

1991

Gregory N. Oliver v. State of Utah : Petition for Writ of Certiorari

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Elizabeth Holbrook.; Attorney for Appellant.

R. Paul Van Dam; Marian Decker; Attorney for Appellee.

Recommended Citation

Petition for Certiorari, *Oliver v. Utah*, No. 910520.00 (Utah Supreme Court, 1991).
https://digitalcommons.law.byu.edu/byu_sc1/3736

This Petition for Certiorari is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UNIT

BRIEF

#2

DOCKET NO. 910520

IN THE SUPREME COURT OF THE STATE OF UTAH

GREGORY N. OLIVER,	:	
Petitioner,	:	Supreme Court
	:	Case No. <u>910520</u>
v.	:	
	:	Court of Appeals
STATE OF UTAH,	:	Case No. 890625-CA
Respondent.	:	Priority No. 13

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOC.
424 EAST 500 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111

Attorney for Petitioner

R. PAUL VAN DAM
ATTORNEY GENERAL
MARIAN DECKER
ASSISTANT ATTORNEY GENERAL
236 STATE CAPITOL BUILDING
SALT LAKE CITY, UTAH 84114

Attorneys for Respondent

FILED

NOV 18 1991

CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

GREGORY N. OLIVER,	:	
Petitioner,	:	Supreme Court
	:	Case No. _____
v.	:	
	:	Court of Appeals
STATE OF UTAH,	:	Case No. 890625-CA
Respondent.	:	Priority No. 13

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

ELIZABETH HOLBROOK
SALT LAKE LEGAL DEFENDER ASSOC.
424 EAST 500 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111

Attorney for Petitioner

R. PAUL VAN DAM
ATTORNEY GENERAL
MARIAN DECKER
ASSISTANT ATTORNEY GENERAL
236 STATE CAPITOL BUILDING
SALT LAKE CITY, UTAH 84114

Attorneys for Respondent

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED FOR REVIEW	1
1. Does a criminal defense attorney have a duty to prepare the defense and investigate evidence which is "cumulative" to, or corroborative of, the defendant's testimony?	
2. How is a criminal defense attorney on direct appeal to present evidence, which was not originally presented in the trial court, to establish ineffective assistance of trial counsel?	
OPINION AND ORDER OF THE COURT OF APPEALS	1
JURISDICTION OF THE UTAH SUPREME COURT	1
CONTROLLING CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
A. PROCEEDINGS BELOW	2
B. FACTS	3
1. Trial Counsel's Admission	3
2. Appellate counsel's Attempts on Direct Appeal to Demonstrate Ineffective Assistance of Trial Counsel	3
REASONS WHY QUESTIONS PRESENTED JUSTIFY ISSUANCE OF THE WRIT	5
A. QUESTION 1	5
B. QUESTION 2	9
CONCLUSION.	12

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES CITED</u>	
<u>Crane v. Kentucky</u> , 476 U.S. 683 (1986)	8
<u>Hurst v. Cook</u> , 777 P.2d 1029 (Utah 1989)	11
<u>Jensen v. DeLand</u> , 795 P.2d 619 (Utah 1989)	10, 11
<u>State v. Crestani</u> , 771 P.2d 1085 (Utah App. 1989) . . .	5, 7
<u>State v. Harding</u> , 635 P.2d 33 (Utah 1981)	8
<u>State v. Humphries</u> , 171 Utah Adv. Rep. 6 (Utah 1991) . .	9, 10
<u>State v. Oliver</u> , 170 Utah Adv. Rep. 44 (Utah App. 1991)	passim
<u>State v. Templin</u> , 805 P.2d 182 (Utah 1990)	5, 7, 10
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	passim
<u>United States v. Cronic</u> , 466 U.S. 648 (1984)	8

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 78-2-2 (Supp. 1991)	2
Utah Rule of Appellate Procedure 48(a)	1
Art. I, § 7, Constitution of Utah	2, 8
Art. I, § 12, Constitution of Utah	2, 8
Art. VIII, § 4, Utah Constitution	9
Amend. VI, United States Constitution	2, 8
Amend. XIV, United States Constitution	2, 8

IN THE SUPREME COURT OF THE STATE OF UTAH

GREGORY N. OLIVER,	:	
Petitioner,	:	Supreme Court
v.	:	Case No. _____
STATE OF UTAH,	:	Court of Appeals
Respondent.	:	Case No. 890625-CA
	:	Priority No. 13

QUESTIONS PRESENTED FOR REVIEW

1. Does a criminal defense attorney have a duty to prepare the defense and investigate evidence which is "cumulative" to, or corroborative of, the defendant's testimony?

2. How is a criminal defense attorney on direct appeal to present evidence, which was not originally presented in the trial court, to establish ineffective assistance of trial counsel?

OPINION AND ORDER OF THE COURT OF APPEALS

The court of appeals' opinion and order denying rehearing are in Appendix 1 to this petition.

JURISDICTION OF THE UTAH SUPREME COURT

The court of appeals filed State v. Oliver, 170 Utah Adv. Rep. 44 (Utah App. 1991), on September 26, 1991. Counsel for Mr. Oliver filed a Petition for Rehearing on October 9, 1991. The court of appeals denied Mr. Oliver's Petition for Rehearing on October 17, 1991. This Petition for Writ of Certiorari is timely under Utah Rule of Appellate Procedure 48(a).

Utah Code Ann. section 78-2-2(3)(a) and (5) (Supp. 1991) provide this Court's jurisdiction over this Petition for Writ of Certiorari to the Utah Court of Appeals.

CONTROLLING CONSTITUTIONAL PROVISIONS

The full text of the following provisions is contained in Appendix 2 to this petition.

Constitution of Utah, Article I Section 7;
Constitution of Utah, Article I Section 12;
United States Constitution, Amendment VI;
United States Constitution, Amendment XIV,
section 1.

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

A jury convicted Mr. Oliver of burglary, a second degree felony, in violation of Utah Code Ann. section 76-2-202, and theft, a third degree felony, in violation of Utah Code Ann. section 76-6-404, in the Third Judicial District Court, the Honorable Michael R. Murphy, Judge, presiding. Judge Murphy sentenced Mr. Oliver to prison for concurrent terms of zero to five and one to fifteen years, and ordered Mr. Oliver to pay restitution (R. 166-167).

The Utah Court of Appeals affirmed Mr. Oliver's burglary conviction and reversed Mr. Oliver's theft conviction, remanding the case to the trial court to reduce Mr. Oliver's third degree felony theft conviction to a class A misdemeanor theft conviction.

State v. Oliver, 170 Utah Adv. Rep. at 44.

The court of appeals denied Mr. Oliver's Petition for Rehearing.

B. FACTS

The court of appeals' "background" discussion is an adequate description of the facts underlying Mr. Oliver's convictions. State v. Oliver, 170 Utah Adv. Rep. 44, 44-45 (Utah App. 1991). For purposes of this petition, this Court should be aware of two additional events.

1. Trial Counsel's Admission

On the morning that trial was scheduled to begin, in support of Mr. Oliver's motion for a continuance, which motion the trial court denied, trial counsel stated in open court,

I didn't do any formal trial preparation that I normally do for a trial such as this, and consequently, I am not prepared to proceed to trial.

(T. 4). This admission supplements the court of appeals' discussion of how trial counsel expected to resolve this case through a guilty plea until the morning that trial began, which discussion appears at page 5 of the Oliver opinion.

2. Appellate Counsel's Attempts on Direct Appeal to Demonstrate Ineffective Assistance of Trial Counsel

On direct appeal, after private trial counsel had withdrawn from representing Mr. Oliver, appellate counsel, who was appointed

to represent Mr. Oliver, moved the court of appeals for an evidentiary hearing in the trial court. This motion was designed to establish record proof of, and dispose of, Mr. Oliver's contentions that the trial court's forcing trial counsel to proceed to trial without adequate preparation violated Mr. Oliver's rights to effective assistance of counsel and to due process of law. A copy of this motion is in Appendix 3 to this petition. The court of appeals denied the motion for an evidentiary hearing in the trial court. Mr. Oliver renewed his motion for an evidentiary hearing in his reply brief.

The court of appeals assessed Mr. Oliver's due process and ineffective assistance claims on the merits by considering the evidence that was discussed in Mr. Oliver's motion for an evidentiary hearing,¹ despite the fact that much of that evidence has never been developed properly or supplemented to the record in any traditional manner. In considering this evidence, the court of appeals did not mention Mr. Oliver's motion for an evidentiary hearing, and gave no indication as to how defense counsel on direct

1. The court of appeals summarized three areas of evidence that Mr. Oliver would have addressed in the requested evidentiary hearing:

[evidence that would] (1) support Oliver's testimony regarding his prior conviction based on misidentification; (2) expose weaknesses in the eyewitness identification testimony; and (3) support Mr. Oliver's assertions concerning possible police misconduct involved in the photo show up.

