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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

DONALD LEON MALMROSE,

Defendant and Appellant.

---

**BRIEF OF APPE[illegible]**

---

APPEAL FROM A DENIAL OF [illegible]
IN THE DISTRICT COURT, SECOND [illegible]
CALVIN GOULD PRESIDING.

[illegible]

UTAH STATE ATTORNEY GENERAL
DAVID L. WILKINSON
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Plaintiff-Respo[illegible]

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

vs.

Case No. 17661

DONALD LEON MALMROSE,

Defendant and Appellant.

---

BRIEF OF APPELLANT

---

APPEAL FROM A DENIAL OF APPELLANT'S MOTION FOR NEW TRIAL IN THE DISTRICT COURT, SECOND JUDICIAL DISTRICT, HONORABLE CALVIN GOULD PRESIDING.

FLORENCE AND HUTCHISON
BRIAN R. FLORENCE
JOHN BLAIR HUTCHISON
818-26th Street
Ogden, Utah 84401
Attorneys for Defendant-Appellant

UTAH STATE ATTORNEY GENERAL
DAVID L. WILKINSON
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Plaintiff-Respondent

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IN THE SUPREME COURT

STATE OF UTAH

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| | | |
|---|---|---|
| STATE OF UTAH, | : | |
| Plaintiff and Respondent, | : | |
| vs. | : | Case No. 17661 |
| DONALD L. MALMROSE, | : | |
| Defendant and Appellant. | : | |

---

BRIEF OF APPELLANT

---

STATEMENT OF THE KIND OF CASE

This is an appeal from the Honorable Calvin Gould's denial of appellant's motion for a new trial.

DISPOSITION IN LOWER COURT

Appellant was convicted by a jury of forcible sexual abuse. He was sentenced to the Utah State Prison. A motion for new trial was denied.

RELIEF SOUGHT ON APPEAL

Appellant requests this Court to reverse the conviction and grant a new trial.

STATEMENT OF FACTS

On April 16, 1980, Brooke Williams was sexually assaulted while jogging on a running course at Weber

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State College. She reported the assault to Weber State police and gave a description of her assailant. On April 17, 1980, Mrs. Williams was shown a group of mug shots in an attempt to identify her assailant. From these pictures she picked out four individuals she thought resembled him. (Suppression Hearing 9) The mug shots were returned to the Ogden City Police Department without a record being kept. (T 118) On July 1, 1980, the complaining witness was shown seven drivers license photos which she mistakenly thought contained the same four pictures as before. She narrowed these to two possible suspects. (Suppression Hearing 10) While reviewing this group of pictures, Mrs. Williams was told by the police that none of the men were "nice guys". (Suppression Hearing 12, 31) She requested a recent photograph of one of these men and the next day the police showed her a Mound Fort Junior High school yearbook open to a page where the defendant was pictured alone with the basketball team. (T 83, 84) After looking at the yearbook photograph, she was informed that defendant had committed a sex offense in California. (Suppression Hearing 24) An identification was obtained.

On September 9, 1980, the complaining witness picked the defendant out of a lineup at the police station and he was arrested. The lineup was eventually

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suppressed by Judge John F. Wahlquist because it was conducted in violation of State statute. (Suppression Hearing 43)

The first photograph display did not contain a picture of the defendant. (T 166) Throughout the proceedings, Mrs. Williams maintained that she picked out the defendant from the first group of mug shots on April 17, 1980. (Suppression Hearing 10) The police officers said she was not shown a picture of the defendant until July 1, 1980. (T 118)

Defendant's trial commenced February 9, 1981 on the charge of forcible sexual abuse, a third-degree felony. During the voir dire of the jury, prospective juror Hunter made the following statements:

> "I have a son who is a principal in an elementary school. It might be better if I didn't listen to this." (T 11)
>
> Speaking of her acquaintance with George Handy, a State's witness, she said: "My acquaintance is casual. I would believe what he said, yes". (T 13)
>
> When the Court asked her whether she would subject George Handy to the same scrutiny as other witnesses, her answer was "probably". (T 14)
>
> "I might be prejudice in this way, that I think where schools are involved there shouldn't be any question involved about teacher propriety." (T 29)
>
> When asked whether there was any reason any of the jurors would not want to hear the case, she said: "I would prefer not to". (T 31)

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Prospective juror Widdison was asked whether he had made up his mind based upon what he had read in the newspaper. He replied: "Not totally. I'm sure it's bias". (T 29) When questioned further about his ability to be fair, he only said: "I believe I could". When asked if he would be inclined to give a speedy decision because of his pending vacation, he answered "probably". (T 30)

The Court denied defendant's challenge for cause on both of these jurors. (T 33) Defendant used a peremptory challenge to eliminate prospective juror Hunter. (R 583) Juror Widdison was selected to try the case. (R 583)

Other jurors selected to try the case gave troublesome responses during the voir dire. Juror Austin said she has occasionally been assaulted by her husband, and further indicated she might have problems with a younger lady in a sexual assault case because of her own family difficulties. (T 26, 27, 31)

Juror Stockwell indicated his brother-in-law was on the Highway Patrol and his daughter was attending Weber State College. (T 17)

Juror Wood lived in the same neighborhood and attends the same church ward as prosecutor Michael Glasmann. When asked if it would make any difference, he responded: "I could probably assure

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them that it wouldn't". (emphasis supplied) (T 10) The Court then suggested that defense counsel might want to pursue this line of questioning. Defense counsel failed to do so. Juror Wood also said he knew James Gaskill, George Handy and Brian Stromberg who were prospective State witnesses. None of these potential problem areas were pursued by Court or counsel.

