

2016

## State of Utah v. Manuel Antonio Lujan : Brief of Respondent on Certiorari Review

Utah Supreme Court

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**IN THE UTAH SUPREME COURT**

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THE STATE OF UTAH,  
*Plaintiff/Petitioner*

v.

MANUEL ANTONIO LUJAN,  
*Defendant/Respondent.*

Respondent is incarcerated

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**BRIEF OF RESPONDENT ON CERTIORARI REVIEW**

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UTAH APPELLATE COURTS

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**BRIEF OF RESPONDENT**

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INTRODUCTION

Mr. Lujan was convicted of aggravated robbery after an eyewitness identified him at a suggestive show-up and pointed to him in court. The court of appeals reversed the conviction due to the suggestive nature of the show-up and the poor conditions under which the eyewitness viewed the robber during the crime.

The State argues that, although there was suggestive State action when the police conducted the show-up of a handcuffed Mr. Lujan, this Court should hold that suggestive State action is step one of a two-step inquiry instead of one of the conditions under a totality of the circumstances approach. The State next argues that this Court should decline to set a standard necessary decide prejudice in this case.

This Court should do the inverse: it should decline to decide whether suggestive State action is a threshold inquiry where it is undisputed suggestive State action was present. And it should hold that the State has the burden to prove that the error in this case was harmless beyond a reasonable doubt.

This Court should affirm the court of appeals' decision, which correctly analyzed the totality of the circumstances and held that the eyewitness identification was inadmissible and that its admission was not harmless beyond a reasonable doubt.

#### STATEMENT OF JURISDICTION

This Court has jurisdiction after granting the State's writ of certiorari under Utah Code section 78A-3-102(5). The court of appeals opinion is attached as Addendum A.

#### STATEMENT OF THE ISSUES

This Court granted certiorari review on the following issues:

1. "Whether the majority of the panel of the Court of Appeals erred in reversing the district court's denial of Respondent's motion to suppress eyewitness identification testimony."
2. "Whether the majority of the panel of the Court of Appeals erred in holding the State was required to demonstrate that any error in admission of the eyewitness identification was harmless beyond a reasonable doubt, and whether it erred in concluding the admission of that testimony was not harmless."



The Court's order granting certiorari is attached as Addendum B.

On certiorari, this Court reviews decisions of the court of appeals for correctness. *State v. Levin*, 2006 UT 50, ¶ 15, 144 P.3d 1096. Whether eyewitness identification violates the right to due process is a question of law that is reviewed for correctness. *See State v. Hubbard*, 2002 UT 45, ¶ 22, 48 P.3d 953.

### CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The exclusion of an unreliable eyewitness identification is grounded in the due process clause of the Utah Constitution.

### STATEMENT OF THE CASE

The State charged Mr. Lujan with aggravated robbery after a show-up procedure. R:1-2. The eyewitness was subsequently unable to positively identify a suspect at a lineup. State's Ex. 42. But he later identified Mr. Lujan at the preliminary hearing. R:355:5. Mr. Lujan filed a motion to suppress identifications by the eyewitness, which the court denied. R:54; 356:75-76. At trial, the jury found Mr. Lujan guilty and the court sentenced him to a suspended prison sentence of 5 years to live, with 36 months of probation and 395 days of jail. R:337. He was released to ICE for deportation. R:337.

The court of appeals reversed. *State v. Lujan*, 2015 UT App 199, ¶ 1, 357 P.3d 20. It held that the introduction of the eyewitness identification was erroneous and prejudicial. This Court granted certiorari review.

### STATEMENT OF FACTS

On the date of the charged offenses, a stranger approached the eyewitness as he prepared his car for inspection in the predawn hours. *Lujan*, 2015 UT App 199, ¶ 2; R:355:9. The car's headlights were on and a working streetlamp was twenty yards away. R:355:10, 11. The eyewitness said that a porch light mounted twenty feet away from the car, the car's dome light, and the illumination from the instrument panel also provided some light. R:355:11, 15, 17, 24.

The stranger opened the rear driver's side door and then closed it and opened the driver's door. *Id.* ¶ 3; R:355:4-5, 15-17. At first, the man was standing about a foot away from where the eyewitness was seated in the driver's seat. R:355:17-18. The man crouched down with his face eight to nine inches from the eyewitness's for "five, seven seconds." R:355:20. The man said to the eyewitness, "why you following me?" *Id.*; R:355:5. The man then put his hand near his waist and the eyewitness believed the man was reaching for the handle of a gun or a knife. *Id.*; R:355:22. The eyewitness was afraid he might be stabbed or shot. *Id.*; R:355:32.

The eyewitness was able to work his way out of the car, move around the man, walk sideways to the front of the car, and then "bolt" to the back door. *Id.*; R:355:7, 31. The eyewitness watched the man drive off in the car and alerted the police. *Id.*; R:355:32-33.

The eyewitness provided a description to the police. R:355:34. He also testified at the preliminary hearing about his memory of the man. He said the

man was Spanish. *Id.* ¶ 2; R:355:34 (Q. What about the race of the man? Can you tell us anything about that? A. I would have to say he's Spanish, yeah.). He was wearing a black leather jacket that had either buttons or a zipper but was open during the encounter. *Id.*; R:355:20-21. He had on a black beanie. *Id.*; R:355:25. The eyewitness explained that the man's "longish hair" poked out of the beanie to "mid-ear length." *Id.*; R:355:26. The man's hair was straight and its color was a combination of black and white. *Id.*; R:355:27. The eyewitness "definitely" remembered the man's hair. *Id.*; R:355:27-28.

The police apprehended Mr. Lujan inside an air conditioning unit at a nearby school after following a trail of leaking car fluid and employing a K9 officer. *Id.* ¶ 4; R:350:46-47. Mr. Lujan told the testifying officer "something like somebody is following me, somebody is out to get me." *Id.*; R:359:8. Mr. Lujan explained that he had been at the nearby 7-11 convenience store. R:359:8. He then walked to the place where he was found. R:359:8. A search of the area from the air conditioning unit, the vehicle, and the trail back to 7-11 revealed no weapons. R:359:24. Mr. Lujan was searched at the time of his arrest and no weapons were recovered. R:359:46. However, when he was booked into jail, an officer listed a knife among Mr. Lujan's possessions but did not remember what it looked like. R:359:94, 99.

The police brought the eyewitness to Mr. Lujan's location and informed him that they had a suspect and wanted to see if the eyewitness could identify him. *Id.* ¶ 6; R:355:36. They conducted a show-up procedure in the dark,



illuminating Mr. Lujan with police car headlights. *Id.*; R:355:37. Mr. Lujan was the only person at the show-up who was not a police officer. *Id.*; R:355:36-37. He stood with his hands cuffed while the eyewitness looked at him from the seat of a police car. *Id.*; R:355:38, 55; 357:49. The police put a beanie on his head. R:357:94. The eyewitness identified Mr. Lujan as the man who took his car. *Id.*; R:355:8.

Mr. Lujan filed a motion requesting a lineup, which the court granted. *Id.* ¶ 7; R:18-25. At the lineup, the eyewitness was told that if he recognized any person present in the lineup as the individual involved in the crime, he was to mark that person's number in a square. *Id.*; State's Ex. 42. The eyewitness was unable to positively identify anyone and left the square blank. *Id.*; State's Ex. 42. The eyewitness was also told that if he thought he recognized any person participating in the lineup, he should mark their number on the back of the card. State's Ex. 42. The eyewitness marked two people from the lineup on the back of the card: Mr. Lujan and another man. *Id.*; State's Ex. 42.

At the preliminary hearing, the prosecution asked the eyewitness to point to the man who had robbed him. *Id.* ¶ 8. The eyewitness pointed to Mr. Lujan. *Id.*; R:355:6. After the preliminary hearing, Mr. Lujan moved to exclude evidence of in-court identification as well as evidence that the eyewitness identified Mr. Lujan in the show-up. The court denied the motion and permitted the eyewitness to identify Mr. Lujan at trial as the man who robbed him. R:356:75-76; 357:20.

At trial, the defense called a correctional officer at the jail, who testified that he was responsible for clothing storage at the jail. The inventory showed that Mr. Lujan did not have a leather jacket when he was booked into jail; the officer was not aware of items ever being misplaced. *Id.* ¶ 5; R:359:62-69, 75. The defense also called an expert to testify about the reliability of eyewitness identification. R:358.

Mr. Lujan was convicted and the court of appeals reversed. *Id.* ¶ 1. After applying the state due process standard and comparing the case to *State v. Ramirez*, 817 P.2d 774 (Utah 1991), the court held that “[t]he same factors that led the Supreme Court to conclude that *Ramirez* was ‘an extremely close case’ are present here” along with “additional indications of unreliability” — the eyewitness remembered a robber with long hair, the eyewitness did not identify Mr. Lujan at a lineup where conditions were less suggestive than the show-up, and the cross-racial identification factors were more significant than they were in *Ramirez*. *Lujan*, 2015 UT App 199, ¶¶ 13-14 (quoting *Ramirez*, 817 P.2d at 784). The court of appeals was “confident that here we can ‘say that [the] testimony is legally insufficient when considered in light of the other circumstances to warrant a preliminary finding of reliability and, therefore, admissibility.’” *Id.* ¶ 15 (quoting *Ramirez*, 817 P.2d at 784). Because the error was not harmless beyond a reasonable doubt, the court vacated Mr. Lujan’s conviction and remanded for a new trial. *Id.* ¶ 19.

