THAT IF THERE IS THE  
19 APPEARANCE OF EVIL, THAT THINGS ARE STRUCK.

20 THE COURT: FIRST OF ALL, I'M NOT SURE YOU  
21 CAN DEEM WHAT HAPPENED AS THE APPEARANCE OF EVIL,  
22 BUT I GUESS I UNDERSTAND WHAT YOU'RE SAYING.

23 MS. REMAL HAS MADE IT CLEAR THAT SHE DOES  
24 NOT UNDERSTAND THAT THE COMMENT OR COMMENTS WERE  
25 MADE IN ANY KIND OF MALICIOUS MANNER. FURTHER, ONLY

1 ONE JUROR HEARD IT. THE JUROR WHO HEARD IT WAS VERY  
2 CLEAR, AS I UNDERSTAND IT, AND WE CAN CERTAINLY  
3 QUESTION FURTHER, THAT THEY DID NOT UNDERSTAND THE  
4 REMARK TO HAVE ANY BEARING ON THIS CASE. THAT IT  
5 HAD NOT IMPACTED HER FEELINGS ABOUT THE CASE AT ALL,  
6 THAT SHE UNDERSTOOD -- AT LEAST IT'S MY PERCEPTION  
7 OF WHAT SHE'S SAID, AND WE CAN CLARIFY THIS, TO BE  
8 SORT OF A LIGHTHEARTED COMMENT THAT WAS NOT RELATED  
9 TO THIS CASE.

10 I INTERRUPTED YOU. GO ON.

11 MR. PARKER: I APPRECIATE THE COURT'S  
12 ARGUMENT. BUT THAT'S WHERE I WAS GOING. I WANTED  
13 TO INDICATE THAT I DIDN'T FEEL THAT WAS A  
14 CIRCUMSTANCE THAT AMOUNTED TO THAT.

15 IN FACT, IN A BROAD WAY I AM WORRIED THAT  
16 THE PREJUDICE, IF ANY, THAT COMES OUT OF THIS  
17 ACTUALLY REFERS TO THE STATE. AND THE MANNER THAT  
18 IT WAS TAKEN BY THIS JUROR, I THINK THAT, IF  
19 ANYTHING, THAT SHE COULD WORRY ABOUT THE CREDIBILITY  
20 OF OFFICERS IN GENERAL. NOT SPECIFICALLY ABOUT THE  
21 DEFENDANT.

22 I GUESS MY RESPONSE IS, THAT, ONE, AS THE  
23 COURT BROUGHT OUT, IT WASN'T DIRECTED AT ALL ABOUT  
24 THIS DEFENDANT. THEY HAD NO KNOWLEDGE OF IT. IT  
25 WASN'T AN INTENTIONAL COMMENT, IT WASN'T

1 INTENTIONALLY MEANT, IT WAS JUST AN ACCIDENT.

2 MS. REMAL: IT WAS.

3 THE COURT: IT WAS NOT INTENDED TO IN ANY  
4 WAY INTERFERE WITH JUSTICE, CLEARLY. THE OFFICERS  
5 ARE PROFESSIONALS WHO HAD NO INTENTION OF DOING ANY  
6 HARM, BUT IT WAS MADE INTENTIONALLY. THAT IS TO  
7 SAY, CERTAINLY THE WORDS CAME OUT OF THE THEIR  
8 MOUTHS ON PURPOSE.

9 MR. PARKER: CERTAINLY. AND I'M NOT  
10 INDICATING THAT IT WAS OTHER THAN THAT. BUT IT WAS  
11 NOT LIKE THE OFFICERS HAD TRIED TO TALK TO THE  
12 PANEL. IT WAS NOT LIKE THE OFFICERS HAD TRIED TO DO  
13 SOMETHING SO DELIBERATELY SO THE PANEL COULD HEAR  
14 AND INFLUENCED. IT WAS ACCIDENTAL, OR INCIDENTAL.

15 IT WAS SURELY A STUPID COMMENT AND SURELY  
16 INAPPROPRIATE, BUT IN THE CONTEXT OF WHO THEY ARE,  
17 IN THE CONTEXT OF NOT KNOWING OUR PANEL, NOT KNOWING  
18 OUR FACTS, AND THAT OF THE JURORS THEMSELVES, THE  
19 ONLY ONE THAT HEARD IT TOOK IT VERY LIGHTLY, SAID  
20 THAT IT WOULD NOT INFLUENCE HER, TOOK IT ALMOST AS  
21 AN INAPPROPRIATE JOKE.

22 I JUST DON'T THINK THAT EQUATES TO THE  
23 PREJUDICE IN THIS CASE THAT WOULD IN ANY WAY  
24 INFLUENCE HER DECISION OR HER ABILITY, REGARDLESS OF  
25 HOW CLOSE THE CASE IS.

1 THE COURT: WHAT DO YOU BELIEVE THE COURT'S  
2 REMARKS DID BY WAY OF HAVING AN IMPACT ON THIS? DO  
3 YOU BELIEVE THAT ANY HARM MAY HAVE BEEN AMELIORATED  
4 OR EXACERBATED?

5 MR. PARKER: I THINK THE COURT HANDLED IT  
6 APPROPRIATELY IN THE BROAD WAY IT WAS ADDRESSED.

7 AND THAT THE COURT'S INDICATION THAT THE  
8 COMMENT WAS SURELY A STUPID COMMENT THAT SHOULD NOT  
9 HAVE BEEN MADE. WE CAN SURELY MAKE A FURTHER  
10 INSTRUCTION IF THE COURT WANTS THAT. IN NO WAY CAN  
11 ANYONE CONDONE SUCH A THING, BUT I AM NOT SURE  
12 THAT'S APPROPRIATE. WE KEEP DIGGING THE PIT AND  
13 MAKING IT WORSE.

