STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP1894-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

STEPHAN I. ROBERSON,

Defendant-Respondent-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AN ORDER GRANTING A MOTION TO SUPPRESS EVIDENCE, ENTERED IN WOOD COUNTY CIRCUIT COURT, THE HONORABLE NICHOLAS J. BRAZEAU, JR., PRESIDING

PLAINTIFF-APPELLANT'S BRIEF AND APPENDIX

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ISSUES PRESENTED

1. C.A.S. claimed that a person, whom he knew as "P" through two prior drug transactions, shot him. Officers presented C.A.S. with a single photograph of Stephen I. Roberson. C.A.S. identified Roberson as the alleged shooter. Did C.A.S.'s out-of-court identification of Roberson from a single photograph violate his due process rights?

The circuit court answered: Yes.

The court of appeals answered: No. The court of appeals declined to extend *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143, 699 N.W.2d 582, to a single-photograph identification and determined that C.A.S.'s identification of Roberson was sufficiently reliable under the totality of the circumstances and, therefore, admissible.

This Court should answer: No.

2. Even if C.A.S.'s out-of-court identification violated Roberson's due process rights, was C.A.S.'s in-court identification of Roberson admissible because it rested on C.A.S.'s prior independent recollection of Roberson?

The circuit court answered: No.

The court of appeals answered: Yes.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case merits oral argument and publication.

INTRODUCTION

During a shooting investigation, Wisconsin Rapids police officers presented the victim, C.A.S., with a single photograph of Roberson from his Facebook page. C.A.S.

identified Roberson as the person who shot him. C.A.S. told police that he and Roberson had conducted two drug transactions in the days before the shooting. C.A.S. also identified Roberson as the shooter in court at a hearing on Roberson's motion to suppress C.A.S.'s identification.

Despite finding that C.A.S. had a sufficient basis to identify the shooter from two prior meetings with him that lasted one-half hour each, the circuit court determined that the out-of-court identification tainted C.A.S.'s in-court identification of Roberson. Based on its determination that the out-of-court identification process was impermissibly suggestive and unreliable, the circuit court suppressed C.A.S.'s out-of-court and in-court identifications of Roberson.

On appeal, the parties have disputed the legal standard that a court should apply when assessing the admissibility of an out-of-court identification based on a single photograph.

The State contends that courts should follow the longstanding suggestiveness-reliability test set forth in *Neil v. Biggers*, 409 U.S. 188, 198–200 (1972), and *Powell v. State*, 86 Wis. 2d 51, 64–65, 271 N.W.2d 610 (1978). Under that test, a court may admit an out-of-court identification based on an otherwise impermissibly suggestive identification procedure, if the out-of-court identification was reliable under the totality of the circumstances. *Id*.

In contrast, Roberson asserts that *Dubose*'s necessity test should apply to a single-photograph identification. *Dubose*, 285 Wis. 2d 143, ¶ 33. Under this standard, which this Court grounded in its interpretation of Article I, Section 8 of the Wisconsin Constitution, "evidence obtained from an out-of-court showup is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary." *Id*. ¶¶ 33, 36.

The Court need not overrule *Dubose* to decide Roberson's case. Like the court of appeals, this Court can reaffirm that the suggestiveness-reliability test applies to review of an out-of-court identification based on a single photograph. Like the court of appeals, this Court can decline to extend *Dubose*'s necessity standard to review of out-of-court identification procedures other than in-person showups.

But this Court should go further and overrule *Dubose*, which departs from this Court's longstanding practice of treating the due process clauses of the Wisconsin and United States Constitutions as substantially equivalent and subject to identical interpretation. Neither *Dubose* nor cases decided after *Dubose* provide guidance as to when this Court will find greater due process protection under the Wisconsin Constitution than under its federal counterpart. *Dubose* is unsound because its exclusive focus on necessity may result in the exclusion of otherwise reliable evidence. An identification's reliability, not its necessity, should be the determinative factor for assessing whether it violates a defendant's due process rights.

This Court should determine that C.A.S.'s out-of-court and in-court identifications of Roberson are admissible. First, based on C.A.S.'s prior relationship with Roberson, the officers' use of a single photograph to identify Roberson was not impermissibly suggestive. Second, even if it was impermissibly suggestive, C.A.S.'s out-of-court identification was still reliable under the totality of circumstances. C.A.S.'s statement suggesting that black people look alike detracted from the reliability of his identification. But other factors heavily supported its reliability, including C.A.S.'s two previous contacts with Roberson and the time they spent together immediately before, during, and after the shooting.

Further, even if the circuit court properly excluded the out-of-court identification, it erred when it excluded C.A.S.'s

in-court identification of Roberson. Based on their previous contacts with each other, C.A.S.'s in-court identification rested on a source independent of his out-of-court identification of Roberson from a single photograph.

STATEMENT OF THE CASE

I. Statement of Facts

On January 20, 2017, Roberson allegedly shot C.A.S. in Roberson's car after C.A.S. told Roberson that another person robbed C.A.S. of marijuana that C.A.S. agreed to sell for Roberson. (R. 4:1–2.)

C.A.S.'s first meeting with Roberson. C.A.S. stated that he met a person who used the name "P" at Walmart toward the end of January 2017. (R. 35, A-App. 110.)[1] P tapped C.A.S. on the shoulder and asked C.A.S. if he "smoked." (A-App. 110.) C.A.S. replied, "yes." (*Id.*) "P," who was attempting to obtain marijuana, asked C.A.S. if he could get a "bag"; C.A.S. replied, "yes." (*Id.*) "P" gave C.A.S. a ride in a tannish, gold-colored Buick to get marijuana. (A-App. 110–11.) C.A.S. recalled that "P" wore a sweatshirt with work pants and that he had dreadlocks or cornrows. (A-App. 111.) After C.A.S. helped "P" purchase marijuana, "P" drove C.A.S. back to Walmart. C.A.S. gave "P" his number. (*Id.*) This first meeting lasted a little longer than a half hour. (A-App. 120.)

P contacted C.A.S. the following day because C.A.S. was supposed to obtain more marijuana for "P." (A-App. 111.)

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[1] The motion hearing transcript appears in the record at R. 35. Because the transcript's pagination in the electronic record does not reflect its actual pagination, the State provides a clean version of the transcript in its appendix and will cite to the appendix in the brief.

C.A.S. told "P" that he could get marijuana but was unsuccessful. (A-App. 112.)

C.A.S.'s second meeting with Roberson. "P" contacted C.A.S. the next day about getting marijuana for "P." (A-App. 112.) C.A.S. texted "P" and said that he could get marijuana, but "P" replied that he would have to wait until after "P" got off work. (A-App. 112.) "P" later picked up C.A.S. and C.A.S.'s brother and sister. (*Id*.) After they got the marijuana, "P" entered C.A.S.'s house and asked C.A.S. to sell it for him. (*Id*.) While "P" wanted C.A.S. to sell it in "eighths," C.A.S. only knew someone who wanted a half ounce. (A-App. 112–13.) C.A.S. described "P" as wearing a sweatshirt and workpants, and having dreadlocks or cornrows in his hair. (A-App. 113.) The second meeting between C.A.S. and "P" lasted a little longer than one half-hour. (A-App. 120.) C.A.S. was later robbed of the marijuana at gun point when he went to sell it. (A-App. 113, 120.)

C.A.S. third meeting with Roberson. After C.A.S. texted "P" and told him that he had been robbed, "P" picked up C.A.S. (A-App. 114.) They drove toward the dog park. (*Id*.) When "P" and C.A.S. were talking, "P" fired a shot past C.A.S.'s head. (*Id*.) During their altercation, "P" then shot C.A.S. in the leg. (*Id*.) "P" then asked C.A.S. if he was going to tell anyone; C.A.S. replied, "no," and asked "P" to take him home. (*Id*.) C.A.S. said that this meeting lasted between one and one-half hours to two hours. (A-App. 120.)

Law enforcement's identification of Roberson as the person referred to as "P." Investigator Nathan Reblin of the Wisconsin Rapids Police Department learned from other unidentified people that a man who used the name "P" shot C.A.S. in the leg. (A-App. 121–23.) Reblin saw text messages between C.A.S. and someone identified as "P" on C.A.S.'s Facebook page. (A-App. 124.) Reblin determined that "P"'s phone number was linked to Roberson's Facebook account. (A-

App. 121–24.) Reblin saw Roberson's profile picture on his Facebook page. (A-App. 126.)