### SUMMARY OF THE ARGUMENT

The court of appeals was correct in its application of precedent and its holding. The court of appeals properly analyzed the reliability considerations outlined in *Ramirez*. This Court should affirm the holding that the eyewitness identification in this case was unreliable and inadmissible because it was suggestive, inconsistent, and brief.

This case does not present the issue of whether suggestive government conduct is a threshold inquiry or a factor to be considered under the totality of the circumstances. This Court should address that issue when a case presents it. It is undisputed that suggestive government conduct occurred in this case. But if this Court does elect to provide guidance, it should hold that the suggestive circumstances surrounding the lineup constitute one factor in a totality of the circumstances analysis geared towards reliability.

The admission of the eyewitness identification was not harmless beyond a reasonable doubt. Identification was the only matter at issue and the State relied on both the show-up and an in-court identification at trial. Mr. Lujan denied involvement. There was no fingerprint or DNA evidence. The eyewitness remembered a jacket and a weapon, but neither was entered into evidence. The eyewitness's description of a long-haired man did not match Mr. Lujan and the eyewitness did not positively identify Mr. Lujan at a lineup where blatant suggestive circumstances were absent. This Court should affirm.



## ARGUMENT

### **I. The court of appeals did not err in its application of the reliability analysis.**

The court of appeals applied this Court's precedent to the facts of the case and arrived at the correct holding. "In *Ramirez*, the Court set forth five factors that must be considered when analyzing the reliability of an eyewitness identification." *State v. Lujan*, 2015 UT App 199, ¶ 11, 357 P.3d 20 (citing *State v. Ramirez*, 817 P.2d 774, 781 (Utah 1991)). The "pertinent factors" originally outlined in *Long* are:

- (1) The 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.

*Ramirez*, 817 P.2d at 781 (brackets omitted) (quoting *State v. Long*, 721 P.2d 483, 493 (Utah 1986)). The list is "not an exhaustive or exclusive list of factors that may be considered." *State v. Hubbard*, 2002 UT 45, ¶ 27, 48 P.3d 953. Consideration of all these factors and the totality of the circumstances in Mr. Lujan's case led the court of appeals to the correct conclusion that the eyewitness testimony was legally insufficient to "warrant a preliminary finding of reliability and, therefore, admissibility." See *Ramirez*, 817 P.2d at 784.

A. The opportunity of the witness to view the actor during the event.

The first reliability factor analyzes the witness's opportunity to view the actor. "[P]ertinent circumstances include the length of time the witness viewed the actor; the distance between the witness and the actor; whether the witness could view the actor's face; the lighting or lack of it; whether there were distracting noises or activity during the observation; and any other circumstances affecting the witness's opportunity to observe the actor." *Id.* at 782. In Mr. Lujan's case, the eyewitness had a brief period of seconds to view the robber, who was a stranger to him. The eyewitness testified that at first he saw the man for five to seven seconds when the man's face was eight to nine inches away.

R:355:20. The man then placed his hand near his waistband, grabbing what the witness believed to be a weapon. R:355:6. The eyewitness then extricated himself from the car and "bolted" to his house. R:355:7. It took him eight to nine seconds to scoot out of the driver's seat and past the man. R:355:229. This sequence of events left only a short window, consistently described in seconds, during which the eyewitness had the opportunity to view the robber.

The incident occurred at night. The car's headlights were on and a streetlamp was twenty yards away. R:355:10, 11. The eyewitness said that a porch light mounted twenty feet away from the car, the car's dome light, and the illumination from the instrument panel also provided some light. R:355:11, 15, 17, 24. Other circumstances affecting the witness's opportunity to observe the actor included a focus on what the eyewitness believed to be a weapon instead of

the robber's features and the stress of the robbery, which left the witness "distraught" and worried he would be stabbed or shot. R:355:32, 35.

The State argues that there was no "evidence of 'weapon-focus effect' that tends to decrease the reliability of the eyewitness identification" because "no weapon was ever produced." State's Brief (SB) SB 45. But the effect is the result of "draw[ing] visual attention away from other things such as the culprit's face." Gary L. Wells & Elizabeth Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277, 282 (2003). Participants in studies tend to make "more errors when a weapon was inferred or present." National Research Council of the National Academies, *Identifying the Culprit: Assessing Eyewitness Identification* 96 (2014). The eyewitness in this case testified that the man's hand was "gripping around" what "looked like a handle" that was about "five inches" long and his hand was "actually touching the object that was sticking out . . . of his waistband." R:355:22-23. It is likely more distracting to see one portion of a concealed weapon in anticipation of seeing the rest than to see a weapon that is already in the open. Therefore, the first *Ramirez* consideration counsels against admitting the eyewitness identification from the show-up.

B. The witness's degree of attention to the actor at the time of the event.

As noted above, the eyewitness was focusing on the robber's hand, which the witness believed was placed on a weapon. R:355:6. The eyewitness's first glimpse of the robber's face for a period of seconds would have been startling, and afterward the eyewitness's focus was directed at a possible weapon and a



path back to the house. Although the State argues that the eyewitness was not unduly stressed because he at first “thought the robber might want a drink or a ride,” SB 46, studies have indicated that witnesses, even when they have “significant opportunity to view the culprit,” are less accurate at identifying a suspect when they “have had little reason to attend closely” because they are not aware that a stolen item was valuable or that a crime was committed. Wells & Olson, *supra*, at 282.

The State points out that, by the time the eyewitness was sitting in “the safety and anonymity of the police cruiser,” his anxiety was likely “sooth[ed].” SB 36. But the “effects of suggestion may be particularly important when the *original memory* is of a highly stressful event.” National Research Council of the National Academies, *supra*, at 95 (emphasis added). In a study that looked at military personnel participating in mock POW scenarios, the “study found that misinformative details of the interrogation event (e.g., regarding the identity of the interrogator), which were introduced after the event had been encoded into long-term memory, affected identification accuracy. The study also found that memories acquired during stressful events are highly vulnerable to modification by exposure to post-event misinformation, even in individuals whose level of training and experience might be considered relatively immune to such influences.” *Id.* (citing C.A. Morgan III et al., *Misinformation Can Influence Memory For Recently Experienced, Highly Stressful Events*, Int’l J.L. & Psychiatry, 36(1) (2013)).

The State also argues that the robber remained facing the eyewitness “without a disguise.” SB 44. But in a study where “[i]n half the robberies, the robber wore a knit pullover cap that covered his hair and hairline” and in the other half, “he did not wear a hat,” the “robber was less accurately identified when he was disguised: 45% of the participants identified the robber in the lineup test if he wore no hat during the robbery; only 27% identified him if he wore a hat during the robbery.” Gary L. Wells, Amina Memon, & Steve D. Penrod, *Eyewitness Evidence: Improving Its Probative Value*, 7 Psychol. Sci. in the Pub. Int. 54 (2006). The eyewitness in this case stated the robber wore a black beanie. R:355:25.

C. The witness’s capacity to observe the event, including his physical and mental acuity.

The third factor is the witness’s capacity to observe the event. “Here, relevant circumstances include whether the witness’s capacity to observe was impaired by stress or fright at the time of the observation, by personal motivations, biases, or prejudices, by uncorrected visual defects, or by fatigue, injury, drugs, or alcohol.” *Ramirez*, 817 P.2d at 783. “Contrary to much accepted lore, when an observer is experiencing a marked degree of stress, perceptual abilities are known to decrease significantly.” *Long*, 721 P.2d at 488-89. The eyewitness in this case acknowledged the frightening and threatening nature of the robbery, which left him “distraught.” R:355:35. The eyewitness testified that during his encounter with the robber, he was afraid he might be stabbed or shot. R:355:32. Additionally, fatigue was likely a factor because the incident occurred

at night when the eyewitness was awake because he had been unable to sleep.

R:355:14.

D. Whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion.

Relevant considerations under this reliability factor include the length of time between the incident and the identification, "instances when the witness . . . failed to identify defendant; instances when the witness or other eyewitnesses gave a description of the actor that is inconsistent with defendant; and the circumstances under which defendant was presented to the witness for identification." *Ramirez*, 817 P.2d at 783. A show-up is most reliable when the eyewitness was already familiar with the suspect. *E.g.*, *State v. Poteet*, 692 P.2d 760, 763 (Utah 1984). In *State v. Hoffhine*, 2001 UT 4, ¶¶ 5, 18-19, 20 P.3d 265, the Court considered it a "close question" whether the reliability factors pointed to admissibility when two suspects were presented at a show-up and the victim ruled out one and was confident the other was the robber. The eyewitness in this case had never seen the man who robbed him before and did not know Mr. Lujan.

R:355:5. The time between the incident and the initial identification was about thirty-five minutes. R:355:8.

The identification was made under circumstances similar to the show-up in *Ramirez*, which troubled the court because of its "blatant suggestiveness."

*Ramirez*, 817 P.2d at 784. As the court of appeals put it, "[t]he same factors that led the Supreme Court to conclude that *Ramirez* was 'an extremely close case' are

present here.” *Lujan*, 2015 UT App 199, ¶ 13. As in *Ramirez*, the show-up was conducted at night and the defendant was illuminated by police car headlights. 817 P.2d at 784; R:355:37. The defendant was the only person at the show-up who was not a police officer. *Id.*; R:355:36-37. “He stood with his hands cuffed” while the eyewitness looked at him from the seat of a police car. *Id.*; R:355:38, 55; R:357:49. Additionally, in both cases the police notified the eyewitness before the identification that the defendant was their suspect in the case. *Id.*; R:355:35; see Gary L. Wells & Elizabeth Olson, *supra*, at 286 (“the ratio of accurate to inaccurate identifications is strongly affected by whether or not eyewitnesses have been instructed (warned) prior to viewing the lineup that the culprit might or might not be in the lineup.”).