14 THE COURT: THE MORE WE FOCUS ON IT AT THIS  
15 POINT, THE MORE ATTENTION WE DRAW TO IT, IS MY  
16 CONCERN. LET ME SAY ONE MORE THING. I COULD HAVE  
17 TAKEN THE ONE JUROR WHO HEARD IT ASIDE, ON THE  
18 RECORD, TAKING OTHERS OUT. I PURPOSELY CHOSE NOT TO  
19 DO THAT, BECAUSE IT HAS BEEN MY EXPERIENCE THAT  
20 SOMETIMES PEOPLE DO NOT IMMEDIATELY RECALL HEARING  
21 SOMETHING, AND THEN WHEN THEIR MEMORIES ARE  
22 REFRESHED AS TO WHAT IT WAS, THEN THEY THINK, OH,  
23 YEAH, I HEARD THAT TOO. AND I DIDN'T WANT THAT  
24 ISSUE TO COME UP. I WANTED TO BE CLEAR THAT  
25 WHATEVER WAS HEARD BY ONE, NEEDED TO BE REVIEWED

1 WITH ALL OF THEM. SO IF THE ONE WOULD REFERENCE IT  
2 TO THE OTHERS, OR IF THAT OCCURRED, THAT THEY  
3 WOULDN'T-- THAT WE WOULD KNOW HOW IT WOULD IMPACT  
4 THEM. AND I WANTED TO BE SURE THAT WE PRESSED THEM  
5 TO FIND OUT WHAT THEY REMEMBERED.

6 I, FRANKLY, MADE VISUAL OBSERVATIONS, AS  
7 WELL AS MAKING A RECORD AS TO WHAT WAS SAID ABOUT  
8 THE EFFECT OF THE WORDS ON THE JURORS, AND THEY DID  
9 NOT APPEAR, IN MY OPINION -- AND I WILL ASK BOTH  
10 COUNSEL TO COMMENT ON THIS -- TO TAKE IT SERIOUSLY  
11 IN ANY WAY.

12 MR. PARKER, WHAT IS YOUR OPINION OF THE  
13 REFERENCE?.

14 MR. PARKER: I AGREE WITH THAT. NOT ONLY  
15 BECAUSE OF THE WORDS THE JUROR SPOKE, BUT THERE WAS  
16 NO SHAKING OF HEADS, NO EITHER SIGN DISGUST OR  
17 LIGHTHEARTEDNESS ON THE OTHER JURORS' PART. THEY  
18 JUST SAT AND LISTENED. I DON'T THINK IT AFFECTED  
19 THEM AT ALL.

20 THE COURT: MS. REMAL, DO YOU HAVE A  
21 PERSPECTIVE ON THIS FURTHER?

22 MS. REMAL: I DIDN'T NOTICE THE OTHER  
23 JURORS MAKING ANY PARTICULAR FACIAL EXPRESSIONS ONE  
24 WAY OR THE OTHER. WHICH SEEMS CONSISTENT WITH THEIR  
25 ANSWER THAT THEY HAVEN'T HEARD ANYTHING.



1 MS. REMAL: I HAVEN'T DECIDED HOW I AM  
2 GOING TO HANDLE THIS. I'M GOING TO THINK ABOUT IT  
3 FOR FIVE MINUTES BEFORE I MAKE MY RULING. THERE IS  
4 A TREMENDOUS COST INVOLVED WITH BRINGING IN A NEW  
5 PANEL. IT'S LIKE \$18 PER JUROR, AND WE HAD  
6 SOMETHING LIKE 26 JURORS. AND THEN THERE'S MILEAGE  
7 COSTS, AND WE HAVE TO START ALL OVER AGAIN TO BRING  
8 INTO ANOTHER 26. MEANWHILE, THE DEFENDANT IS HELD  
9 IN JAIL ANOTHER TWO WEEKS, WHICH IS EXTREMELY UNFAIR  
10 TO THE DEFENDANT.

11 BUT MY UNDERSTANDING, MR. HALE, IS THAT  
12 THAT'S WHAT YOU WANT. YOU WANT TO HAVE A NEW JURY  
13 PANEL BROUGHT IN; IS THAT RIGHT?

14 THE DEFENDANT: YES, I BELIEVE SO.

15 THE COURT: WHY?

16 THE DEFENDANT: I JUST FEEL THAT THE ISSUE,  
17 WITH THE WAY IT WAS BROUGHT OUT, HOW EVERYONE--  
18 IT'S JUST IT'S SO EMBEDDED IN THEIR MINDS.

19 THE COURT: WHO SAID THAT?

20 THE DEFENDANT: IF I WAS ON A JURY, AND I  
21 WOULD THINK THAT THEY ARE MAKING THIS BIG DEAL OF  
22 WHAT HAPPENED, AND THAT'S HOW I WOULD FEEL, THAT  
23 THERE MUST BE A REASON FOR IT. I JUST THINK IT  
24 WOULD AFFECT ME THAT WAY. AND I'M GOING ALONG WITH  
25 WHAT MY LAWYER FEELS, AS WELL. AND I'M PUTTING MY

1 TRUST IN HER HANDS.

2 THE COURT: AND SHE'S A FINE LAWYER. I  
3 UNDERSTAND WHERE YOU'RE COMING FROM. ALL RIGHT.  
4 THANK YOU, SIR. YOU UNDERSTAND THAT THIS IS GOING  
5 TO RESULT IN A DELAY IF I GRANT A MISTRIAL, BUT  
6 NOTHING IS MORE IMPORTANT THAN YOUR HAVING A FAIR  
7 TRIAL. DO YOU UNDERSTAND THAT?

8 THE DEFENDANT: YES, MA'AM.

9 THE COURT: ALL RIGHT. I'M GOING TO TAKE  
10 FIVE MINUTES AND THINK ABOUT THIS. I'M GOING TO ASK  
11 COUNSEL TO STEP OUT. I'M GOING TO ASK SARGEANT  
12 BELTRAN TO TAKE THE DEFENDANT BACK INTO THE HOLDING  
13 CELL. AND I'M GOING TO ASK THE OFFICERS TO REMAIN  
14 BEHIND, AS WELL AS THE COURT REPORTER AND MY TWO  
15 OFFICERS.

16 (COURTROOM CLEARED AS DIRECTED.)

17 THE COURT: OKAY. WITHOUT MILEAGE WE ARE  
18 TALKING ABOUT \$468. PLUS THAT DOESN'T TAKE INTO  
19 ACCOUNT THE LAWYERS' TIME, MY TIME, COUNSEL'S TIME.