Juror Poulter admitted to a hearing problem. She said she could hear the prosecutor, but sometimes couldn't hear the others which apparently included the Court and defense counsel. (T 23) When she was asked by the Court if she had any immediate family in police work, her response was: "Yes, he has one daughter teaching here -- well, here in Ogden. (T 19) It was apparent from the response that she did not hear the Judge's question. Jurors Stockwell, Wood and Poulter were all selected to try the case. (R 583)

After the jury was selected, the Court read instructions 1 through 10 which included the instructions on the presumption of innocence and credibility of witnesses. (T 35, 506) These instructions were not given again at the conclusion of the three-day trial.

During defense counsel's opening statement, he said:

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> "I would just like to bring out that the only reason that Mr. Malmrose is before you is through a series of coincidences. A coincidence where his car was parked allowed the police to take his license number. The license number in turn was pulled because his car was parked in an area where they had some problems with men exposing themselves." (T 44)

Evidence was not introduced to support this allegation.

During the trial, James Gaskill testified about conducting certain laboratory tests. The substance of the testimony was that the blood type obtained from defendant's saliva sample matched the blood type in the assailant's semen found on the body of the complaining witness. Also, both specimens contained the H antigen which shows they are secretors. His written report was offered and admitted into evidence. (T 150)

Dr. David Dodd, a Ph.D. psychologist, proferred expert testimony on behalf of defendant on the many problems and misconceptions involved in evaluating the accuracy of eyewitness identifications. Dr. Dodd maintained that education, special training, and intelligence are not meaningful factors in assessing the accuracy of such an identification. The prosecutor went into great detail establishing the educational background, special training and supposed high intelligence of the complaining witness. The purpose of this testimony was to infer that she possessed a

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superior ability to perceive and accurately recall. The Court refused to allow Dr. Dodd to testify to the jury. (T 170)

Prior to the trial, defendant filed his Notice of Alibi as required by statute. The State called four rebuttal witnesses to defendant's alibi. At no time did the prosecutor file a reciprocal Notice of Alibi as required by statute.

During the cross-eximination of defendant, the prosecutor asked:

> "Do you recall making the statement to them (the police), I'm a voyeur, but I wouldn't assault anyone." (T 358)

A timely objection was made and the Court ruled in defendant's favor, but denied a request for a cautionary instruction. (T 363)

One of the State's rebuttal witnesses was Mark Eubank. He testified concerning the weather on April 16, 1980 which was brought into issue during the presentation of defendant's alibi. His entire presentation was from the reports of other people in the Ogden area. This is mentioned because the defendant argues herein that the presentation was hearsay.

Florence Stowe was initially called by the defendant. She testified that defendant was at work at Mound Fort Junior High school on April 16, 1980, and that she could remember the day because she had

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ordered some cream pies for a church meeting that night and recorded this fact in a personal journal. The prosecutor recalled Mrs. Stowe in rebuttal and asked her to read the dates of the last two entries in her journal which were March 30, 1980 and April 26, 1980. (T 471) Mr. Glasmann asked no further questions and created the impression that she was mistaken about the date in her earlier testimony. Mrs. Stowe's journal entry on April 26, 1980 specifically referred to the date of the church function as April 16, 1980. (R 641)

The jury returned a verdict of guilty on February 11, 1981 after three days of trial.

On February 25, 1981, the Court sentenced the defendant to the Utah State Prison. A motion for new trial was timely filed by new counsel for the defendant. The motion was denied by the Court on April 3, 1981.

## ARGUMENT

### POINT ONE

DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12 OF THE UTAH CONSTITUTION.

Many of the issues raised in this appeal were not properly preserved by defense counsel at trial. As subsequent matters are discussed in this Brief,

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that fact will be noted, but further authority will not be cited except as set forth in this Point.

The Sixth Amendment of the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right. . . to have the assistance of counsel for his defense."

Article I, Section 12 of the Utah State Constitution similarly provides:

> "In criminal prosecutions, the accused shall have the right to appeal and defend in person and by counsel. . ."

As a general rule, a judgment of conviction will not be invalidated because of inexperience or unskillfulness on the part of defense counsel or because of error in judgment on his part.