Waupaca County Sheriff's Deputy Kevin Studzinski encountered Roberson during a traffic stop, and Roberson took Studzinski's picture. (A-App. 132–33, 135.) Officers later saw Studzinski's picture on Roberson's Facebook page, and Studzinski identified Roberson in court as owner of that Facebook page. (A-App. 140.)

C.A.S.'s out-of-court identification of Roberson. At the suppression hearing, C.A.S. explained that he was taken into custody on a probation hold approximately two weeks after he was shot. (A-App. 115–16.) While he was in jail, C.A.S. spoke to Reblin about the shooting. (A-App. 127.) Before C.A.S. identified Roberson as the shooter from Roberson's Facebook profile picture, C.A.S. and Reblin discussed the circumstances that led to the shooting. (A-App. 127–28.)

Reblin's recorded interview with C.A.S.[2] Reblin told C.A.S. that he wanted to talk to him about being shot. (R. 19:09h:22m:50s–23m:20s.) C.A.S. said that a "black guy" named "P" was involved. (R. 19:09h:23m:36s.) C.A.S. explained that he met "P" at Walmart; "P" asked if he had "weed." (R. 19:09h:23m:43s.) C.A.S. confirmed that he had never seen "P" before that day in his life. (R. 19:09h:27m:02s.) C.A.S. stated "P" told him that he had been trying to get a "bag" for about a week. (R. 19:09h:27m:31s.) C.A.S. got "weed" for "P" the first time they met. (R. 19:09h:23m:58s.)

C.A.S. told Reblin that "P" bought him a phone. (R. 19:09h:25m:25s.) Reblin said that he saw texts on the phone with a person named "P," and C.A.S. confirmed that this was on a phone that "P" gave him. (R. 19:09h:26m:02s–

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[2] A DVD of Reblin's interview with C.A.S. was received as evidence at the suppression hearing. (A-App. 103–04; R. 19.)

45s.) C.A.S. described "P"'s car as a gold Buick Century. (R. 19:09h:28m:14s.)

C.A.S. told Reblin that "P" asked him to "hustle" the marijuana for him, but someone robbed him of the marijuana. (R. 19:09h:28m–29m.) When C.A.S. told "P" someone robbed him of the marijuana, "P" drove C.A.S. to a dog park. (R. 19:09h:29m:04s–30m:33s.) "P" shot a .22 or .25 caliber gun past C.A.S.'s head, punched him in the face, and then shot him in the leg. (R.19:09h:31m:50s–32m:01s.) "P" asked C.A.S., "Why did you make me shoot you?" (R. 19:09h:31m:44s, 09h:36m:41s.)

From his conversations with "P," C.A.S. learned that "P" was from Milwaukee and had recently moved to the area (R. 19:09h:38m:59s), that "P" had just got out of prison (R. 19:09h:39m:11s), and "P" could not be reached when he was at work. (R. 19:09h:39m:19s.)

Reblin testified that he asked C.A.S. if he could identify the person who shot him. (A-App. 127.) C.A.S. testified that he got a good look at the person who shot him and knew what the shooter looked like. (A-App. 116.) Reblin then showed C.A.S. a Facebook profile picture of Roberson, who was wearing a dress shirt, bow tie, suspenders, and sunglasses. (A-App. 117, 127–28; R. 20; 21.)[3] C.A.S. identified the person in the picture as "P," the person who shot him. (A-App. 118–19, 128; R. 20.) Officers did not show C.A.S. any other photographs. (A-App. 119.)

In C.A.S.'s recorded interview, Reblin asked C.A.S. if he would recognize "P" if he saw him again. (R. 19:09h:39m:30s.) C.A.S. replied, "possibly . . . black people kind of look . . ."

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[3] Exhibit 2 is a black and white version of a colored photograph that appears on Roberson's Facebook page, which was marked and received as Exhibit 3. (R. 20; 21:1.)

while making a hand gesture that included opening his hand with his palm facing out and placing it back on his lap. (R. 19:09h:39m:34s.)

Another officer then showed C.A.S. his cell phone. (R. 19:09h:39m:41s.) After C.A.S. appeared to shake his head up and down, Reblin asked if that was "him," C.A.S. replied, "Yep." (R. 19:09h:39m:43s.) Reblin asked C.A.S. "100%?" C.A.S. responded, "100%." (R. 19:09h:39m:51s.) After C.A.S. identified "P," Reblin and C.A.S. discussed C.A.S.'s contacts with "P," the circumstances that led to the shooting, and possible court proceedings. (R. 19:09h:39m:55s–09h:57m:20s.)

Reblin did not believe that a photo array was necessary because he had already identified Roberson without C.A.S. (A-App. 128.) Further, while C.A.S. knew Roberson by his nickname, C.A.S. had more than "a one-time interaction with him." (A-App. 128–29.)

C.A.S.'s in-court identification of Roberson. At a suppression hearing, C.A.S. identified Roberson as the person who shot him. (A-App. 116.) C.A.S. testified that he got a good look at the shooter and he knew what the shooter looked like before Reblin showed him the picture. (A-App. 116.)

II. Procedural History

A. Circuit court proceedings

The State charged Roberson with first-degree reckless injury, contrary to Wis. Stat. § 940.23(1)(a). (R. 4:1.) Roberson moved to suppress C.A.S.'s and Officer Studzinski's identification of him. (R. 17:1.) C.A.S., Reblin, and Studzinski testified at an evidentiary hearing. (R. 35.)

In its decision, the circuit court concluded that "[t]he chances that a misidentification occurred are unclear." (R. 28:3.) The circuit court observed:

> [C.A.S.] had every opportunity to observe the defendant at the time of the crime. They were seated in the front seat of a car together after the defendant had come and picked [C.A.S.] up. They drove, but then stopped the car for their confrontation. [C.A.S.]'s degree of attention is difficult to pinpoint. On the one hand, it is likely he was paying attention to the person in this physical confrontation who shot him. However, it is also likely that he was paying attention to the gun and the situation, as well as the robbery that had recently occurred to him. There was no prior description of the criminal to weigh in this case. The level of attention demonstrated by the witness at the confrontation was not significant here. The length of time between the crime and the confrontation in court was approximately two months. While not noted in those factors, it is also relevant at this state to consider [C.A.S.]'s comment to the effect that African Americans look alike. The chances that a misidentification occurred are unclear.

(R. 28:2–3.)

The circuit court determined that "[C.A.S.] had met 'P' twice before the shooting incident. These weren't meetings in passing; they lasted approximately a half hour each. This Court believes [C.A.S.] has a sufficient basis to identify 'P' from those meetings." (R. 28:3.)

Based on this record, the circuit court determined that Reblin's presentation of a single photograph of Roberson to C.A.S. unnecessarily suggested Roberson's identification:

> The process is shaky, and the victim making the identification is likewise shaky, so the Court lacks confidence that the identification of "P" by [C.A.S.] is not the result of showing the single photo to him. As such, [C.A.S.]'s identification of [Roberson]'s photo

> and his later identification in court, tainted by his exposure to that photo, are suppressed.

(R. 28:4.) While the circuit court suppressed both C.A.S.'s out-of-court and in-court identifications of Roberson, it denied his motion to suppress Studzinski's identification of him. (R. 28:5–6.)

B. The Court of Appeals' Decision

The State appealed the circuit court's decision suppressing C.A.S.'s identifications of Roberson. *State v. Roberson*, No. 2017AP1894-CR, 2018 WL 4846813, ¶ 1 (Wis. Ct. App. Oc. 4, 2018). The court of appeals reversed, determining that both C.A.S.'s out-of-court and in-court identifications were admissible. *Id*. ¶¶ 1, 8, 51.

The court of appeals declined to apply *Dubose*'s necessity standard when it assessed the admissibility of C.A.S.'s out-of-court identification of Roberson from a single photograph. *Roberson*, 2018 WL 4846813, ¶ 17. Considering *Dubose* and *State v. Ziegler*, 2012 WI 73, 342 Wis. 2d 256, 816 N.W.2d 238, the court of appeals concluded that "a single photograph identification procedure is not a 'showup.'" *Id*. ¶ 15. Further, based on this Court's later comment restricting *Dubose*'s "broader [due process] right to the specific context of an identification procedure known as a 'showup,'" the court of appeals declined to apply *Dubose*'s necessity test to C.A.S.'s identification of Roberson. *Id*. ¶ 17 (quoting *State v. Luedtke*, 2015 WI 42, ¶ 48, 362 Wis. 2d 1, 863 N.W.2d 592).

