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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP001894 CR

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STATE OF WISCONSIN,

Plaintiff-Appellant

v.

STEPHAN I. ROBERSON,

Defendant-Respondent-Petitioner

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On Review of a Decision of the Wisconsin Court of Appeals, District IV, Reversing the Order Granting a Motion to Suppress Evidence, Entered in Wood County Circuit Court, Hon. Nicholas J. Brazeau, Presiding.

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# BRIEF OF *AMICI CURIAE* THE INNOCENCE PROJECT, INC., AND THE WISCONSIN INNOCENCE PROJECT

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*Amici* The Innocence Project, Inc. and the Wisconsin Innocence Project respectfully submit this brief in support of Petitioner.

## ARGUMENT

In 2010, the Wisconsin Department of Justice ("DOJ") acknowledged that "[r]esearch and nationwide experience have demonstrated that eyewitness evidence can be a particularly fragile type of evidence, and that eyewitnesses can be mistaken." Wis. Dep't of Justice, *Model Policy and Procedure for Eyewitness Identification* 2 (Apr. 1, 2010) [hereinafter Model Policy]. Wisconsin's DOJ recognized that suggestive police procedures can contaminate witness memory, increasing the likelihood of misidentification. *See id.* Indeed, eyewitness misidentification is the leading cause of wrongful convictions in DNA exoneration cases, contributing to approximately 71% of these cases.[1]

A troubling number of these misidentifications resulted from "showups" — procedures where the police show a witness a single suspect live or photographically.[2] There is a growing consensus among scientists and courts that showups are inherently suggestive and present a grave risk of misidentification. Because photographic showups, unlike live-person showups, are never justified by exigent circumstances, they are particularly pernicious. This Court should hold that single-photograph identification evidence is inadmissible, unless

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[1] *See Eyewitness Identification Reform*, Innocence Project, https://www.innocenceproject.org/causes/eyewitness-misidentification/ (last visited July 20, 2019).

[2] Brandon Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 55 & n.34 (2011) (among the first 250 wrongful conviction cases established by DNA evidence, 33% of mistaken identity cases involved a showup).

the State can establish, by a preponderance of the evidence, that the witness and the suspect were so familiar with each other that there is no material risk of misidentification. Such a rule is consistent with Wisconsin's policy of promoting procedures that enhance the reliability of criminal investigations and prosecutions.

## I. Single-Suspect Identification Procedures Elevate the Risk of Misidentification and Contravene Public Policy.

### a. Scientists and Courts Overwhelmingly Recognize That Single-photograph Showups Are Inherently Suggestive and Unreliable.

Scientists uniformly agree that memory does not operate like a videotape; rather it is a dynamic process that is susceptible to influence by a multitude of factors.[3] Citing scientific research, Wisconsin's DOJ has described eyewitness evidence as "trace evidence . . . susceptible to contamination if not handled properly." Model Policy, *supra*, at 2.

In particular, police investigative practices can affect what witnesses remember and their confidence in the memory.[4] Suggestive identification procedures — including showups — are among the commonly recognized law enforcement procedures

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[3] Nat'l Research Council, Nat'l Acads., *Identifying the Culprit: Assessing Eyewitness Identification* 15 & n.19, 47-50, 59-60, 66-69 (2014) [hereinafter NAS Report], https://www.innocenceproject.org/wp-content/uploads/2016/02/NAS-Report-ID.pdf.

[4] *See, e.g.*, NAS Report, *supra*, at 67; *see also* Elizabeth F. Loftus et al., *Eyewitness Testimony*: *Civil and Criminal* § 3-9 (5th ed. 2018) (ebook) ("[H]uman recollection can be supplemented, partly restructured, and even completely altered by postevent inputs.").

*(cont'd)*

that can influence witness memories and lead to mistaken identifications.[5]

Courts have overwhelmingly recognized that showups, including photo showups, are inherently suggestive. More than 50 years ago, the United States Supreme Court recognized that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (citing social science in support). In *Simmons v. United States*, 390 U.S. 377 (1968), the U.S. Supreme Court recognized the risk of false identification when the police show witnesses a single photograph, explaining that the danger of misidentification is "increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw." *Id.* at 383. The Supreme Court subsequently noted the "corrupting effect" of the single-photo identification procedure due to its inherent suggestiveness. *Manson v. Brathwaite*, 432 U.S. 98, 116-17 (1977). Countless other courts have likewise condemned the use of photo showups as yielding unreliable testimony and an unacceptable risk of misidentification. *See, e.g.*, *People v. Gray*, 577 N.W.2d 92, 94 (Mich. 1998) ("[T]he exhibition of a single photograph 'is one of the most suggestive photographic identification procedures that can be used.'" (quoting Nathan R. Sobel & Dee Pridgen, *Eyewitness Identification: Legal & Procedural Problems* § 5.3(f), at 5-42 (2d ed. 1981))). Although these courts may assess the severity of the negative consequences differently, they agree that photo showups are inherently and dangerously suggestive.

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[5] *See generally* Winn S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 Wis. L. Rev. 529, 539-44, 557 (2003).

