

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES ROBERT DAY,

No. 38028

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

**SEP 06 2001**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richard*  
CHIEF DEPUTY CLERK

**FAST TRACK STATEMENT**

1. Name of party filing this fast track statement:

James Robert Day.

2. Name, law firm, address, and telephone number of attorney submitting this fast track statement:

Dianne M. Dickson  
Clark County Public Defender's Office  
309 S. Third St., Ste. 226  
Las Vegas, NV 89155  
(702) 455-4685

3. Name, law firm, address, and phone number of appellate counsel if different from trial counsel: Same.

4. Judicial district, county, and district court docket number of lower court proceedings: Eighth Judicial District, County of Clark, District Court Case No. C167783.

5. Name of judge issuing decision, judgment, or order appealed from: Kathy A. Hardcastle.

6. Length of trial. If this action proceeded to trial in the district court, how many days did the trial last? 3 days.

7. Conviction(s) appealed from: C167783--Count I, Robbery With Use of a Deadly Weapon and Count II, Burglary While in Possession of a Deadly Weapon.

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KL 12/62

1           8.     **Sentence for each count:**   Sentenced as an habitual  
2 criminal to a maximum of three hundred (300) months and a minimum of  
3 one hundred twenty (120) months in the Nevada Department of Prisons,  
4 with three hundred eighty-two (382) days credit for time served; pay  
5 \$25 Administrative Assessment Fee and \$250 DNA Analysis Fee.

6           9.     **Date district court announced decision, sentence, or**  
7 **order appealed from:**   May 9, 2001.

8           10.    **Date of entry of written judgment or order appealed**  
9 **from:**   May 18, 2001.

10          11.    **If this appeal is from an order granting or denying**  
11 **a petition for a writ of habeas corpus, indicate the date written**  
12 **notice of entry of judgment or order was served by the court:**   N/A

13          12.    **If the time for filing the notice of appeal was**  
14 **tolled by a post-judgment motion,**

15                (a) **specify the type of motion, and the date of**  
16 **filing of the motion:**   N/A

17          13.    **Date notice of appeal filed:**   June 18, 2001.

18          14.    **Specify statute or rule governing the time limit for**  
19 **filing the notice of appeal, e.g., NRAP 4(b), NRS 34.560, NRS**  
20 **34.575, NRS 177.015, or other:**   NRAP 4(b)

21          15.    **Specify statute, rule or other authority which grants**  
22 **this court jurisdiction to review the judgment or order appealed**  
23 **from:**   NRS 177.015(3).

24          16.    **Specify the nature of disposition below, e.g.,**  
25 **judgment after bench trial, judgment after jury verdict, judgment**  
26 **upon guilty plea, etc.:**   Judgment after jury verdict.

27          17.    **Pending and prior proceedings in this court. List**  
28 **the case name and docket number of all appeals or original**

1 proceedings presently or previously pending before this court which  
2 are related to this appeal (e.g., separate appeals by co-defendants,  
3 appeal after post-conviction proceedings): N/A

4 18. Pending and prior proceedings in other courts. List  
5 the case name, number and court of all pending and prior proceedings  
6 in other courts which are related to this appeal (e.g., habeas  
7 corpus proceedings in state or federal court, bifurcated proceedings  
8 against co-defendants): N/A

9 19. Proceedings raising same issues. List the case name  
10 and docket number of all appeals or original proceedings presently  
11 pending before this court, of which you are aware, which raise the  
12 same issues you intend to raise in this appeal: Appellate counsel  
13 is unaware of any pending proceedings before this court which raise  
14 the same issues as the instant appeal.

15 20. Procedural history. Briefly describe the procedural  
16 history of the case (provide citations for every assertion of fact  
17 to the appendix, if any, or to the rough draft transcript):

18 The Appellant, Robert Day, was arrested on or about  
19 April 22, 2000, and charged with Robbery With Use of a Deadly Weapon  
20 and Burglary While in Possession of a Deadly Weapon. The Appellant  
21 filed a Motion to Dismiss the Information based on the failure of  
22 the prosecution to obtain and preserve the identity of a material  
23 witness who would have supported Mr. Day's innocence. (App. 017,  
24 026) That Motion was denied by the court (Trans. 3/12/01) and the  
25 matter was tried by jury on March 13 and 14, 2001, following which  
26 the Defendant was convicted of both charges. Prior to trial, an  
27 Amended Information was filed by the State, alleging habitual  
28 criminal status. (App. 014) A Second Amended Information was filed

1 subsequent to trial, again alleging habitual criminal status, but  
2 modifying the prior convictions alleged. (App. 064) The Appellant  
3 was sentenced on May 9, 2001, and over objection of the Appellant,  
4 the court ordered that he be treated as a habitual criminal and  
5 sentenced him to the maximum term of 300 months and a minimum of 120  
6 months with 382 days credit for time served.

