

STATE OF WISCONSIN
IN SUPREME COURT

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CASE NO. 2013AP218-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JESSICA M. WEISSINGER,

Defendant-Appellant-Petitioner,

ON REVIEW OF A DECISION OF THE COURT OF
APPEALS, DISTRICT II, AFFIRMING THE JUDGMENT
ENTERED BY THE OZAUKEE CIRCUIT COURT, THE
HONORABLE SANDY A. WILLIAMS PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Introduction 1

Argument 1

I. A NEW TRIAL IS WARRANTED BECAUSE
THE DEFENDANT-APPELLANT-PETITIONER
WAS PREJUDICED WHEN THE TRIAL COURT
ERRED BY ALLOWING TESTIMONY ABOUT
A BLOOD DRAW ANALYZED BY THE
WISCONSIN STATE LABORATORY OF
HYGIENE TO BE ADMITTED INTO
EVIDENCE AT TRIAL 1

Conclusion 7

Certification

Certificate Of Compliance With Rule 809.19(12)

TABLE OF AUTHORITIES

<u>State of Arizona v. Velasco</u> 799 P.2d 821,828, 165 Ariz. 480	2
<u>State v. Disch</u> , 119 Wis.2d 461, 497, 351 N.W.2d 492 (1984)	4
<u>State v. Dubose</u> , 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 572 (2005)	2

INTRODUCTION

Recognizing that the Court does not view favorably repetitious argument, Defendant-Appellant-Petitioner Jessica M. Weissinger will submit this brief reply to the State's Response Brief herein.

ARGUMENT

- I. A NEW TRIAL IS WARRANTED BECAUSE THE DEFENDANT-APPELLANT-PETITIONER WAS PREJUDICED WHEN THE TRIAL COURT ERRED BY ALLOWING TESTIMONY ABOUT A BLOOD DRAW ANALYZED BY THE WISCONSIN STATE LABORATORY OF HYGIENE TO BE ADMITTED INTO EVIDENCE AT TRIAL.

The Fourteenth Amendment of the United States Constitution states "No State shall make or enforce any law which shall abridge the privileges or immunities do 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 protections of the laws." The Wisconsin Constitution states in Article 1, sec. 1 that

"All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from consent of the governed."

The United States Constitution and the Wisconsin Constitution both address the concept of "due process." However the concept of "due process" is not a straight forward concept. "There is probably no more nebulous and indefinable concept in the law than 'due process of law.' Generally speaking, the denial of due process is a denial of 'fundamental fairness, shocking to the universal sense of justice.'" State of Arizona v. Velasco 799 P.2d 821,828, 165 Ariz. 480, quoting *Oshrin v. Coulter*, 142 Ariz. 109, 111, 688 P.2d 1001, 1003 (1984).

The issue of "due process" has been the subject of many cases since the inception of the principles that encompass due process. State v. Dubose, 2005 WI 126, 285 Wis.2d 143, 699 N.W.2d 572 (2005) is just one of those cases. It changed the manner in which show ups were performed. This change was based on the broad principle that the identifications were unnecessarily suggestive. But prior to reaching this ultimate conclusion, the Court spends a considerable amount of time discussing the

historical decisions that formed the basis for the Court's previous rulings regarding identifications.

After this discussion, the Court turns its attention to the concept of what has changed over the years with eyewitness identification. The Court states "[o]ver the last decade, there have been extensive studies on the issue of identification evidence, research that is now impossible [to] ignore." The Court listed a number of publications such as *Nancy Steblay et al., Eyewitness Accuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 *L. & Human Behavior*. 523 (2003); *Winn S. Collins, Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 *Wis. L. Rez.* 529; *Gary L. Wells & Elizabeth Olson, Eyewitness Testimony*, 54 *Ann. Rev. Psychol.* 227 (2003); *Tiffany Hinz & Kathy Pezdek, The Effects of Exposure to Multiple Lineups on Face Identification Accuracy*, 25 *L. & Human Behav.* 185 (2001); *U.S. Department of Justice, Eyewitness Evidence: A Guide for Law Enforcement* (1999). Id. at 162. The Court indicated that based upon the above mentioned studies that "eyewitness testimony is often 'hopelessly unreliable.'" Id. at 162, quoting *Commonwealth v. Johnson*, 650 *N.E.2d* 1257, 1262 (Mass 1995). This is the same information that Judge Paul Reilly pointed out in his dissent in this