Id. at 45 and 46. Mr. Oliver relied on these same three areas of evidence to establish the denial of his rights to due process of law and to effective assistance of counsel. See Appendix 2 to this petition.

appeal is to present evidence of trial counsel's ineffectiveness and/or the due process violation.

REASONS WHY QUESTIONS PRESENTED JUSTIFY ISSUANCE OF THE WRIT

A. QUESTION 1

The first question presented for this Court's review is,

Does a criminal defense attorney have a duty to prepare the defense and investigate evidence which is "cumulative" to, or corroborative of, the defendant's testimony?

This Court should grant a writ of certiorari on this question because the Oliver opinion answers this question in the negative, and thus conflicts with polestar opinions of this Court, the United States Supreme Court, and of a different panel of the Utah Court of Appeals. See State v. Templin, 805 P.2d 182, 188 (Utah 1990); Strickland v. Washington, 466 U.S. 668, 691 (1984); State v. Crestani, 771 P.2d 1085, 1092 (Utah App. 1989).

The Oliver opinion correctly notes the two-pronged showing a criminal defendant must make to establish a claim of ineffective assistance of counsel: "(1) that his or her counsel's performance was deficient; and (2) that counsel's performance prejudiced the defendant." Oliver at 46, citing Strickland v. Washington, 466 U.S. 668, 687 (1984).

The court of appeals held that Mr. Oliver did not establish the deficient performance prong of the Strickland test. The court of appeals' rationale was that Mr. Oliver had failed to show deficient performance because the evidence identified by Mr. Oliver

on appeal as evidence omitted by trial counsel was "cumulative" to Mr. Oliver's testimony, to trial counsel's cross-examination of the State's witnesses, and to argument presented by trial counsel. The court of appeals' resolution of the ineffective assistance claim is as follows:

Although Oliver points to three specific areas in which he claims his counsel should have been more prepared, the record, as discussed regarding Oliver's due process claims,² establishes that his attorney presented evidence and argument to the jury in all of these areas. Any additional evidence would have been cumulative. Oliver has failed to demonstrate how his counsel's performance was deficient and therefore we need not address whether Oliver was prejudiced by such performance.

Id. at 47.

The Oliver analysis conflicts with Strickland, which provides that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. 668, at 691. While it may be that a defense attorney's failure to investigate may be harmless

2. The court's analysis of the due process issue, which overlaps the ineffective assistance of counsel analysis, is as follows:

Defense counsel questioned Oliver about his previous conviction based on eyewitness misidentification, and again brought the prior misidentification to the jury's attention during closing argument. He cross-examined each eyewitness who testified and addressed the weaknesses of each person's testimony at length in his closing argument. Defense counsel also cross-examined Deputy Matthews about his investigation and the photo show up he conducted with at least one of the eyewitnesses.

Id. at 46.

under the second prong of Strickland, a defense attorney's failure to investigate adequately is always deficient performance. State v. Templin, 805 P.2d 182, 188 (Utah 1990).

The Oliver court's reasoning that a defense attorney has no duty to present evidence that is "cumulative" to the defendant's testimony conflicts with this Court's decision in State v. Templin, 805 P.2d 182 (Utah 1990). In Templin, this Court recognized that under the first prong of Strickland, defense attorneys must "adequately investigate ... the availability of prospective defense witnesses." Id. at 188. Part of the reason that this Court reversed Mr. Templin's conviction was that the trial attorney had failed to investigate and present witnesses to bolster Mr. Templin's testimony. Id. at 188-189.

The Oliver court's reliance on trial counsel's performance at trial, in spite of trial counsel's admission that he was not prepared to proceed to trial, conflicts with State v. Crestani, 771 P.2d 1085 (Utah App. 1989), which was written by a different panel of the court of appeals. In Crestani, the panel rejected the trial court's assertion that a defense attorney's inadequate preparation is mollified if the attorney's trial performance is superficially adequate. The panel stated,

In its memorandum decision, the trial court stated, that "[t]here is no question that preparation for a trial is important but the final test is counsel's conduct in the courtroom." We think the court's emphasis is misplaced. Certainly, there can be no appropriate performance in the courtroom without adequate preparation, and without such preparation, representation is nothing but a sham and a pretense.

Id. at 1092.

Aside from the fact that the Oliver opinion is inconsistent with well-established authority, the Oliver opinion undercuts the importance of trial preparation by criminal defense attorneys, and thereby impacts adversely on some of the most fundamental rights in our criminal justice system.³ The criminal defendants' rights to prepared defense counsel are perhaps the most important rights, because criminal defendants must rely on counsel to assert all other rights, and to present all defenses.⁴

Because of the importance of the rights obfuscated by the Oliver decision, this Court should grant the writ on Question 1, and reiterate to the court of appeals, the lower courts, and criminal defense attorneys the precept that a criminal defense attorney has a duty to prepare the defense and investigate evidence to corroborate the defendant's testimony.

3. Article I Section 12 of the Utah Constitution, included in Appendix 1 to this petition, contains many specific rights that together recognize the importance of prepared trial counsel in criminal cases. Article I Section 7 of the Utah Constitution also protects the right to present a complete defense. State v. Harding, 635 P.2d 33 (Utah 1981).

The right to effective assistance of counsel is protected by the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668, 687 (1984). The right to a prepared defense is protected not only by the Sixth Amendment, but also by the due process clause of the Fourteenth Amendment to the United States Constitution. See Crane v. Kentucky, 476 U.S. 683, 690 (1986).

4. See United States v. Cronin, 466 U.S. 648, 653-654 (1984).

B. QUESTION 2

The second question for this Court's review is,

How is a criminal defense attorney on direct appeal to present evidence, which was not originally presented in the trial court, to establish ineffective assistance of trial counsel?

This Court should grant a writ of certiorari on Question 2 because this Court is constitutionally empowered to create rules of procedure and evidence,⁵ and should exercise these powers in this case to inform appellate attorneys and the court of appeals how to proceed in similar cases.

In State v. Humphries, 171 Utah Adv. Rep. 6 (Utah 1991), this Court recognized that

generally a claim of ineffectiveness of trial counsel cannot be raised on appeal because the trial record is insufficient to allow the claim to be determined. ... [H]owever, ... ineffective assistance of trial counsel should be raised on appeal if the trial record is adequate to permit decision of the issue and defendant is represented by counsel other than trial counsel.

Id. at 7.

Unfortunately, however, it is not always clear whether the trial record is adequate to dispose of the claim.⁶ This creates a dilemma for the criminal defendant and appellate counsel. On one

5. Article VIII Section 4 of the Utah Constitution provides this Court's rulemaking powers.

6. In the instant case, for instance, given the trial court's forcing trial counsel to trial despite trial counsel's admission that he had done no formal preparation and was not prepared to go to trial, and given the omissions of trial counsel that appear in the record created in the trial court, it is arguable that the record is adequate to establish the claim of ineffective
(footnote continues)

hand, the defendant and appellate counsel are encouraged to raise the ineffective assistance claim on direct appeal if the record may be considered adequate, in order to preserve the issue,⁷ and because there is no guarantee that the defendant will be appointed counsel in subsequent proceedings. On the other hand, the defendant and appellate counsel may be wary of adjudicating the part of the claim

(footnote 6 continued)
assistance. See Appendix 2 to this petition, discussing record evidence that substantiates the claim; Strickland v. Washington, 466 U.S. 668, 691-696 (1984) (discussing varying degrees of prejudice that are presumed, or must be shown, when varying kinds of ineffective assistance of counsel are involved); State v. Templin, 805 P.2d 182, 186 n.20 (Utah 1990) (same). Other cases demonstrate that it is not always clear whether the record is adequate to dispose of ineffective assistance of counsel claims. See e.g. State v. Humphries, 171 Utah Adv. Rep. 6, 6-7 (Utah 1991) (while this Court found the record adequate to reverse Mr. Humphries' conviction, it was the opinion of the State that the record was not adequate, and that the issue of ineffective assistance of counsel should be addressed in a postconviction proceeding with an evidentiary hearing).

7. In Jensen v. DeLand, 795 P.2d 619 (Utah 1989), this Court allowed a plaintiff in postconviction relief proceedings an evidentiary hearing on his allegation of ineffective assistance of trial counsel. Id. at 621. The plaintiff's attorney on the direct appeal of the criminal conviction advised him that the record on appeal was insufficient to support the claim of ineffective assistance of counsel, and that the defendant should wait to develop the record in postconviction proceedings. Id. at 620-621. This Court did not indicate whether the attorney on direct appeal was correct in refusing to raise the issue on direct appeal. This Court remanded the case to the trial court for an evidentiary hearing, because the record was inadequate to address the claims of ineffectiveness. Id. at 621. This Court warned, however, that appellate attorneys should raise the issue on direct appeal when possible, stating,

By our decision today, we do not suggest or imply that a criminal defendant may strategically abstain from raising an ineffective-assistance-of-counsel claim which could be reviewed on direct appeal. We do not and will not sanction manipulation of that sort.