7           **21. Statement of facts. Briefly set forth the facts**  
8 **material to the issue on appeal:**

9           On April 22, 2000, Karen Walker, who was employed at the  
10 Parkway Inn Motel located at 5201 S. Industrial, Las Vegas, Nevada,  
11 was robbed shortly before 1 p.m. (Trans. Vol. I, p. 8) Ms. Walker  
12 testified that the robber came behind the counter where she was  
13 working and told her to open the cash drawers. (Trans. Vol. I, p.  
14 12) The robber was holding a small knife, with a blade 2 ½ to 3  
15 inches long. (Trans. Vol. I, p. 13) She said that he removed all of  
16 the paper money from the drawer and stuffed it into his pockets.  
17 (App. 014) Ms. Walker described the robber as having salt and  
18 pepper gray hair, a mustache, approximately her height and age (5'5"  
19 and 52 years old)<sup>1</sup> and wearing blue jeans and a blue and white t-  
20 shirt. (Trans. Vol. I, pp. 38-39) Ms. Walker specifically  
21 testified that she did not remember seeing any tattoos or other  
22 markings on the robber. (Trans. Vol. I, p. 41) Officer Huffmaster,  
23 the first officer on the scene, obtained a description from Ms.  
24 Walker which was broadcast to other police. Ms. Walker told  
25 Huffmaster that the robber was "late 40's, gray hair, blue shirt and  
26 jeans" and that the robber had no tattoos. (Trans. Vol. I, pp. 51,  
27 53) Mr. Day's arms are covered in tattoos. (Trans. Vol. II, p. 57

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28           <sup>1</sup>Mr. Day is 5'11" and was 46 years old. (Trans. Vol. II, p. 36)

1 & Exhibit A)

2           Approximately 30 minutes later, Sgt. Flaherty said he saw  
3 Mr. Day, who was wearing blue jeans and had gray hair and who he  
4 said fit the description of the alleged robber. (Trans. Vol. I, p.  
5 82; Trans. Vol. II, p. 24) Mr. Day was not wearing a shirt and was  
6 walking around the trucks at a truck stop next to the Wild Wild West  
7 Casino on Tropicana Avenue, (Trans. Vol. II, p. 25) a distance of  
8 approximately a half mile or more by street from where the robbery  
9 occurred. (Trans. Vol. II, p. 21) Sgt. Flaherty, who was in plain  
10 clothes, approached Mr. Day and asked to speak to him. (Trans. Vol.  
11 I, p. 84) At the time, Mr. Day was speaking to a truck driver,  
12 (Trans. Vol. II, p. 25) whose identity has never been determined.  
13 (Trans. Vol. II, p. 26) Shortly after Sgt. Flaherty approached Mr.  
14 Day, Mr. Day took off running south across Tropicana, (Trans. Vol.  
15 I, p. 91) climbed into a truck which was parked across the street to  
16 hide and was physically pulled from the truck by Flaherty and other  
17 officers. (Trans. Vol. I, pp. 88-90) Sgt. Flaherty searched Mr.  
18 Day and found \$1,018.55 in his pockets, (Trans. Vol. II, p. 29) the  
19 bulk of the money being crumpled up in Mr. Day's pocket. (Trans.  
20 Vol. I, p. 91) Mr. Day also had a small pocket knife with a 2"  
21 blade. (Trans. Vol. II, p. 14) Karen Walker was brought to the  
22 area of Mr. Day's arrest, was told by the police that they believed  
23 they had the person in custody who had robbed her, and while sitting  
24 in a police car approximately 40 feet away from Mr. Day who was in  
25 handcuffs and surrounded by police, identified him as the robber.  
26 (Trans. Vol. I, pp. 42-43).

