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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

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In the matter of the refusal of David Francis Walloch:

STATE OF WISCONSIN,

Plaintiff-Respondent,

Court of Appeals case no.:  
2015AP000574

v.

DAVID FRANCIS WALLOCH,

Defendant-Appellant.

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**REPLY BRIEF OF DEFENDANT-APPELLANT**

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APPEAL FROM AN ORDER OF THE  
CIRCUIT COURT FOR WASHINGTON COUNTY, BRANCH III,  
THE HONORABLE TODD K. MARTENS, PRESIDING

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## **ARGUMENT**

### **I. THE STATE MUST PROVE IDENTIFICATION BY A PREPONDERANCE OF THE EVIDENCE, AND MAY NOT MEET ITS BURDEN BY SIMPLY STATING A LEGAL CONCLUSION**

Defendant argues, and the state concedes, that inherent in the issues to be decided at a refusal proceeding is identification of the defendant as the subject of the refusal. The state must establish the identification of the defendant. While there is no specific formula for proving the identity of a defendant, the state cannot meet its burden simply by stating a legal conclusion, in this case that the defendant was identified, with no evidence to support that conclusion. The Wisconsin jury instruction on the issue of defendant identification admonishes the trier of fact on the numerous considerations in identification, including the credibility of the witness, the opportunity to observe the witness and make a reliable identification, the period of time elapsed between the witness's observation and the identification, and all of the factors that might affect perception, memory, and all of the influences and circumstances relating to the identification. Wis JI Criminal 141.

The Court has recognized that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and

responsible for more wrongful convictions than all other causes combined. *State v. Dubose*, 2005 WI 126, ¶30, 285 Wis. 2d 143, 699 N.W.2d 582. The Wisconsin Department of Justice published recommended guidelines for law enforcement on eyewitness identification, including a Model Policy and Procedure for Eyewitness Identification and a Comprehensive Review & Analysis of Best Practices. *State v. Shomberg*, 2006 WI 9, ¶ 16, 709 N.W.2d 370.

Here, based on witness testimony, what is known is that officers were dispatched to the scene not because of the suspect who was arrested for drunk driving and refused to voluntarily submit to a chemical test, but rather because of another matter involving other suspects. R 6, p. 7. While the state introduced conclusory testimony that the suspect in question was Defendant David Walloch, it provided no rationale for how its witnesses identified this suspect. No evidence was introduced which would allow a trier of fact to assess the manner in which an identification was made, or why it should be considered reliable. While it is true that the law has evolved to manage issues of identification, the state must meet its burden of identification by a preponderance of the evidence. The State may not meet its burden simply by asserting a legal conclusion.

Signed and dated at Glendale, Wisconsin this \_28<sup>th</sup>\_ day of July  
2015.

Respectfully submitted,  
MISHLOVE & STUCKERT, LLC

\_\_\_\_\_/s/\_\_\_\_\_  
BY: Emily Bell  
Attorney for the Defendant  
State Bar No.: 1065784

### **CERTIFICATION**

I certify that this brief conforms to the rules contained in Wis. Stats. §809.19(3)(b) and (c), for a brief produced with a proportional serif font. The length of this brief is 410 words.

Additionally, I certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Signed and dated at Glendale, Wisconsin this 28<sup>th</sup> day of July 2015.

Respectfully submitted,  
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