20 NOT ONLY THAT, BUT ALL THE PERSONNEL'S  
21 TIME. AND THEN IT'S NOT JUST \$468, IT'S MILEAGE,  
22 WHICH I HAD NO IDEA WHAT IT IS. THEN IT'S DOUBLE  
23 BECAUSE WE'RE DOING IT ALL OVER AGAI IF I GRANT THE  
24 MISTRIAL.

25 WE HAVE NOW LOST, EVEN IF I DON'T GRANT THE

1 MISTRIAL, ABOUT AN HOUR, BY THE TIME THIS IS TAKEN  
2 CARE OF. AND THERE IS A HUGE ISSUE ON APPEAL THAT  
3 LAWYERS WILL SPEND LOTS OF TIME BRIEFING AND WILL  
4 ADD TO THE APPELLATE ISSUES THAT GO UP. AND IF THE  
5 COURT OF APPEALS FINDS THAT I ERRED IN NOT GRANTING  
6 THE MISTRIAL, IF THAT'S WHAT I DECIDE TO DO, THEN  
7 THE CASE WILL HAVE TO BE RE-TRIED.

8 AND SO THAT WILL HAVE COST US THE EXPENSE  
9 OF NOT ONLY BRINGING IN ANOTHER JURY AND BRINGING  
10 THE WITNESSES BACK, BUT WE HAVE TO GO THROUGH THE  
11 ORDEAL OF TESTIFYING AGAIN. BUT THERE IS A HUGE  
12 COST IN CONNECTION WITH APPEAL. AND AT THE VERY  
13 LEAST, THERE'S A HUGE APPELLATE ISSUE.

14 I WANT TO MAKE SURE YOU UNDERSTAND HOW  
15 SIGNIFICANT THIS IS, WHETHER I GRANT THE APPEAL --  
16 OR EXCUSE ME, THE MISTRIAL OR NOT.

17 DO YOU UNDERSTAND THAT, OFFICERS?

18 OFFICER TWITCHELL: YES, MA'AM.

19 OFFICER GALLOWAY: YES.

20 THE COURT: THIS ISN'T HUMOROUS.

21 OFFICER TWITCHELL: IT WAS NOT INTENDED TO  
22 IN ANY WAY AFFECT THOSE PEOPLE.

23 THE COURT: IF YOU WERE BAD OFFICERS, I  
24 WOULDN'T EVEN BOTHER TALKING ABOUT IT WITH YOU. BUT  
25 YOU'RE NOT; YOU'RE BOTH VERY FINE OFFICERS. THAT'S

1 WHY I AM TAKING THE TIME TO DISCUSS IT WITH YOU,  
2 BECAUSE I WANT YOU TO BE EVEN BETTER OFFICERS.

3 IT'S A BIG DEAL, WHATEVER IS SAID AT THE  
4 GATES, BECAUSE PEOPLE PAY ATTENTION TO IT. PEOPLE  
5 IN UNIFORM. AND IN FACT, THE MORE PROFESSIONAL YOU  
6 ARE, THE MORE IT TENDS TO BE OBSERVED. YOU BOTH  
7 APPEAR TO BE, IN MY EXPERIENCE, VERY FINE OFFICERS.

8 SO I'M TAKING THE TIME TO TELL YOU THIS  
9 CANNOT EVER OCCUR AGAIN. AND YOU NEED TO TELL YOUR  
10 COLLEAGUES, THAT WHAT THEY SAY, EVEN IN A  
11 LIGHTHEARTED, JOKING MANNER, IS NOT INSIGNIFICANT.

12 OBVIOUSLY THE PUBLIC IS GOING TO PAY  
13 ATTENTION TO IT, AND IT'S GOING TO GET BACK TO ME.  
14 I DON'T WANT TO DECLARE A MISTRIAL, BUT I ALSO KNOW  
15 AT THIS POINT IT'S GOING TO BE AN ISSUE IF I DON'T.  
16 SO I NEED TO THINK ABOUT IT. AND TWO THINGS I NEED  
17 TO DO IS, I NEED TO QUICKLY DEAL WITH THIS ISSUE AND  
18 TRY TO DO IT IN A WAY THAT CREATES FEWER ISSUES ON  
19 APPEAL. ASSUMING THERE IS A CONVICTION.

20 OBVIOUSLY, IT COULD ALSO THE IMPACT THE  
21 JURY NEGATIVE TO THE PROSECUTION, WHERE THEY THINK,  
22 GEE, THERE'S AN ISSUE AND MAYBE WE OUGHT TO BEND  
23 OVER BACKWARDS TO MAKE SURE WE GIVE HIM THE BENEFITS  
24 OF THE DOUBT. SO I JUST WANT YOU TO BE CLEAR THAT  
25 I'M NOT SAYING YOU ARE BAD OFFICERS. TO THE

1 CONTRARY, I HAVE A LOT OF RESPECT FOR BOTH OF YOU.

2 I KNOW HOW HARD YOUR JOB IS. I KNOW YOU  
3 HAVE TIME ON YOUR HANDS WHEN YOU'RE NOT WORKING  
4 REALLY HARD, AND OTHER TIMES WHEN YOU'RE REALLY  
5 UNDER THE GUN, WORKING VERY HARD AND DEALING WITH  
6 DIFFICULT AND COMPLEX ISSUES.

7 PLEASE DON'T DO THIS AGAIN. DO I HAVE YOUR  
8 WORD ON THIS?

9 OFFICER TWITCHELL: YES, AND MY SINCERE  
10 APOLOGIES TO THE COURT.

11 THE COURT: ENOUGH SAID. BUT PLEASE PASS  
12 THE WORD THAT JUDGE LEWIS WAS NOT UNKIND ABOUT IT.  
13 BUT THIS IS A VERY BIG DEAL. OKAY. THANK YOU,  
14 GENTLEMAN.

15 OFFICER TWITCHELL: THANK YOU, YOUR HONOR.

16 OFFICER GALLOWAY: THANK YOU, MA'AM.

17 THE COURT: I'M TAKING FIVE MINUTES TO  
18 THINK ABOUT IT.

19 (COURT IN RECESS BRIEFLY AT 2:35 P.M.)

20 (COURT RESUMES SESSION AT 2:40 P.M. OUT OF  
21 THE PRESENCE OF THE JURY.)