27           At trial, for the first time, Ms. Walker disclosed that  
28 one of the police officers, on April 22, 2000, had given her a

1 picture of Mr. Day, ostensibly so she could show everyone else at  
2 work the person who had robbed the motel and she was allowed to keep  
3 that photograph in her possession throughout these proceedings.  
4 (Trans. Vol. I, pp. 44-45)

5         The State was never able to establish how much money was  
6 taken in the robbery. Officer Huffmaster said that he was told and  
7 wrote in his report that the amount taken was \$1,051. (Trans. Vol.  
8 I, p. 56) Ms. Walker said that there was "just over \$1,000" in the  
9 cash drawers. (Trans. Vol. I, p. 12) She said that there are two  
10 drawers in which money is kept: the bank drawer always contained  
11 \$500 and the second drawer contained \$200 at the start of day to  
12 which were added the daily receipts. (Trans. Vol. 1, pp. 15, 26)  
13 Ms. Walker said that she and her manager did an exact count of the  
14 amount taken. (Trans. Vol. I, p. 27) Billy Ramirez, the general  
15 manager of the motel, testified that he also did not remember the  
16 exact amount of money taken but that it was "a little over \$1,000."  
17 (Trans. Vol. I, p. 65) He said that the two cash drawers contained  
18 a total of \$500 as the bank, contrary to what Karen Walker had said,  
19 with \$400 in one drawer and \$100 in the other drawer. (Trans. Vol.  
20 I, p. 69) Mr. Ramirez said Karen Walker was the one who counted the  
21 money to determine how much was missing rather than himself.  
22 (Trans. Vol I, pp. 71-72) Ms. Walker testified that all but \$12 was  
23 returned to them by the police. (Trans. Vol. I, p. 18) The  
24 \$1,018.55 which was found in Mr. Day's pockets was turned over to  
25 Billy Ramirez, even though it is undisputed that there were no coins  
26 taken in the robbery and the amount found on Mr. Day does not match  
27 the amount which was claimed to have been taken from the motel.  
28 (Trans. Vol. I, pp. 14, 65-66) Apparently, nobody ever counted the

1 change that was in either one of these drawers in attempting to  
2 determine how much money was taken.

3           Mr. Day testified that he had come to Las Vegas in  
4 February, 2000, with a truck driver for whom he was working. (Trans.  
5 Vol. II, p. 39) Up to the time of his arrest, he worked as a  
6 "lumper," a day laborer who assists truck drivers in loading and  
7 unloading their cargo. (Trans. Vol. II, p. 40) He also would  
8 occasionally go out on the road with a trucker for longer periods of  
9 time. (Trans. Vol. II, p. 40) He testified that lumpers congregate  
10 in the area of this truck stop on Tropicana Avenue, though they are  
11 often chased from that property by Wild Wild West security. (Trans.  
12 Vol. II, p. 45) As a lumper, Mr. Day earned \$100 a day or more and  
13 was paid in cash. (Trans. Vol. II, pp. 41-42, 47) Price Beasley  
14 was brought in by the defense to testify that he also is a lumper.  
15 (Trans. Vol. II, p. 87) He confirmed that he has seen Mr. Day  
16 working as a lumper at this truck stop and that, as a lumper, he  
17 earns \$800 to \$1,000 per week, sometimes more. (Trans. Vol. II, pp.  
18 88-89)

19           Mr. Day testified that on April 22, 2000, he had just  
20 returned from a week on the road with another trucker and had been  
21 paid \$560, in cash. (Trans. Vol. II, p. 43) On April 22 he picked  
22 up a job as a lumper for another truck driver whose name he did not  
23 know. (Trans. Vol. II, pp. 43, 46) He and two other lumpers helped  
24 the driver deliver a load in the Las Vegas area and returned to the  
25 truck stop late in the morning. (Trans. Vol. II, p. 46) Mr. Day  
26 and the other lumpers began to fold up the moving pads in the back  
27 of the trailer while the truck driver went to cash a comp check, so  
28 that he could pay the lumpers for their work. (Trans. Vol. II, p.