Instead, the court of appeals reviewed the admissibility of C.A.S.'s out-of-court and in-court identifications of Roberson under "the long-standing suggestiveness/reliability test" set forth in *Biggers*, 409 U.S. at 198, and *Powell*, 86 Wis. 2d at 64–65. *Roberson*, 2018 WL 4846813, ¶¶ 10, 18. For purposes of analysis, it assumed that the out-of-court procedure was impermissibly suggestive and focused on

whether the State proved that the identification was "nonetheless reliable." *Id.* ¶ 18. While acknowledging that C.A.S. made a "careless and racist statement" during the interview, the court of appeals determined that "a reasonable fact finder watching the video could find" that "CAS credibly had no trouble actually identifying the particular black male with whom he had spent considerable time." *Id.* ¶ 49. Based upon the totality of circumstances, including "CAS's opportunity to view "P," C.A.S.'s degree of attention, C.A.S.'s level of certainty, and the length of time between the shooting and the identification," the court of appeals concluded that the single-photograph procedure was sufficiently reliable and, therefore, that the out-of-court identification was admissible. *Id.* ¶¶ 49–50. Because it determined that the out-of-court procedure was sufficiently reliable, the court of appeals concluded that C.A.S.'s in-court identification was admissible. *Id.* ¶ 8.

C. Roberson's petition for review

Roberson asked the Court to address whether *Dubose*'s necessity standard should apply when a court assesses the admissibility of an out-of-court identification based on a single photograph. (Roberson's Pet. 1.) The State opposed the petition because the court of appeals correctly determined that *Dubose*'s necessity test does not apply to single-photograph presentations. (State's Response 2–5.) Alternatively, the State explained that if the Court granted the petition, it would ask the Court to overrule *Dubose* and hold that the *Biggers/Powell* suggestiveness-reliability test should apply whenever a court reviews a challenged out-of-court identification. (State's Response 6–10.) The Court granted Roberson's petition.

STANDARD OF REVIEW

This Court applies a two-step analysis when it reviews a motion to suppress an out-of-court or in-court identification. First, it will uphold the circuit court's factual findings unless clearly erroneous. *Dubose*, 285 Wis. 2d 143. "[W]hen evidence in the record consists of disputed testimony and a video recording, [a reviewing court] will apply the clearly erroneous standard of review when reviewing the trial court's findings of fact based on that recording." *State v. Walli*, 2011 WI App 86, ¶ 17, 334 Wis. 2d 402, 799 N.W.2d 898.[4]

Second, this Court independently applies the relevant constitutional principles to these facts. *State v.* (*David*) *Roberson*, 2006 WI 80, ¶ 25, 292 Wis. 2d 280, 717 N.W.2d 111.

ARGUMENT

I. The officers' decision to present C.A.S. with a single photograph of Roberson did not violate Roberson's due process rights.

First, the State discusses the suggestiveness-reliability test and the *Dubose* necessity test. Second, the State addresses why the suggestiveness-reliability test, and not the *Dubose* necessity test, should apply to single-photograph identifications. Third, the State explains why, though this Court need not overturn *Dubose* to decide Roberson's case, it

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[4] In *State v. Jimmie R.R.*, 2000 WI App 5, 232 Wis. 2d 138, 606 N.W.2d 196, the court of appeals applied a *de novo* standard of review when "the only evidence" was "the videotape itself." *Id.* ¶ 39. The court reasoned that it was "in as good a position" as the circuit court to make a factual determination. *Id.* The State questions *Jimmie R.R.*'s correctness because the court of appeals is without jurisdiction to make factual findings. *Gottsacker v. Monnier,* 2005 WI 69, ¶ 35, 281 Wis. 2d 361, 697 N.W.2d 436 *(*citation omitted).

should overturn *Dubose*. Lastly, the State applies the application of the suggestiveness-reliability standard to Roberson's case.

A. Legal principles

1. The suggestiveness-reliability test for assessing out-of-court identifications

An out-of-court identification procedure implicates a defendant's due process rights "when law enforcement officers use an identification procedure that is both suggestive and unnecessary."[5] *Perry v. New Hampshire*, 565 U.S. 228, 238–39 (2012). Specifically, "[i]t is the likelihood of misidentification which violates a defendant's right to due process . . ." *Biggers*, 409 U.S. at 198.

While the Supreme Court "condemned" "unnecessarily suggestive" out-of-court confrontations, it declined to adopt a strict rule requiring their exclusion. *Biggers,* 409 U.S. at 198. The court subsequently characterized the exclusion of an otherwise reliable identification as a "Draconian sanction." *Manson v. Brathwaite*, 432 U.S. 98, 113 (1977). It emphasized that "reliability is the linchpin" in determining the admissibility of identification testimony. *Id.* at 114, *quoted with approval in State v. Hibl*, 2006 WI 52, ¶ 24, 290 Wis. 2d 595, 714 N.W.2d 194. The question is "whether under the 'totality of the circumstances' the identification was reliable

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[5] C.A.S.'s out-of-court, pre-charging identification of Roberson did not implicate his Sixth Amendment right to counsel because that right only attaches to post-indictment lineups. *United States v. Wade*, 388 U.S. 218, 236–37 (1967). Further, the right to counsel does not extend to post-indictment photograph identifications. *Holmes v. State*, 59 Wis. 2d 488, 500–01 n.12, 208 N.W.2d 815 (1973) (citing *United States v. Ash*, 413 US. 300, 321 (1973).

even though the confrontation procedure was suggestive." *Biggers*, 409 U.S. at 199.

Following *Biggers* and *Brathwaite*, this Court adopted a two-part test for assessing whether to admit an out-of-court identification. *Powell*, 86 Wis. 2d at 65 n.6. First, the defendant has the burden of establishing that the witness' out-of-court identification resulted from an impermissibly suggestive procedure. *Id*. Second, if the defendant meets this burden, then the State must prove that the identification was nonetheless reliable under the totality of the circumstances. *Id*. at 66.

To establish that an otherwise impermissibly suggestive out-of-court identification is nonetheless reliable, courts assess several factors. These factors include the witness's opportunity "to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Biggers*, 409 U.S. at 199–200; *see also Hibl*, 290 Wis. 2d 595, ¶ 39.

Because the reliability determination is based on the totality of the circumstances, courts do not treat the *Bigger*s factors as exclusive and will consider other factors. *See United States v. Dortch*, 342 F. Supp. 3d 810, 818 (N.D. Ill. 2018). Indeed, this Court has noted several factors beyond those identified in *Biggers* that may affect the reliability of an eyewitness's identification. *Hibl*, Wis. 2d 595, ¶¶ 39–40.

Wisconsin courts have applied this two-prong test to a variety of out-of-court identifications challenged on due process grounds, including:

- lineups, *State v. Benton*, 2001 WI App 81, ¶¶ 5–10, 243 Wis. 2d 54, 625 N.W.2d 923;

- sequential lineups, *State v. Armstrong*, 110 Wis. 2d 555, 576–78, 329 N.W.2d 386 (1983);
- voice identification lineups, *State v. Ledger*, 175 Wis. 2d 116, 129–32, 499 N.W.2d 198 (Ct. App. 1993);
- photo arrays, *Powell*, 86 Wis. 2d at 66; *State v. Mosley*, 102 Wis. 2d 636, 652, 307 N.W.2d 200 (1981);
- and pre-*Dubose* showups, *State v. Wolverton*, 193 Wis. 2d 234, 264–65, 533 N.W.2d 167 (1995).

Single-photograph presentations. Wisconsin courts have declined to hold that the presentation of a single photograph is *per se* impermissibly suggestive. "A single photo identification is not to be presumed guilty until proved innocent." *Kain v. State*, 48 Wis. 2d 212, 219, 179 N.W.2d 777 (1970). Rather, courts determine whether an out-of-court identification is inadmissible on a case-by-case basis. *Id*. The question is whether the photographic identification procedure was so impermissibly suggestive as to give rise to substantial likelihood of misidentification. *Id*.[6] As this Court explained, a rule that requires each case to be considered on its own facts under this standard "stops far, far short of rendering all [single] photo identifications either or ipso facto 'impermissibly suggestive.'" *Id*. Citing *Kain*, the court of appeals later held that an identification based on a single-photograph identification is "not per se impermissibly suggestive." *State v. Hall*, 196 Wis. 2d 850, 879, 540 N.W.2d

[6] In *Kain*, the supreme court used the word "irreparable" to qualify the word "misidentification." *Kain*, 48 Wis. 2d at 219. In *Biggers*, the Supreme Court removed the word "irreparable." It explained: "While the phrase [irreparable misidentification] was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself." *Biggers*, 409 U.S. at 198.