Id. at 621.

that is reflected in the traditional appellate record, wishing to present all aspects of the claim in one forum with a better cumulative chance at showing prejudice from all of trial counsel's deficiencies.⁸

In this case, appellate counsel for Mr. Oliver attempted to present all traditional record evidence that appears to demonstrate ineffective assistance of trial counsel. Counsel also attempted to identify and develop all known non-record evidence relevant to that claim, by moving for an evidentiary hearing.

In the absence of any governing procedure, the court of appeals silently lumped the record evidence with the allegations of non-record evidence contained in Mr. Oliver's motion for an evidentiary hearing. Because much of the evidence alleged in the motion for an evidentiary hearing has never been developed, Mr. Oliver has not had a fair opportunity to establish the claim of ineffective assistance of counsel. Should Mr. Oliver pursue a petition for postconviction relief, the court presiding over those proceedings will have the difficult, if not impossible, task of determining the finality to give to the court of appeals' decision.

In order to protect criminal defendants' due process rights to thorough and meaningful adjudication of an ineffective assistance of counsel claim, this Court should grant the writ on Question 2,


8. See Jensen v. DeLand, 795 P.2d 619, 621 (Utah 1989) (ineffective assistance of counsel is a due process violation which is reviewable in postconviction relief proceedings); Hurst v. Cook, 777 P.2d 1029, 1032-1036 (Utah 1989) (discussing application of res judicata and waiver doctrines in context of postconviction relief).

and establish procedural and/or evidentiary rules on how a criminal defense attorney on direct appeal is to present evidence, which was not originally presented in the trial court, to establish ineffective assistance of trial counsel.

CONCLUSION

Mr. Oliver requests that this Court grant a writ of certiorari on Questions 1 and 2 presented in this petition.

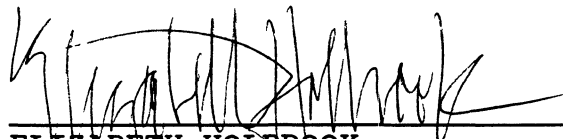
RESPECTFULLY SUBMITTED this 15 day of November, 1991.



ELIZABETH HOLBROOK
Attorney for Petitioner

CERTIFICATE OF DELIVERY

I, Elizabeth Holbrook, hereby certify that ten copies of the foregoing will be delivered to the Utah Supreme Court, 332 State Capitol, Salt Lake City, Utah 84114, and four copies will be delivered to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 15 day of November, 1991.



ELIZABETH HOLBROOK

DELIVERED by _____ this _____ day
of November, 1991.

APPENDIX 1

OLIVER OPINION AND ORDER DENYING REHEARING

to pay the filing fee.

The actions of Judge Hanson were justified. I don't believe the legislature ever intended that filing fees should be waived where a party has retained a private attorney and has paid legal fees to that attorney.

The overwhelming majority of people seeking divorce are struggling financially as they attempt to support two households on the same amount of money with which they previously supported one. Most could file similar affidavits. If only a portion of the 7,000 divorces filed each year in Salt Lake County successfully sought a waiver of filing fees, the cost to the taxpayers could be hundreds of thousands of dollars annually.

Unfortunately, Ms. Kelsey is caught in the middle.⁶ Although I am sympathetic to her plight, I cannot condone the practice of court costs "taking a back seat" to attorney fees. Here, the principle involved is crucial. Therefore, this court should stand by the decision of Judge Hanson and deny the petition for a writ of mandamus.

Leonard H. Russon, Judge

1. Legal Aid Society of Salt Lake provides indigent representation to the Salt Lake County community. Other similar organizations provide legal services to indigents in other cities and counties in the State.

2. Ms. Kelsey testified that she never actually dealt with Mr. Barnard, but with a member of his staff, Valerie Gylling. The Utah State Bar Directory does not list Valerie Gylling. Utah Code Ann. §78-51-25 (1987) prohibits any person who is not a member of the bar and licensed to practice law from practicing law or holding himself or herself out as an attorney.

3. These means are provided by Legal Aid Society which, in conjunction with the Salt Lake County Bar pro bono program, provides local attorneys, who donate their time free of charge, to serve indigent clients.

4. The complaint did not even seek an award of attorney fees that would enable Ms. Kelsey to recover from the defendant the \$100 that she paid to Mr. Barnard.

5. Moreover, if Ms. Kelsey's immediate protection had been at issue, the proper action would be to advise her to obtain an immediate protective order from the district court, pursuant to the Cohabitant Abuse Act, Utah Code Ann. §§30-6-1 to 30-6-11 (Supp. 1991), which does not require the assistance of legal counsel nor the payment of fees. Utah Code Ann. §30-6-4 (Supp. 1991).

6. If, on the other hand, Mr. Barnard were to return the \$100 to Ms. Kelsey, there would be nothing to prevent Judge Hanson from waiving the filing fee.

Cite as
170 Utah Adv. Rep. 44

IN THE UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Appellee,
v.
Greg N. OLIVER,
Defendant and Appellant.

No. 890625-CA
FILED: September 26, 1991

Third District, Salt Lake County
Honorable Michael R. Murphy

ATTORNEYS:

Elizabeth Holbrook, Salt Lake City, for
Appellant

R. Paul Van Dam and Marian Decker, Salt
Lake City, for Appellee

Before Judges Bench, Greenwood, and
Jackson.

OPINION

GREENWOOD, Judge:

Appellant Greg N. Oliver appeals his conviction of burglary, a second degree felony, in violation of Utah Code Ann. §76-6-202 (1989) and theft, a third degree felony, in violation of Utah Code Ann. §76-6-404 (1989) on the bases that the trial court erred in denying his motion for a continuance and that admissible evidence supports only a misdemeanor theft conviction. We affirm in part, and reverse and remand in part.

BACKGROUND

At 2:30 p.m. on January 7, 1989, John Spielmans returned home from a basketball game with his son. He noticed that the side door to his garage, which was usually locked, was open. Spielmans went into the garage to investigate. He then saw a man dressed in a dark cap and dark jacket jump over a chain link fence ten to twelve feet away and run north. Spielmans began chasing the man, but lost sight of him. Spielmans returned home and noticed that the front door to his house was dented and that it appeared someone had been inside the house. He called 911 and waited outside for the police to arrive. While he was waiting, one of Spielmans's neighbors called his attention to a man who was leaning against a wooden fence across the street. Noting the similarity of that person's clothing to that of the man he had observed running away, Spielmans concluded it was the same person. Spielmans walked toward the man,

over his left shoulder as Spielmans approached him and said, "It wasn't me, man" before driving off. Spielmans again called 911 and described the car, including the license plate number and the direction of travel.

When Deputy Matthews arrived to investigate, Spielmans told him that a watch, a gold ring, four one-dollar bills and four or five gold Canadian coins were missing from his house. Deputy Matthews also spoke with Spielmans's neighbor who saw the man run across his front yard, climb into the parked car and speed away when Spielmans approached him.

Deputy Matthews ran a computer check on the license plate of the car and obtained the vehicle owner's name and address. He then went to the vicinity of that address to investigate further. He saw a man fitting the description that Spielmans had given, exit the vehicle owner's residence.

Based on his own observations, the license plate number of the car and the descriptions given by both Spielmans and his neighbor, Deputy Matthews obtained a picture of defendant, Greg N. Oliver, from the police records division. The next day, he returned to Spielmans's home with the photo of Oliver and showed it to Spielmans, advising him that he had reason to believe that Oliver was the same person Spielmans described. Spielmans identified Oliver as the man he had seen.

Three days after the incident, Deputy Matthews assembled a photo spread, including the picture of Oliver and pictures of five other men. He showed the photo spread to Spielmans, who again identified Oliver as the suspect. Deputy Matthews also showed the photo spread to three of Spielmans's neighbors, two of whom identified Oliver as the person they had observed the day of the incident.

Oliver was arrested and charged with one count of burglary, a second degree felony and one count of theft, a third degree felony.

The trial judge granted two continuances prior to the case actually being tried. At the final pretrial conference, on August 28, 1989, Oliver's attorney told the trial judge that he was ready to proceed to trial and agreed to a trial date of September 5, 1989.

After the pretrial conference, Oliver entered into plea negotiations with the State. The trial judge's clerk told both the State and Oliver's attorney, however, to prepare as if they were going to trial as scheduled. The night before trial, Oliver agreed to the State's plea proposal and decided that he would enter a guilty plea in the morning rather than go to trial. The next morning, however, Oliver changed his mind and decided that he wanted to go to trial. Oliver's attorney moved for a one day continuance, stating that he needed more time

jury on one count of second degree burglary and one count of third degree theft.

ISSUES

On appeal Oliver argues that: (1) the trial court's denial of his motion for a continuance denied him due process of law; (2) the trial court's denial of his motion for a continuance denied him effective assistance of counsel; and (3) admissible evidence supports only a class A misdemeanor theft conviction.