1 47) The three were joined in the back of the truck by some other  
2 lumpers and all began to drink beer and shoot craps while waiting  
3 for the trucker to return. (Trans. Vol. II, p. 48) Mr. Day had  
4 removed his shirt while working in the back of the truck because it  
5 was hot and dirty. (Trans. Vol. II, p. 48) Mr. Day was winning at  
6 craps and, after making his final point, grabbed up his money and  
7 stuffed it into his pocket and left the back of the truck before he  
8 could be persuaded to stay and, presumably, loose back what he had  
9 won. (Trans. Vol. II, p. 50) By that time, the trucker had  
10 returned, paid Mr. Day \$120 and Mr. Day was speaking to him when  
11 Sgt. Flaherty appeared. (Trans. Vol. II, pp. 49-50) Mr. Day said  
12 that, at first, he thought Flaherty was security from the Wild Wild  
13 West Casino who had come to chase him and the other lumpers out of  
14 the area. (Trans. Vol. II, p. 52) He said he ran when he learned  
15 Flaherty was police because he believed there was a parole violation  
16 warrant for his arrest because he had walked away from a program his  
17 federal parole officer had committed him to. (Trans. Vol. II, pp.  
18 39, 53)

19           Because Mr. Day has been in continuous incarceration since  
20 April 22, 2000, he was never able to learn the identity of the truck  
21 driver for whom he had been working that morning nor the identities  
22 of the other lumpers he had been working with. Sgt. Flaherty, who  
23 spoke to the truck driver, said he never obtained his name or  
24 identity and the trucker was allowed to leave the area. (Trans.  
25 Vol. II, p. 26) Over objection, Sgt. Flaherty was allowed to  
26 testify that, when he talked to the truck driver, the truck driver  
27 told him that Mr. Day had offered him \$100 to drive Mr. Day to New  
28 Orleans. (Trans. Vol. II, p. 34) This was a statement which was



1 not contained in any of the police reports and which Appellant was  
2 completely unaware of prior to time of trial.

3           22. Issues on appeal. State concisely the principal  
4 issue(s) in this appeal:

5           1.    The Court erred in denying Appellant's Motion to  
6 Dismiss Due to the State's failure to preserve the identity of a  
7 material witness.

8           2. The Court erred in allowing the District Attorney to  
9 elicit from Sergeant Flaherty hearsay statements of the unknown  
10 truck driver.

11           3. The in-court identification of the Appellant by Ms.  
12 Walker was impermissibly tainted.

13 23. Legal argument, including authorities.

14 I.

15 THE COURT ERRED IN DENYING APPELLANT'S MOTION  
16 TO DISMISS DUE TO THE STATE'S FAILURE TO  
PRESERVE THE IDENTITY OF A MATERIAL WITNESS.

17 Prior to time of trial, the Appellant filed a motion pro  
18 per seeking the dismissal of the Information. (App. 017) That  
19 motion was adopted and supplemented by Appellant's counsel. (App.  
20 026) The basis for the motion was the State's failure to obtain and  
21 preserve the identity of the truck driver with whom Mr. Day was  
22 speaking at the time Sgt. Flaherty approached him. Because of the  
23 nature of his work, Mr. Day never learned the identity of the  
24 trucker who had employed him. However, Sgt. Flaherty, after pulling  
25 his police vehicle in front of the truck, said he spoke to the  
26 trucker and then asked the trucker to watch his police vehicle while  
27 Sgt. Flaherty pursued Mr. Day. It was learned at trial for the  
28 first time that Sgt. Flaherty claims that, when he spoke to the

1 truck driver, he asked him what he and Mr. Day had been talking  
2 about and claims he was told that Mr. Day offered the trucker \$100  
3 to drive him to New Orleans. This last inculpatory statement was  
4 not contained in any of Sgt. Flaherty's police reports and was  
5 unknown to Appellant prior to trial and is discussed further below.  
6 Despite the trucker's apparent involvement with Mr. Day and despite  
7 the officer's allegation of the trucker's inculpatory testimony,  
8 Sgt. Flaherty never obtained the identity of this trucker, even  
9 though the truck was still there when Flaherty returned to his  
10 vehicle after arresting Mr. Day, so that Mr. Day was not able to  
11 call him as a witness at trial. (Trans. Vol. II, pp. 34-35)

12 Pursuant to Brady v. Maryland, 373 U.S. 83 (1963), the  
13 prosecution must produce for discovery by the defense in a criminal  
14 case any and all exculpatory evidence, or evidence which is material  
15 to either guilt or innocence or to punishment. This Court, citing  
16 Brady, held in the case of State v. Havas, 95 Nev. 706, 601 P.2d  
17 1197 (1979), that the State's failure to preserve and produce such  
18 evidence for discovery and inspection by the defense in a criminal  
19 case constitutes a violation of due process of law.