219 (Ct. App. 1995), *reversed on other grounds*, 207 Wis. 2d 54, 557 N.W.2d 778 (1997) (citation omitted).

Even if a court determines that the presentation of a single photograph is impermissibly suggestive, it must still assess whether the identification procedure was reliable under the totality of the circumstances. *See Hall*, 196 Wis. 2d at 879. In *Brathwaite*, the Supreme Court applied the *Biggers* factors and held that an undercover officer's identification of Brathwaite from a single photograph was reliable and, therefore, admissible. *Brathwaite*, 432 U.S. at 113–17.

2. The *Dubose* necessity standard for assessing a showup identification's admissibility

In *Dubose*, this Court departed from its longstanding practice of treating the due process clauses under the state and federal constitutions[7] as "essentially equivalent" and "subject to identical interpretation." *Dubose*, 285 Wis. 2d 143, ¶¶ 36, 40; *id.* ¶ 56 (Wilcox, J., dissenting). It held that Wis. Const. Art. I, § 8 contained a broader due process right than that contained within the Fifth and Fourteenth Amendments of the United States Constitution. *Id.* ¶ 41 (Fourteenth Amendment); *id.* ¶ 64 (Wilcox, J., dissenting) (Fifth Amendment).

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[7] Wis. Const. art. 1, § 8, cl. 1 states: "No person may be held to answer for a criminal offense without due process of law . . . ."

United States Const. amend. V states: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

United States Const. amend XIV § 1 states: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Relying on its conclusion that Article I, § 8 afforded greater due process protection than its federal counterparts, the Court rejected its past reliance on the *Biggers* / *Powell* suggestiveness-reliability test it previously applied to showups. *Dubose*, 285 Wis. 2d 143, ¶¶ 17–27, 29–31. Instead, based on its conclusion that showups are "inherently suggestive," the Court held that evidence obtained from a showup is inadmissible "unless, based on the totality of the circumstances, *the showup was necessary*." *Id.* ¶¶ 2, 33 (emphasis added).

Dubose holds that a showup is "necessary" only if "police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array." *Dubose*, 285 Wis. 2d 143, ¶¶ 2, 33, 45. "Under *Dubose*, identification evidence resulting from an 'unnecessary' showup is suppressed as inherently too suggestive, without any separate fact-based inquiry into suggestiveness or reliability." *Hibl*, 290 Wis. 2d 595, ¶ 26.

3. *Dubose* does not extend to identification procedures beyond a showup.

In *Dubose*, this Court recognized a factual difference between an out-of-court identification based on a showup and one based on a single-photograph presentation. *Dubose*, 285 Wis. 2d 143, ¶ 9–10. "While our focus is on the two showups that occurred here, the photo identification by showing [the victim] a mug shot of Dubose, was also unnecessarily suggestive and that out-of-court identification should have been suppressed." *Id.* ¶ 37. But the Court did not explain why the single-photograph presentation in *Dubose* was unnecessarily suggestive. That is, it did not say it was unnecessarily suggestive because it involved a mug shot, or because it followed two unnecessary showups, or because,

even without the showups, presenting a single photograph to the victim was unnecessary under the necessity test.

This Court's subsequent decisions have limited *Dubose*'s reach. In *Hibl*, 290 Wis. 2d 595, ¶ 56, this Court held that *Dubose*'s necessity standard did not control a victim's spontaneous or accidental identification of a defendant absent police involvement. In *Ziegler*, 342 Wis. 2d 256, ¶¶ 81–82, this Court distinguished a showup from an identification made in court through the showing of a single mug shot. "[The victim]'s identification of Ziegler through his mug shot did not constitute a showup." *Id.* ¶ 81. Based partly on *Hibl* and *Ziegler*, this Court reaffirmed the limited reach of *Dubose*'s "actual holding: that due process under the Wisconsin Constitution provides greater protection in *one identification procedure, the showup*." *Luedtke*, 362 Wis. 2d 1, ¶ 50 (emphasis added). And as this Court recently explained, it "viewed *Dubose* narrowly in the context of 'showups,'" and "declined to extend *Dubose* beyond its limited scope." *State v. Trammell*, 2019 WI 59, ¶ 33.

Based on *Hibler*, *Ziegler*, *Luedtke*, and *Trammell*, this Court should decline to extend *Dubose* to single-photograph identifications. Instead, it should direct courts to assess the admissibility of an out-of-court identification based on the *Biggers* / *Powell* suggestiveness-reliability test.

B. This Court should overturn *Dubose*'s necessity test and hold that the *Biggers* / *Powell* suggestiveness-reliability test guides the admissibility of all out-of-court identifications.

This Court should decline Roberson's invitation to extend *Dubose* to a single-photograph confirmatory identification. Instead, this Court should reassess whether

Dubose's shift in focus from an identification procedure's reliability to its necessity is legally sound.

1. Legal principles

This Court "follows the doctrine of stare decisis scrupulously because of [its] abiding respect for the rule of law." *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 94, 264 Wis. 2d 60, 665 N.W.2d 257. Therefore, this Court will not overturn precedent absent a "special justification." *Schultz v. Natwick*, 2002 WI 125, ¶ 37, 257 Wis. 2d 19, 653 N.W.2d 266. This Court has identified five factors that contribute to a decision to overturn prior case law, including

> (1) Changes or developments in the law have undermined the rationale behind a decision; (2) there is a need to make a decision correspond to newly ascertained facts; (3) there is a showing that the precedent has become detrimental to coherence and consistency in the law; (4) the prior decision is unsound in principle; or (5) the prior decision is unworkable in practice.

Luedtke, 362 Wis. 2d 1, ¶ 40 (citation omitted). Further, "the decision to overrule a prior case may turn on whether the prior case was correctly decided and whether it has produced a settled body of law." *Johnson Controls*, 264 Wis. 2d 60, ¶ 99.

2. *Dubose* has not produced a settled body of law and has become detrimental to coherence and consistency in the law.

This Court has repeatedly stated that when "the language of the provision in the state constitution is 'virtually identical' to that of the federal provision . . ., Wisconsin courts have normally construed the state constitution consistent with the United States Supreme Court's construction of the

federal constitution." *State v. Houghton*, 2015 WI 79, ¶ 50, 364 Wis. 2d 234, 868 N.W.2d 143 (citation omitted).

Thus, before *Dubose*, this Court treated a litigant's due process claims "under the federal Constitution consistently with their claims under the state constitution *because ordinarily there is no discernible difference* in intent between the . . . Due Process Clause under the Wisconsin Constitution and the United States Constitution." *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 35 n.11, 235 Wis. 2d 610, 612 N.W.2d 59 (emphasis added). Because these due process clauses "are essentially equivalent," they "are subject to identical interpretation." *State v. Hezzie R.*, 219 Wis. 2d 848, 891, 580 N.W.2d 660 (1998).

Although this Court may recognize that our state constitution provides greater due process protections, *Dubose* represents a significant departure from this Court's longstanding practice of interpreting the Article I, Section 8 due process clause coextensively with the Supreme Court's interpretations of its federal counterparts.[8] While noting that the state and federal due process clauses are "somewhat similar, but not identical," to each other, this Court did not identify textual differences between the two provisions that compelled it to replace the suggestiveness-reliability standard with the necessity standard. *Dubose*, 285 Wis. 2d 142, ¶ 41; *id.* ¶ 57 (Wilcox, J., dissenting).

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[8] In *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899, decided the same day as *Dubose*, this Court restated its authority to afford greater due process protection under Article I, Section 8 than the protections afforded under the Fifth Amendment. *Id.* ¶¶ 2, 57–62 (holding that Article 1, Section 8 requires the suppression of physical evidence when it is "obtained as the direct result of an intentional *Miranda* violation").

The *Dubose* decision also provides no guidance to litigants or lower courts assessing *when* Article I, Section 8 confers greater due process protection than its federal counterpart. The Court's post-*Dubose* decisions have not answered this question, either.