22 THE COURT: OFFICER, CAN I ASK YOU TO JUST  
23 TAKE THEM OUT IN THE HALL FOR ONE MOMENT. JUST ONE  
24 SECOND. WE'LL BRING THE DEFENDANT IN, AND MAKE SURE  
25 WE HAVE GOT OFFICER TIMMERMAN IN, AND THEN WE'LL

1       START.

2               (DEFENDANT NOW PRESENT.)

3               MR. HALE, I'M GOING TO DENY THE MOTION. I  
4       WANT TO TELL YOU AHEAD OF TIME. EXCUSE ME. I HAVE  
5       A PIECE OF CANDY IN MY MOUTH. VERY UNPROFESSIONAL.  
6       BUT I WANTED TO TELL YOU AHEAD OF TIME, I DON'T  
7       THINK IN ANY WAY IT'S GOING TO INTERFERE WITH YOUR  
8       RIGHT TO A FAIR TRIAL.

9               AND I THOUGHT ABOUT IT AND CONSIDERED IT,  
10      AND IF I THOUGHT IT WOULD HAVE ANY IMPACT, I WOULD  
11      HAVE GRANTED THE MOTION. BUT I DON'T THINK IT WILL.  
12      AND THIS MAY BE AN ISSUE ON APPEAL IF YOU'RE  
13      CONVICTED. AND YOU MAY NOT BE CONVICTED.

14              SO I HAVE CONSIDERED IT. I JUST FEEL,  
15      GIVEN THE RESPONSE OF THE ONE JUROR, THAT IT'S NOT  
16      HAD AN IMPACT. BUT I WANTED YOU TO KNOW AHEAD OF  
17      TIME.

18              ALL RIGHT. LET'S BRING IN THE JURY.

19              (PROCEEDINGS CONTINUE IN PRESENCE OF JURY.)

20              THE COURT: ALL RIGHT. THANK YOU.

21              LADIES AND GENTLEMEN, COUNSEL AND THE COURT  
22      HAVE BEEN TALKING ABOUT A VARIETY OF ISSUES WE NEED  
23      TO DEAL WITH. ISSUES LIKE JURY INSTRUCTIONS AND  
24      OTHER THINGS. WE TRY TO COORDINATE WITNESSES SO  
25      THAT WE CAN GET THEM ON WHEN THEY ARE ABLE TO

## ADDENDUM D

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

\* \* \* \* \*

THE STATE OF UTAH, )  
 )  
 PLAINTIFF, )  
 )  
 VS. )  
 )  
 JACOB ROSS HALE, )  
 )  
 DEFENDANT. )

**ORIGINAL**

CASE NO. 991906795 FS

\* \* \* \* \*

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
(MOTION HEARING)

BEFORE THE HONORABLE LESLIE A. LEWIS

SALT LAKE CITY, UTAH

AUGUST 19, 1999

FILED DISTRICT COURT  
Third Judicial District

JAN 26 2000

SALT LAKE COUNTY

By H. Shupe Deputy Clerk

**FILED**

Utah Court of Appeals

REPORTED BY GAYLE B. CAMPBELL, RPR, CSR

FEB 24 2000  
Julia D'Alesandro  
Clerk of the Court



1        THAT.

2                I'D SUBMIT TO THE COURT THAT THAT IN FACT  
3        IS SOME SUGGESTION THAT IS IMPROPER, AND THAT THAT  
4        CERTAINLY AFFECTS THE WITNESS'S ABILITY TO HAVE AND  
5        INDEPENDENT RECOLLECTION OF THE EVENT, THE  
6        IDENTIFICATION.    AND I SUBMIT THAT UNDER THOSE  
7        CIRCUMSTANCES THE COURT OUGHT TO DISALLOW THE STATE  
8        FROM HAVING MR. LEWIS TESTIFY TO ANYTHING OTHER THAN  
9        HIS INITIAL IDENTIFICATION IN THE PHOTO-SPREAD.

10               BECAUSE I WOULD SUBMIT THAT THE LINEUP AND  
11        THE IN-COURT IDENTIFICATION, ALL OF WHICH TOOK PLACE  
12        AFTER DETECTIVE TIMMERMAN'S STATEMENT THAT, "YOU  
13        PICKED THE RIGHT SUSPECTS IN THE OF PHOTO-SPREAD,"  
14        WOULD HAVE TAINTED THOSE LATER IDENTIFICATIONS.

15               THE COURT:    ALL RIGHT.    IT IS CLEAR FROM  
16        THE CASE LAW, AND I AM REFERRING NOT ONLY TO  
17        RAMIREZ, BUT ALSO TO STATE VERSUS NELSON, THE  
18        EARLIER CASE OF STATE VS LONG, AS TO THE COURT'S  
19        CONSIDERATION OF THE RELIABILITY OF EYE-WITNESS  
20        IDENTIFICATION, THERE ARE A NUMBER OF FACTORS FOR  
21        THE COURT TO CONSIDER BEFORE EYE-WITNESS  
22        IDENTIFICATION DATA IS PRESENTED TO THE FINDER OF  
23        FACT.

24               WE HAVE AN UNUNUSUALLY CLEAR, ARTICULATE  
25        WITNESS IN THIS CASE.    THAT IS NOT ALWAYS WHAT

1 PROSECUTION HAS TO DEAL WITH, OR WHAT THE DEFENSE  
2 HAS TO CONTEND WITH.

3 THE INDIVIDUAL IN THIS CASE IS A MAN WHO  
4 APPEARS TO BE, AND I DON'T KNOW IF I AM CORRECT ON  
5 HIS AGE, BUT IN HIS LATER '30S, OR '40S. HE'S NOT  
6 TOO YOUNG, HE'S NOT TOO OLD, TO HAVE GOOD JUDGMENT  
7 AND A SENSE OF PERSPECTIVE. HE HAS ATTESTED TO THE  
8 FACT THAT HE HAD MORE THAN ADEQUATE OPPORTUNITY TO  
9 SEE, TO REMEMBER, TO FORM AN OPINION, TO LOOK AT THE  
10 PERSON HE IDENTIFIED AS THE DEFENDANT, FROM A NUMBER  
11 OF DIFFERENT ANGLES, OVER A LENGTHY PERIOD.