In Herring v. Estelle, 491 F. 2d 125 (5th Cir. 1974), the Court held that the governing standard should be "reasonably effective assistance" of counsel. The Sixth Circuit has adopted the following standard:

> "The assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render effective assistance." Beasley v. United States, 491 F. 2d 687 (6th Cir. 1974)

In United States v. Bosch, 584 F. 2d 113 (1st Cir. 1978), a narcotics trial, defense counsel introduced into evidence a pre-trial motion for reduction of bail. The motion disclosed defendant's



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two other narcotics convictions. It was offered to prove that defendant had been in court on the date it was filed; however, defense counsel did not attempt to delete the reference to his client's prior crimes. During deliberation, the jury informed the trial Judge that the fact of defendant's prior convictions had influenced its opinion of his character. Counsel did not request a limiting instruction or demand a mistrial. Defendant was convicted. On appeal, the Bosch Court reversed and adopted the "reasonably competent assistance standard". The Court held that the quality of defense counsel's representations must be within the range of competence expected of attorneys in criminal cases. The standard in Utah was adopted in State v. McNichol, 554 P. 2d 203 (1976).

In footnote five of State v. Gray, 601 P. 2d 918 (1979), the Court stated:

> "We do not mean to be understood as saying that a defendant can only succeed in showing that he was deprived of counsel by showing that his attorney's failures reduced his trial to "a farce or a mockery of justice". We agree with the dissent that the standard should be as stated in State v. McNichol. . . that the right to counsel "is not satisfied by a sham or pretense" of an attorney, but an accused is "entitled to the assistance of a competent member of the Bar who shows a willingness to identify himself with the interests of the accused and present such defenses as are available."

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In State v. Smith, 621 P. 2d 697 (1980), this Court considered whether the lack of fair assistance of counsel could be treated as harmless error. The Court said:

> "But the assistance of counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." At page 699.

It is submitted that the errors of defendant's counsel at trial went beyond errors of judgment or mistake of tactics and fell below the threshold of competence expected of lawyers in criminal trials.

POINT TWO

DEFENDANT'S CHALLENGE FOR CAUSE OF JURORS HUNTER AND WIDDISON SHOULD HAVE BEEN SUSTAINED.

During the jury voir dire, prospective jurors Hunter and Widdison each expressed a state of mind which indicated they could not act impartially if selected.

Juror Hunter made the following statements:

> "I have a son who is a principal in an elementary school. It might be better if I didn't listen to this." (T 11)
>
> Speaking of her acquaintance with George Handy, a State's witness, she said: "My acquaintance is casual. I would believe what he said, yes". (T 13)
>
> When the Court asked her whether she would subject George Handy to the same scrutiny as other witnesses, her answer was "probably". (T 14)

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"I might be prejudice in this way, that I think where schools are involved there shouldn't be any question involved about teacher propriety." (T 29)

When asked whether there was any reason any of the jurors would not want to hear the case, she said: "I would prefer not to". (T 31)

Juror Widdison was asked whether he had made up his mind based upon what he had read in the newspaper. He replied: "Not totally. I'm sure it's bias". (T 29) When questioned further about his ability to be fair, Mr. Widdison only said: "I believe I could". When asked if he would be inclined to give a speedy decision because of his pending vacation, he answered: "probably". (T 30) It should be noted that Mr. Widdison's vacation was scheduled to start before the trial actually ended. (T 24)

Defense counsel challenged both jurors for cause. The Court denied the challenge. (T 33) Defendant used a peremptory challenge to eliminate Mrs. Hunter. (R 583) Mr. Widdison was selected and tried the case. (R 583)

Rule 19(14), Utah Rules of Criminal Procedure, allows a challenge for cause provided:

> "[t]hat a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to substantial rights of the party challenging. . ."

In <u>State</u> v. <u>Brooks</u>, 563 P. 2d 799 (1977), the

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Utah Supreme Court held it was an abuse of discretion for the trial court to deny defense counsel challenge for cause when the record indicated a relationship of affection, respect, or esteem for some of the State's witnesses. The Court went on to say that even though the potential jurors stated they would set aside these relationships and decide the case without bias, it would run counter to human nature not to believe those personal associations would influence their decisions.

Jenkins v. Parrish, No. 15905, filed March 13, 1981, considered the trial Court's refusal to remove a juror for cause who indicated she would give more weight to the testimony of a doctor simply because he was a doctor. Upon further questioning by the Court, the juror conceded that if the doctor's testimony was not in accord with the other evidence, she would accept the other evidence.

In granting a new trial, the Utah Supreme Court said:

> "Although Mrs. Eddins expressed a desire and ability to remain fair and impartial once all the evidence was presented, her statements do not alter the fact that she indicated that her background would cause her to place greater credence in a doctor's testimony simply because of his status as a doctor. A statement made by a juror that she intends to be fair and impartial loses much of its meaning in light of other testimony and facts which suggest a bias."

It is submitted that jurors Hunter and Widdison

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indicated a state of mind that would prevent them from acting impartially. Despite what curative questions might have subsequently been asked by the Court, it "would run counter to human nature" (Brooks, supra) not to believe that their expressed bias would influence their decision.