Instead, since *Dubose*, this Court has consistently declined to grant litigants greater due process protections under Article I, Section 8, than under its federal counterpart. *See* Section I.B.3, *supra.*

Beyond the identification context, this Court has recognized that *Dubose* "did not create a precedential sea change." *Trammell*, 2019 WI 59, ¶ 33. Expressly referencing *Dubose*, this Court has declined to recognize greater due process protection under Article I, Section 8 in other contexts, including a challenge to evidence preservation and destruction, *Luedtke*, 362 Wis. 2d 1, ¶¶ 47–50, and a challenge to the standard jury instruction defining reasonable doubt, *Trammell*, 2019 WI 59, ¶¶ 32–34.

Without reference to *Dubose*, this Court has also reiterated that it has "interpreted Article I, Section 8(1) of the Wisconsin Constitution consistent with the United States Supreme Court's interpretation of the Fifth Amendment." *State v. Bartelt*, 2018 WI 16, ¶ 26, 379 Wis. 2d 588, 906 N.W.2d 684 (citation omitted); *see also State v. Gonzalez*, 2014 WI 124, ¶ 6 n.6, 359 Wis. 2d 1, 856 N.W.2d 580.

Similarly, since *Dubose*, this Court has reaffirmed that it treats Article I, Section 1, of the Wisconsin Constitution to "be substantially equivalent of the due process and the equal protection clauses of the 14th Amendment to the U.S. Constitution," interpreting them consistently with each other. *Milwaukee County v. Mary F.-R.*, 2013 WI 92, ¶ 10 n.15, 351 Wis. 2d 273, 839 N.W.2d 581 (citation omitted); *see also Blake v. Jossart*, 2016 WI 57, ¶ 28, 370 Wis. 2d 1, 884 N.W.2d 484.

Thus, neither Article I, Section 8's text nor this Court's post-*Dubose* decisions provide a compelling reason to adhere to *Dubose*. By overruling *Dubose*, the Court will restore clarity to its due process jurisprudence.

3. Other jurisdictions have not followed *Dubose*'s adoption of a bright-line rule focused on a procedure's necessity.

In *Dubose*, this Court anticipated that its "experimentation with this test will be successful in Wisconsin and later adopted elsewhere." *Dubose*, 285 Wis. 2d 143, ¶ 41 n.19. But courts in other jurisdictions have declined to follow *Dubose*'s rigid approach of excluding an out-of-court identification without assessing whether the identification was nonetheless reliable. *See e.g., State v. Washington*, 189 A.3d 43, 55–59 (R.I. 2018) (noting that exclusion of an otherwise reliable identification would "frustrate rather than promote justice"); *State v. Wyatt*, 806 S.E.2d 708, 710–713 (S.C. 2017) (court assesses reliability if procedure was suggestive and unnecessary).

Other jurisdictions recognize that certain procedures like showups may be impermissibly suggestive but will still permit admission of an otherwise reliable identification based on a modified *Biggers* framework that considers other specific variables deemed relevant to reliability. *See, e.g., State v. Henderson*, 27 A.3d 872, 919–923 (N.J. 2011); *State v. Harris*, 191 A.3d 119, 123, 130, 134 (Conn. 2018) (arraignment identification procedure assessed under *Henderson*-like framework); and *Young v. State*, 374 P.3d 395, 427 (Alaska 2016) (following New Jersey's *Henderson* framework).

Thus, like *Dubose*, other state courts have recognized that evolving research may shed new light on factors relevant

to questions of suggestiveness and reliability.[9] *Henderson*, 27 A.3d at 894–911; *Harris*, 191 A.3d at 137; and *Young*, 374 P.3d at 416. But unlike *Dubose*, these other courts rejected the adoption of bright-line rules that may result in the exclusion of otherwise reliable evidence. *Henderson*, 27 A.3d at 928; *Young*, 374 P.3d at 427.

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[9] In *Dubose*, this Court's members debated the certainty and quality of research that prompted the Court to fashion the necessity standard. *State v. Dubose*, 2005 WI 126, ¶¶ 29–30, 285 Wis. 2d 143, 699 N.W.2d 582; *id.* ¶ 48–51 (Butler, J., concurring); *id.* ¶¶ 88–91 (Roggensack, J., dissenting).

The research has continued to evolve. In 2014, the National Academy of Sciences extensively reviewed the research on eyewitness identification. National Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification,* The National Academies Press (2014) (available online at https://www.nap.edu/login.php?record_id=18891) (last viewed July 9, 2019). The report identified shortcomings in research and recommended improvements to protocols, more standardization of eyewitness identification practices, and better research on eyewitness identification. *Id.* at 103–19.

The N.A.S. report prompted the U.S. Department of Justice to update its identification procedures for photo arrays. USDOJ, *Eyewitness Identification Procedures for Conducting Photo Arrays* (available online at https://www.justice.gov/file/923201/download (last viewed July 9, 2019). The USDOJ noted the evolution in research that guides identification procedures. *Id.* at 7–10. For example, past research challenged the assumption that a witness's confidence minimally corelates to its accuracy. *Id.* at 9. But more recent research has suggested that when proper procedures are used, "eyewitness confidence is a highly informative indicator of accuracy, and high-confidence suspect identifications are highly accurate." John Wixted & Gary Wells, "The Relationship between Eyewitness Confidence and Identification Accuracy: A New Synthesis," *Psychological Science in the Public Interest* (2017) (available online at https://journals.sagepub.com/stoken/default+domain/2X3HtwVgmHH7cCakgVgq/full) (last viewed July 9, 2019).

4. *Dubose* is unsound in principle because it usurps the jury's primary role of assessing evidence.

After *Dubose*, the Supreme Court of the United States reiterated, "Only when evidence is so extremely unfair that its admission violates fundamental conceptions of justice have we imposed a constraint tied to the Due Process Clause." *Perry*, 565 U.S. at 237 (internal citations and quotations omitted). As Justice Ginsberg explained, "The Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant the means to persuade the jury that the evidence should be discounted as unworthy of credit." *Id.*

Constitutional safeguards, including the right to counsel, compulsory process, and confrontation plus cross-examination of witnesses, provide a defendant with the means to counter the State's evidence. *Perry*, 565 U.S. at 237. Accordingly, "statutes and rules ordinarily govern the admissibility of evidence." *Id.* "[J]uries are assigned the task of determining the reliability of the evidence presented at trial." *Id.* In assessing the challenge to an out-of-court identification before it, the Supreme Court stated that "[a] rule requiring [the] automatic exclusion" of evidence goes "too far" because it prevents a jury from considering "reliable and relevant" evidence. *Id.* at 239 (citations omitted).

Indeed, while recognizing the circuit court's "limited gate-keeping function" to assess admissibility under Wis. Stat. § 904.03, this Court has emphasized that "questions as to the reliability of constitutionally admissible eyewitness identification evidence will remain for the jury to answer." *Hibl*, 290 Wis. 2d 595, ¶¶ 52, 53. Similarly, the New Jersey Supreme Court reaffirmed the jury's primary role evaluating identification evidence: "The threshold for suppression

remains high. Juries will therefore continue to determine the reliability of eyewitness identification evidence in most instances, with the benefit of cross-examination and appropriate jury instructions." *Henderson*, 27 A.3d at 928.

As this Court has recognized, "Generally, we are 'content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill.'" *Hibl*, 290 Wis. 2d 595, ¶ 53 (quoting *Brathwaite*, 432 U.S. at 116). *Dubose*'s broad rule excluding unnecessary showup identification evidence without assessing whether it is otherwise reliable precludes juries from considering relevant evidence. It undermines the confidence that courts have historically placed in juries to "'measure intelligently the weight of identification testimony that has some questionable feature.'" *Id.*

Overturning *Dubose* will not result in the abdication of the circuit court's gate-keeping role guiding the admissibility of eyewitness identification evidence. *Hibl*, 290 Wis. 2d 595, ¶ 53. When a defendant challenges an out-of-court identification procedure on due process grounds, the circuit court must assess it under the *Biggers / Powell* suggestiveness-reliability test. And current scientific research about suggestibility and reliability is relevant to this inquiry. *See id.* ¶ 40. Finally, should a circuit court admit a witness's out-of-court identification, the defendant may still challenge its accuracy at trial through cross-examination, admissible expert testimony, and argument based on appropriate jury instructions. *See* Wis. J.I.-Criminal 141 (2013).