20 In order to establish a due process violation resulting  
21 from the State's loss or destruction of evidence, the Appellant must  
22 demonstrate either 1) that the State lost or destroyed the evidence  
23 in bad faith; or 2) that the loss unduly prejudiced the Appellant's  
24 case and the evidence possessed an exculpatory value that was  
25 apparent before the evidence was destroyed. The burden of  
26 demonstrating prejudice lies with the Appellant and requires some  
27 showing that it could be reasonably anticipated that the evidence  
28 . . .

1 sought would be exculpatory and material to Appellant's defense.  
2 Sheriff v. Warner, 112 Nev. 1234, 926 P.2d 775 (1996).

3 Appellant has not attempted to argue the bad faith of Sgt.  
4 Flaherty in allowing a vital witness to leave without obtaining  
5 identification from him, though one might wonder why Flaherty did  
6 not do so when, if what he says is true, the trucker had some very  
7 inculpatory testimony to offer against Mr. Day. Furthermore, Mr.  
8 Day had told Flaherty he was working for the trucker at the time of  
9 the offense. (App. 019)

10 Bad faith is not required as the Appellant can demonstrate  
11 prejudice in the loss of this information. The rule is well  
12 settled:

13 When an accused seeks dismissal for the State's  
14 good-faith loss or destruction of material  
15 evidence, he or she must show prejudice flowing  
16 from the unavailability of the evidence. To  
establish prejudice, the accused must make "some  
showing that it could be reasonably anticipated  
that the evidence sought would be exculpatory."

17 Deere v. Nevada, 100 Nev. 565, 566, 688 P.2d 322, 323 (1984) (citing  
18 Boggs v. State, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979)).

19 In this case, the trucker who got away would have verified  
20 that Mr. Day was employed by him on that very morning, he would have  
21 been able to explain the source of at least some of Mr. Day's money  
22 and he would have been able to contradict what Sgt. Flaherty claimed  
23 the trucker said regarding Mr. Day asking him for a ride to New  
24 Orleans. He would have provided at least a partial alibi in that he  
25 knew Mr. Day was working in the back of the truck at the approximate  
26 time the robbery was taking place.

27 The failure of Flaherty to obtain the identity of this  
28 witness became even more egregious when it was disclosed for the

1 first time at trial that Flaherty alleged that the trucker had made  
2 statements damning to Appellant's case. Flaherty testified, over  
3 objection, that during his initial contact with Mr. Day, he went  
4 over and spoke to the truck driver. At that time, he certainly had  
5 the opportunity to obtain information from this trucker. After Mr.  
6 Day was in custody, Flaherty went back to his police car and, again,  
7 failed to obtain the identity of the trucker.<sup>2</sup> If the trucker had  
8 made the inculpatory statement that Flaherty alleged he had made  
9 with respect to trying to hire a ride to New Orleans, it is  
10 inconceivable that Flaherty would not have seen the importance of  
11 this statement and taken information from the trucker so that this  
12 inculpatory testimony could be used at time of trial. This is in  
13 contrast with the thoroughness with which Flaherty made sure to  
14 obtain all pertinent information from the owner of the truck in  
15 which Mr. Day tried to hide, a gentleman who had no personal contact  
16 with Mr. Day. (Trans. Vol. I, pp. 75-79)

17 In Baccari v. State, 97 Nev. 109, 624 P.2d 1008 (1981),  
18 this Court recognized that Brady makes no reference to the timing of  
19 the obtaining or loss of evidence. That court quoted United States  
20 v. Bryant, 439 F.2d 642, 650-51 (D.C. Cir. 1971):

21 It is most consistent with the purposes of  
22 those safeguards to hold that the duty of  
23 disclosure attaches in some form once the  
24 Government has first gathered and taken  
25 possession of the evidence in question. . . .  
[H]ence we hold that before a request for  
discovery has been made, the duty of disclosure  
is operative as a duty of preservation. Only  
if evidence is carefully preserved during the

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27 <sup>2</sup>Flaherty testified that there was a truck parked by his vehicle after Day's arrest, but that he  
28 didn't know if it was the same one. He didn't make any effort to determine if it was and left the scene  
without any attempt to talk to the trucker again. (Trans. II, pp. 34-35)

1 II.

2 THE COURT ERRED IN ALLOWING THE DISTRICT  
3 ATTORNEY TO ELICIT FROM SERGEANT FLAHERTY  
4 HEARSAY STATEMENTS OF THE UNKNOWN TRUCK DRIVER.