POINT THREE

THE ENTIRE JURY VOIR DIRE BY THE COURT AND DEFENSE COUNSEL WAS INADEQUATE.

Many areas of potential bias and competency were inadequately explored by the Court or counsel.

Juror Austin said that on occasion she had been assaulted by her husband, and further indicated she might have problems with a younger lady in a sexual assault case because of her own family difficulties. (T 26, 27, 31)

Juror Stockwell's brother-in-law was on the Highway Patrol and his daughter was attending Weber State College. (T 17)

Juror Wood lived in the same neighborhood and attends the same church ward as prosecutor Michael Glasmann. When asked if it would make any difference, he responded: "I would probably assure them that it wouldn't". (emphasis supplied) (T 10) The Court then suggested that defense counsel might want to pursue this line of questioning. Defense



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counsel failed to do so. Juror Wood also said he knew James Gaskill, George Handy and Brian Stromberg who were prospective State witnesses. There was no follow-up concerning the nature of these relationships. (T 13)

Juror Poulter admitted to a hearing problem. She said she could hear the prosecutor, but sometimes couldn't hear the others which apparently included the Court and defense counsel. (T 23) This hearing problem was made apparent when the Court asked her if any of her immediate family were in police work. Her answer was not at all responsive to this question which shows she could not hear the proceedings. (T 19) Jurors Stockwell, Wood and Poulter were selected to try the case. (R 583)

## POINT FOUR

## UNNECESSARY PREJUDICIAL SUGGESTION ABOUT DEFENDANT TOOK PLACE DURING DEFENSE COUNSEL'S OPENING STATEMENT.

During defense counsel's opening statement, he said:

> "I would just like to bring out that the only reason that Mr. Malmrose is before you is through a series of coincidences. A coincidence where his car was parked allowed the police to take his license number. The license number in turn was pulled because his car was parked in an area where they had some problems with men exposing themselves."

Evidence was not introduced to support this statement.

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It is obvious the State could not have properly introduced such evidence. It's possible that it might be considered a tactical error on part of defense counsel, but it is difficult to see how this statement could have assisted the defendant under any circumstances. On the other hand, it created the risk that the jury would assume the defendant had been involved in other sexual offenses on other occasions because of his proximity to the scene of unrelated crimes. It would appear that this statement falls within the same type of conduct by defense counsel as mentioned in Point One, United States v. Bosch, supra.

POINT FIVE

THE COURT ABUSED ITS DISCRETION IN DISALLOWING THE TESTIMONY OF DAVID DODD.

The Court refused to allow the proferred expert testimony of Dr. David Dodd, a Ph.D. psychologist on the many problems and misconceptions involved in evaluating the accuracy of eyewitness identifications. Dr. Dodd maintained that education, special training, and intelligence are not meaningful factors in assessing the accuracy of such an identification. (T 164) In other words, these factors do not improve a person's ability to perceive or recall an incident although most laymen, including jurors, erroneously

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believe the reverse is true. It should be noted the complaining witness is a highly educated woman with several advanced degrees including a degree in Police Science. Judge John F. Wahlquist, at the suppression hearing, made the following Finding of Fact:

> "It is necessary to recognize the general character of this particular crime. This particular crime victim, from the standpoint of a prosecuting witness, is almost ideal. She has a master's degree in a related field which would cause her to guard, to be careful, and to be alert. She's at her prime in life. She appears to be in excellent health. Her vision appears to be good at short distances. At the time of her assault, there were no distracting forces such as other third parties. There was some striking, but there was no evidence of any unconsciousness or anything of the sort. There is every reason to believe that this is an above average intelligent woman who has been carefully trained by the fates of life to be what she is now, and that is a crime victim witness. This is her status. The record also shows that she has throughout been considerably cautious as far as identification is concerned." (Suppression Hearing 41, 42)

In the recent case, State v. Griffin, No. 16669, filed February 20, 1981, the Utah Supreme Court upheld the trial Court's refusal to allow testimony of a psychologist as an expert witness to testify about the credibility of eyewitness identification. In Griffin, this Court indicated that the use of expert testimony on the merits of

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eyewitness identification was within the discretion of the trial court and that expert testimony would not ordinarily be allowed in areas equally within the knowledge of jurors.

If Judge Wahlquist believed that education, special training, and intelligence enhanced one's capacity to perceive and recall, then surely one or more jurors could have shared his opinion. The purpose of Dr. Dodd's testimony was to rebut what the defense maintained was a popularly held misconception. The defendant was prejudiced. He was denied the opportunity to completely present his side of the case. The prosecutor went into great detail establishing the educational background, special training, and supposed high intelligence of the complaining witness. The purpose of this testimony was to infer that she possessed a superior ability to perceive and accurately recall. Would the prosecutor have gone into such detail if the complaining witness had been an uneducated fry cook at a local cafe?