C. C.A.S.'s single-photograph identification of Roberson was neither impermissibly suggestive nor unreliable under the totality of the circumstances.[10]

1. The out-of-court identification procedure was not impermissibly suggestive.

Roberson did not prove that C.A.S.'s out-of-court identification resulted from an impermissibly suggestive procedure. That C.A.S. identified Roberson from a single photograph alone does not render the out-of-court identification procedure impermissibly suggestive under this case's facts.

First, Roberson's photograph itself was not impermissibly suggestive. An officer used his cell phone to show C.A.S. a single photograph of Roberson. (R. 19:09h:39m:41s.) C.A.S. testified that Exhibit 2 was the photograph that an officer showed him and that it was a photograph of the person known to him as "P." (A-App. 118.) Unlike a mugshot, which carries with it the implicit prejudicial suggestion that the person depicted has been arrested or convicted of a crime, Exhibit 2 does not convey this type of suggestibility. Instead, it shows Roberson dressed in a dress shirt, bow tie, suspenders, and sunglasses. (R. 20.)

Second, the manner that officers presented C.A.S. with Roberson's Facebook photograph was not impermissibly suggestive. Before presenting C.A.S. with Roberson's

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[10] If this Court decides that *Dubose* nevertheless applies, then it should remand the case to the circuit court to assess the necessity of the single-photograph presentation. *Dubose*, 285 Wis. 2d 143, ¶¶ 2, 45. As the State argues in Section II, *infra*, the in-court identification is admissible regardless of the legal standard that applies to the out-of-court identification.

photograph, Reblin spoke to C.A.S. for over 15 minutes about Roberson's initial introduction to C.A.S., the drug deals C.A.S. arranged for Roberson, and the shooting. (R. 19:09h:22m:50s–19:09h:39m:30s.)

Only after speaking to C.A.S. about his prior relationship with the person C.A.S. knew as "P" and the shooting, did Reblin ask C.A.S., "If you saw him again would you recognize him?" (R. 19:09h:39m:30s.) After C.A.S. replied, "possibly . . . I mean black people kind of look," Reblin showed C.A.S. Roberson's photograph with his phone and C.A.S. confirmed that this was the person who shot him. (R. 19:09h:39m:34s–51s.) After C.A.S. identified "P" from the cellphone, Reblin and C.A.S. continued to discuss C.A.S.'s contacts with "P," the circumstances that led to the shooting, and possible court proceedings. (R. 19:09h:39m:55s–09h:57m:20s.)

The officers' presentation of a single photograph was not impermissibly suggestive. Based on their preliminary conversation with C.A.S., the officers knew that C.A.S. had a previous relationship with Roberson, or "P." (A-App. 128–29.) The officers did not ask C.A.S. to identify a stranger who assaulted him, but to confirm the identity of a shooter he knew. (A-App. 128–29.)

Courts in other jurisdictions have recognized that "suggestiveness is not a concern" when "the protagonists are known to one another." *People v. Gissendanner*, 399 N.E.2d 924, 930 (N.Y. 1979).[11] This "confirmatory identification"

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[11] Other courts have also determined that a single-photograph identification is not impermissibly suggestive when the victim identifies an assailant previously known to him or her. *See, e.g.*, *Neukam v. State*, 934 N.E.2d 198, 201 (Ind. 2010); and *State v. Liverman*, 727 S.E.2d 422, 427 (S.C. 2012) ("The suggestive nature of a show-up is mitigated by the witness's prior knowledge of the accused.").

exception is based on the assumption that a "witness is so familiar with the defendant that there is 'little or no risk' that police suggestion could lead to misidentification." *People v. Rodriguez*, 593 N.E.2d 268, 272 (N.Y. 1992). While this exception does not apply "where familiarity emanates from a brief encounter," it "may be confidently applied where the protagonists are family members, friends or acquaintances." *Id*.

Further, the officers here did not make improper comments or engage in improper activities during the out-of-court identification process. *See Foster v. State*, 348 S.W.3d 158, 162 (Mo. Ct. App. 2011) ("[t]he showing of a single photograph of a defendant to a witness where there is no improper comment or activity on the part of the officer showing the photograph does not result in impermissible suggestiveness."). Here, where C.A.S. met with Roberson on two occasions for approximately one-half hour each in the days before the shooting, the officer's presentation of a single photograph to C.A.S. to confirm Roberson's identity was not impermissibly suggestive.

Finally, this Court's decision in *Kain* is also instructive. There the defendant was at a tavern and asked an employee, who had previously seen the defendant at the tavern, for a case of beer. *Kain*, 48 Wis. 2d at 214. After leaving the bar area, the employee heard a thump. *Id*. When the employee saw the defendant leaving the tavern, the defendant took the case of beer from the employee and told her that he placed the money on the counter. *Id*. The employee later discovered money missing from the tavern. *Id*. The employee identified the defendant from a single photograph that officers presented to her. *Id*. at 218. The court determined that there was no basis to object to the photograph identification on the ground that it was impermissibly suggestive, in part because

the employee recognized the defendant as someone whom she had previously seen at the tavern. *Id.* at 219–20.

Like the victim in *Kain*, C.A.S. knew Roberson before the shooting. Based on the record, the circuit court appropriately found that C.A.S. met "P" twice before the shooting. "These weren't meetings in passing; they lasted approximately a half hour each." (R. 28:3.) Roberson allegedly shot C.A.S. during the third meeting, which lasted approximately an hour and a half. (R. 28:1–2.)

The officers' presentation of a single photograph to C.A.S., who knew Roberson through contacts cumulatively exceeding two hours, was not impermissibly suggestive.

2. C.A.S.'s out-of-court identification of Roberson was reliable under the totality of the circumstances, even if the procedure was suggestive.

Based on its thorough assessment of the *Biggers* factors, the court of appeals correctly concluded that C.A.S.'s out-of-court identification of Roberson was reliable. *Roberson*, 2018 WL 4846813, ¶¶ 27–50. The record supports its determination. *Biggers*, 409 U.S. at 199.

C.A.S.'s opportunity to view the shooter before and at the time of the shooting. See Biggers, 409 U.S. at 199. C.A.S. had a significant opportunity to view Roberson before, during, and after the commission of the crime. Just days before the shooting, Roberson introduced himself to C.A.S., they drove together in Roberson's Buick, they obtained marijuana on two occasions, and C.A.S. agreed to sell marijuana for him. (R. 28:1–2.) Though Roberson did not provide his name to C.A.S., Roberson made no effort to conceal his identity, exchanging his phone number and text messages with C.A.S., sharing information about himself, including his work schedule and that he was from Milwaukee, just got out of

prison, and relocated to the area. (R. 28:1; 19:09h:25m:25s–09h:26m:45s, 09h:38m:59s, 09h:39m:11s, 09h:39m:19s.) C.A.S. also provided details about the third meeting, including the circumstances before, during, and after Roberson allegedly shot him. (R. 28:1.)

The circuit court recognized that C.A.S. "was paying attention to the person in this physical confrontation who shot him"; however, it commented that it was "also likely that [C.A.S.] was paying attention to the gun and . . . the robbery that recently occurred to him." (R. 28:3.) But the shooting itself was not the product of a brief, momentary encounter between two strangers.

The circuit court found that the meeting culminating in the shooting lasted one-and-a-half to two hours. (R. 28:2.) The circuit court's decision placed almost no weight on the fact that Roberson picked up C.A.S. after C.A.S. called Roberson to tell him that he had been robbed, that they drove to the dog park together, and that Roberson drove C.A.S. home after C.A.S. got shot. (A-App. 113–14.) C.A.S. had three encounters with Roberson that allowed C.A.S. to make a reliable out-of-court identification of Roberson.

C.A.S.'s degree of attention. *See Biggers*, 409 U.S. at 199. When the circuit court assessed C.A.S.'s degree of attention (R. 28:38), it "mistakenly focus[ed] solely on the point in time of the altercation and shooting." *Roberson*, 2018 WL 4846813, ¶ 34. It ignored the time that C.A.S. spent with Roberson before and after the shooting, "without the stresses and distractions of a violent encounter." *Id*.