Furthermore, the eyewitness provided a description that did not match Mr. Lujan and the witness was unable to identify Mr. Lujan with certainty when he was not the only possible suspect. The eyewitness consistently described the robber as having “longish hair” that poked out of the beanie to “mid-ear length.” R:355:26. The eyewitness “definitely” remembered the man’s hair. R:355:27-28. Mr. Lujan’s head was shaved when he was apprehended and when the eyewitness identified him at the show-up. State’s Ex. 43 (booking photo); R:78 (booking photo attached as an exhibit to the motion to exclude eyewitness identification).

Additionally, as the court of appeals noted, “the man’s original description of the robber omitted any mention of facial hair,” which is a “feature[] that seem[s] hard to miss at a distance of ten inches.” *Lujan*, 2015 UT App, ¶ 14. The

State writes without record citation that “Officer Bias admitted cutting short his initial investigation with [the witness] to follow the liquid trail left by the stolen car, suggesting [the witness] may not have gotten to that part of his identification and did not need to revisit it once Defendant was arrested.” SB 41. The officer testified that he spoke with the eyewitness, who provided a description.

R:357:117-18. The officer then “handed him a witness statement” and asked him to complete it while the officer “began just checking the area visually to see if there was anything that was dropped,” which is when he noticed the leak.

R:357:119. He did not testify that his interview was interrupted before the witness had provided a complete description of the robber. Similarly, the witness testified the officer found the leak “[a]fter I gave a description.” R:357:45.

The State also argues that “the inconsistencies in [the eyewitness’s] descriptions of the robber — the hair, the jacket, and the goatee — were reasonably explained. Through Defendant’s expert, the prosecutor established that lighting and proximity both obscure or distort things.” SB 37. The poor witnessing conditions do not mitigate the inconsistencies in the witness’s description or his failure to make a positive identification absent suggestive circumstances; rather, the poor witnessing conditions and inconsistencies are both factors indicating the identification was not reliable and both weigh heavily in favor of excluding it.

Even after seeing Mr. Lujan at the show-up, at a lineup procedure, which lacks many of the highly suggestive circumstances that make a show-up



troubling, the witness understood the instructions but did not positively identify Mr. Lujan. R:355:39-40. Rather, he identified two men he thought looked familiar. R:355:40-41. *Long* noted that identifications in a group procedure are more reliable than show-up procedures like the ones in *Ramirez* and in this case. *Long*, 721 P.2d at 495 n.8. The identification in this case was not spontaneous, did not remain consistent, and was the product of suggestion.

The State argues that the “variables subject to consideration under” the suggestiveness factor “are usefully divided into two categories: (a) the circumstances of the identification procedure itself that may be suggestive (procedural factors), and (b) witness behavior that may signal that the identification was the product of suggestion rather than memory (witness factors).” SB 33. The State provides no citation to authority in law or science explaining why this division is useful. SB 33. It is not a useful distinction. The State argues that blatantly suggestive circumstances can be counterbalanced by “[w]itness confidence,” a “quick positive identification,” and testimony that the eyewitness “identified Defendant because of his looks.” SB 35-36.<sup>1</sup> But “the accuracy of an identification is, at times, inversely related to the confidence with which it is made.” *State v. Long*, 721 P.2d 483, 490 (Utah 1986); *see also* Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 Vand. L. Rev. 451, 453

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<sup>1</sup> The State argues that the eyewitness explained “that he identified Defendant because of his looks, not because of the setting in which the identification took place.” SB 36 (citing R:357:49-50, 94-65, 106-07). The eyewitness testified that the identification was based on looks, but was not asked and did not address how the suggestive setting affected him.

(2012) (“eyewitness confidence[] is not a sign of reliability, but it is highly malleable and may be the product of police suggestion”). “Social science research has shown that a witness’s level of confidence in an identification is not a reliable predictor of its accuracy especially where the level of confidence is inflated by its suggestiveness.” *Commonwealth v. Johnson*, 45 N.E.3d 83, 90 (Mass. 2016) (alterations omitted) (internal quotation marks omitted) (citing Supreme Judicial Court Study Group on Eyewitness Evidence: Report and Recommendations to the Justices 19 (July 25, 2013)). “In short, suggestiveness is likely to inflate an eyewitness’s certainty regarding an identification and to alter the eyewitness’s memory regarding the quality of his or her observation of the offender to conform to the eyewitness’s inflated level of confidence in the identification.” *Id.* at 91. “[T]he problem with eyewitness testimony is that the witnesses who *think* they are identifying the wrongdoer — who are credible because they believe every word they utter on the stand — may be mistaken.” *United States v. Bartlett*, 567 F.3d 901, 906 (7th Cir. 2009) (citing Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal* (3d ed.1997) (collecting studies); Elizabeth F. Loftus, *Eyewitness Testimony* (1979; rev. ed.1996); Daniel L. Schacter, *The Seven Sins of Memory: How the Mind Forgets and Remembers* 112-37 (2001)).

This effect is on display in this case. The officer testified that the witness did not provide hair color or mention a goatee. R:359:12; R:355:50 (his report indicated the witness “described the suspect as being a Hispanic male wearing a

black jacket and black hat with long hair”). The witness testified, when asked if he mentioned a goatee to the officer, “I think I did.” R:357:87. Because blatantly suggestive circumstances yield quick, confident, but unreliable identifications, this Court should decline the State’s invitation to separate the dye from the water in the analysis of suggestiveness.

- E. 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.” *Long*, 721 P.2d at 493. “[T]he evidence concerning the reliability of [cross-racial] identification is stunning and robust and, of crucial importance here, not likely well understood by juries.”

*United States v. Smith*, 621 F. Supp. 2d 1207, 1215 (M.D. Ala. 2009). As explained above, the stressful nature of the event diminishes the likelihood that the witness was able to perceive and remember the robber.

The eyewitness described his own race as Native American and described the robber as Spanish. R:355:34. As the court of appeals noted, in *Ramirez*, this Court was “concerned with the ‘differences in racial characteristics between’ the eyewitness and Ramirez. The Court determined, however, that because the identification was based principally on the eyes, physical size, and clothing, these racial factors may have been of relatively little importance.” *Lujan*, 2015 UT App 199, ¶ 12 (internal citations omitted) (internal quotation marks omitted). In Mr.

Lujan's case, however, where the eyewitness caught a brief, close-up of the robber's face "racial factors' are more significant here than they were in *Ramirez*." *Id.* ¶ 13. The State argues that a number of the eyewitness's neighbors "were Hispanic, including those on either side and across the street, giving him an easy familiarity with their features." SB 47. However, the witness's description of the robber as Spanish, not Hispanic, either belies such easy familiarity or suggests that the robber was from Spain, not Latin America.

R:355:34. Additionally, studies have found that "cross-race contact . . . played only a small role in [cross-race identification], accounting for just 2% of the variability across participants." Wells, Memon, & Penrod, *supra*, at 52. Duration of viewing exposure, on the other hand, can interact with own-race bias. National Research Council of the National Academies, *supra*, at 96. "[R]educing the amount of time allowed for viewing of each face significantly increased the magnitude of the bias, largely manifested as an increase in the proportion of false alarm responses to other-race faces." *Id.* (citing Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces — A Meta-Analytic Review*, 7 Psychol. Pub. Pol'y & L. 3 (2001)). The eyewitness in Mr. Lujan's case spent only five to seven seconds face-to-face with the robber.

R:355:20. In *Ramirez* the witness's estimate of time varied from a second to "a minute' or longer." *Ramirez*, 817 P.2d at 782. The court of appeals was therefore correct that the racial factors had more influence in this case than *Ramirez*. *Lujan*, 2015 UT App 199, ¶ 13.

The court of appeals wrote that if “*Ramirez* was an extremely close call, we are confident that here we can say that the man’s testimony is legally insufficient when considered in light of the other circumstances to warrant a preliminary finding of reliability and, therefore, admissibility.” *Id.* ¶ 15 (internal quotation marks omitted). The totality of the circumstances suggested that the eyewitness identification from the show-up was unreliable and should not have been admitted. The eyewitness provided a description of a man he saw during a high-stress robbery for a matter of several seconds. The pre-show-up description differed from Mr. Lujan significantly because Mr. Lujan had a goatee and did not have any hair, let alone the mid-ear length hair the suspect remembered. R:355:26; 359:12. The eyewitness did not provide the “salt and pepper” description until after the show-up. R:359:12. When asked to identify the robber, even after the show-up, in a lineup with eight men, the eyewitness did not positively identify Mr. Lujan. State’s Ex. 42. The in-court identification was tainted both by the earlier show-up and by the suggestive circumstances of a courtroom identification. *See State v. Mincy*, 838 P.2d 648, 657 (Utah Ct. App. 1992) (“unnecessarily suggestive” identification procedures give rise to “the possibility of irreparable misidentification”). Mr. Lujan was the only defendant sitting at counsel table and the only realistic choice. Under these circumstances, the court of appeals was correct that due process required the exclusion of the suggestive and unreliable eyewitness identification.