It is submitted that proferred testimony of Dr. Dodd was not within the ordinary intelligence of the jurors and that the Court abused its discretion by not allowing him to testify. Expert opinion testimony is admissible if it will aid the jury on a factual issue in a case. _Expert Testimony on Eyewitness Perception_, 82 Dick. L. Rev. 465 (1978).

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While Griffin held that it is within the discretion of the trial court to allow this type of expert testimony, it appears that Judge Gould erroneously believed he did not have discretion since there wasn't a Utah case at that time. (T 170)

POINT SIX

THE IDENTIFICATIONS OF DEFENDANT BY THE COMPLAINING WITNESS WERE TAINTED AND SHOULD HAVE BEEN SUPPRESSED.

On April 17, 1980, the day after the assault, the complaining witness was shown a group of mug shots in an attempt to identify her assailant. From these pictures she picked out four individuals she thought resembled him. (Suppression Hearing 9) On July 1, 1980, the complaining witness was shown seven drivers license photos which she mistakenly thought contained the same four pictures as before which she narrowed down to two possible suspects. (Suppression Hearing 10) Then she requested a recent photograph of one of these men and the next day the police showed her a Mound Fort Junior High school yearbook open to a page where the defendant was pictured alone with the basketball team. (T 83, 84) An identification was obtained.

On September 9, 1980, the complaining witness picked the defendant out of a lineup at the police station. The lineup was conducted in violation of State statute. Nevertheless, the earlier photographic

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lineups and the in-court identifications were held admissible. (Suppression Hearing 42-44)

Although the evidence is in conflict, it appears the first photographic display did not contain a picture of the defendant. (T 116) Throughout the proceedings, the complaining witness maintained that she picked him out from the first group of mug shots on April 17, 1980. On the other hand, the police officers say that the complaining witness was not shown a picture of the defendant until two or three months later. (T 118)

The mug shots cannot be produced because they were returned to the Ogden City Police Department without a proper record being kept which is prejudicial to defendant. (T 118) These pictures would have been helpful in supporting defendant's contention of mistaken identity.

In order to encourage the complaining witness to make an identification, the police offered certain unsolicited comments. While reviewing the second group of pictures, she was told none of the men were "nice guys". (Suppression Hearing 12, 31) After looking at the yearbook photograph, she was informed that defendant had committed a sex offense in California. (Suppression Hearing 24) These comments by the police officer were suggestive, irresponsible, and extremely

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prejudicial since their purpose was to assure the complaining witness that even if she made a misidentification, it would not create too much of a miscarriage of justice because the men shown to her were social degenerates anyway.

The yearbook photograph was unduly suggestive since defendant was the only adult on the page. The tainted identification process was bolstered by the illegal lineup suppressed by Judge John F. Wahlquist.

Photographic lineups are to be afforded the same due process protection as in-person lineups. Simmons v. United States, 390 U.S. 377 (1968). The test is whether the pre-trial confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law. Stovall v. Denno, 338 U.S. 293 (1967).

The in-court identification of defendant by the complaining witness was tainted by unconstitutional pre-trial confrontations. In Wong Sun v. United States, 371 U.S. 471, the Court said that evidence to which an objection is made cannot come from exploitation of prior illegality which is not purged from the primary taint. Where a flawed pre-trial identification occurs, the State is not entitled to use an in-court identification without showing it is

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not tainted by the prior identification. Only a per se exclusionary rule can be an effective sanction to ensure that law enforcement authorities will respect the defendant's due process rights during pre-trial identification procedures. See Gilbert v. California, 388 U.S. 263 (1967).

In Neil v. Biggers, 34 L. Ed 2d 401 (1972), the United States Supreme Court held that the reliability of the identification procedure must be considered under the "totality of the circumstances". Those circumstances include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation", at 411.

Applying each of these factors in defendant's case, the evidence is as follows:

A) Opportunity to view the criminal. Mrs. Williams claims the assailant was in front of her for 7-1/2 to 8 minutes. (T 72)

B) Degree of attention. Considering the nature of the crime, this aspect could be questionable. She claims she observed him closely, but admitted she did not observe his eyes. (T 97)

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C) Accuracy of prior description.

Mrs. Williams gave an oral description to police on the day of the asault as follows: A white male American approximately 45 to 50 years old, approximately six foot four tall, thin build, but was muscular, had light to medium brown hair that was graying, hair was slightly wavy and parted on the right side. The male has a ruddy complexion which appears to be acne scars. Has a distinctive line or scar on the left side of his face. No facial hair. Facial features appear square with a medium to large nose. No glasses. Suspect was wearing dark navy-blue sweater shirt and navy-blue sweat pants. Suspect has a slight tan and his skin appears leathery. (T 75) She denied at trial that she told police his hair was slightly wavy. (T 76)

