

1 And most, I think, significantly the photo
2 he viewed on the photo spread was the photo he had
3 already described to the same degree of certainty
4 in the police car and, therefore, it does not
5 appear that Detective McColgin's statements in fact
6 tainted his opinion or his identification, although
7 certainly had the danger of doing so.

8 Now, moving on to the ~~preliminary hearing~~
9 identification, Mr. Mendell's identification of the
10 defendant at the preliminary hearing was not unduly
11 suggestive in the sense that it is, obviously, the
12 standard procedure used at every preliminary
13 hearing.

14 We do have the protections of counsel
15 present, the Court being the fact finder at the
16 preliminary hearing who was present to observe the
17 manner of I.D., the degree of certainty, and to
18 factor all of those in to with the reliability of
19 that identification, just as the jury would be able
20 to do in trial.

21 For all of the factors that I have
22 described and in relation to the photo spread,
23 those all also render the identification at the
24 ~~preliminary hearing particularly reliable,~~ that is,
25 Mr. Mendell's opportunity to view the shooter was
26 extensive and clear.

27 Mr. Mendell paid close attention to the
28 shooter's face. He described the shooter with

1 extraordinary accuracy at the time and that is
2 consistent with the defendant, and he has remained
3 equally confident in his identification. That is,
4 consistently confident, and not one hundred percent
5 certain, but that the defendant looked like the
6 shooter.

7 Again, the preliminary hearing being two
8 months after the incident is considerably after the
9 photo spread, but not an unduly long period of time
10 to shake the confidence of the reliability of the
11 identification at the preliminary hearing.

12 So the most important factor to me again
13 is that Mr. Mendell identified the defendant
14 immediately after the shooting based on the single
15 photo I.D. not as Nathan Medina, but as the
16 shooter. In fact, he still didn't recognize the
17 shooter as Nathan Medina when he saw that photo, so
18 the fact that he identified the same photo hours
19 later after being told that Ms. Rhoads had
20 identified Nathan Medina did not alter his I.D. It
21 doesn't appear that Detective McColgin said she
22 identified photo two in the photo spread, that it
23 was in fact the defendant, just that she had
24 identified Nathan Medina, but that didn't affect
25 Mr. Mendell particularly because he didn't
26 recognize the photo as Nathan Medina. He
27 recognized the photograph as the shooter. So that
28 to me is the most compelling factor in the finding

1 the identification at each stage to be reliable,
2 despite the suggestiveness of Detective McColgin's
3 comments.

4 I rely on People vs. Arias A-R-I-A-S, 13
5 Cal.4th.92 page 168.

6 ~~So I find that Mr. Mendell, although~~
7 ~~subjected to potential suggestibility by~~
8 ~~Detective McColgin's comments is not in fact~~
9 ~~influenced by the comment.~~ He consistently
10 identified the same photograph, happens to be of
11 the defendant as the shooter, despite the fact that
12 he did not recognize the photo as Nathan Medina.
13 Simply the fact that ~~Mr. Medina's physique had~~
14 ~~changed so drastically~~ since the last time that Mr.
15 Mendell had seen him that Mr. Mendell could not
16 reconcile the body shape of the shooter as the body
17 shape of the man he knew as Nathan Medina.
18 Therefore, he identified off of the similarity in
19 facial features, despite the fact that it was
20 inconsistent with his recollection of the
21 defendant.

22 The fact that the degree of certainty of
23 the I.D. does not change him at all as reliable as
24 they were from the beginning, and, of course, the
25 degree of certainty is something that can be argued
26 to the jury by both sides.

27 And I rely on People vs. Cook, 608 F.2d.
28 1175, 1178 through 79.

1 The fact that the degree of certainty did
2 not change after the suggestive comment suggests
3 that the comment did not have any effect on the
4 witness.

5 So Mr. Mendell was consistent at all times,
6 believed he could identify the shooter, he was
7 quite confident of that throughout. Before his --
8 Detective McColgin's comments, he said he would
9 definitely identify the shooter if he saw him
10 again.

11 And again at the preliminary hearing he
12 was -- said he was confident he could identify the
13 shooter before he even saw the photo spread.

14 And his testimony "I will never get that
15 picture out of my head", that is the picture of the
16 shooter's face, strongly corroborates his ability
17 to recall the shooter's appearance.

18 So ~~I find that the identification at the~~
19 ~~preliminary hearing was reliable based on the~~
20 ~~totality of the circumstances, and for the same~~
21 ~~reasons I don't believe there is any basis to~~
22 ~~exclude any potential identification of the~~
23 ~~defendant in court during the trial.~~ The evidence
24 as a whole indicates that Mr. Mendell's
25 ~~identification will be based on his observation of~~
26 ~~the shooter at the scene, not on Detective~~
27 ~~McColgin's comments.~~ And the defense will be given
28 absolute full opportunity to elicit all relevant

1 factors regarding the identification, including
2 Mr. Mendell's lack of certainty throughout this
3 process; that the defense will be permitted to
4 elicit and argue to the jury that they should not
5 accept Mr. Mendell's identification because he was
6 influenced by Detective -- or may have been
7 influenced by Detective McColgin, but I find based
8 on a totality of the circumstances that he was
9 not. And, therefore, the identifications do not
10 violate due process.

11 Of course, the jury will have an
12 opportunity to observe firsthand Mr. Mendell's
13 testimony and any ability to identify the
14 defendant.

15 ~~So the motion to exclude the various stages~~
16 ~~of identification is denied.~~

17 I think that resolves all of our
18 outstanding in limine motions.

19 MR. MOAWAD: I believe so.

20 There are some additional documents that --
21 that we hadn't yet discussed that are from the
22 computer, but I will certainly bring them to the
23 attention of the Court and counsel before I do
24 anything with them.

25 THE COURT: As long as you have everything
26 resolved before opening statements so we can
27 proceed expeditiously. In other words, if there is
28 any disagreement we need to talk about it before.