12 THAT THERE WAS NOTHING OBSCURING HIS FACE  
13 IN GENERAL, THAT HIS EYES WERE COVERED BY  
14 SUNGLASSES, BUT THAT HE WAS ABLE TO SEE BEHIND THE  
15 EYES. IN FACT, ONE OF THE THINGS HE NOTICED WAS THE  
16 PATTERN, IF YOU WILL, OF BLINKING. HIS  
17 IDENTIFICATION IS CONSISTENT WITH HIS DESCRIPTION.  
18 THE IDENTIFICATION IS CONSISTENT IN EVERY RESPECT.  
19 THERE WAS AN IDENTIFICATION IN A PHOTO-SPREAD, AND  
20 ALSO A LINEUP, AND THEY WERE CONSISTENT. THERE'S  
21 NEVER BEEN A FAILURE IDENTIFY.

22 THERE IS A THEORY THAT ONE OF THE FACTORS  
23 THAT MAY IMPACT ONE'S ABILITY TO MAKE A GOOD  
24 IDENTIFICATION IS FEAR. AND CERTAINLY THAT MAY BE  
25 THE CASE. IT'S ALSO THE COURT'S BELIEF THAT FEAR

1 MAY BE A FACTOR THAT ENHANCES ONE'S OPPORTUNITY TO  
2 LOOK CLOSELY, TO OBSERVE, AND TO REMEMBER, BECAUSE  
3 YOU KNOW IT'S IMPORTANT TO DO SO.

4 IN THIS CASE I FIND THAT, AS MS. REMAL-- OR  
5 I BELIEVE MR. PARKER POINTED OUT, SOME OF THE  
6 OBSERVATIONS PRECEDED WHAT ONE WOULD REFER TO AS  
7 TRAUMA. THEY OCCURRED THROUGH FIRST THE REAR VIEW  
8 MIRROR, AND AS THE PERSONS STEPPED NEARER THE CAR  
9 ITSELF, LONG BEFORE A WEAPON WAS DISPLAYED.

10 AND ONCE THE WEAPON WAS DISPLAYED, THE  
11 WITNESS HAD EVERY REASON TO BE CAUTIOUS AND CAREFUL  
12 WHICH HE WAS, SHOWING A CALM, LOGICAL, INTELLIGENT  
13 APPROACH. BUT HE ALSO HAD EVERY REASON TO REMEMBER  
14 THE FACES OF THE INDIVIDUALS. AND THAT'S CONSISTENT  
15 WITH HIS IDENTIFICATION.

16 HE NOT ONLY SAW THE PERSON FROM A DISTANCE,  
17 HE SAW THE PERSON CLOSE UP. HE NOT ONLY SAW THE  
18 PERSON FROM THE POSITION OF BEING IN THE CAR LOOKING  
19 OUTSIDE OF THE CAR, HE ALSO HAD THE OPPORTUNITY TO  
20 ASSESS HEIGHT AND STATURE BY STANDING NEXT TO THE  
21 INDIVIDUALS.

22 THERE ARE NO RACE ISSUES THAT CONFUSE OR  
23 MAKE MORE DIFFICULT THE ISSUE OF IDENTIFICATION.  
24 THERE ARE NO PROBLEMS WITH THE WITNESS'S CAPACITY TO  
25 MAKE OBSERVATIONS, NO PROBLEMS WITH HIS MENTAL STATE

1 ON THE DATE AT ISSUE. HE APPEARS TO BE A SUPREMELY  
2 INTELLIGENT MAN, WHO HAD AN ADEQUATE AMOUNT OF TIME  
3 TO SLEEP, WHO WAS NOT UNDER THE INFLUENCE OF DRUGS  
4 THAT WOULD HAVE INTERFERRED WITH HIS CAPACITY TO  
5 OBSERVE, TO REMEMBER.

6 HE ALSO TESTIFIED IN A MANNER CONSISTENT  
7 WITH SOMEONE WHO PAID CAREFUL ATTENTION AND WAS  
8 FOCUSED ON WHAT WAS OCCURRING. THE COURT ALSO NOTES  
9 THAT WE ARE NOT LOOKING AT WHAT I WOULD CALL A  
10 SUGGESTIVE IDENTIFICATION PROCESS. THAT IS, AT THE  
11 SHOW-UP PROCESS. BUT RATHER THE MORE STANDARD AND  
12 PERMISSIBLE PROCESS OF FIRST COMMENCING WITH THE  
13 DESCRIPTION, FOLLOWED BY A PHOTO-SPREAD.

14 AND IN THIS CASE THE COURT NOTES THE  
15 PHOTO-SPREAD IS IS SIX SIMILARLY COLORED  
16 PHOTOGRAPHS, WHICH I THINK IS MORE LIKELY TO YIELD A  
17 FAIR DETERMINATION AS TO IDENTIFICATION.

18 THAT IS FOLLOWED BY A LINEUP INVOLVING  
19 EIGHT SIMILAR INDIVIDUALS, WITH SIMILAR COLORING,  
20 STATURE, SIMILAR RACE, ETC. THE WITNESS HAS FURTHER  
21 ATTESTED TO GOOD LIGHTING THROUGHOUT WHAT WAS A LONG  
22 ENCOUNTER.

23 WE'RE NOT TALKING ABOUT LESS THAN A MINUTE,  
24 ONE PERSON LOOKING AT ANOTHER OVER THE COUNTER IN A  
25 CONVENIENCE STORE. RATHER, WE'RE TALKING ABOUT A

1 SCENARIO THAT INCLUDES A VARIETY OF OPPORTUNITIES TO  
2 OBSERVE OVER A FAIRLY SIGNIFICANT PERIOD OF TIME.

3 THERE'S BEEN NOTHING IN THE WITNESS'S  
4 DEMEANOR TO SUGGEST THAT ANY FEAR HE MIGHT HAVE FELT  
5 HAS RESULTED IN CONFUSION. AS MR. PARKER HAS  
6 POINTED OUT, THE WITNESS'S SPEECH WAS CALM, PRECISE,  
7 LOGICAL, THOUGHTFUL, AND CLEAR, IN HIS DESCRIPTIONS  
8 OF WHAT HE HE OBSERVED AND IN HIS RECOLLECTION, AND  
9 SO FORTH, OF THE SAME.