The next day she wrote out a description for the police as follows: Approximately 45 years old, stood about six three or six four, had medium to light brown hair with a great deal of gray running through it, had straight hair that had body to it, parted on the right side, a ruddy complexion with skin that was leathery, tawnish, and marked with scars that appeared to be the result of bad acne during adolescent years, had a line on his face. Appeared to be outdoors a lot, lean and in good shape. (T 77)

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At trial she admitted the defendant had no acne scars. (T 92) He had no scar but had lines on both sides of his face, not just the left side. (T 92) The defendant is only six foot one inch. (T 365) In judging his height for police, she had compared her assailant to her husband's height which is five foot eleven and a half inches. (T 57) If that were correct, she shouldn't have been so far off on estimated height. The defendant has never had a part in his hair while teaching at Mound Fort. (T 318) He has never owned or been seen in a navy-blue sweat shirt or navy-blue sweat pants. (T 345, 309)

D) Level of certainty of witness. Mrs. Williams claimed she was certain in her identification of the defendant, but she was also certain that the defendant's picture was among the first group of mug shots shown to her on April 17, 1980, and the police admit she is wrong in that regard.

E) Length of time between crime and confrontation. The crime occurred on April 16, 1980. Mrs. Williams was first shown a picture of defendant on July 1, 1980. The first in-person meeting occurred through a one-way glass window at the suppressed lineup in September of 1980. All subsequent identification from that point on were tainted by the prior illegalities.



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It is submitted that the critical factors in the totality of circumstances, i.e. the length of time before initial identification, the error about defendant's mug shot, and mistakes in the description, all point to an unreliable identification.

The failure to keep records of the mug shots shown to Mrs. Williams on April 17, 1980 was extremely damaging to defendant.

> "In short, the accused's inability to effectively reconstruct at trial any unfairness that occurred at lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." <u>United States</u> v. <u>Wade</u>, 388 U.S. 218 (1967).

Thus, even if the conduct of the pre-trial identification is not so unnecessarily suggestive as to amount to a denial of due process, the circumstances of the prior identification are recognized by the Supreme Court as constituting a potential source of material for cross-examination. In this case, all opportunities for cross-examination were lost when the photographic lineups were not properly preserved.

Where a law enforcement agency loses evidence which may be material to the defendant's case, the charges should be dismissed; <u>United States</u> v. <u>Heath</u>, 174 F. Supp 877 (1957). <u>United States</u> v.

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Consolidated Laundries Corp., 291 F. 2d 563 (2nd Cir. 1961), involved missing evidence which might have been of value in cross-examining a prosecution witness. The potential value of the evidence in cross-eximination could not be estimated with accuracy the Court reasoned. Therefore, since it was apparent that the evidence would have had at least some such value, the Court found it to be material to the defense and its negligent suppression a violation of due process. See also Brady v. Maryland, 373 U.S. 83 (1963) by analogy.

POINT SEVEN

THE COURT ERRED IN ADMITTING INTO EVIDENCE A WRITTEN LABORATORY REPORT BY JAMES GASKILL, WEBER STATE COLLEGE CRIME LAB DIRECTOR.

James Gaskill testified about conducting certain laboratory tests. The substance of the testimony was that the blood type obtained from defendant's saliva sample matched the blood type in the assailant's semen found on the body of the complaining witness. Also, both specimens contained the H antigen which shows they are secretors. His written report was then offered and admitted into evidence. (T 150)

While the testimony only placed the defendant within forty to forty-five percent of the world's population, (T 146), as an exhbit, the report

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created a continuing impression on the jury since they could review it again and again during their deliberations. It was the only physical evidence that had any circumstantial connection to the defendant, no matter how slight.

It is clear from Rules 62 and 63 of the Rules of Evidence that the report is hearsay and does not fall within any of the recognized exceptions.

POINT EIGHT

THE STATE'S INTENTIONAL REFERENCE TO ALLEGED PRIOR CRIMINAL MISCONDUCT BY THE DEFENDANT AND THE COURT'S REFUSAL TO GIVE A CAUTIONARY INSTRUCTION WAS PREJUDICIAL ERROR.

During the cross-examination of the defendant, the prosecutor asked:

> "Do you recall making the statement to them (the police), I'm a voyeur, but I wouldn't assault anyone." (T 358)

This is an impermissible comment on defendant's character and was an obvious attempt to let the jury know about defendant's past misdemeanor problems which were clearly inadmissible. There was a timely objection and the Court ruled in defendant's favor, but denied the request for a cautionary instruction. (T 63)

In United States v. Diaz, 585 F. 2d 116 (5th Cir. 1978), the Court said:

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> "The sole issue, therefore, is whether the failure of the trial judge in this case to give such an instruction, sua sponte, is reversible error. It does not appear that this precise question has been determined by this circuit. Other circuits are divided on this. See Nutt v. United States, 335 F. 2d 817 (10th Cir.), a cert. denied 379 U.S. 909, 85 S. Ct. 203, 13 L. Ed 2d 180 (1964), holding that there was no error when a limiting instruction was not requested; contra, United States v. Bobbitt, 146 U.S. App. D.C. 224, 450 F 2d 685 (D.C. Cir. 1971), holding that the trial judge must act, sua sponte, whether or not a request for an instruction is made. United States v. Ailstock, 546 F. 2d 1285 (6th Cir. 1976); Evans v. Cowan, 506 F. 2d 1248 (6th Cir. 1974)" at 117.