## **II. This Court should not rearrange the analysis set forth in precedent.**

The State concedes that “the showup identification of Defendant in this case was suggestive.” SB 32-33. The show-up procedure the police employed was virtually identical to the one this Court criticized for its “blatant suggestiveness” in 1991. *State v. Ramirez*, 817 P.2d 774, 784 (Utah 1991). As in *Ramirez*, Mr. Lujan “‘was the only person at the showup who was not a police officer,’ he ‘stood with his hands cuffed,’ and the ‘headlights of several police cars were trained on him.’” *State v. Lujan*, 2015 UT App 199, ¶ 12, 357 P.3d 20 (quoting *Ramirez*, 817 P.2d at 784)). This case therefore is not like *Perry v. New Hampshire*, where the identification occurred “spontaneously,” “without any inducement from the police,” when the eyewitness “pointed to her kitchen window and said the person . . . was standing in the parking lot,” and the Court was thus squarely presented with the issue of whether suggestive police activity is a threshold inquiry. 132 S. Ct. 716, 722 (2012) (internal quotation marks omitted).

Both sides agree that this Court must consider all the reliability factors *Ramirez* outlined. This case does not present the issue of whether the suggestiveness of the identification is a threshold inquiry or a factor to be considered in an overall reliability analysis. And this Court has “unequivocally declared that ‘courts are not a forum for hearing academic contentions or rendering advisory opinions.’” *Utah Transit Authority v. Local 382 of*

*Amalgamated Transit Union*, 2012 UT 75, ¶ 19, 289 P.3d 582 (quoting *Baird v. State*, 574 P.2d 713, 715 (Utah 1978)). There is no reason to rearrange the reliability analysis at the State's request in a case where rearrangement would serve no practical function. Whether the due process concerns relating to eyewitness identification should focus on suggestiveness or general reliability is a serious, contested issue. *See Perry*, 132 S. Ct. at 731 (Sotomayor, J., dissenting) (arguing that the holding "recasts the driving force of our decisions as an interest in police deterrence, rather than reliability."); *Commonwealth v. Johnson*, 45N.E. 3d 594, 598 (Mass. 2016) ("where a witness's identification of a defendant arises from highly or especially suggestive circumstances, its admissibility should not turn on whether government agents had a hand in causing the confrontation because the evidence would be equally unreliable in each instance." (internal quotation marks omitted)); *see also* Gary L. Wells, Amina Memon, & Steve D. Penrod, *Eyewitness Evidence Improving Its Probative Value*, 7 Psychol. Sci. in the Pub. Int. 45, 46 (2006) ("But even if the system reaches a point at which it makes perfect use of system variables, eyewitness errors attributable to other factors will remain."). This Court should not make a decision that reconsiders precedent until the facts of the case, not one of the parties, demands it.

Furthermore, the State's argument that suggestive police conduct was always a threshold inquiry in Utah is new to its brief on certiorari. It was not argued in the State's trial court response to the motion to suppress. R:121-26 (setting forth the "five reliability factors" and addressing them in that order). The

State presented its argument to the court of appeals as a totality of the circumstances analysis. It argued that “[u]nder the Utah Constitution, the ultimate question is whether, under the totality of the circumstances, the identification was sufficiently reliable even though the identification employed by police may have been suggestive.” Ct. of Appeals Br. Appellee 21. The State listed the *Long* considerations, which place “whether the witness’s identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion” as the fourth of five factors. Ct. of Appeals Br. Appellee 15. And the State addressed the factors in that order. Ct. of Appeals Br. Appellee 29 (addressing suggestiveness as point four). The State now argues that “the court of appeals applied a state due process model not contemplated by *Ramirez*,” SB 27, but the State presented that model in its brief to the court of appeals.

The State argues that addressing the issue now would “prevent further confusion about and misapplication of the state due process analysis.” SB 29. But providing guidance in this case, where the holding would not depend on that guidance, would create more confusion. *State v. Hubbard*, 2002 UT 45, ¶¶ 25-26, 48 P.3d 953, held that the “standard for determining whether defendant’s right to due process as guaranteed by article I, section 7 of the Utah Constitution was denied is whether, under the totality of the circumstances, the identifications were reliable.” *Hubbard* held that the photo array in that case was “not impermissibly suggestive” but its analysis did not end there because “[e]ven if law enforcement procedures are appropriate and do not violate due process,

eyewitness identification testimony must still pass the gatekeeping function of the trial court and be subject to a preliminary determination whether the identification is sufficiently reliable to be presented to the jury.” *Id.* ¶ 26 (citing *Ramirez*, 817 P.2d at 778-79). Addressing the issue in this case, therefore, would create an interesting but unnecessary dilemma for lawyers, judges, law enforcement, and the general public. They would be left to wonder whether language in this case addressing an issue that is not necessary to the holding overrules *Hubbard*. This Court should avoid that confusion by waiting for a true opportunity to address the dispute head-on.

However, if this Court does choose to address the question of whether suggestive government conduct is a threshold inquiry, it should clarify that it is not. Rather, as recognized in the State’s earlier analysis in this case, the ultimate inquiry is reliability, and suggestive circumstances are an important but not the threshold consideration in the analysis. *Ramirez* made a conscious departure from the federal model: “We therefore hold that for purposes of determining the due process reliability of eyewitness identifications under article I, section 7, we will not limit ourselves to an analytical model that merely copies the federal. We will require an in-depth appraisal of the identification’s reliability along the lines laid out by *Long*.” *Ramirez*, 817 P.2d at 780. The approach is “more appropriate” and will “meet or exceed in rigor the federal standard.” *Id.* at 780-81.

When *Ramirez* said that its “approach departs from federal case law only to the degree we find the federal analytical model scientifically unsupported,” it did so in the context of explaining that an identification deemed admissible under the Utah standard would necessarily also be admissible under the federal analysis. *Id.* at 780. “Since this approach departs from federal case law only to the degree that we find the federal analytical model scientifically unsupported, we have no doubt that the more empirically based approach of *Long* will allow a court to consider fully ‘the totality of the circumstances’ surrounding the identification, as required by *Biggers* and its progeny, or that the resulting reliability determination will meet or exceed in rigor the federal standard as expressed in *Biggers* and *Stovall*.” *Id.* (internal quotation marks omitted). Thus, “because [the Court] found article I, section 7 [of the Utah Constitution] satisfied, [there was] no need to perform a separate *Biggers* federal analysis.” *Id.* at 784.

That *Ramirez* lists suggestiveness as the fourth of five factors, and addresses it “[f]inally,” plainly indicates that suggestiveness is not a threshold inquiry. *Id.* at 784. Additionally, *Ramirez* compared the reliability inquiry in eyewitness cases to scientific evidence, where no government misconduct is required. 817 P.2d at 778-79 (“discussing need for threshold reliability examination by trial court prior to admission of scientific evidence, even though jury will ultimately determine weight”). It focused on the important gatekeeping function of the trial court and noted that the “danger of . . . an abdication of responsibility is particularly serious where the admission of an eyewitness



identification is concerned because of the probability that such evidence even though thoroughly discredited has a powerful effect on a jury.” *Id.* at 779.

Later, *Hubbard* set out the two separate due process approaches based on the defendant’s two separate challenges. 2002 UT 45. *Hubbard* begins with the federal “two-part test.” *Id.* ¶ 23. Under the federal analysis, the Court held that the “pretrial identification procedures . . . were not impermissibly suggestive” and thus “federal due process was not violated.” *Id.* ¶ 24. “As a result,” the Court did not need to “address whether the subsequent in-court identifications were sufficiently based on untainted, independent foundations to be reliable.” *Id.*

The Court could not use the same analytical model to handle the Utah due process challenge, however. “Utah courts examine the procedural actions taken by law enforcement officials in assembling and presenting a photo array to witnesses for due process, and Utah courts also make a preliminary determination on whether the identification is sufficiently reliable such that its admission and consideration by the jury will not violate defendant’s right to due process.” *Id.* ¶ 25. This is because in Utah, “[e]ven if law enforcement procedures are appropriate and do not violate due process, eyewitness identification must still pass the gatekeeping function of the trial court and be subject to a preliminary determination whether the identification is sufficiently reliable to be presented to the jury.” *Id.* ¶ 26. The Court therefore proceeded to analyze the *Long* factors and concluded that under the facts of that case, “the

witness identifications were not so unreliable as to warrant exclusion of the identification testimony from consideration by the jury.” *Id.* ¶¶ 27-30.

In *Ramirez* and *Hubbard*, this Court set out an analytical model more like the one explained by the dissent than the majority in *Perry v. New Hampshire*, 132 S. Ct. at 730 (Sotomayor, J., dissenting). It was the dissent’s position that the “driving force” of the due process line of eyewitness cases was “reliability,” not “police deterrence.” *Id.* at 731. The dissent explained that although “[p]olice machinations can heighten the likelihood of misidentification, . . . they are no prerequisite to finding a confrontation ‘so impermissibly suggestive as to give risk to a very substantial likelihood of misidentification.’” *Id.* at 733 n.3. The dissent noted that a “vast body of scientific literature has reinforced every concern . . . articulated” in the case law regarding the reliability and thus admissibility of eyewitness identification. *Id.* at 738; *see also Lujan*, 2015 UT App 199, ¶ 10 n.1. The “focus[] on overall reliability,” *Perry*, 132 S. Ct. at 735, stressed by the dissent echoes *Ramirez*’s holding that the “ultimate question to be determined is whether, under the totality of the circumstances, the identification was reliable.” *Ramirez*, 817 P.2d at 781.