matter. It is clear that mistakes have been made in regards to eyewitness identifications and also by crime labs. This Court as well as a number of other jurisdictions throughout the Country have recognized that eye witness identifications have violated the due process rights of defendants and as a result the laws have changed regarding how eye witness identifications are conducted. Judge Reilly points out that the mistakes made in crime labs throughout the Country have also violated the due process rights of defendants especially when there are identifiable mistakes by said crime labs.

"Due process guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.'" State v. Disch, 119 Wis.2d 461, 497, 351 N.W.2d 492 (1984), quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440, 3449, 73 L.Ed.2d 1193 (1983). This statement encompasses the main issues with the concept of due process. Specifically whether or not there was a fair trial.

In the matter at hand, there was not a fair trial. Weissinger was not in a position to test the very substance that resulted in her conviction. The reason she was not able to test the substance was due to an administrative agency's rule to destroy blood samples after a specific period of time.

There has been no explanation offered by the State of Wisconsin or the Department of Hygiene that gives any sort of explanation as to why a sample of blood cannot be kept for future testing by a defendant in a criminal case. The State has taken the position that since an administrative agency has a rule that blood samples are destroyed within six months irrespective of whether or not a person is aware that the sample will be destroyed and irrespective of whether or not criminal charges will be forthcoming and that destroyed sample will be the lynchpin of the evidence used to convicted the defendant, that rule is acceptable and it does not violate the due process rights of a person.

Due process required changes in the procedures in regards to witness identification. These changes came about because research showed eye witness identifications were not always reliable and as a result defendants who had criminal convictions based upon eye witness identifications did not receive a fair trial. Due process should require

that a criminal defendant whose trial resolves around the issue of whether or not they were under the influence of an illegal substance, that criminal defendant should be allowed to test the sample of blood that is being used against them. An administrative agency's rule should not trump the concept of a fair trial. Fairness supports this proposition and so does due process.

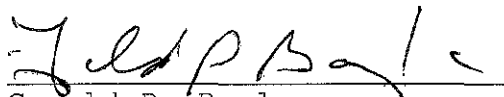
CONCLUSION

For all the reasons stated herein, Defendant-Appellant Weissinger respectfully requests that this Court reverse the decision of the Court of Appeals and remand the matter to the trial court with an order to suppress the results of the blood draw that was analyzed by the Wisconsin State Laboratory of Hygiene and further to grant a new trial based upon the erroneous admission of these results at the original jury trial in this matter.

Dated this 22 day of December 2014.

Respectfully submitted,

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Attorneys for Defendant-
Appellant



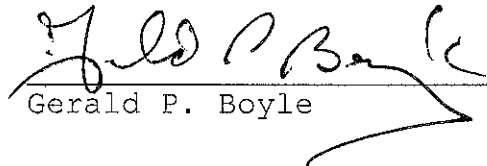
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Certification

I certify that this brief conforms to the rules contained in Wis. Stat. Section 809.19(8)(b) and (c) Stats., for a brief produced with a monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margin on the other 3 sides. The length of this brief is 7 pages.

Dated: 12.22.14



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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

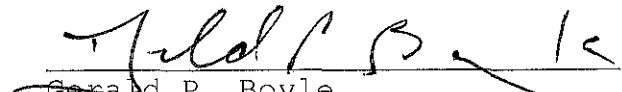
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: 12.22.14

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