They further stated:

> "We recognize the salutary rule that empowers the trial judge to exercise discretion in determining what curative instruction is required and hold only that when, during a jury trial, evidence is introduced that the defendant has a prior conviction for the same offense for which he is being tried, both counsel and the court have a duty to minimize the risk that the jury would infer guilt on the cocaine charges from the fact of previous convictions on cocaine charges. Thus, in this situation where no cautionary instruction is given to the jury, prejudicial error has intervened" at 118.

## POINT NINE

THE STATE'S USE OF WITNESSES TO REBUT DEFENDANT'S ALIBI WITHOUT WRITTEN NOTICE WAS IN VIOLATION OF STATUTE.

In compliance with 77-14-2, Utah Code Annotated, defense counsel submitted a list of all

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but one alibi witness which he decided to call after his initial Notice of Alibi had been filed. The prosecutor did not provide notice of rebuttal witnesses as required by that same statute. Defense counsel did not object, but it is clear from the record that the State's alibi rebuttal witnesses had a devastating effect on defendant's case.

Most all of the alibi witnesses called by defendant claimed to have seen him at Mound Fort Junior High school at the time of the alleged attack. Each of the witnesses recalled this day because there had been a baseball game with another school. They also recalled that there had been a slight rain shower sometime during or just prior to the game.

All of the State's rebuttal witnesses, including Mark Eubank, claimed there was no rain on that day in the area of Mound Fort Junior High.

In Judge Gould's Memorandum Decision denying defendant's motion for a new trial, he claimed that if this was an error, it was harmless since defense counsel had actual knowledge of these rebuttal witnesses well before the trial commenced. There is nothing in the record to support this conclusion. While some of these witnesses were introduced to the prospective jury during voir dire, there is nothing to indicate they were to be used as rebuttal witnesses

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or the nature of their testimony.

## POINT TEN

THE COURT ERRED IN ALLOWING HEARSAY TESTIMONY FROM STATE'S WITNESS, MARK EUBANK.

One of the most damaging witnesses to defendant was Mark Eubank. He testified about the weather on April 16, 1980. The entire presentation was hearsay. None of the people he claimed observed the weather testified in court. Meaningful cross-examination and confrontation was impossible. Even though an objection was not taken, the Court should have alerted defendant's counsel at a bench conference or entered an objection on its own. To illustrate this point, it should be noted that on another occasion the Court entered its own objection to a leading question posed by defense counsel without prior objection by the State. (T 234) The Court should have afforded the same courtesy to the defendant in this damaging area of testimony.

In his Memorandum Decision denying defendant's motion for new trial, Judge Gould stated that Mark Eubank's testimony was founded upon regular entires made in the course of business known as "Weather Bank" and, therefore, admissible as an exception to the hearsay rule.

Rule 63(13), Utah Rules of Evidence, states:

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> "Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness."

The substance of Mark Eubank's testimony came from documents of weather conditions that were prepared by other weather observers, not a part of "Weather Bank", and sent to Mr. Eubank for his own information. Those documents were not made in the regular course of his business.

Even if Mr. Eubank's testimony could have fallen within the exception stated above, there was absolutely no foundation to show that the exception, in fact, applied.

POINT ELEVEN

PROSECUTORIAL MISCONDUCT OCCURRED IN TESTIMONY OF FLORENCE STOWE WHEN CALLED AS A REBUTTAL WITNESS BY THE STATE.

Florence Stowe was initially called by the defendant. She testified that defendant was at work at Mound Fort Junior High school on April 16, 1980 and that she could remember the day because she had ordered some cream pies for a church meeting that night and recorded this fact in a personal journal.

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The prosecutor recalled Mrs. Stowe in rebuttal and asked her to read the dates of the last two entries in her journal which were March 30, 1980 and April 26, 1980. The prosecutor asked no further questions and created the impression for the jury that Mrs. Stowe was mistaken about the date in her earlier testimony. Defense counsel also failed to ask any further questions.

Mrs. Stowe's Affidavit was filed with the Court during the hearing on defendant's motion for new trial. (R 641) Her journal entry on April 26, 1980 specifically referred to the date of the church function as April 16, 1980. Mrs. Stowe's Affidavit further states that the Weber County Attorney's office had previously confirmed that the church meeting in question was in fact held on April 16, 1980.

In Walker v. State, 624 P. 2d 687 (1981), the Utah Supreme Court held that a false impression knowingly fostered by the prosecutor could have affected the judgment of the jury and the prosecutorial misconduct deprived the defendant of a fair trial.

It is submitted that this prosecutor also intentionally created a false impression in the minds

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of the jury and thereby deprived defendant of a fair trial.