10 THEREFORE, THE COURT FINDS THAT THE WITNESS  
11 HAD AN ADEQUATE OPPORTUNITY TO VIEW THE ACTOR DURING  
12 THE EVENT AND LEADING UP TO THE EVENT, THAT THE  
13 WITNESS PAID A HIGH DEGREE OF ATTENTION TO THE ACTOR  
14 AT THE TIME OF THE EVENT BECAUSE OF THE NATURE OF  
15 THE CIRCUMSTANCES, BECAUSE OF THE FACT THAT HE IS A  
16 RELATIVELY YOUNG MAN WITH GOOD JUDGMENT AND GREAT  
17 CAPACITY TO OBSERVE AND REMEMBER.

18 THAT HE DOES IN FACT TESTIFY TO HIS  
19 CAPACITY TO OBSERVE THE EVENTS, AND HIS STATEMENTS,  
20 AS WELL, REFLECTED THAT, THAT HE HAD NO PHYSICAL OR  
21 MENTAL LIMITATION. ON THE CONTRARY, HE HAD PHYSICAL  
22 AND MENTAL ACCUITY.

23 THAT THE IDENTIFICATION WAS MADE IN A  
24 RESPONSIBLE MANNER THAT IT BEGAN WITH HIS  
25 DESCRIPTION, UNAIDED BY SOMEONE ATTEMPTING TO DIRECT

1 THAT DESCRIPTION IN ANY PARTICULAR MANNER OR  
2 ATTEMPTING TO SUGGEST A CERTAIN DESCRIPTION WOULD BE  
3 APPROPRIATE OR CONSISTENT.

4 THE MERE FACT THAT OFFICER TIMMERMAN MAY  
5 HAVE SAID TO HIM, AFTER HIS IDENTIFICATION, AND  
6 AFTER HIS DESCRIPTION, THAT HE HAD PICKED A PERSON  
7 THAT THEY ALSO BELIEVED MIGHT BE THE INDIVIDUAL, TO  
8 THIS COURT'S MIND DID NOT IN ANY WAY TAINT THAT  
9 IDENTIFICATION.

10 IT WAS NOT PRIOR TO; IT WAS SUBSEQUENT TO  
11 THE IDENTIFICATION. IT IS CLEAR WHEN THE WITNESS  
12 WAS BROUGHT IN FOR THE IDENTIFICATION PROCEDURE IT  
13 WAS IS NOT SO FAR AFTER THE THE EVENT THAT HIS  
14 MEMORY WOULD HAVE BEEN IMPAIRED. RATHER, IT WAS  
15 CLOSE IN TIME, AS WAS THE LINEUP. AND THERE WAS NO  
16 IMPERMISSIBLE SUGGESTION PRIOR TO THE PHOTO-SPREAD  
17 OR THE LINEUP SUCH AS, "THE PERSON'S IN THE THE  
18 SPREAD; PICK THEM OUT," OR, "THE PERSON'S IN THE  
19 LINEUP; PICK THEM OUT."

20 RATHER, IT WAS A GENERAL STATEMENT, "WE'D  
21 LIKE YOU TO LOOK AT THIS AND SEE IF YOU CAN IDENTIFY  
22 THE PERSON OR PERSONS THAT WERE INVOLVED." THIS IS  
23 NOT IMPERMISSIBLE. AND, FURTHER, ALL OF THE  
24 TESTIMONY OF THE WITNESS, TAKEN IN IT'S TOTALITY,  
25 INDICATES TO THE COURT THAT THE EVENT WAS OBSERVED

1 CLEARLY AND CAREFULLY BY THE WITNESS, THAT THERE IS  
2 A STRONG LIKELIHOOD, CONSISTENT WITH HIS TESTIMONY,  
3 THAT HE WAS ABLE TO PERCEIVE, REMEMBER, AND RELATE  
4 WHAT WAS OBSERVED.

5 THE FACTORS THAT IMPACT OBSERVATION,  
6 INCLUDING LIGHTING, TIME OF OBSERVATION, LENGTH OF  
7 OBSERVATION, ANY BIASES, INTERFERENCE, HAVE ALL  
8 BEEN CONSIDERED BY THIS COURT, AND THE COURT FINDS  
9 NO BIAS, NO INTERFERENCE WITH THE OPPORTUNITY TO SEE  
10 OR THE CAPACITY TO REMEMBER.

11 THERE ARE NO RACIAL COMPONENTS HERE. AND  
12 IN SHORT, THE COURT FINDS THAT WHILE THIS IS AN  
13 ISSUE OF FACT, NELSON AND RAMIRIZ MADE CLEAR THAT  
14 THE COURT MUST MAKE AN INITIAL INDICATION OF WHETHER  
15 THE EYE-WITNESS IDENTIFICATION IS RELIABLE. AND  
16 THIS COURT DETERMINES AT THIS TIME THAT IT IS A  
17 RELIABLE EYE-WITNESS IDENTIFICATION.

18 BASED UPON THE FACTORS I'VE INDICATED.  
19 THAT IS TO SAY, THE FINDERS OF FACT WHO LISTEN TO  
20 THIS EVIDENCE COULD CONCLUDE THAT THE WITNESS HAS  
21 IDENTIFIED THE DEFENDANT, AND THERE ARE MANY FACTORS  
22 THAT CAN BE CONSIDERED IN THE JURY MAKING SUCH AN  
23 ASSESSMENT. THERE IS NOT A PAUCITY OF EVIDENCE HERE  
24 OR THE LACK OF OPPORTUNITY FOR IDENTIFICATION.

25 TO THE CONTRARY. THE WITNESS, FURTHER, HAS

1 SUFFICIENT AGE TO HAVE LIFE EXPERIENCES THAT WOULD  
2 AID HIM IN MAKING AN IDENTIFICATION.

3 IN OTHER WORDS, HE'S NOT, IF YOU WILL  
4 EXCUSE ME FOR USING THE PHRASE THAT'S SO REPUGNANT I  
5 TO MY DAUGHTER, HE'S NOT A KID. HE'S NOT AN ELDERLY  
6 PERSON WITH SIGHT PROBLEMS, BUT RATHER A PERSON OF  
7 MODERATE TO YOUNG AGE WHO IS IN AN EXCELLENT  
8 POSITION TO MAKE AN IDENTIFICATION.