Utah courts consistently use the *Ramirez* analytical model, focusing on the overall reliability of the eyewitness identification. *State v. Decorso*, 1999 UT 57, ¶ 45, 993 P.2d 837 (Addressing all factors although the identification “was not the product of suggestion”); *State v. Glasscock*, 2014 UT App 221, ¶ 26, 336 P.3d 46 (“To evaluate admissibility of an eyewitness identification, we examine the

‘totality of the circumstances’ to determine whether ‘the eyewitness testimony is sufficiently reliable so as not to offend a defendant’s right to due process.’ (alterations omitted)); *State v. Clark*, 2014 UT App 56, ¶ 50, 322 P.3d 761 (applying the *Ramirez* factors to determine that “[u]nder the totality of the circumstances” the identifications “were sufficiently reliable for admission at trial”); *State v. Rivera*, 954 P.2d 225, 229 (Utah Ct. App. 1998) (concluding that an identification met “all of the *Ramirez* reliability factors”). The State’s request that this Court “clarify” *Ramirez* is actually a request that this Court overrule it without meeting the “substantial burden” of proving that the precedent is neither persuasive and nor firmly established. *See State v. Menzies*, 889 P.2d 393, 398-99 (Utah 1994); *Eldridge v. Johndrow*, 2015 UT 21, ¶ 21, 345 P.3d 553 (“Because stare decisis is so important to the predictability and fairness of a common law system, we do not overrule our precedents lightly.” (internal quotation marks omitted)).

Although *Ramirez* labeled its test as “more stringent than[] the federal analysis,” the case law does not suggest that the framework has led to the exclusion of many eyewitness identifications. In fact, in the twenty-five years since *Ramirez*, counsel is aware of no other Utah appellate case declaring an eyewitness identification inadmissible. *Cf. Perry*, 132 S. Ct. at 737 (Sotomayor, J., dissenting) (“The vast majority of eyewitnesses proceed to testify before a jury. To date, *Foster* is the only case in which [the United State Supreme Court has] found a due process violation.”). Despite this Court’s criticism of the suggestive

show-up procedure the police employed in *Ramirez*, the identification was admissible in that case and the police employed the same suggestive show-up procedure in this case. When the majority and the dissent agreed in *Lujan* that “the time may have arrived for the Utah Supreme Court to revisit its holding in *State v. Ramirez*,” it was the admissibility of unreliable identifications like the one deemed admissible in *Ramirez* and the continuing use of unnecessarily suggestive show-up procedures that concerned them. *Lujan*, 2015 UT App 199, ¶¶ 21 (Pearce, J., dissenting), 10 n.1 (majority opinion).

This Court should thus reaffirm that the Utah due process analysis differs from the federal analysis because it focuses on overall reliability, using suggestive government conduct as a factor in the analysis but not a threshold inquiry, the absence of which could prevent the court from fulfilling “its charge as gatekeeper” when it comes to powerful but unreliable eyewitness identifications. *See Ramirez*, 817 P.2d at 778. Utah’s due process analysis allows courts to consider subtly but not intentionally suggestive identification procedures, or suggestive procedures arranged by non-government parties, in combination with the other reliability considerations for a holistic approach that both encourages best practices in identification procedures and guards against wrongful convictions. *See Perry*, 132 S. Ct. at 726 (“A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place.”); *see id.* at 738 (Sotomayor, J., dissenting) (“The empirical evidence

demonstrates that eyewitness misidentification is the single greatest cause of wrongful convictions in this country.” (internal quotation marks omitted)); *Ramirez*, 817 P.2d at 779 (“The danger of such an abdication of [the trial court’s gatekeeping] responsibility is particularly serious where the admissibility of an eyewitness identification is concerned because of the probability that such evidence even though thoroughly discredited has a powerful effect on the jury.”).

**III. The admission of the eyewitness identification was not harmless beyond a reasonable doubt.**

The State argues that this Court should apply the harmless beyond a reasonable doubt standard in this case without establishing any precedent. SB 18 (“The standard should remain undecided in this jurisdiction”). This is a change of course, as the State’s petition for certiorari argued that the “issue of whether the burden shifts to the State to prove that a preserved state constitutional error in admission of eyewitness identification testimony is harmless beyond a reasonable doubt is a matter of first impression which should be decided by this Court.” Pet. Cert. 18. And this Court granted the petition to review that question. Add. B.

The court of appeals noted that if “Utah’s approach ‘is certainly as stringent as, if not more stringent than, the federal analysis,’” as explained in *Ramirez*, then “there is no reason to assume our constitution would impose a different [and less stringent] standard of review for those few circumstances where our

constitution is violated but the federal constitution is not.” *Lujan*, 2015 UT App 199, ¶ 16 n.2.

Constitutional errors, including unreliable eyewitness identifications, must be harmless beyond a reasonable doubt. This Court has explained that the standard harmless error analysis “does not govern errors . . . that are constitutional in nature.” *State v. Villarreal*, 889 P.2d 419, 425 (Utah 1995). “Where the error in question amounts to a violation of a defendant’s” constitutional rights, “its harmlessness is to be judged by a higher standard, i.e., reversal is required unless the error is harmless beyond a reasonable doubt.” *Id.* (internal quotation marks omitted). The admission of unreliable eyewitness evidence is a violation of constitutional due process. *Ramirez*, 817 P.2d at 780. Utah courts must “scrutinize” eyewitness identification testimony for “constitutional defects.” *State v. Nelson*, 950 P.2d 940, 944 (Utah Ct. App. 1997) (internal quotation marks omitted). When such defects exist, the State must prove they are harmless beyond a reasonable doubt. *Villarreal*, 889 P.2d at 425.

Federal circuit courts have applied the harmless beyond a reasonable doubt test to eyewitness identification admitted in violation of due process. *E.g.*, *United States v. Stubblefield*, 621 F.2d 980, 983 (9th Cir. 1980); *United States v. Russell*, 532 F.2d 1063, 1068-69 (6th Cir. 1976). “[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” *Chapman v. California*, 386 U.S. 18, 24 (1967). A violation of due process under the Utah Constitution



should be no less serious to this Court than a violation under the United States Constitution. The U.S. Supreme Court declared that it was its “responsibility to protect” federal constitutional rights “by fashioning the necessary rule.” *Id.* at 21. It is this Court’s responsibility to protect Utah Constitutional rights, and where fairness and reliability under due process are concerned, the harmless beyond a reasonable doubt standard is appropriate. The United States Supreme Court adopted the harmless beyond a reasonable doubt test for certain constitutional errors because although “there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,” there are some “which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal of the conviction.” *Id.* at 22-23.

In *State v. Bullock*, 699 P.2d 753, 756 (Utah 1985), the Utah Supreme Court concluded that an eyewitness identification was admissible under the due process clause and that, furthermore, “the trial court’s denial of the motion to suppress did not affect defendant’s substantial rights” because there was strong evidence of guilt even absent the identification. *Chapman* noted the similarity between the substantial rights test and the harmless beyond a reasonable doubt test: both tests “emphasize[] an intention not to treat as harmless those constitutional errors that ‘affect substantial rights’ of a party.” *Chapman*, 386 U.S. at 24.

Nevertheless, the State argues that *Ramirez*, *Nelson*, and *Clopten* applied the reasonable likelihood of a more favorable result standard.<sup>2</sup> *Ramirez* applied that standard to a different error. The defendant in *Ramirez* “raise[d] several issues on appeal,” first that “the introduction of the eyewitness identification violated his right to due process of law under article I, section 7 of the Utah Constitution and the Fourteenth Amendment to the United States Constitution because the identification was unreliable,” and second that he was unconstitutionally stopped without articulable reasonable suspicion. 817 P.2d at 778. The Court never addressed what standard of harmlessness applies to the eyewitness identification issue because the Court concluded that the eyewitness identification was properly admitted. *Id.* at 784.

The Court then addressed the claim that the defendant was illegally stopped. *Id.* at 785. This claim presented the Court with a “difficult problem” because the “trial judge simply refrained from passing on the issue [when defendant raised it] and let the evidence resulting from the stop and seizure go to the jury.” *Id.* at 787. The Court held that it was error for the judge to “permit[] the evidence of the stop and seizure and the fruits of that stop, including the eyewitness identification, in evidence without determining its constitutional admissibility.” *Id.* at 788. And it was this failure, not the admission of an

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<sup>2</sup> The parties, however, ultimately agree that this Court should employ the harmless beyond a reasonable doubt standard to this case. SB 50-51 (arguing there is “no reason to reach” the issue of the standard for prejudice and “assuming application of the federal standard”). The federal standard is appropriate, but the error was harmful under either standard.

unconstitutionally unreliable eyewitness identification, that the Court deemed harmful under the non-constitutional test. *Id.* *Ramirez* never held or suggested that unconstitutionally admitted eyewitness identification is subject to the same harmlessness test.

Rather, *Ramirez* suggested that a harmless beyond a reasonable doubt standard would have applied if the eyewitness testimony was unconstitutionally unreliable. *Ramirez* held that “[t]he burden of demonstrating the admissibility of the proffered evidence is on the prosecution” and the “defendant is then entitled to a determination by the court of the evidence’s constitutional admissibility.” *Id.* at 778. This language suggests that, when there is an error in the process, the prosecution should bear the burden of proving it was constitutionally harmless.