ANALYSIS

Due Process

Oliver argues that the trial court's denial of his motion for a one day continuance violated his right to due process because it forced his counsel to proceed to trial without being adequately prepared. Oliver asserts that his attorney did not conduct any formal trial preparation after Oliver decided to plead guilty. Consequently, when he changed his mind the next morning and decided he wanted to go to trial, Oliver's counsel was not sufficiently prepared. Oliver claims that had his attorney had one more day to prepare for trial, he would have been better prepared to: (1) support Oliver's testimony regarding his prior conviction based on misidentification; (2) expose weaknesses in the eyewitness identification testimony; and (3) support Oliver's assertions concerning possible police misconduct involved in the photo show up.

The grant or denial of a continuance is within the discretion of the trial court. *State v. Humpherys*, 707 P.2d 109, 109 (Utah 1985)(per curiam); *State v. Creviston*, 646 P.2d 750, 752 (Utah 1982); *State v. Moosman*, 542 P.2d 1093, 1094 (Utah 1975). This court will not reverse the trial court's decision absent a clear abuse of discretion. *Id.*

When moving for a continuance, a party must show that denial of the motion will prevent the party from obtaining material and admissible evidence, that any additional witnesses it seeks can be produced within a reasonable time, and that it has exercised due diligence in preparing for the case before requesting the continuance. *State v. Linden*, 761 P.2d 1386, 1387 (Utah 1988). Absent such showing, the trial court does not abuse its discretion if it denies the motion. *Id.* We are also persuaded by Washington precedent, that on appeal, the moving party must show that it was materially prejudiced by the court's denial of the continuance or that the trial result would have been different had the continuance been granted. *State v. Barker*, 667 P.2d 108, 114 (Wash. App. 1983).

Oliver has failed to make the necessary showing required by these cases. Oliver's counsel did not allege that there were any witnesses or evidence that he needed to obtain

specifically what he needed to do, or how or why Oliver would be prejudiced if he was denied the extra day. Defense counsel simply requested time to conduct more formal trial preparation.

Oliver's counsel also failed to demonstrate that he exercised due diligence before requesting the continuance. Oliver's attorney represented Oliver at an arrest warrant hearing, the pretrial conference and throughout plea negotiations with the State. At the pretrial conference, eight days before trial, defense counsel told the trial judge that he was prepared to proceed to trial. After the pretrial, the trial judge instructed his court clerk to notify both the State and defense counsel that, although Oliver and the State were engaged in plea negotiations, they should prepare as if they were going to trial anyway. The trial judge stated that Oliver was having a hard time deciding whether or not he would accept the State's plea bargain and that no one would know until the day of trial whether or not he would actually enter a plea. In denying the motion, the trial judge stated:

All counsel, prosecution and defense counsel were told that given circumstances, as I understand them, that Mr. Oliver could not make up his mind, that everyone needed to proceed, as if we were going to trial, and the responses we got from the respective offices of prosecution and defense is that they would act accordingly.

On appeal, Oliver has failed to show that he was materially prejudiced by denial of this motion. The trial lasted two days, instead of only one, as scheduled. Therefore, Oliver's counsel had the evening of the first day and overnight to further prepare before the State's case had been fully presented. In essence, because the trial went two days, Oliver's counsel was afforded the time to prepare that he requested and which he would have had if the continuance had been granted. All of the State's witnesses were subject to recall by defense counsel and the trial judge found that defense counsel took full advantage of the opportunity to cross-examine each of them. Also, because the motion was denied and the parties had to proceed to trial, one of the State's witnesses was unable to appear. At the end of the State's case, the trial judge made the following statement regarding his denial of Oliver's motion for a continuance:

Each of the witnesses who testified yesterday it seemed to me, that there was full availability of cross-examination by [defense counsel] and he took advantage of that ... I want to make sure the record is

been made available to the defendant, to the witnesses ... and in fact, since the trial did not conclude in the first day, that there has been extra time to prepare, extra time to do whatever is necessary

Furthermore, it appears to me that there may have been some benefit in the sense that this witness you mentioned, Mrs. Lehman, is not available.

Further, Oliver has not shown that the trial result would have been different had the continuance been granted. The record shows that Oliver's counsel explored all of the areas Oliver now complains of. Defense counsel questioned Oliver about his previous conviction based on eye witness misidentification, and again brought the prior misidentification to the jury's attention during closing argument. He cross-examined each eyewitness who testified and addressed the weaknesses of each person's testimony at length in his closing argument. Defense counsel also cross-examined Deputy Matthews about his investigation and the photo show up he conducted with at least one of the eyewitnesses.

Oliver did not tell his attorney that he had decided to plead guilty until the night before trial. Any formal trial preparation should have been done before that time. Oliver does not show that he was materially prejudiced by the court's denial of this motion or that the trial would have been different had the continuance been granted. Therefore, we find that the trial court did not abuse its discretion in denying the motion for a continuance and that such denial did not deprive Oliver of due process.

Ineffective Assistance of Counsel

Oliver claims that the trial court's denial of his motion for a one day continuance denied him effective assistance of counsel. As in his due process argument, Oliver contends that his counsel was not sufficiently prepared to: (1) support Oliver's testimony regarding his prior conviction based on misidentification; (2) expose weaknesses in the eyewitness identification testimony; or (3) support Oliver's assertions concerning possible police misconduct involved in the photo show up. Oliver argues that his counsel's failure to more fully explore these issues constitutes ineffective assistance of counsel.

In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), the United States Supreme Court established a two-part test for determining whether a criminal defendant's sixth amendment right to effective assistance of counsel has been denied. The defendant must show: (1) that his or her counsel's performance was deficient; and (2) that counsel's performance prejudiced the

order to prevail. *Id.*

An attorney's performance is deficient when it falls below the objective standard of reasonableness. *Id.* at 688, 104 S. Ct. at 2064-65; *State v. Templin*, 805 P.2d 182, 186 (Utah 1990); *State v. Carter*, 776 P.2d 886, 893 (Utah 1989). The defendant must point to specific instances in the record which, under the circumstances, show that counsel's performance was deficient. *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066; *Templin*, 805 P.2d at 186; *State v. Hoyt*, 806 P.2d 204, 212 (Utah App. 1991).

In assessing trial counsel's performance, an appellate court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" *Templin*, 805 P.2d at 186 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065).

Although Oliver points to three specific areas in which he claims his counsel should have been more prepared, the record, as discussed regarding Oliver's due process claims, establishes that his attorney presented evidence and argument to the jury in all of these areas. Any additional evidence would have been cumulative. Oliver has failed to demonstrate how his counsel's performance was deficient and therefore we need not address whether Oliver was prejudiced by such performance. We conclude that Oliver was not denied effective assistance of counsel.

Admissibility of Evidence

Oliver argues that the State failed to introduce admissible evidence establishing that the value of the stolen property totalled over \$250 as required for a third degree felony theft conviction under Utah Code Ann. §76-6-412(1)(b) (1989).¹

Spielmanns reported that a watch, a ring, four one-dollar bills and four or five Canadian coins were stolen from his home. At trial, Spielmanns testified that the watch was worth one hundred twenty-five dollars, the four dollar bills were worth four dollars and that the total value of the coins was approximately three dollars and seventy-five cents. When questioned about the ring's value, the following exchange occurred:

Q. [THE PROSECUTOR]: And at the time that the ring was taken, did you have an opinion as to the value of that ring?

A. [SPIELMANS]: I did have, and whatever that opinion was is reflected in the police report. I don't recall.

Q: You do not recall?

A: No.

Q: Is there anything that would help refresh your recollection?

report, I believe.

....

Q: I'm asking you if looking at the police report refreshes your recollection as to the ring.

A: As to the ring?

Q: As to the ring. Thank you.

A: I'm sure it reflects what I said. I just don't recall.

....

Q: ... Having looked at this report, this police report, does that refresh your recollection as to how you valued the ring at that time?

A: Yes.

Q: Okay. What was the value you placed on that ring at that time?

A: I really can't recall. It states \$200 on there. That's what I said. If it says \$200 on there, that's what I said.

The police report was not introduced into evidence.

Oliver claims that Spielmanns's testimony, based on the police report, that the ring was worth \$200 is inadmissible because Spielmanns lacked personal knowledge of the value and his memory was not refreshed by the police report. Therefore, Oliver contends that the State proved a total value of less than \$250 for the stolen property, which constitutes a class A misdemeanor under §76-6-412(1)(c)², rather than a felony.

The State argues that the evidence presented is sufficient to sustain the felony conviction. Before we can assess whether the evidence is sufficient to support a felony theft conviction, we must first determine whether the evidence that the ring was worth \$200 was properly admitted, as that evidence is necessary for a felony conviction.

In reviewing a trial court's decision to admit evidence, we will not reverse that ruling unless a substantial right of the party has been affected. *State v. Morgan*, 162 Utah Adv. Rep. 61, 61 (Utah App. 1991) (citing *Salt Lake City, v. Holtman*, 806 P.2d 235, 237 (Utah App. 1991)); Utah R. Evid. 103(a).