The accuracy of C.A.S.'s prior description of the shooter. *See Biggers*, 409 U.S. at 199. The court of appeals weighed this factor against reliability. *Roberson*, 2018 WL 4846813, ¶ 35. While C.A.S. recalled what the shooter was wearing during their prior meetings and his hair style (A-App. 111,

113), the record does not demonstrate that officers requested, or that C.A.S. offered, a detailed physical description of the person he knew as "P." *Roberson*, 2018 WL 4846813, ¶ 36. As the court of appeals noted, "the description/accuracy issue is whether a witness's prior description was accurate or inaccurate." *Id.* ¶ 37 (citation omitted). Because C.A.S. did not provide a description, his description was neither accurate nor inaccurate. *Id.*

The level of certainty that C.A.S. demonstrated during the identification procedure. See Biggers, 409 U.S. at 199. C.A.S. demonstrated a high level of certainty in his out-of-court identification of Roberson. When officers showed him Roberson's Facebook picture, C.A.S. appeared to immediately and affirmatively nod his head. (R. 19:09h:39m:43s.) When Reblin asked C.A.S. if that is "him," C.A.S. replied, "Yep." (*Id.*) Reblin asked C.A.S., "100%?" C.A.S. responded, "100%." (R. 19:09h:39m:51s.)

The length of time between the shooting and the identification procedure. See Biggers, 409 U.S. at 199–200. The circuit court determined that approximately two weeks passed between the shooting and C.A.S.'s identification of Roberson. (R. 28:2.) Based on the number, nature, and duration of contacts between C.A.S. and Roberson, "this was a relatively short amount of time" that weighed "in favor of reliability." *Roberson*, 2018 WL 4846813, ¶ 41.

Cross-racial identification. See Hibl, 290 Wis. 2d 595, ¶ 40. The lower courts appropriately considered C.A.S.'s statement, "I mean black people kind of look," when they assessed the reliability of his identification of Roberson. *Roberson*, 2018 WL 4846813, ¶¶ 42, 46–48. The lower courts agreed that C.A.S.'s statement suggested that his belief that "African American people look alike" might make it difficult to identify the person in the photograph. *Id.* ¶ 47; (R. 28:2.) But the court of appeals determined that the record did not

support the circuit court's assertion that "C.A.S. was 'clearly unsure of the characteristics of African Americans' and that '[o]bjectively, it is hard to convince ones self that [C.A.S.] wouldn't have identified any picture of an African American male as 'P' if [the questioning officer] indicated that it was a picture of 'P.'" *Id.* ¶ 47, quoting (R. 28:4.)

The court of appeals based its determination on two facts readily apparent from the video recording and that were not addressed in the circuit court's decision. First, C.A.S. told the officers that "if he found P he would shoot P, thus indicating that he would be able to identify P if he saw him." *Id.* ¶ 48. (R. 19:09h:35m:32s.) Second, the court of appeals noted that "C.A.S. did not hesitate [when shown Roberson's photograph]. His response shows immediate recognition that the photo he was shown depicted the man C.A.S. knew as P." *Id.* ¶ 48 (R. 19:09h:39m:43s.)

The court of appeals appropriately recognized that C.A.S.'s general statement appropriately weighed against the reliability of his out-of-court identification. *Roberson*, 2018 WL 4846813, ¶ 49. But it reasonably determined, based on the totality of circumstances, including the considerable time that C.A.S. and Roberson spent together, that C.A.S.'s out of court identification "was sufficiently reliable that a jury should hear and see the evidence of that identification." *Id.* ¶¶ 49–50 (citing *Hibl*, 290 Wis. 2d 595, ¶¶ 51–53).

Even if this Court determines that the single-photograph presentation was impermissibly suggestive, the totality of circumstances demonstrate that C.A.S.'s out-of-court identification was nonetheless reliable.

D. Roberson's arguments notwithstanding, the court of appeals properly assessed the reliability of C.A.S.'s out-of-court identification.

Roberson argues that the procedure here did not comply with the Wisconsin Department of Justice's Model Policy and Procedure for Eyewitness Identification (Model Policy) promulgated under Wis. Stat. § 175.50.[12] (Roberson's Br. 6–14.) Section 175.50(2) requires law enforcement agencies to adopt written policies guiding eyewitness identification procedures. Section 175.50(5) identifies several legislatively recommended practices intended to "enhance the objectivity and reliability of eyewitness identifications and to minimize the possibility of mistaken identifications." *Id.* These legislatively recommended practices focus primarily on their reliability, rather than their necessity.

Robinson did not raise concerns about the officers' noncompliance with the Model Policy, or any policy the Wisconsin Rapids Police Department may have adopted, in the lower courts. (R. 25; Roberson's Court of Appeals Brief.) As Investigator Reblin explained, based on his training and experience, he did not use a photo array because C.A.S. knew Roberson based on their multiple interactions with each other. (A-App. 128–29.) Even if the identification procedure here did not comply with an adopted policy, this is not a basis to suppress C.A.S.'s out-of-court identification of Roberson.

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[12] Model Policy and Procedure for Eyewitness Identification, Wisconsin Department of Justice Bureau of Training and Standard for Criminal Justice (2010), available at https://www.doj.state.wi.us/sites/default/files/2009-news/eyewitness-public-20091105.pdf (last viewed July 9, 2019).

Section 175.50 does not create sanctions for a department's failure to adopt a policy or mandate suppression of a noncompliant identification.[13] If the Legislature had intended to sanction a particular identification procedure, it would have expressly provided one. *See Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 36, 341 Wis. 2d 607, 815 N.W.2d 367.

The Legislature enacted section 175.50 as part of a criminal justice reform package that included mandated recording of certain custodial statements. 2005 Wis. Act 60. Wisconsin Stat. § 938.31(3)(b) and (c) generally mandate the exclusion of a juvenile's unrecorded custodial statement unless certain exceptions are satisfied. Its decision in the same act to expressly provide for the exclusion of a juvenile's unrecorded custodial statement, while not providing for exclusion for failure to comport with a model identification policy, demonstrates that it did not intend courts to suppress statutorily noncompliant out-of-court identifications.

Noncompliance with Wis. Stat. § 175.50 and related policies guiding the reliability of out-of-court identifications may properly inform a court's assessment of suggestiveness and reliability. But noncompliance does not provide a basis to suppress C.A.S.'s identification of Roberson, much less justify an extension of *Dubose*'s necessity standard to identification procedures other than showups.

Roberson also argues that courts should treat eyewitness identification evidence like other trace evidence in criminal prosecutions. (Roberson's Br. 13.) The State rejects

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[13] In *State v. Drew*, 2007 WI App 213, ¶¶ 16–17, 305 Wis. 2d 641, 740 N.W.2d 404, a decision declining to extend *Dubose*'s necessity standard to photo arrays, the court of appeals declined to assess suggestiveness based in part on the necessity of a deviation from the Model Policy.

this analogy. Unlike trace evidence, "memories cannot be stored in evidence lockers." *Henderson*, 27 A.3d at 924. The New Jersey Supreme Court emphasized that efforts should be made "to avoid reinforcement and distortion of eyewitness memories from outside effects, and expose those influences when they are present. But we continue to rely on people as the conduits of their own memories, on attorneys to cross-examine them, and on juries to assess the evidence presented." *Id*. And further, even if trace evidence offered a valid analogy, it does not justify favoring *Dubose*'s necessity standard over the suggestiveness-reliability test.

II. Even if C.A.S.'s out-of-court identification should have been suppressed, C.A.S.'s in-court identification of Roberson is admissible because the out-of-court procedure did not taint the in-court identification.

Even if this Court concludes that the out-of-court identification should have been suppressed, the out-of-court procedure did not taint C.A.S.'s in-court identification of Roberson at the suppression hearing and would not taint C.A.S.'s identification of Roberson at trial.

A. Legal principles

Evidence must be suppressed as a fruit of the poisonous tree when the evidence is obtained through the exploitation of an illegality. (*David*) *Roberson*, 292 Wis. 2d 280, ¶ 32. But the exclusionary rule "*does not reach backward to taint information that was in official hands prior to any illegality*." *Id.* ¶ 33 (citation omitted).

"The admissibility of an in-court identification depends upon whether that identification evidence has been tainted by illegal activity." (*David*) *Roberson*, 292 Wis. 2d 280, ¶ 32. A court will set aside a conviction based on an eyewitness identification at trial that followed a pretrial identification by

photograph "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Powell*, 86 Wis. 2d at 64 (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

Thus, a circuit court may still admit the in-court identification if it determines that the witness's in-court identification is based on an independent source. (*David*) *Roberson*, 292 Wis. 2d 280, ¶ 34. "[T]he in-court identification must rest on an independent recollection of the witness's initial encounter with the suspect." *Id.* ¶ 34.