POINT TWELVE

THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY.

The errors referred to in this Point were not preserved by defense counsel at trial. Rule 19(c) of Utah Rules of Criminal Procedure states that, not withstanding a parties failure to object, error may be assigned to instructions in order to avoid manifest injustice.

In United States v. Greene, 591 F. 2d 471 (8th Cir. 1979), the Court held that where eyewitness identification was the sole basis for conviction, it was reversible error for the trial court not to give a cautionary instruction alerting the jury to the inherent frailties of eyewitness identification.

The language of this instruction was first drafted by the Court of Appeals for the District of Columbia in United States v. Telfaire, 469 F. 2d 552 at 558-559 (1972). It was restated in Greene as follows:

> "Identification testimony is an expression of belief or impression by the witness. In this case its value depends on the opportunity the witness had to observe whether or not the defendant was the person on Trans World Airlines Flight 245 and in Los Angeles and to make a reliable identification later.

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In appraising the identification testimony of a witness, you should consider the following:

1) Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender?

Whether the witness had an adequate opportunity to observe the person at the time will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.

2) Are you satisfied that the identification made by the witness subsequent to the event was the product of his or her own recollection?

You may take into account both the strength of the identification, and the circumstances under which the identification was made. If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see defendant, as a factor bearing on the reliability of the identification.

3) Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether he is truthful, and consider whether he had the capacity and opportunity to make a reliable observation on the matter covered in his testimony.

I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the

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burden of proving beyond a reasonable doubt the identity of the defendant as being the person on Trans World Airlines Flight 245 and being in Los Angeles. If after examining the testimony, you have a reasonable doubt to the accuracy of the identification, you must find in favor of the defendant on this issue" at 474, footnote 4.

The instruction has subsequently been approved in United States v. Holley, 502 F. 2d 273 (4th Cir. 1974) and United States v. Hodges, 515 F. 2d 650 (7th Cir. 1975). State courts have also approved the instruction in principle or slightly altered form. Brook v. State, 380 So. 2d 1012 at 1014 (Ala. 1980); Freeman v. State, 371 So. 2d 118 (Fla. 1979); Commonwealth v. Rodriguez, 391 N.E. 2d 892 (Mass. 1979); and in a concurring opinion in Hampton v. State, 285 N.W. 2d 868 at 875 (Wis. 1979).

Since the sole basis for conviction of this defendant rested upon questionable identification procedures previously explained, it was imperative to give the Telfaire charge.

Other states which have considered the instruction but refused to require it have said the essence of the instruction was given in other instructions of the Court, particularly the instruction on credibility of witnesses.

This standard cannot be applied in defendant's

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case. Judge Gould read the first eleven instructions to the jury at the start of the trial, but did not reread them at the conclusion of the three-day trial. These preliminary instructions included the instructions on presumption of innocence and on judging the credibility of witnesses.

This practice prejudiced the defendant because important instructions were not given to the jury at the close of the case and, therefore, not fresh in their minds.

POINT THIRTEEN

INEFFECTIVE ASSISTANCE OF COUNSEL WAS FURTHER DEMONSTRATED BY FAILING TO ATTEMPT INTRODUCTION OF DEFENDANT'S POLYGRAPH RESULTS.

The defendant passed a polygraph test administered by Dr. David Raskin. Admittedly, he had failed a polygraph earlier administered by police under questionable circumstances. (Suppression Hearing 43) Defense counsel made no attempt at trial to have the results admitted despite Dr. Raskin's previously recognized qualifications. _State_ v. _Collins_, 612 P. 2d 775, 778 (1980).

In _Collins_, this Court stated that it would consider the admissibility of an unstipulated polygraph provided it had the benefit of an adequate evidentiary record, at 778. Qualified defense counsel

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should have been aware of the foundational requirements cited in Collins and made the appropriate attempt at trial.

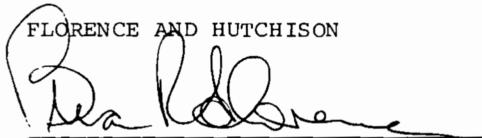
## CONCLUSION

A motion for new trial as provided for in Rule 24, Utah Rules of Criminal Procedure, requires only a showing of error or improprieties which had a substantial adverse effect on the defendant. Any of these points may well have satisfied that burden. The accumulated effect is overwhelming.

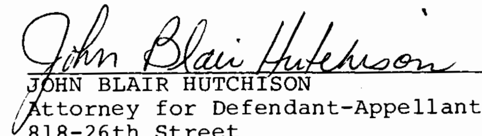
DATED this 13th day of May, 1981.

Respectfully submitted,

FLORENCE AND HUTCHISON



BRIAN R. FLORENCE
Attorney for Defendant-Appellant
818-26th Street
Ogden, UT 84401



JOHN BLAIR HUTCHISON
Attorney for Defendant-Appellant
818-26th Street
Ogden, UT 84401

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