Under Utah Rule of Evidence 602, a witness may only testify about matters of which the witness has personal knowledge. A witness may use a writing to refresh his or her memory for the purpose of testifying. Utah R. Evid. 612(1).

It is evident from the trial transcript that Spielmanns had no independent knowledge or memory of the value of the ring, nor was his memory refreshed after looking at the police report. He had no present personal knowledge of the ring's value and, therefore, his testimony concerning the value is inadmissible. We find that admissible evidence supports only a

more, we reverse and remand on the felony theft conviction issue.

CONCLUSION

For the reasons stated above, we affirm the trial court's denial of the motion for a continuance, and reverse and remand on the felony theft conviction for proceedings consistent with this opinion.

Pamela T. Greenwood, Judge

WE CONCUR:

Russell W. Bench, Judge

Norman H. Jackson, Judge

1. Utah Code Ann. §76-6-412(1) (1989) provides:

(1) Theft of property and services as provided in this chapter shall be punishable:

...

(b) as a felony of the third degree if the: (i) value of the property or services is more than \$250 but not more than \$1000;

2. Utah Code Ann. §76-6-412(1)(c) (1989) provides:

(1) Theft of property and services as provided in this chapter shall be punishable:

...

(c) as a class A misdemeanor if the value of the property stolen was more than \$100 but does not exceed \$250;

Cite as
170 Utah Adv. Rep. 48

IN THE UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Appellee,
v.
Mark Raymond DASTRUP,
Defendant and Appellant.

No. 900144-CA
FILED: September 27, 1991

Sixth District, Sevier County
Honorable Don V. Tibbs

ATTORNEYS:

Shelden R. Carter, Provo, for Appellant
R. Paul Van Dam and Judith S.H. Atherton,
Salt Lake City, for Appellee
Before Judges Bench, Jackson, and Russon.

OPINION

BENCH, Presiding Judge:

Defendant entered a guilty plea to ten counts of forgery, all second-degree felonies, in violation of Utah Code Ann. §76-6-501 (1990), and eight counts of theft, one third-degree felony and seven second-degree felonies, in violation of Utah Code Ann. §76-6-404 (1990). Defendant subsequently attempted to set aside his guilty plea and resulting conviction by contending that the trial court did not strictly comply with Rule 11(5) of the Utah Rules of Criminal Procedure as required by *State v. Gibbons*, 740 P.2d 1309 (Utah 1987). His motion was denied. Defendant now appeals the denial of his motion to set aside his guilty plea. We reverse and remand.

When defendant originally entered his guilty plea, the trial court conducted a colloquy with defendant on the record regarding his desire to enter his plea. During that colloquy, the court addressed each of defendant's constitutional rights enumerated in Rule 11(5). The trial court did not, however, ask the defendant on the record if he knew that by pleading guilty he was waiving those rights.

Defendant asserts that the trial court's failure to ask him specifically if he knew that he was waiving his rights rendered his plea unacceptable under Rule 11(5).¹ Rule 11(5) provides in pertinent part:

The court ... may not accept the plea until the court has found:

....

(c) *the defendant knows he has rights against compulsory self-incrimination, to a jury trial, and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;*

Utah R. Crim. P. 11(5) (emphases added). Defendant makes this claim even though in his affidavit he affirmatively acknowledged that he knew he was waiving each of his rights enumerated in Rule 11(5)(c).

Recently, this court held in *State v. Smith*, 812 P.2d 470, 477 (Utah App.), *petition for cert. filed*, 167 Utah Adv. Rep. 25 (Utah 1991), and *State v. Trujillo-Martinez*, 162 Utah Adv. Rep. 64 (Utah App. 1991), that a trial court could consider both the colloquy and the affidavit in determining whether the defendant's plea was being entered in strict compliance with Rule 11(5).² Subsequently, however, the Utah Supreme Court's decision in *State v. Hoff*, 164 Utah Adv. Rep. 21 (Utah 1991) seems to have foreclosed that interpretation. In *Hoff*, the supreme court stated that *Gibbons* requires that the trial

10/28/91

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

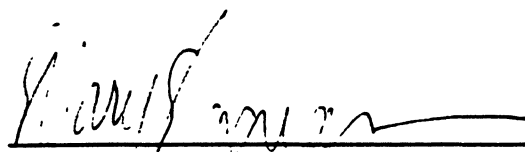
State of Utah,)	ORDER DENYING
)	PETITION FOR REHEARING
Plaintiff and Appellee,)	
)	
v.)	Case No. 890625-CA
)	
Greg N. Oliver,)	
)	
Defendant and Appellant.)	

THIS MATTER having come before the Court upon appellant's
Petition for Rehearing, filed October 9, 1991,

IT IS HEREBY ORDERED that the appellant's Petition for
Rehearing is denied.

Dated this 17th day of October, 1991.

FOR THE COURT:



Mary T. Noonan
Clerk of the Court

APPENDIX 2

CONTROLLING CONSTITUTIONAL PROVISIONS

TEXT OF CONTROLLING CONSTITUTIONAL PROVISIONS

Article I, Section 7 of the Constitution of Utah provides:

Sec. 7. [Due process of law.]

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

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

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Amendment VI to the Constitution of the United States provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Amendment XIV to the Constitution of the United States provides:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX 3

MOTION FOR EVIDENTIARY HEARING

FILED

JAN 22 1991

ELIZABETH HOLBROOK, #5292
Attorney for Defendant/Appellant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	MOTION FOR SUSPENSION OF
	:	RULES, REMAND, AND STAY OF
Plaintiff/Appellee,	:	APPELLATE PROCEEDINGS
v.	:	
GREG N. OLIVER,	:	Case No. 890625-CA
	:	Priority No. 2
Defendant/Appellant.	:	

A. PROCEDURAL AND FACTUAL CONTEXT

Mr. Oliver was tried and convicted by a jury of Burglary and Theft on September 5 and 6 of 1989, sentenced to the Utah State Prison for concurrent terms of zero to five and one to fifteen years, and ordered to pay restitution (R. 166-167).¹

On the first day of trial, Mr. Oliver's trial counsel moved for a continuance, explaining that trial counsel had expected to dispose of the case through a plea and had not done any preparation for trial of the case, "Based on that, I didn't do any formal trial preparation that I normally do for a trial such as this, and

1. The district court pleadings file will be referred to as "R.". The transcript of the hearing on the motion to suppress will be referred to as "M.H.". The transcript of the trial (contained in two volumes, numbered consecutively) will be referred to as "T.".

consequently, I am not prepared to proceed to trial." (T. 4). The trial court apologetically denied the motion for a continuance (T. 9).

Shortly after the State's case had been presented, the trial court made a record concerning the court's denial of the motion for a continuance, explicitly finding that any error in the denial was harmless and not prejudicial to Mr. Oliver (T. 146-147).

Mr. Oliver seeks a remand to the trial court to establish that the denial of the motion for continuance resulted in the denial of his rights to due process of law and effective assistance of counsel.

- - -

This case involves a burglary and theft that occurred on January 7, 1989 (R. 6-7). The prosecution of Mr. Oliver was primarily based on the eyewitness identification of four witnesses who saw a person in the vicinity of the burglary and theft.

- - -

The essence of Mr. Oliver's defense was that the State's eyewitnesses had misidentified him as the person in the vicinity of the burglary and theft--he testified that he had previously been convicted of aggravated robbery on the basis of eyewitness identification and that he was later acquitted of that conviction when his innocence was established (T. 149). His testimony on this point was as follows:

Okay. Mr. Oliver, have you ever been convicted
of a felony?
Yes, I was.
When was that?

First, it was back in '83. I was convicted of aggravated robbery, and the jury trial was convicted because I have this blond hair. A year later they caught the guys that did it, and I was acquitted.

Okay.

They took me from prison and brought me back here to jail, and I--in '82 I had my right hand severed off and I filled a prescription and--
Forged a prescription?

I altered it. I filled it. Somebody else forged it. I filled it and the doctor give me Motrin.
Were you convicted for that?

Yes. The put that--charged me in that and convicted me of that and sentenced me back to prison.

Then you were on parole?

Yes. They let me out on parole after that. And I expired in November of '88.

(T. 149-150) (emphasis added).²

As is discernable from examination of the emphasized portion of Mr. Oliver's testimony, supra, there were problems with Mr. Oliver's credibility. In addition to his admission that he had been involved in and convicted of forgery, the jurors were also faced with Officer Matthews' testimony that Officer Matthews had a hunch that the offender in this case was Mr. Oliver (T. 116). Officer Matthews also indicated that when Mr. Spielmans reported the crime, Mr. Spielmans seemed to think that he knew the suspect from his work with Adult Probation and Parole (T. 124).