The State cites *State v. Nelson*, 950 P.2d at 944-45, a court of appeals case that also involved the failure to address an issue instead of the admission of evidence that violated due process. At the suppression hearing for the eyewitness identification, the trial court in *Nelson* “did not make findings as required by Rule 12 of the Utah Rules of Criminal Procedure, did not consider any of the circumstances surrounding the identification in light of the *Ramirez* factors, and did not make a preliminary determination of reliability.” *Id.* at 943-44 (footnote omitted). Similar to the trial court in *Ramirez*’s handling of the stop and seizure motion, the trial court in *Nelson* “sidestepped its gatekeeping responsibility by failing to determine the constitutional admissibility of the eyewitness

identification testimony.” *Id.* at 944. The court of appeals held that the “trial court’s failure to make any findings and failure to make any legal determination as to the constitutional admissibility of the eyewitness identification was error.” *Id.* The court determined that there was a reasonable likelihood of a more favorable result absent the error and remanded for a new trial instead of asking the trial court “to address the admissibility question” and “tempt it to reach a post hoc rationalization for admission of this pivotal evidence.” *Id.* (internal quotation marks omitted). It never held that admitted eyewitness identification evidence was constitutionally unreliable and therefore did not address what the test for prejudice would be in such a case.

Finally, the State cites *State v. Clopten*, 2009 UT 84, ¶ 39, 223 P.3d 1103. SB 50. But the issue in *Clopten* was not whether it was harmful error to admit constitutionally unreliable eyewitness identification; the issue was “whether expert testimony regarding the reliability of eyewitness identification should be presumed admissible when timely requested.” *Id.* ¶ 6. The Court in *Clopten* addressed an evidentiary issue, not a constitutional violation. *Id.* ¶¶ 30-38 (analyzing the admissibility of expert testimony regarding eyewitness identification under Utah Rule of Evidence 702). *Clopten* held the error was harmful and reversed under the standard harmless error analysis and never addressed what standard would apply to unreliable eyewitness identification admitted in violation of constitutional due process. *Id.* ¶¶ 48-49.

The court of appeals correctly concluded that the admission of the eyewitness identification in this case was not harmless beyond a reasonable doubt. *Lujan*, 2015 UT App 199, ¶ 19. Without the identification, “the State loses its strongest evidence against Defendant.” *Id.* As the prosecution noted in closing, “there’s not a whole lot of dispute about what happened. The dispute lies with who did it.” R:362:8. Absent the eyewitness’s confident in-court and show-up identifications, the State did not provide strong evidence of guilt. In fact, the officer who orchestrated the show-up testified that if the eyewitness had not identified Mr. Lujan as the robber, “we would know that he was not our suspect and we would know that we need to continue our search.” R:359:31. The eyewitness described a robber with long hair and an open leather jacket. R:357:85 (testifying that he could “definitely see hair sticking out of the sides of the hat”), 83-84 (describing a leather jacket that “definitely” opened in the front). Mr. Lujan had a goatee, closely shaved hair, and the evidence indicated he had no jacket. R:357:59, 62-69, 75, 137. The State makes much of the officers’ testimony that they also remembered a jacket. SB 12, 37, 42-43, 51. But the officer who testified about clothing storage at the jail was not aware of items ever being misplaced. R:359:62-69, 75. The jury might then question whether the officers’ memories were influenced by the witness’s description. And the loss or destruction of evidence would only further damage the State’s case.

Even after the show-up, the eyewitness was not able to positively identify Mr. Lujan at a lineup; he could indicate only that he thought he recognized Mr.

Lujan and another man. State's Ex. 42. Furthermore, Mr. Lujan's statements to the police denied involvement in the robbery. R:359:8, 32. The police did not recover fingerprints from the inside of the vehicle, and did not attempt to dust the outside or collect DNA evidence. R:359:7.

And, although Mr. Lujan was found relatively near the abandoned vehicle and a K9 officer was employed, the officer who found Mr. Lujan described his inclination to go towards the air conditioning unit as a "gut feeling" based on a rustling noise after he had "split up" with the K9 officer. R:359:17-18. The officer testified that the dog began to pull the handler hard when the officers reached the walkway gate of the school, which was an indication that the dog had "picked up on a track of the person that they are looking for." R:357:128. The State describes the dog's "discernment of a lone scent," SB 51-52, but the State cites no record source for this assertion and the K9 handler did not testify. The dog pulled the officers through the walkway gate. R:357:128. Afterwards, the dog "pull[ed] . . . toward some portable or relocatable classrooms." R:357:128-29. But at that point the officer and the K-9 handler "kind of split our efforts so that [they] wouldn't be ambushed from behind." R:357:129.

When the officer had the gut feeling, he did not "alert the canine handler because [he] didn't want to give [his] position away." R:357:130. The dog did not return until the officer "had a weapon out and pointed" and was giving commands to Mr. Lujan. R:359:28. The officer's "commands seemed to prompt the K-9 officer to come over to [his] location." R:359:28. The court of appeals

therefore did not err when it explained that the dog “pulled officers toward portable classrooms at the elementary school, while other officers veered off from the K9 unit.” *Lujan*, 2015 UT App 199, ¶ 18.

Finally, the State argues that “no one but Defendant was found anywhere in the area,” but there was no evidence that anyone was looking after the police arrested Mr. Lujan. SB 52; *see* R:359:31 (testimony that the police would have continued searching if the witness had not identified Mr. Lujan).

The eyewitness identification was undoubtedly the State’s strongest evidence in this case. The harmless beyond a reasonable doubt standard on appeal compounds the highest standard in the law. It means that this Court must know beyond a reasonable doubt that no juror would have had a reasonable doubt as to Mr. Lujan’s guilt if the State had presented this case without evidence of the show-up or an in-court identification. The court of appeals was correct that “the State’s case is severely weakened” without the identification. *Id.* ¶ 17. This Court should affirm.

#### CONCLUSION

For the reasons above, this Court should affirm the judgment of the Utah Court of Appeals.

SUBMITTED this 15<sup>th</sup> day of July, 2016.

  
\_\_\_\_\_  
NATHALIE S. SKIBINE



CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains less than 14,000 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

  
\_\_\_\_\_  
NATHALIE SKIBINE

CERTIFICATE OF DELIVERY

I, NATHALIE S. SKIBINE, certify that I have caused to be hand-delivered the original and nine copies of the foregoing brief to the Utah Supreme Court, 450 South State, 5th Floor, Salt Lake City, Utah 84114-0230, and three copies to the Utah Attorneys General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 15<sup>th</sup> day of July, 2016.

  
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NATHALIE S. SKIBINE

DELIVERED this 15 day of July, 2016.

  
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Tab A





THE UTAH COURT OF APPEALS

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STATE OF UTAH,  
Plaintiff and Appellee,

v.

MANUEL ANTONIO LUJAN,  
Defendant and Appellant.

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Memorandum Decision  
No. 20131166-CA  
Filed August 6, 2015

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Third District Court, Salt Lake Department  
The Honorable Randall N. Skanchy  
No. 121910892

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Nathalie S. Skibine and Lisa J. Remal, Attorneys  
for Appellant

Sean D. Reyes and Kris C. Leonard, Attorneys  
for Appellee

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JUDGE GREGORY K. ORME authored this Memorandum Decision,  
in which JUDGE KATE A. TOOMEY concurred. JUDGE JOHN A.  
PEARCE dissented, with opinion.

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ORME, Judge:

¶1 Defendant Manuel Antonio Lujan appeals his conviction of aggravated robbery, a first degree felony under section 76-6-302 of the Utah Code. Because we determine that the trial court erroneously admitted unreliable eyewitness testimony, we reverse and remand for a new trial.

¶2 Early one November morning, a man could not sleep, so he got out of bed and went outside. He decided to get his car ready for an upcoming safety inspection. It was while the man was seated inside his car in his driveway that he came face-to-face with a robber. The man described the robber as "Spanish"

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and as wearing a black leather jacket and beanie. The robber had black and white "longish hair," which was straight and poked out of the beanie to "mid-ear length." The man "definitely" remembered the robber's hair.

¶3 The robber opened the man's driver-side door, squatted next to the seat, and asked the man, "Why you following me?" The robber stood, and the man saw him reach for what appeared to be the handle of a gun or a knife. The man was afraid he might be stabbed or shot. Wanting to return to the safety of his house, the man stood, nearly touching the robber, who was about his same height. He slowly worked his way around the robber and around the car and ran to his house. The robber drove off in the man's car, and the man told his brother to call the police, which he did. Officers soon arrived.

¶4 The man's car had a fluid leak, and officers were able to follow a trail of fluid and recover the abandoned car a few blocks away, near an elementary school. A K9 unit was called, and the dog appeared to "pick[] up on a track of the person that they [were] looking for" at the walkway gate of the school. The dog pulled the officers through the gate and toward "some portable or relocatable classrooms." At that point, some officers "kind of split" from the K9 unit, and one of those officers had a "gut feeling" to check an air conditioning unit outside the school, even though the dog was focused elsewhere. Officers found Defendant inside the air conditioning unit, and he told them "something like somebody is following me, somebody is out to get me."

¶5 Defendant is Hispanic, and he had closely-shaven hair and a goatee when the police found him. He was wearing a black beanie. Officers also testified that he was wearing a black jacket, but no jacket appeared in Defendant's booking photo, was listed on the jail property list, or was produced at trial.

¶6 Police contacted the man whose car had been stolen and told him that they had a suspect. They brought the man to the

*State v. Lujan*

school and asked if he could identify Defendant, who stood handcuffed in the dark, the only non-officer present, illuminated by the headlights of police cars. The man identified Defendant as the robber.

¶7 After being arrested and charged, Defendant requested a lineup, which the trial court granted. At the lineup, the man was unable to positively identify anyone as the robber. He did indicate that Defendant and another man looked familiar, but he was unsure whether either was the robber.