5 On cross-examination of Sgt. Flaherty, he was asked by  
6 Appellant's counsel whether he had gotten the name of the truck  
7 driver who was talking to Mr. Day at the time Sgt. Flaherty  
8 approached Mr. Day. (Trans. Vol. II, p. 26) Over counsel's  
9 objection, the District Attorney was then allowed to ask Sgt.  
10 Flaherty whether or not he had a conversation with that truck driver  
11 and what the truck driver told him. Sgt. Flaherty testified that  
12 "the truck driver stated to me that Mr. Day offered him \$100 to  
13 drive him to New Orleans." (Trans. Vol. II, p. 34)

14 Following the closing arguments, counsel was allowed to  
15 make a record on the objection to this clearly hearsay testimony.  
16 (Trans. Vol II, pp. 122-124) At that time, the State argued that  
17 they were not introducing this hearsay for the truth, but to merely  
18 explain "why the police officer did not follow up on that  
19 investigation with regards to the trucker." (Trans. Vol. II, p.  
20 122) The statement which was admitted does not serve the purpose  
21 which the District Attorney argued it was admitted for.

22 Allowing the police officer to testify to a hearsay  
23 statement which was not contained in any of his police reports and  
24 which was disclosed for the first time in court, was obviously for  
25 the purpose of showing that Mr. Day was attempting to flee  
26 apprehension for a crime the State alleged he committed. The jury  
27 was given, at the prosecutor's request, an instruction on flight as  
28 consciousness of guilt. (App. 055) The jury was not advised that  
the flight instruction should apply only to Mr. Day's run across

1 any substantive purpose. That motion was denied by the court.  
2 (Trans. Vol. II, p. 124)

3  
4 III.

5 THE IN-COURT IDENTIFICATION OF THE APPELLANT BY  
6 MS. WALKER WAS IMPERMISSIBLY TAINTED.

7 Karen Walker testified that the entire time in which she  
8 was in the presence of the robber was perhaps a little longer than  
9 a minute. (Trans. Vol. I, p. 25) During that period of time, she  
10 primarily focused on the robber's hands as they held the knife, as  
11 they removed the money from the drawers and as they stuck the money  
12 into his pockets. (Trans. Vol. I, pp. 24, 29, 30, 41) Ms. Walker  
13 testified that she did not give a description to the 911 operator  
14 when the police were initially called. (Trans. Vol. I, p. 32) She  
15 did, however, give a description to the first responding officer,  
16 Officer Huffmaster, who said that he immediately broadcast the  
17 description that she gave him. (Trans. Vol. I, pp. 50-51) The  
18 description that Officer Huffmaster remembered receiving was "late  
19 40's, gray hair, blue shirt and jeans." (Trans. Vol. I, p. 51)  
20 Interestingly enough, Sgt. Flaherty said Mr. Day matched the  
21 description he had been given except that he wasn't wearing a shirt.  
22 (Trans. Vol. I, p. 83) When questioned about the description he had  
23 been given, Sgt. Flaherty said that it was of "a white male, mid  
24 40's, blue jeans and a white and blue, I believe, striped shirt,  
25 with a mus-[sic]." (Trans. Vol. II, p. 22) Flaherty's description  
26 does not match the description broadcast by Huffmaster. Mr. Day was  
27 also wearing boots, though that wasn't part of the description.  
28 (Trans. Vol. II, p. 22) In fact, the only way in which Mr. Day  
matched the description was that he was a white male with gray hair

1 and a mustache, a fairly generic description. Ms. Walker also said  
2 that the robber was approximately her height and age. She is 5'5"  
3 tall and 52 years old. Mr. Day is six inches taller and six years  
4 younger. However, the most serious problem with Ms. Walker's  
5 identification is that she said that the person who robbed the  
6 Parkway Inn had no scars, marks or tattoos. (Trans. Vol. I, pp. 40-  
7 41, 53) Mr. Day's arms, the arms on which Ms. Walker's attention was  
8 focused, are covered in tattoos.