2. In closing argument, trial counsel argued, in part, as follows:

Ladies and gentlemen, Mr. Oliver, as he testified was sent to prison once on mistaken identity. And was released when they caught the right person. I would ask you not let that happen again, to review this evidence and bring back a verdict of not guilty on both charges.

(T. 201).

Trial counsel should have procured evidence to support Mr. Oliver's testimony. A review of the district court pleadings file in the 1982 case referred to by Mr. Oliver establishes that Mr. Oliver was in fact convicted and that the conviction was later set aside when the actual perpetrators confessed. Trial counsel for Mr. Oliver in the 1982 case indicates that the basis of that conviction was misidentification of Mr. Oliver. See Appendix 1, containing the affidavit of counsel; Appendix 2, containing certified documents from the district court pleadings file in the 1982 misidentification, aggravated robbery case; State v. Templin, 149 Utah Adv. Rep. 14 (Utah 1990) (ineffective assistance of counsel established when trial counsel failed to call witness to corroborate defendant's testimony).

The trial court should have granted the motion for the continuance so that trial counsel could prepare to represent Mr. Oliver.

- - -

Salt Lake Sheriff's Deputy, Kevin Matthews, testified that in investigating this case on January 7, he had an idea that the suspect was Mr. Oliver, and so he obtained a photograph of Mr. Oliver through the records division of the Department of Corrections and took it to Mr. Spielmans for identification (T. 116). He indicated that when he showed Mr. Oliver's photograph to Mr. Spielmans, he told Mr. Spielmans that he had "reason to believe this may be the person that entered his residence earlier that day" (T. 117). When Officer Matthews asked Mr. Spielmans if

Mr. Spielmans could identify the person in the photo, Mr. Spielmans pointed at the photo and said, "That's the guy." (T. 117).³

When asked if he showed the single photo to any of the other witnesses, he did not recall having done so (T. 116). His police report indicated, "I contacted the witnesses at their residences, . . . and they were able to pick Mr. Oliver out a[s] the suspect in the burglary from a picture." (T. 122-123) (emphasis added). Officer Matthews tried to explain the report by noting that he may have shown the photo to Mr. Spielmans' son, who did not see a suspect at the scene of the crime (T. 122). When asked repeatedly about the discrepancy between the report and his testimony, Officer Matthews would not commit himself, answering with phrases like "I don't believe" and "all I remember" (T. 123).

As is demonstrated by review of the record in this case, trial counsel did not ask two of the four eyewitnesses if Officer Matthews had shown them the one photo, mug shot show up of Mr. Oliver prior to their exposure to the photo array, the line-up, or Mr. Oliver's in-court appearance (T. 83-95; 95-102).

Trial counsel should have addressed the possibility that three of the four eyewitnesses were improperly tainted by the one

3. Compare Officer Matthews' testimony at the motion to suppress, "And Mr. Spielmans observed the picture and stated that he felt positive that that was the suspect." (M.H. 267, 271-272). Compare Mr. Spielmans' testimony that he indicated that the photo appeared to be the person (T. 52).

photo, mug shot show up.⁴

The trial court should have granted the motion for the continuance so that trial counsel could prepare to represent Mr. Oliver.

- - -

As was discussed above, at least one of the eyewitnesses was shown a one photo, mug shot show up the day after the crime, and was subsequently shown a photo array and line-up, and identified Mr. Oliver as the perpetrator of the crime in this case (T. 52, 54, 58, 61, 116-117, 127-128; R. 3, M.H. 233-234).

The same mug shot used in that show up was placed in the photo array that was shown to all of the State's witnesses (M.H. 228-230, in Appendix 3).

At the pretrial motion to suppress eyewitness identification, Mr. Oliver was represented by Lynn R. Brown of the Salt Lake Legal Defender Association (M.H. 219). However, at trial, Mr. Oliver was represented by new, private counsel. The prosecutor and trial court apparently forgot that the mug shot (State's Exhibit 1 from the motion to suppress) was part of the photo array, and thought that the one photo from the show up had been lost (T. 52-53, 59-60, in Appendix 4).

4. The eyewitness who indicated that she was not shown the one photo, mug shot show up identified Mr. Oliver in the photo array and did not identify anyone at the line up or at trial (T. 78-80). questioned by the police or given an opportunity to tell his side of the story (T. 151, 163).

Trial counsel should have reviewed the motion to suppress and addressed the prejudice arising from this repeated suggestion of Mr. Oliver's mug shot in the show up and then in the photo array.

The trial court should have granted the motion for the continuance so that trial counsel could prepare to represent Mr. Oliver.

- - -

The essence of Mr. Oliver's view of the case was that he was innocent and that his conviction was based on police misbehavior and failure to investigate honestly. He indicated that he was never questioned by the police or given an opportunity to tell his side of the story (T. 151, 163).

Although Mr. Oliver indicated that his parole had expired in November of 1988 (T. 150), he was arrested by three parole officers (T. 156-157).

He disputed Officer Matthews' testimony that Mr. Oliver had evaded Officer Matthews during the investigation of the crime (T.108-112), indicating that Mr. Oliver did not hear a siren, and asking that Officer Matthews be recalled and asked if Officer Matthews had turned his red light on (T. 155-156, 165). While Officer Matthews testified that he saw Mr. Oliver exiting Karen Weed's home during the alleged evasion, Mr. Oliver indicated that a photograph of the scene would have shown that from where Officer Matthews was standing, his view of Karen Weed's home was blocked by a fence (T.160-161).

Trial counsel should have sought the evidence necessary to corroborate Mr. Oliver's testimony concerning the police misconduct in this case, which may have borne directly on Officer Matthews' credibility and the identification procedures used in this case. See Templin, supra.

The trial court should have granted the motion for the continuance so that trial counsel could prepare to represent Mr. Oliver.

B. LEGAL BASIS FOR ALLEGATIONS OF DENIAL OF DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL

Article I section 7 of the Utah Constitution guarantees all people the right to due process of law: "No person shall be deprived of life, liberty or property, without due process of law." Article I section 12 of the Utah Constitution provides more specific protections to those accused of crime:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

The sixth and fourteenth amendments to the United States Constitution provide the accused with rights to due process and assistance of counsel.⁵

These constitutional provisions and the counterparts have been interpreted and applied in contexts similar to the instant one, and support Mr. Oliver's assertions that the trial court's denial of the motion for continuance, trial counsel's lack of preparation in this case, and improper identification procedures and other police misconduct denied him due process of law and effective assistance of counsel and void his convictions. E.g., Nelson v. Johnson, 669 P.2d 1207 (Utah 1983) (component of due process is provision of adequate time for preparation of defense); State v. Templin, 149 Utah Adv. Rep. 14 (Utah 1990) (effective assistance of counsel requires

5. The sixth amendment provides,

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Section 1 of the fourteenth amendment provides,

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

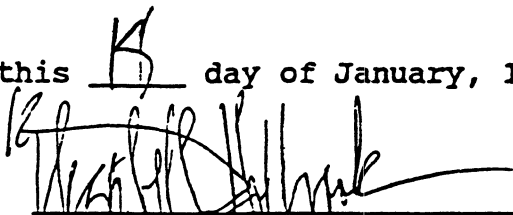
investigation and preparation of defense); State v. Thamer, 777 P.2d 432 (Utah 1989) (due process requires reliable eyewitness identification).⁶

CONCLUSION

Mr. Oliver seeks a remand to the trial court to determine whether trial counsel's performance was objectively deficient and prejudicial, Strickland v. Washington, 466 U.S. 668, 687 (1984), and to determine whether the trial court's failure to grant the continuance and the improper identification procedures require a new trial in this case.

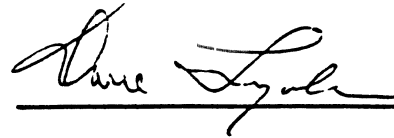
In the alternative, Mr. Oliver requests that the due date for his opening brief be extended until fifteen days after disposition of the motion to remand.

RESPECTFULLY SUBMITTED this 14 day of January, 1991.


ELIZABETH HOLBROOK
Attorney for Mr. Oliver

6. Mr. Oliver is aware that in order to rely on the Utah Constitution, he must present adequate briefing on the matter in the trial court, State v. Earl, 716 P.2d 803 (Utah 1986), and intends to do so in the event that this Court grants the remand.

DELIVERED/MAILED a copy of the foregoing to the Attorney
General's Office, 236 State Capitol, Salt Lake City, Utah 84114,
this 22 day of January, 1991.



Appendix 1

(to motion for evidentiary hearing)

ELIZABETH HOLBROOK, #5292
Attorney for Defendant/Appellant
SALT LAKE LEGAL DEFENDER ASSOCIATION
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
Telephone: 532-5444

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	AFFIDAVIT
Plaintiff/Appellee,	:	
v.	:	
GREG N. OLIVER,	:	
Defendant/Appellant.	:	Case No. 890625-CA Priority No. 2

STATE OF UTAH) OF DEED
) SS: SS:
COUNTY OF SALT LAKE)

I, ELIZABETH HOLBROOK, ~~declare under penalty of perjury~~ ~~penalty~~
that the following is true and correct: ~~true and correct:~~

1. I am an attorney licensed to practice law in the State
of Utah and employed as an appellate attorney at the Salt Lake Legal
Defender Association.