¶8 At the preliminary hearing, the man was asked to identify the robber, and he pointed to Defendant. As Defendant observes, he “was the only defendant sitting at counsel table and the only realistic choice.”

¶9 Defendant moved to exclude evidence of the show-up and in-court identifications. The motion was denied, Defendant was convicted as charged, and he now appeals. The sole issue raised on appeal is whether the trial court erred when it denied Defendant’s motion to suppress the identifications. We conclude that it did.

¶10 In *State v. Ramirez*, 817 P.2d 774 (Utah 1991), the Utah Supreme Court revised and clarified the protocol for courts to use in analyzing the admissibility of eyewitness identifications.<sup>1</sup>

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1. We decide this case within the framework established by *State v. Ramirez*, 817 P.2d 774 (Utah 1991). We have every reason to believe, however, that *Ramirez* must be revisited. See Anne E. Whitehead, Note, *State v. Ramirez: Strengthening Utah’s Standard for Admitting Eyewitness Identification Evidence*, 1992 Utah L. Rev. 647, 689 (1992) (generally approving of *Ramirez* but recognizing that it “is not without flaws” because “the court’s conclusion seems incongruous with the results of its application of the reliability analysis, leaving uncertain the future impact of the new Utah analytical framework”). Aside from any flaws  
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inherent in the *Ramirez* analysis, scientific and legal research regarding the reliability of eyewitness identifications has progressed significantly in the last twenty-four years. See generally National Research Council of the National Academies, *Identifying the Culprit: Assessing Eyewitness Identification* 11–12 (2014).

Before *Ramirez*, the Utah Supreme Court first took an in-depth look at the potential shortcomings of eyewitness identifications in *State v. Long*, 721 P.2d 483 (Utah 1986). In *Long*, the Court accepted the invitation to “either abandon any pretext of requiring a cautionary eyewitness instruction or make the requirement meaningful” by deciding “to follow the latter course.” *Id.* at 487. The Court did this by “abandon[ing] its discretionary approach to cautionary jury instructions and direct[ing] that in cases tried from th[at] date forward, trial courts shall give such an instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense.” *Id.* at 492.

Then, after *Ramirez*, the Court considered another aspect of cases involving eyewitness identifications—expert testimony. In *State v. Butterfield*, 2001 UT 59, 27 P.3d 1133, the Court affirmed a trial court’s exclusion of an expert witness because the trial court had found that the proposed expert testimony “did not deal with the specific facts from [that] case but rather would constitute a lecture to the jury about how it should judge the evidence.” *Id.* ¶ 44 (internal quotation marks omitted). The issue was revisited in *State v. Hubbard*, 2002 UT 45, ¶ 14, 48 P.3d 953. In *Hubbard*, while leaving *Butterfield* untouched, the Court did invite trial courts “to specifically tailor instructions other than those offered in *Long* that address the deficiencies inherent in eyewitness identification.” *Id.* ¶ 20.

But in *State v. Clopten*, 2009 UT 84, 223 P.3d 1103, the Court recognized that its “previous holdings ha[d] created a de facto presumption against the admission of eyewitness expert testimony, despite persuasive research that such testimony is the  
(continued...)



*See id.* at 779, 781–82. The Utah Supreme Court indicated that such clarification was necessary because “the scientific literature . . . ‘is replete with empirical studies documenting the unreliability of eyewitness identification.’” *Id.* at 779 (quoting *State v. Long*, 721 P.2d 483, 488 (Utah 1986)). This led the Court “to comment that ‘[p]erhaps it is precisely because jurors do not appreciate the fallibility of eyewitness testimony that they give such testimony great weight.’” *Id.* at 780 (alteration in original) (quoting *Long*, 721 P.2d at 490). Thus, Utah applies a more stringent standard in making reliability determinations than that employed in the federal system. *Id.* at 784. Compare *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972) (indicating that “the factors to be considered in evaluating the likelihood of misidentification

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(...continued)

most effective way to educate juries about the possibility of mistaken identification.” *Id.* ¶ 30. The Court sought to change this by announcing “that the testimony of a qualified expert regarding factors that have been shown to contribute to inaccurate eyewitness identifications should be admitted whenever it meets the requirements of rule 702 of the Utah Rules of Evidence.” *Id.* The Court “expect[ed] this application of rule 702 [to] result in the liberal and routine admission of eyewitness expert testimony.” *Id.*

While Utah jurisprudence now better recognizes the problematic nature of eyewitness identification, *Ramirez* remains the standard by which courts must evaluate the admissibility of this evidence. It is a standard that does not accurately reflect the changed views about handling this problematic evidence. And the disconnect between the legal analysis in *Ramirez* and its outcome makes it an unreliable tool for resolving particular cases, as shown by the two opinions in this case. All of this, taken together, indicates that it is time for our Supreme Court to reconsider *Ramirez*, a proposition with which the dissent agrees. *See infra* ¶ 21.

include the opportunity of the witness to view the criminal at the time of the crime, the witness'[s] degree of attention, the accuracy of the witness'[s] 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"), and *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (focusing on whether an eyewitness confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [defendant] was denied due process of law"), with *Ramirez*, 817 P.2d at 781 (listing factors that are "generally comparable to the *Biggers* factors" but "more precisely define the focus of the relevant inquiry," and identifying the "ultimate question to be determined [as] whether, under the totality of the circumstances, the identification was reliable").

¶11 In *Ramirez*, the Court set forth five factors that must be considered when analyzing the reliability of an eyewitness identification: (1) opportunity to view, (2) degree of attention, (3) capacity to observe, (4) spontaneity and consistency, and (5) nature of the event. *Ramirez*, 817 P.2d at 781. The first factor, the opportunity of the witness to view the actor during the event, includes (but is not limited to) considering the length of time the witness viewed the actor, the distance between the witness and the actor, whether the witness could view the actor's face, the lighting or lack of it, and whether there were distracting noises or activity during the observation. *Id.* at 782. The second factor considers the witness's degree of attention to the actor. *Id.* at 781, 783. The third factor, whether the witness had the capacity to observe the actor during the event, includes considering whether the witness's capacity to observe was impaired by stress or fright, personal motivations, biases, prejudices, uncorrected visual defects, fatigue, injury, drugs, or alcohol. *Id.* at 783. The next factor, whether the witness's identification was made spontaneously and remained consistent thereafter or whether it was a product of suggestion, includes considering the length of time that passed between the witness's observation at the time of the event and the identification of the defendant, the witness's mental capacity and state of mind at the time of the

identification, the witness's exposure to information from other sources, instances when the witness failed to identify the defendant, instances when the witness gave descriptions that were inconsistent with the defendant, and the circumstances under which the defendant was presented to the witness for identification. *Id.* And the final factor, the nature of the event and the likelihood that the witness would perceive, remember, and relate it correctly, includes considering whether the event was an ordinary one in the mind of the witness and whether the race of the actor was the same as the witness. *Id.* at 781.

¶12 The *Ramirez* court considered the first four factors in detail and concluded that it was "an extremely close case." *Id.* at 784. The Supreme Court was particularly troubled by the "blatant suggestiveness of the showup," where Ramirez was identified in a very similar fashion to the way Defendant was here—Ramirez "was the only person at the showup who was not a police officer," he "stood with his hands cuffed," and the "headlights of several police cars were trained on him." *Id.* The Court was also concerned with the "differences in racial characteristics between" the eyewitness and Ramirez. *Id.* The Court determined, however, that "because the identification was based principally on the eyes, physical size, and clothing, these racial factors may have been of relatively little importance." *Id.*

¶13 The same factors that led the Supreme Court to conclude that *Ramirez* was "an extremely close case" are present here. *See id.* The show-up was conducted in almost identical fashion. Furthermore, the man who identified Defendant is Native American and Defendant is Hispanic. But unlike in *Ramirez*, the identification was not confined to the eyes, physical size, and clothing of Defendant. Instead, the State makes a point of the fact that the robber's entire, unobscured "face was about ten inches from" the man's when the robber first crouched down next to the car. Thus "racial factors" are more significant here than they were in *Ramirez*. *Cf. id.* at 776, 784 (noting that "racial factors may have been of relatively little importance" when eyewitness identification was based on the defendant's eyes, physical size,

and clothing, and the eyewitness did not have the opportunity to view the defendant's entire face).

¶14 This case also presents additional indications of unreliability. For instance, the man failed to identify Defendant at the lineup, which is an important consideration under the fourth *Ramirez* factor. *See id.* at 783. Moreover, the man's original description of the robber omitted any mention of facial hair and included a definite recollection of long, straight hair. In contrast, Defendant had a goatee and a shaved head, both of which are features that seem hard to miss at a distance of ten inches, and the man did not miss the shaved head because it was covered with a beanie—he "definitely" remembered hair protruding well below the beanie.

¶15 If *Ramirez* was an extremely close call, we are confident that here we can "say that [the man]'s testimony is legally insufficient when considered in light of the other circumstances to warrant a preliminary finding of reliability and, therefore, admissibility." *See id.* at 784. But our inquiry does not end there. We must also consider whether Defendant suffered prejudice as a result of the trial court admitting the identifications.

¶16 We agree with Defendant that the State bears the burden of convincing us that the improperly admitted eyewitness identifications were harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.")<sup>2</sup> The State has not met this burden.