9           After Mr. Day was in custody, Ms. Walker was brought to  
10 the area of his arrest, was told that the police believed that they  
11 had the robber in custody and she was asked to identify Mr. Day  
12 while he was standing in handcuffs, surrounded by police,  
13 approximately 40 feet away from where she sat in a police vehicle.  
14 Certainly, the nature of that identification is enough to raise some  
15 questions as to its reliability. The courts have long recognized  
16 that such one-on-one identifications are "inherently suggestive."  
17 Bias v. State, 105 Nev. 869, 871, 784 P.2d 963, 964 (1989).

18           In order to overcome this suggestive identification, the  
19 State is required to show that there was an independent basis for  
20 the in-court identification so that the identification can be deemed  
21 to be reliable. Bias, supra. See also: Banks v. State, 94 Nev. 90,  
22 575 P.2d 592 (1978).

23           In this case, the identification by Karen Walker of the  
24 Appellant is impermissibly and irrevocably tainted by the fact that  
25 Ms. Walker was provided with a picture of Mr. Day on the day of the  
26 incident. (Trans. Vol. I, p. 44) She had that picture for almost a  
27 year before she was asked to identify Mr. Day in court. Not  
28 surprisingly, she picked him out. Counsel hasn't found any cases

1 dealing with this precise situation where the victim is provided  
2 with an identifying picture of a suspect with the obvious result  
3 that that victim has no difficulty in making an in-court  
4 identification. However, the law should be the same in such a case;  
5 where the identification procedure is unnecessarily suggestive and  
6 where the in court identification cannot be said to be reliable  
7 because of unnecessarily suggestive identification, then Appellant's  
8 due process rights have been violated. In Banks v. State, 94 Nev.  
9 90, 96, 575 P.2d 592, 596 (1978), this Court cited the United States  
10 Supreme Court of Manson v. Brathwaite, 432 U.S. 98 (1977), in  
11 setting forth factors to consider in determining whether or not an  
12 in-court identification has sufficient reliability:

13           The opportunity of the witness to view the  
14           criminal at the time of the crime, the witness'  
15           degree of attention, the accuracy of his prior  
16           description of the criminal, the level of  
17           certainty demonstrated at the confrontation,  
18           and the time between the crime and the  
19           confrontation. Against these factors is to be  
20           weighed the corrupting effect of the suggestive  
21           identification itself.

22           Unlike Banks, Ms. Walker had only a brief period of time  
23           in which to view her robber and, based on her testimony, she  
24           appeared to be focusing most of the time on his hands and arms, the  
25           hand which held the knife and the hand which took the money and put  
26           it into his pockets and dropped some of it to the floor. Further,  
27           Ms. Walker's description, if it applies to Mr. Day, is not accurate  
28           as she did not accurately describe his height, his age, or the fact  
29           that he has tattoos all over his arms. Unfortunately, the record  
30           doesn't show with what certainty Ms. Walker identified Mr. Day since  
31           no where in the trial transcript does she actually say that she ever  
32           did identify Mr. Day as the robber on April 22, 2000. Her testimony



1 is that she was taken for the identification and she saw Mr. Day in  
2 police custody. (Trans. Vol. I, pp. 18, 43)

3 Because counsel was never advised that Ms. Walker had been  
4 given a picture of Mr. Day by the police and because that fact only  
5 came out on cross-examination of Ms. Walker at time of trial, the  
6 Appellant never had an opportunity to contest the identification at  
7 pre-trial. However, because this argument involves an issue of  
8 constitutional proportions relating to the right of confrontation  
9 and due process, the Court should address the issue.

10 24. Preservation of issues. State concisely how each  
11 enumerated issue on appeal was preserved during trial. If the issue  
12 was not preserved, explain why this court should review the issue:

13 Issue I preserved by pre-trial motion.

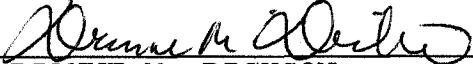
14 Issue II preserved by timely objection at trial.

15 Issue III not preserved due to Appellant being unaware of  
16 issue until the trial when the opportunity to contest the  
17 identification pre-trial had passed. The Court should address this  
18 issue because it involves fundamental constitutional rights.

19 25. Issues of first impression or of public interest.  
20 Does this appeal present a substantial legal issue of first  
21 impression in this jurisdiction or one affecting an important public  
22 interest? If so, explain:

23 Respectfully submitted,

24 MORGAN D. HARRIS  
25 CLARK COUNTY PUBLIC DEFENDER

26 By   
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DATED this 8th day of August, 2001.

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