2. I am the attorney appointed to represent GREG N. OLIVER
in the above-captioned case during the pendency of his appeal.

3. I was not present during the trial of this matter and
did not represent Mr. Oliver at trial.

4. I have spoken with Robert N. Macri, the attorney who
represented Mr. Oliver in the aggravated robbery/misidentification
case documented in Appendix 2 to this brief.

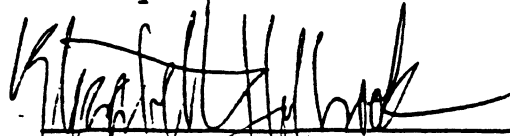
5. It is my understanding from talking to Mr. Macri that:

(a) in that aggravated robbery case, Mr. Oliver was convicted on the basis of eyewitness identification testimony of two witnesses;

(b) Mr. Oliver was later acquitted of that charge when the real perpetrator of the crime was found.

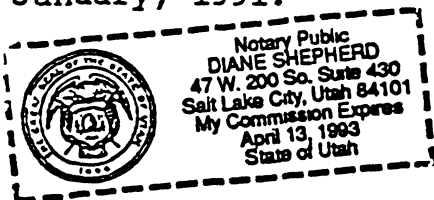
(c) Visual comparison of Mr. Oliver and the perpetrator of the aggravated robbery demonstrates effectively Mr. Oliver's argument that eyewitness identification is unreliable.

DATED this 18 day of January, 1991.


ELIZABETH HOLBROOK

SUBSCRIBED and SWORN to before me this 18th day of

January, 1991.




NOTARY PUBLIC
Residing in Salt Lake City, Utah

My Commission Expires:

4-13-93

Appendix 2
(to motion for evidentiary hearing)

In the District Court of Davis County
State of Utah

FILED

JUL 1 1983

THE STATE OF UTAH

Plaintiff

vs.

GREGORY NESS OLIVER

Defendant

MICHAEL G. ALLPHIN, Clerk
Davis County, Utah

JUDGMENT, SENTENCE
AND COMMITMENT TO THE
UTAH STATE PRISON

Case No. 4215

That whereas, said defendant, GREGORY NESS OLIVER

having heretofore on the 9th day of June, A. D. 1981,

Having been convicted by a Jury in this court of the
charge of Aggravated Robbery, Second degree felony

and now being present in court, accompanied by his attorney, and ready for sentence, thereupon the
court renders its judgment as follows:

You, Gregory Ness Oliver

Having been convicted by a Jury, the court adjudges you to
be guilty and it is the judgment of the court and the sentence of the law that you
Gregory Ness Oliver

for your said offense do be confined in the Utah State Prison for the term of one to fifteen
years

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the said
Gregory Ness Oliver

be sentenced to imprisonment
in the Utah State Prison for a term of one to fifteen years, AND PAY-RESTITUTION IN
THE AMOUNT OF \$550.00.

said sentence to begin as of June 28, 1983

NOW, THEREFORE, you Gregory Ness Oliver

the
above named defendant, are remanded into the custody of the Sheriff of Davis County, State of
Utah, to be by him delivered into the custody of the Warden, or other proper officer of said Utah
State Prison in execution of this judgment and sentence.

WITNESS: Honorable Douglas L. Cornaby
Judge, and the seal of the District Court of the Second Judicial District in and for the State of
Utah affixed this 28 day of June, A. D. 1983

RODNEY W. WALKER
Clerk of the District Court of the Second
Judicial District in and for Davis County,
State of Utah.

By

FILMED

Received this 29th day of June, 1983, from Brant Johnson, Sheriff of Davis County, Utah, the person of Gregory Ness Oliver for the term of 1 to 15 Yrs at the Utah State Prison for Aggr. Robbery.

Also 1 Yr for Theft.

Kenneth V. Shulsen, Warden

Severley Fisher
Severley Fisher
I.D. & Records Officer

Circuit Court, State of Utah
Davis County, Bountiful Department

Commitment

U-979

vs

GREGORY NESS OLIVER
Defendant

THE STATE OF UTAH TO ANY PEACE OFFICER IN THE STATE OF UTAH:

The above-named defendant has been charged with the crime of

THEFT

25 BOUNTIFUL, DAVIS COUNTY, UTAH

date JULY 15, 1980

(XX)

(X) The defendant was found guilty and was sentenced to pay a fine of

\$ 00 and to be imprisoned in the county jail for 365 days and 0 days of the imprisonment was suspended upon payment of the fine.

YOU ARE COMMANDED to take the defendant into your custody and safely keep the defendant

[illegible]

(x) until he shall serve out the imprisonment of 365 days.

1 I do hereby pay the fine in the amount of \$ 100.00

(X) Defend the right to a fair trial for all, without regard to race, ethnicity, or religion.

Special instructions: THIS TIME MAY BE SERVED CONCURRENTLY WITH ANY
JAIL SENTENCE DISTRICT COURT MIGHT LEVY ON MR. OLIVER ON JUNE 28, 1983
IF THE SENTENCE IN DISTRICT COURT IS LESS THAN 1 YEAR, MR. OLIVER MUST
COMPLETE THE YEAR ON THE SENTENCE ON THIS CHARGE

Date: JUNE 27 1983

In the District Court of the Second Judicial District

IN AND FOR THE

County of Davis, State of Utah

		MINUTE ENTRY
STATE OF UTAH	}	Date <u>August 16, 1983</u>
vs.		Case No. <u>4215</u>
GREGORY NESS OLIVER		<u>CALVIN GOULD</u> , Judge
Defendant		J. Jones, Reporter C. Long, Clerk

This matter comes before the Court for hearing on Motion for New Trial with Melvin C. Wilson, Esq. appearing as counsel for plaintiff. Defendant is present and represented by Robert Macri, Esq.

Plaintiff's counsel makes statement to the Court representing there has been further investigation in this matter, and based upon that investigation and copies of confessions of two other parties, moves to dismiss this case.

Court orders the defendant released from custody of the Utah State Prison. Motion granted.

STATE OF UTAH) ss
COUNTY OF DAVIS)
I THE UNDERSIGNED, CLERK OF THE DISTRICT
COURT OF DAVIS COUNTY, UTAH DO HEREBY CER-
TIFY THAT THE ANNEXED AND FOREGOING IS A TRUE
AND FULL COPY OF AN ORIGINAL DOCUMENT ON
FILE IN MY OFFICE AS SUCH CLERK.
WITNESS MY HAND SEAL OF SAID OFFICE
THIS 18 DAY OF Dec. 19 90
ALYSON E. BROWN, CLERK
BY Kristine Booth

FILMED

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
DAVIS COUNTY, UTAH

IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH 1983 SEP 19 AM 11:47

MICHAEL C. ALPHIN, CLERK
2ND DISTRICT COURT

THE STATE OF UTAH, :

BY AB
DEPUTY CLERK

Plaintiff, :

vs. : ORDER RELEASING EVIDENCE

GREGORY N. OLIVER : Case No. 4215

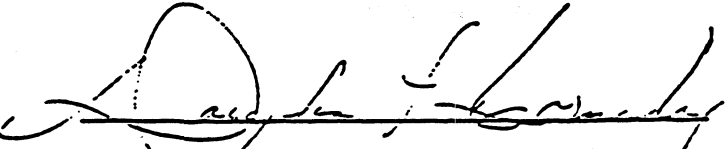
Defendant. :

The above matter having come before the Court at the request of the Defendant for an Order releasing evidence and it appearing to the Court that the previous conviction having been set aside and the Information dismissed and all time periods for appeal having elapsed;

NOW THEREFORE IT IS HEREBY ORDERED that the Clerk of the Court shall release to Gregory Oliver one levi jacket presently being held in evidence in regards to the above-mentioned case.

Dated this 16 day of September, 1983.

BY THE COURT:


Second District Judge

IT IS HEREBY CERTIFIED BY THE CLERK OF THE DISTRICT COURT OF DAVIS COUNTY, UTAH TO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND SEAL OF SAID OFFICE

THIS 18 DAY OF Dec. 19 90

ALYSON E. BROWN, CLERK

BY Kristine Bothe

Appendix 3

(to motion for evidentiary hearing)

1 that time?

2 A Yes, he did.

3 Q And did he show you one or more pictures?

4 A One picture.

5 MS. BYRNE: May I approach the witness, Your
6 Honor?

7 THE COURT: You may.

8 MS. BYRNE: Your Honor, do we need this marked
9 for this hearing, for purposes of this hearing?

10 MR. BROWN: For purposes of my motion, I would
11 like the picture separated from the others as a separate
12 exhibit.

13 THE COURT: Let me ask you this: if this matter
14 goes to trial, is the photo array going to be an exhibit?

15 MS. BYRNE: Yes, it will be, Your Honor.

16 THE COURT: How are those attached in the folder?

17 MS. BYRNE: I was just checking that here. They
18 seem to be affixed on two sides with Scotch tape.

19 THE COURT: Why don't we do this, why don't we
20 take the picture in question from the photo array and mark
21 it on the back.