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2. We recognize that *State v. Ramirez*, 817 P.2d 774 (Utah 1991), was primarily concerned with an alleged due process violation under the Utah Constitution. *Id.* at 781. *See* Utah Const. art. I, § 7. Utah's approach "is certainly as stringent as, if not more stringent than, the federal analysis," but there is no reason to  
(continued...)

¶17 For us to determine that the trial court's error was harmless beyond a reasonable doubt, we must consider "the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *State v. Villarreal*, 889 P.2d 419, 425–26 (Utah 1995) (citation and internal quotation marks omitted). When the man's identifications of Defendant are removed, the State's case is severely weakened.

¶18 Evidence supporting the State's case includes the facts that Defendant was wearing a beanie and a jacket when found and that he is Hispanic, which jurors might conclude matched the man's description of a "Spanish" robber. The State recognizes that its strongest piece of evidence, aside from the eyewitness identifications, albeit with their significant descriptive discrepancies, was Defendant's comment to police about someone following him—a comment similar to the question posed by the robber to the man, "Why you following me?" But without the identifications, the jurors would likely have found very significant the man's initial description of the robber—a description that lacked a goatee and included long black and white hair—and the evidence that a trained police dog following the suspect's scent pulled officers toward portable classrooms at the elementary school, while other officers veered off from the K9 unit and later found Defendant curled up in an air conditioning unit.

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assume our constitution would impose a different standard of review for those few circumstances where our constitution is violated but the federal constitution is not. *Ramirez*, 817 P.2d at 784. See U.S. Const. amend. XIV, § 1.

*State v. Lujan*

¶19 When the eyewitness testimony is taken away, the State loses its strongest evidence against Defendant, and we cannot say that the trial court's error in admitting the unreliable eyewitness identifications was harmless beyond a reasonable doubt. We accordingly vacate Defendant's conviction and remand for a new trial.

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PEARCE, Judge (dissenting):

¶20 I dissent.

¶21 I agree with the majority that the time may have arrived for the Utah Supreme Court to revisit its holding in *State v. Ramirez*, 817 P.2d 774 (Utah 1991). But so long as *Ramirez* remains good law, we are duty-bound to apply it. I cannot squint at *Ramirez*'s holding in a way that permits me to see how the identification testimony offered in this case is less reliable than the testimony the *Ramirez* court deemed admissible. *Ramirez* identified five factors a court must consider in assessing the reliability of eyewitness testimony. In almost all respects, the showup involving Defendant in this case was substantially less troublesome than that the *Ramirez* court approved.

¶22 The first *Ramirez* factor centers on the "opportunity of the witness to view the actor during the event." *Id.* at 782. This includes consideration of how long the witness saw the actor, the distance between them, the lighting, whether the witness could view the actor's face, and whether there were distracting circumstances that would affect the witness's ability to see the actor. *Id.*

¶23 In *Ramirez*, the witness (Wilson) testified at various times that he had seen the actor for either a second, a few seconds, or a minute or longer. Wilson also testified that the actor was about ten feet away from him; other witnesses described the distance as being as much as thirty feet away. Wilson testified that the

actor was crouched at the end of a building and was wearing a mask over the lower part of his face. Wilson conceded that he could not see the actor's eyes clearly, but he "could see enough to know" they were "small." *Id.* Testimony varied as to whether the lighting was good or whether shadows shrouded the actor. *Id.* at 782–83.

¶24 Here, the trial court found that the witness viewed Defendant for several seconds when they were face to face in the car's open doorway. They were less than a foot apart, and the area was lit by two street lamps, a porch light, a neighbor's floodlight, and the car's headlights, as well as the car's overhead dome light and lighted dashboard. Defendant's face was uncovered. In all relevant ways, with the possible exception of the duration of the observation, the witness's opportunity to view Defendant was superior to the observation *Ramirez* considered.

¶25 The second *Ramirez* factor examines the witness's degree of attention to the actor. *Id.* at 783. In *Ramirez*, Wilson was accosted by two men: Ramirez, who wielded a firearm, and a second man carrying a pipe. Wilson was struck with the pipe before he was even aware of Ramirez. While Wilson became aware of Ramirez's presence, the "pipe man" continued to threaten and swing the pipe at Wilson. In contrast, here, the witness was alone with Defendant. After observing Defendant for several seconds, the witness thought that the way Defendant moved his hand was suggestive of having a weapon. The witness began to get out of the car and negotiate his way around Defendant to escape the situation. Although concern over the potential possession of a weapon by Defendant may have distracted the witness, it remains a far cry from the distractions Wilson faced.

¶26 The third *Ramirez* factor looks at the witness's capacity to observe the event, including "whether the witness's capacity to observe was impaired by stress or fright at the time of the observation, by personal motivations, biases, or prejudices, by



uncorrected visual defects, or by fatigue, injury, drugs or alcohol." *State v. Ramirez*, 817 P.2d 774, 783 (Utah 1991). The *Ramirez* court considered that Wilson had been struck by a pipe and was facing a gun pointed at him by a masked man while the assailant continued to swing the pipe and threaten him. The supreme court concluded that "it was reasonable to assume that Wilson experienced a heightened degree of stress." *Id.* Although the witness here was undoubtedly startled by the presence of a stranger in his car at 3:30 a.m., there was no evidence before the trial court that this impaired the witness's capacity to observe Defendant. Nor was there any evidence that injury, drugs, or alcohol may have impaired the witness.

¶27 The fourth *Ramirez* factor considers whether the witness's identification was made spontaneously and remained consistent. *Id.* It also examines whether the identification was the "product of suggestion." *Id.* *Ramirez* instructs that trial courts should consider a variety of factors, including the amount of time between observation and identification, the witness's mental capacity and state of mind at the time of the identification, the witness's exposure to information from other sources, instances when the witness failed to identify the defendant, instances when the witness gave inconsistencies in the description of the defendant, and the circumstances under which the defendant was presented to the witness for identification. *See id.*

¶28 In *Ramirez*, the showup occurred less than an hour after the event and the court concluded that nothing in the record suggested that Wilson's mental capacity or state of mind influenced the identification. Wilson was aware that one of the other witnesses had not identified Ramirez as the gunman but was otherwise not exposed to other identifications or opinions. The supreme court noted that Wilson's descriptions had varied in some details, such as whether Ramirez had worn a hat or sported tattoos. *Id.* at 784.

¶29 In this matter, the showup took place thirty-five minutes after the robbery. There is no indication in the record that the

witness had been influenced by additional information. However, as the majority ably describes, there exist a number of concerns with the consistency of the witness's descriptions of Defendant. Notably, at a subsequent lineup, the witness identified both Defendant and another man as persons who might have stolen his car. Moreover, the witness originally omitted any mention of Defendant's facial hair and said that the robber had long, straight hair. Defendant had a goatee and was bald. The discrepancies in the witness's identification present the only way in which this matter could be considered a better candidate for reversal than *Ramirez*. However, in light of the myriad other ways in which the testimony in *Ramirez* appears more unreliable than that at issue here, I cannot conclude that these discrepancies are enough to pull this case from *Ramirez*'s reach.

¶30 *Ramirez* also examined whether Wilson's identification of Ramirez was the product of suggestion by looking at the procedures the showup employed. The identification occurred at night. *Id.* Prior to the showup, police officers remarked to Wilson that they had apprehended someone who fit the description of one of the robbers. Ramirez, the only person involved in the showup who was not a police officer, was handcuffed to a chain-link fence illuminated by the headlamps of police cars. Wilson identified Ramirez from the back seat of a police vehicle. Here, Defendant was similarly cuffed and lit by headlights. Defendant was also the only person at the showup who was not a law enforcement officer.

¶31 I concur with the majority when it echoes the *Ramirez* court's conclusion that "[t]he blatant suggestiveness of the showup is troublesome." 817 P.2d 774, 784 (Utah 1991). However, even after acknowledging the troublesome nature of the showup, as well as Wilson's inability to see Ramirez's face (in part because Ramirez was wearing a mask), Wilson's changing testimony about whether Ramirez wore a hat, and the distraction caused by another assailant wielding a pipe, the *Ramirez* court found that Wilson's identification testimony was

*State v. Lujan*

sufficiently reliable to be admissible. *Id.* at 782–84. Although it is far from the most satisfying result, if the testimony Wilson offered in *Ramirez* cleared the bar, so too must the testimony the witness offered in this matter.

¶32 For these reasons, I dissent.

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Tab B





IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,  
Petitioner,

FILED  
UTAH APPELLATE COURTS  
ORDER DEC 23 2015

v.

Appellate Case No. 20150840-SC

MANUEL ANTONIO LUJAN,  
Respondent.

This matter is before the court upon a Petition for Writ of Certiorari, filed on October 8, 2015.


The Petition for Writ of Certiorari is granted as to the following issues:

1. Whether the majority of the panel of the Court of Appeals erred in reversing the district court's denial of Respondent's motion to suppress eyewitness identification testimony.
2. Whether the majority of the panel of the Court of Appeals erred in holding the State was required to demonstrate that any error in admission of the eyewitness identification was harmless beyond a reasonable doubt, and whether it erred in concluding the admission of that testimony was not harmless.

A briefing schedule will be established hereafter. Pursuant to Rule 2 of the Rules of Appellate Procedure, the Court suspends the provision of Rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. Additionally, absent extraordinary circumstances, no extensions will be granted by motion. The parties shall comply with the briefing schedule upon its issuance.

FOR THE COURT:

Dec. 23, 2015  
Date

  
Thomas R. Lee  
Associate Chief Justice

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2015, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:


CLINT T. HEINER  
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