The State must prove by clear and convincing evidence that the in-court identification was based on observations of the defendant made by the witness independent of and prior to the improper out-of-court identification process. *Id.* ¶¶ 35, 68.

In determining whether an in-court identification is sufficiently removed from the primary taint, i.e., the tainted out-of-court identification process, Wisconsin courts have applied the seven factors identified in *United States v. Wade*, 388 U.S. 218, 242 (1967). (*David*) *Roberson*, 292 Wis. 2d 280, ¶ 35 n.14 (citations omitted.) These factors include:

> (1) the prior opportunity the witness had to observe the alleged criminal activity; (2) the existence of any discrepancy between pre-lineup description and the accused's actual description; (3) any identification of another person prior to the lineup; (4) any identification by picture of the accused prior to the lineup; (5) failure to identify the accused on a prior occasion; (6) the lapse of time between the alleged crime and the lineup identification; and (7) the facts disclosed concerning the conduct of the lineup.

Id. ¶ 35 n.14 (citations omitted.)

The Wisconsin Supreme Court "has applied the *Wade* test to determine the *admissibility* of in-court identifications

subsequent to lineups that violated the accuseds' Sixth Amendment right to counsel." *State v. McMorris*, 213 Wis. 2d 156, 168, 570 N.W.2d 384 (1997). In *Dubose*, this Court remanded the case to the circuit court for a determination of whether the witness's out-of-court identifications of Dubose tainted the witness's in-court identification under *Wade*. *Dubose*, 285 Wis. 2d 143, ¶ 43. In *Roberson*, this Court again reaffirmed its commitment to the *Wade* test for assessing whether a prior illegality tainted a witness's subsequent in-court identification of a defendant. (*David*) *Roberson*, 292 Wis. 2d 280, ¶ 35 n.14.

In *State v. Larsen*, 141 Wis. 2d 412, 423, 415 N.W.2d 535 (Ct. App. 1987), the court of appeals upheld a witness's in-court identification of the defendant following a single-photograph identification when the witness had previously known the defendant. Courts in other jurisdictions have concluded that a witness's prior familiarity with a defendant establishes a sufficient independent basis for an in-court identification and counters any tainted out-of-court identification. *See Commonwealth v. Ali*, 10 A.3d 282, 303 (Pa. 2010). Cases recognizing a "confirmatory identification exception" rest on the rationale that when an eyewitness knew the witness before the crime occurred, "it would be less likely that the police procedure would be unduly suggestive and that the judicial identification would be tainted." *Simons v. State*, 860 A.2d 416, 422 n.1 (Md. App. 2004) (citing cases). In determining whether a witness was "impervious to suggestion," courts consider several factors including the "details of the extent and degree of the protagonists' prior relationship, their encounters, and how they knew one another." *People v. Graham*, 725 N.Y.S.2d 145, 148 (N.Y. App. Div. 2001).

B. Because C.A.S.'s in-court identification rests on independent grounds that preceded the challenged out-of-court identification, his in-court identification is admissible at Roberson's trial.

At the suppression hearing, C.A.S. identified Roberson in-court as the person who used the name "P" and who shot him. (A-App. 116–17.) C.A.S. also testified about their interactions before the shooting. (A-App. 109–15.)

The circuit court determined that C.A.S. had a "sufficient basis to identify 'P'" from two meetings before the shooting, which "lasted approximately a half hour each." (R. 28:3.) Despite this finding and without applying the proper legal standards for assessing whether C.A.S.'s in-court identification had an independent source, the circuit court erroneously concluded that C.A.S.'s out-of-court identification of Roberson tainted C.A.S.'s in-court identification. (R. 28:4.)[14]

Applying the factors for assessing the reliability of an in-court identification, *Roberson*, 292 Wis. 2d 280, ¶ 35 n.14, C.A.S.'s in-court identification was based on a source independent of his out-of-court identification. First, C.A.S. had a significant opportunity to observe Roberson before, during, and after the shooting. C.A.S. spent approximately one-half hour on each of two occasions in the days before the shooting with Roberson. (R. 28:1–2.) He also spent at least an

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[14] Based on its determination that the circuit court erred when it determined that the out-of-court identification procedure was tainted, the court of appeals reversed the circuit "court's in-court identification ruling." *Roberson*, 2018 WL 4846813, ¶ 8. It did not specifically address whether C.A.S.'s in-court identification was admissible under *Wade*. *Id.* But the same factors that prompted it to determine that C.A.S.'s out-of-court identification was sufficiently reliable demonstrate that C.A.S.'s in-court identification rested on an independent basis. *Id.* ¶¶ 27–50.

hour and a half with him on the third occasion when he was shot, not only picking C.A.S. up before the shooting, but giving him a ride home after the shooting. (R. 28:1–2.)

Further, C.A.S. did not identify anyone other than Roberson as the person who shot him. C.A.S. also did not fail to identify Roberson when given an opportunity to do so. At most, only two weeks lapsed between the shooting and C.A.S.'s identification of Roberson.

The video recording of the out-of-court identification demonstrates that officers did not engage in inappropriate behavior to encourage C.A.S. to identify Roberson. Reblin, without referring to Robinson by name, merely asked C.A.S. if he would be able to identify the person who shot him if he saw "him" again. (R. 19:09h:39m:31s.) Richter showed C.A.S. Roberson's Facebook photograph on a cellphone without referring to him as the shooter. (R. 19:09h:39m:40s.) While the officers did not ask C.A.S. to provide them with a detailed physical description of Roberson before showing C.A.S. Roberson's photograph, the failure to obtain this description is but one factor in the analysis.

Based primarily on C.A.S.'s extensive interaction with Roberson before the shooting, C.A.S.'s in-court identification was based on an independent source. C.A.S.'s brief viewing of Roberson's Facebook profile picture did not give rise to a substantial likelihood that C.A.S.'s out-of-court identification of Roberson tainted his in-court identification.

The admission of C.A.S.'s in-court identification rests on a stronger independent basis than the in-court identifications that this Court previously upheld. In *Mosley*, 102 Wis. 2d 636, a robbery victim testified that his in-court identification of the defendant was based on the defendant's face, as seen through a stocking, and body build, as opposed to any tattoos that the witness observed during a potentially

impermissibly tainted out-of-court identification procedure. This Court held that the witness's in-court identification "was sufficiently independent of the photo-identification to avoid any taint." *Id*. at 656; *see also Rozga v. State*, 58 Wis. 2d 434, 443, 206 N.W.2d 606 (1973) (upholding victim's in-court identification based "on her own personal knowledge and observation at the time of the offense" despite improper showup). Thus, even the absence of a prior relationship between a witness and a defendant does not foreclose a witness's in-court identification of a suspect.

C.A.S.'s in-court identification of Roberson stands on an even stronger independent basis than the witnesses' identifications of their assailants in *Mosley* and *Rozga*, which were based on their limited observations of the assailant under stressful conditions during the crime. C.A.S. spent considerable time with Roberson under less stressful circumstances. C.A.S. twice rode with Roberson in his car when they went to purchase marijuana. Roberson was sufficiently confident in his relationship with C.A.S. that he asked C.A.S. to sell marijuana for him and provided him with a phone so that they could text each other. (R. 28:1; 19:09h:25m:25s–26m:15s.) C.A.S.'s viewing of Roberson's Facebook photograph simply did not taint C.A.S.'s in-court identification of Roberson.

Based on the totality of the circumstances, an independent source supported C.A.S.'s in-court identification of Roberson. Even if the circuit court properly excluded C.A.S.'s out-of-court identification of Roberson, it erred when it excluded C.A.S.'s in-court identification of Roberson.

CONCLUSION

This Court should affirm the court of appeals decision reversing the circuit court's order granting Roberson's motion to suppress C.A.S.'s out-of-court identification and in-court identification of him.

Dated this ____ day of July 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,752 words.

_____
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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 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 this 10th day of July 2019.

_____
DONALD V. LATORRACA
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Appendix
State of Wisconsin v. Stephan I. Roberson
Case No. 2017AP1894-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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DONALD V. LATORRACA
Assistant Attorney General

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Dated this 10th day of July 2019.

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