22 MS. BYRNE: All right.

23 THE COURT: That way, if we need the entire array
24 again we will have a clear record of everything.

25 MS. BYRNE: We are going to use the photo array

1 again immediately after this, so--

2 THE COURT: All right. Then you can put the
3 individually-marked picture back in, or it can be just
4 loose.

5 MS. BYRNE: You have seen that?

6 MR. BROWN: Yes.

7 Q (By Ms. Byrne) I am showing you what has been
8 marked as State's Exhibit No. 1 for identification. Have
9 you seen that picture before?

10 THE COURT: Mr. Brown, can the record reflect
11 that the picture in question is only the picture on the
12 left side as you look at that exhibit, rather than both
13 pictures?

14 MS. BYRNE: Thank you, Your Honor.

15 MR. BROWN: Yes.

16 THE COURT: All right.

17 THE WITNESS: It seems to be the exact picture I
18 saw.

19 Q (By Ms. Byrne) And to the best--

20 MR. BROWN: To clear that up, the exact picture
21 you saw--

22 MS. BYRNE: That's what I was about to do. But
23 go ahead, if you would like.

24 MR. BROWN: Go ahead.

25 MS. BYRNE: Okay.

1 Q (By Ms. Byrne) So to the best of your
2 recollection, this is a picture that Officer Matthews
3 showed you on January 8?

4 A That's right.

5 Q Do you recall what time of day that was?

6 A Late afternoon, I believe. Could have been 3:00.
7 3:00 to 6:00. I'm not really-- I can't be more precise
8 than that.

9 Q At the time Officer Matthews showed you that
10 picture, did he ask you any questions at that time?

11 A Not that I can recall precisely.

12 Q Did you make any statement when you saw that
13 picture? picture?

14 A I believe I said it appears to be.

15 Q You would have said it appears to be-- It appears
16 appears to be?

17 A Yes.

18 Q It appears to be what?

19 A The individual that I saw the day previously.

20 Q At any time after January 8, did he show you any
21 other pictures?

22 A Detective Matthews did not.

23 Q Did another officer show you any pictures?

24 A Yes. Detective Carr showed me a photo spread.

25 MS. BYRNE: For the record, I have taken what was

1 marked as State's Exhibit No. 1 and I have placed it in its
2 original position in the six-picture lineup that has been
3 marked as State's Exhibit No. 2.

4 Q (By Ms. Byrne) Looking at State's Exhibit No. 2,
5 do you recognize that?

6 A I recognize it as the defendant?

7 Q Excuse me?

8 A I recognize that guy as the defendant.

9 Q Do you recognize that photo spread as a whole?

10 A It's the same format. I can't say the other
11 pictures are the same.

12 Q You can't say it's the same one you were shown
13 before?

14 A Yes. But it's the same format.

15 Q And at the time you were shown the photo spread
16 containing six pictures by another officer, did you at that
17 time pick out a person that you believed to be the one you
18 saw on January 7?

19 A I did.

20 Q And what, if any, statement did you make
21 concerning the identification to the detective who showed
22 you that photo spread?

23 A That I felt the picture I had identified was the
24 person I'd seen and chased.

25 Q I'm sorry, you felt that what?

Appendix 4

(to motion for evidentiary hearing)

1 A I did.

2 Q Did he ask any questions about that photograph?

3 A He asked me if that photograph was the individual

4 who had burglarized my home.

5 Q Did you make a response to that question?

6 A Yes. I indicated that it appeared to be.

7 Q It appeared to be what?

8 A The defendant.

9 Q I'm sorry, you said it appeared to be what?

10 A I said the photograph appeared to be that of

11 the defendant.

12 Q Okay. Well, at that time there would not have

13 been a defendant. Who did you indicate that was a photograph

14 of?

15 A I indicated it appeared to be a photograph of

16 the individual who had burglarized my home.

17 MS. BYRNE: Your Honor, may we approach the

18 bench for a moment on a matter of the picture?

19 THE COURT: Yes.

20 [Bench conference off the record.]

21 MS. BYRNE: If I may have a moment, your Honor.

22 I seem to have misplaced an item of evidence that the next

23 question would be concerning. If the Court was planning

24 to take a break for the benefit of the reporter, I wonder

25 if I could request it be now so I could trot back across

1 the street and see if I may have left it on my desk.

2 THE COURT: Well, it's a little bit early. The
3 photograph that you have asked him about?

4 MS. BYRNE: There's another one. ~~and I am sure of~~

5 THE COURT: Well, is there any reason why we
6 can't proceed to the next series of questions, then come
7 back to that? It's at least clear in my mind.

8 MS. BYRNE: We can.

9 THE COURT: If we come back in an hour with
10 the picture I, at least, would remember Mr. Spielmans'
11 testimony that he just gave, and I can't assume anything
12 less on the part of the jury.

13 MS. BYRNE: I'm sorry, your Honor.

14 THE COURT: I'm sure the jury will figure it
15 out. I just don't want to take a break now.

16 MS. BYRNE: When was the Court planning on taking
17 the break?

18 THE COURT: Probably about quarter to 3:00.
19 If you finish before then, we can always come back. I'm
20 sure the jury is going to understand, even though it may
21 be out of order a little bit.

22 MS. BYRNE: That's fine.

23 Q After the occasion when you looked at this one
24 picture, were you then shown further pictures after that?

25 A Yes. Sometime later. I believe it was a week

1 home was burglarized, if you were to see the person that
2 you saw jumping over the fence at the side of your house
3 again, would you be able to recognize that person?

4 A I would.

5 Q And is that person in the courtroom today?

6 A Yes, he is.

7 Q And would you point him out for the jury, please?

8 A Gentleman in the ski sweater, the defendants
9 table.

10 MS. BYRNE: May the record reflect that he has
11 identified the defendant, Mr. Greg Oliver?

12 MR. McCAUGHEY: No objection.

13 THE COURT: The record will so reflect.

14 MR. McCAUGHEY: And to the best of your recollection
15 is that person that you just identified present at the
16 lineup that you observed?

17 A Yes.

18 Q And is that person you picked out in the lineup?

19 A It is.

20 Q And in the photo spread of six individuals that
21 you observed, was the person's picture in that photo lineup?

22 A It was.

23 Q And is that the same person you have picked
24 out in the photo lineup?

25 A It is.

1 MS. BYRNE: Your Honor, the State has no further
2 questions.

3 THE COURT: Why don't we take a break now, then
4 you can run and

5 MS. BYRNE: I was, subject to that.

6 THE COURT: Members of the jury, we are going
7 to take a break at this time. During which time Mrs. Byrne
8 will get the pictures she needs. Remember the admonition
9 of the Court is to not discuss this matter with anyone,
10 including among yourselves, do not form or express any
11 opinions or conclusions. And is ten minutes enough,
12 Mrs. Byrne?

13 MS. BYRNE: I hope so, your Honor.

14 THE COURT: All right. We'll try to keep this
15 break to ten minutes if we can. See you then.

16 [Whereupon, the jury exited the courtroom.]

17 THE COURT: Do you have any jury instructions
18 for me?

19 MS. BYRNE: I do.

20 THE COURT: Anything else we need to address?
21 If not, we'll be in recess.

22 ---Recess---

23 THE COURT: Go ahead, Ms. Byrne.

24 MS. BYRNE: Your Honor, Mr. Warner, who I
25 indicated earlier is an investigator with our office, is

1 here now. I would like to have him with me, if for no other
2 reason, in case I misplace something else during at least
3 the afternoon proceedings. I have discussed it with
4 Mr. McCaughey and he has no objection.

5 MR. McCAUGHEY: That's correct, your Honor.

6 THE COURT: All right. Members of the jury,
7 Mr. Warner will be an exception to the exclusionary rule.
8 There is an exception to that, and that is for a witness
9 who is present is necessary to aid counsel in the
10 presentation of the case. Mr. Warner appears to fit that
11 exception, and Mr. McCaughey has agreed that he can stay,
12 so he will be with us.

13 Go ahead,

14 MS. BYRNE: Thank you, your Honor.

15 Q Mr. Spielmans, showing you what's been marked
16 as State's Exhibit 15 for identification, do you recognize
17 that? You may want to look on both sides.

18 A This appears to be the photo spread that I was
19 shown at the sheriff's office.

20 Q Okay. And that would have been when?

21 A Somewhat more than a week after the event, I
22 believe. I don't recall the exact date.

23 MS. BYRNE: State would move to have what has
24 been marked as State's Exhibit 15 introduced into evidence.

25 MR. McCAUGHEY: No objection.