9 AND THE COURT FURTHER INCLUDES THAT THE  
10 IDENTIFICATION WAS INDEPENDENT OF ANY SUGGESTIVE  
11 PROCEDURES, ATTITUDES, OR STATEMENTS BY LAW  
12 ENFORCEMENT. I WILL FURTHER CONSIDER THESE SAME  
13 FACTORS AS THE TESTIMONY IS ADDUCED, BUT I HAVE MADE  
14 THESE FINDINGS AT THIS TIME BASED UPON THE TESTIMONY  
15 I HEARD TODAY AND MY CAREFUL CONSIDERATION OF THE  
16 SAME.

17 WE HAD A DESCRIPTION, FOR EXAMPLE, NOT ONLY  
18 RELATIVE TO HEIGHT AND LIGHTING, BUT AS TO THE  
19 COLORING OF THE DEFENDANT, HIS STATURE, HIS FACIAL  
20 HAIR, THE COLOR OF HIS HEAD HAIR, CERTAIN SPECIFIC  
21 CHARACTERISTICS ABOUT HIS EYES.

22 AND ALL OF THIS CAUSED THE COURT TO BELIEVE  
23 THAT THE WITNESS IS A PERSON WHO IS CREDIBLE, AND TO  
24 WHOM THE JURY COULD LOOK FOR RELIABLE TESTIMONY, AND  
25 MAY ATTEND TO THE SAME.



1 IS THERE ANYTHING FURTHER AT THIS TIME?

2 MR. PARKER: NOT FROM THE STATE

3 MS. REMAL: NO, YOUR HONOR.

4 THE COURT: MR. PARKER, I DON'T EXPECT  
5 YOU'RE GOING TO HAVE THE TIME TO REDUCE THIS TO  
6 WRITING BETWEEN NOW AND THE TRIAL ON MONDAY. BUT I  
7 AM GOING TO LAY ON THE BURDEN, IF YOU WILL, OF  
8 PREPARING FINDINGS AND AN ORDER ON THIS ISSUE OF  
9 EYE-WITNESS IDENTIFICATION CONSISTENT WITH BUT NOT  
10 LIMITED TO WHAT I HAVE ARTICULATED.

11 AND SINCE WE HAVE ONE OF THE WORD BEST  
12 COURT REPORTERS PRESENT, I'M SURE GAYLE AT SOME  
13 POINT CAN PULL A TRANSCRIPT FOR YOU TO ASSIST YOU IN  
14 THAT REGARD.

15 I THINK THAT PROBABLY TAKES CARE OF THE  
16 ISSUES OF EYE-WITNESS IDENTIFICATION. I HAVE FROM  
17 BOTH SIDES SUGGESTED VOIR DIRE FOR THE PROCESS ON  
18 MONDAY. WE'RE COMMENCING AT 9:00 O'CLOCK. I'LL ASK  
19 COUNSEL TO BE HERE AT 8:30. I ASK THE DEFENDANT TO  
20 BE TRANSPORTED AS CLOSE TO 8:00 O'CLOCK AS POSSIBLE  
21 SO MS. REMAL CAN SPEND AS MUCH TIME AS SHE WISHES TO  
22 MEET WITH HIM PRIOR TO THE TRIAL.

23 DO EITHER OF YOU, MR. PARKER OR MS. REMAL,  
24 HAVE ANY OBJECTIONS TO THE THE OTHER SIDE'S  
25 REQUESTED VOIR DIRE?

1 MR. PARKER: I DO NOT.

2 MS. REMAL: I DON'T.

3 THE COURT: WHAT I'M GOING TO DO IS WHAT I  
4 BELIEVE I SUGGESTED TO YOU BOTH BEFORE. I WILL ASK  
5 THE VOIR STOCK VOIR DIRE, WHICH INCLUDES SOME OF  
6 WHAT YOU HAVE ASKED FOR, OR BOTH SPECIFICALLY ASKED.

7 AND THOSE QUESTIONS YOU MAY ASK YOURSELF,  
8 OR YOU MAY FOLLOW-UP ON ANY QUESTIONS THE COURT ASKS  
9 OR REMIND THE COURT, EITHER BY ASKING THEMSELVES OR  
10 ASKING ME TO ASK ANY QUESTIONS THAT ARE LOGICAL BY  
11 WAY OF FOLLOW-UP THAT I MAY NOT HAVE ASKED.

12 IN OTHER WORDS, MY PURPOSE IS TO LET YOU BE  
13 INVOLVED IN THE VOIR DIRE PROCESS. I HAVE  
14 INSTRUCTIONS. YOU MAY CERTAINLY SUPPLEMENT THEM AS  
15 WE GO THROUGH. I DON'T THINK THERE IS ANYTHING  
16 FURTHER AT THIS TIME IN TERMS OF TIMING, SO WE'LL  
17 COMMENCE AS NINE IN TERMS OF PICKING A JURY. WE'LL  
18 MOVE AS QUICKLY AS WE CAN, MAKING SURE THAT WE TAKE  
19 THE TIME WE NEED TO. I EXPECT TO HAVE A JURY AND DO  
20 OPENINGS BEFORE THE NOON RECESS. WE'LL PROBABLY NOT  
21 HAVE AN OPPORTUNITY TO CALL WITNESS UNTIL THE  
22 AFTERNOON.

23 MY HABIT IS GENERALLY TAKE AN HOUR AND A  
24 HALF FOR LUNCH, AND GENERALLY BREAK AROUND FIVE OR  
25 FIVE-THIRTY, DEPENDING ON THE PROGRESS WE'RE MAKING.

1 I WON'T STOP AT NOON IF WE ARE THE MIDDLE  
2 OF SOMETHING. WE'LL GO A LITTLE LATER. BUT  
3 GENERALLY, WE TRY TO STOP AROUND NOON. BUT I TRY TO  
4 BE SENSITIVE TO COUNSEL'S SUGGESTION, AND ALSO TO  
5 THE WITNESS'S SCHEDULE. IF WE'RE CLOSE TO FINISHING  
6 WITH SOMEONE, I LIKE TO DO THAT BEFORE WE TAKE OUR  
7 NOON BREAK. WE WILL TAKE A SHORT BREAK IN THE  
8 MORNING AND A SHORT BREAK IN THE AFTERNOON, AS WELL.

9 ON TUESDAY, WE'LL LIKELY START AT 8:30  
10 INSTEAD OF 9:00 O'CLOCK.

11 MR. PARKER, HOW MANY WITNESSES, TOTAL, WILL  
12 YOU BECALLING IN THE TRIAL?

13 MR. PARKER: WELL, MY ACTUAL WITNESS LIST  
14 INCLUDES ABOUT EIGHT, BUT THE ONES THAT I'M ASSUMING  
15 WE'LL GO FORWARD WITH, BARRING SOME CHANGE, IS JUST  
16 FIVE. TWO OF THOSE WILL BE RATHER LONG, THREE  
17 FAIRLY BRIEF.

18 THE COURT: MS. REMAL?

19 MS. REMAL: I ANTICIPATE TWO OR THREE.

20 THE COURT: OKAY. AND I KNOW THAT YOU MAY  
21 NOT HAVE MADE THIS DETERMINATION, OR MAY NOT BE  
22 PREPARED TO DIVULGE THE INFORMATION, WHICH YOU DON'T  
23 NEED TO, BUT HAVE YOU MADE A DETERMINATION AS TO  
24 WHETHER THE DEFENDANT WILL BE TESTIFYING?

25 MS. REMAL: I HAVE NOT. WE HAVE DISCUSSED

1 IN TOGETHER. AND, FRANKLY, YOUR HONOR, I HAVE  
2 INDICATED TO HIM THAT I THINK WE OUGHT TO MAKE THAT  
3 DECISION FINALLY ONCE THE STATE HAS COMPLETED THEIR  
4 CASE.

5 THE COURT: CERTAINLY THAT'S UP TO YOU. I  
6 JUST THOUGHT IF YOU HAD A PERCEPTION AT THIS POINT,  
7 IT MIGHT BE HELPFUL. WE SHALL OBVIOUSLY LET YOU  
8 RESERVE THE RIGHT TO MAKE THAT DETERMINATION WHEN  
9 YOU DEEM IT APPROPRIATE.

10 WHAT I AM ASKING IS THAT, MR. PARKER, YOU  
11 MAKE KNOWN ANY AND ALL WITNESSES YOU MIGHT CALL.  
12 THE SAME WITH MS. REMAL.

13 MICHELLE, HOW MANY JURORS DO WE HAVE COMING  
14 IN?

15 THE CLERK: WE HAVE ORDERED 27.

16 THE COURT: TWENTY-SEVEN. AND TO MY  
17 RECOLLECTION, THIS CASE RECEIVED A LITTLE BIT OF  
18 PUBLICITY, BUT NOT A LARGE AMOUNT.

19 MS. REMAL: I THINK THAT'S ACCURATE.

20 THE COURT: SO I THINK THAT'S A GOOD NUMBER  
21 OF JURORS. DOES ANYONE HAVE ANY CONCERN WITH THE  
22 NUMBER.

23 MR. PARKER: NOT I.

24 MS. REMAL: NO.

25 THE COURT: DO YOU WANT TO PICK AN

1       ALTERNATE?

2               MS. REMAL:   I DON'T--

3               MR. PARKER:   I DON'T THINK WE NEED IT.   I  
4       THINK THIS WILL BE A DAY-AND-A-HALF TRIAL.

5               THE COURT:   SO UNLESS WE RUN INTO A PANEL  
6       OF JURORS THAT ALL LOOK LIKE THEY MAY HAVE  
7       SIGNIFICANT PROBLEMS, WE WON'T PICK AN ALTERNATE.  
8       BUT I WILL RESERVE THE RIGHT TO KIND OF USE MY  
9       INSTINCTS ON THAT.   AND I WILL LOOK FORWARD TO  
10      SEEING YOU BOTH ON MONDAY.   IS THERE ANYTHING  
11      FURTHER?

12              MS. REMAL:   NOPE.

13              MR. PARKER:   NO.

14              THE COURT:   OKAY.   AND ANY CLOTHES ISSUE TO  
15      THE DEFENDANT?

16              MS. REMAL:   THEY'RE ALREADY HEAR IN THE  
17      BUILDING.

18              THE COURT:   GREAT.   WE'LL LOOK FORWARD TO  
19      SEEING YOU, THEN, ON MONDAY.   THANK YOU.   WE'RE IN  
20      RECESS.

21                       (PROCEEDINGS CONCLUDED AT 5:15 P.M.)

22

23

24

25

C E R T I F I C A T E

STATE OF UTAH :

COUNTY OF SALT LAKE :

I, GAYLE B. CAMPBELL, CERTIFIED SHORTHAND  
REPORTER AND REGISTERED PROFESSIONAL REPORTER IN THE  
STATE OF UTAH HEREBY CERTIFY:

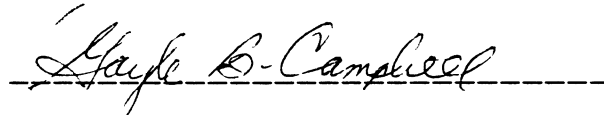
THAT I AM AN OFFICIAL COURT REPORTER IN THE  
THIRD DISTRICT COURT OF THE STATE OF UTAH;

THAT I WAS PRESENT DURING THE ENTIRE  
PROCEEDINGS IN THE BEFORE-ENTITLED CAUSE;

THAT THE PROCEEDINGS WERE REPORTED  
STENOGRAPHICALLY BY ME, AND WERE THEREAFTER  
TRANSCRIBED.

THAT SAID TRANSCRIPT CONSTITUTES TO THE  
BEST OF MY ABILITY A TRUE AND COMPLETE RECORD OF THE  
PROCEEDINGS HAD.

IN WITNESS THEREOF, I HAVE SUBSCRIBED MY  
NAME AND SEAL THIS 5TH DAY OF JANUARY, 2000.



GAYLE B. CAMPBELL, CSR, RPR