*(cont'd)*

Relying on current scientific research, this Court in *Dubose* recognized that showups are unreliable and present an unacceptable risk of misidentification. *State v. Dubose*, 2005 WI 126, ¶¶ 29-33, 285 Wis. 2d 143, 699 N.W.2d 582. Research and meta-analyses conducted since *Dubose* confirm these conclusions.[6] Studies have consistently found that showups pose a greater risk to innocent suspects than do lineups, particularly for innocent suspects who happen to resemble the perpetrator.[7] One study found that after a delay of only two hours from their initial view of the culprit, witnesses were *four times* as likely to make an incorrect identification from a photo showup than from a lineup — a shocking 58% error rate.[8] And unlike in the case of lineups or photo arrays, where mistaken identifications are distributed among "fillers," or known innocents, there is no way for the police to know when a witness's identification of a suspect from a photo showup is mistaken.[9] Witnesses making showup identifications tend to overestimate confidence at high levels, further complicating the task of assessing the reliability of the witness's memory.[10] Accordingly, photo showups present unique

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[6] *See*, *e.g.*, Jeffrey S. Neuschatz et al., *A Comprehensive Evaluation of Showups,* 1 Advances Psychol. & L. 43 (2016); Stacy A. Wetmore et al., *Effect of Retention Interval on Showup and Lineup Performance*, 4 J. Applied Res. Memory & Cognition 8 (2015); Steven E. Clark & Ryan D. Godfrey, *Eyewitness identification evidence and innocence risk*, 16 Psychonomic Bull. & Rev. 22 (2009).

[7] *See generally id.*; Nancy Steblay et al., *Eyewitness* A*ccuracy Rates in Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, 27 Law & Hum. Behav. 523, 533, 537 (2003).

[8] A. Daniel Yarmey et al., *Accuracy of Eyewitness Identification in Showups and Lineups*, 20 Law & Hum. Behav. 459, 464-65 (1996).

[9] *See* Neuschatz et al., *supra*, at 45-46.

[10] *Id.* at 63.

dangers that are not present in properly constructed lineups or photo arrays.

### b. Wisconsin's Model Policy Already Sets Forth Sound Photo Identification Procedures.

Given that suspect photographs can so readily be presented in array form, Wisconsin's Model Policy never even *contemplates* the use of a single-photo display for an identification. Relying on sound scientific research, the Model Policy explains that reliable photo identification procedures use arrays, non-suspect fillers chosen to minimize suggestiveness, double-blind administration, and concrete pre-identification instructions. *See* Model Policy, *supra*, at 3-6.

These scientifically-sound safeguards are discarded entirely when police opt for a photo showup instead. Showing only one photo to an eyewitness is tantamount to telling the witness that the police believe that the perpetrator is the person shown in the photo and that all they need from the witness is a confirmation. This effect renders the entire procedure suggestive and unreliable, as the witness is aware of whom police officers have already targeted as a suspect.[11]

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[11] *See, e.g.*, *State v. Lawson*, 291 P.3d 673, 707 (Or. 2012); *see also United States v. Gonzalez*, 863 F.3d 576, 584 (7th Cir. 2017) ("Photographs of only one suspect were displayed, telegraphing to [the witness] that the police thought this was the robber."); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 1, 7 (2009) ("Show-ups, however, are suggestive in a different way, namely they suggest to the witness *which* person to choose."); Michael D. Cicchini & Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, 100 J. Crim. L. & Criminology 381, 389, 391 (2010) ("[S]how-ups 'convey the impression to witnesses that the police think they have caught the perpetrator and want confirmation' . . . [and] produce even *less* reliable eyewitness evidence, which makes *(cont'd)*

Similarly, blind administration is impossible at a showup because it is immediately obvious to all who the suspect is.[12]

Furthermore, a photo showup does not have any non-suspect fillers to test an eyewitness's memory and reveal a misidentification, or distinguish eyewitnesses who are just guessing from those who actually recognize the suspect.[13] Therefore, it is much more difficult to discover misidentifications in a photo showup, which places innocent people at greater risk, especially if the innocent suspect happens to resemble the true perpetrator. *State v. Lawson*, 291 P.3d 673, 707-08 (Or. 2012).

Wisconsin's Model Policy states that investigators should use "the most reliable procedure available under the circumstances." Model Policy, *supra*, at 6. Allowing photo showups contravenes the Model Policy's goal of employing the "best techniques for accurately capturing and preserving eyewitness memories, thereby enhancing the reliability of criminal investigations and prosecutions." *Id.* at 2.

## II. Evidence From a Photo Showup Should Be Inadmissible.

Unreliable eyewitness testimony derails the truth-seeking function of the criminal justice system. For instance, suggestive procedures may increase a witness's confidence in an identification, irrespective of accuracy, disproportionally and unduly influencing a jury's assessment of the reliability of the

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already bad evidence even worse, and is even more likely to result in false identifications and wrongful convictions.").

[12] *See generally* Neuschatz et al., *supra*, at 45; Model Policy, *supra*, at 23-24.

[13] *See, e.g.*, Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 603, 631-32 (1998); Loftus et al., *supra*, § 4-7.

*(cont'd)*

identification.[14] More fundamentally, inaccurate eyewitness identifications can confound investigations from the earliest stages. When a witness positively identifies a suspect as a result of an improperly suggestive procedure, law enforcement tends to focus its investigation on the suspect to the exclusion of other leads.[15] Critical time is lost while police focus on an innocent suspect rather than the actual perpetrator. Suggestive identification procedures, even when administered by law enforcement in good faith, can therefore undermine public safety. This Court in *Dubose* recognized that unreliable evidence presents "serious problems in Wisconsin criminal law cases," stating:

> [A]n unnecessarily suggestive identification procedure simply creates unreliable evidence where reliable evidence could have been gathered. It is not a case where good ends justify bad means—the end result of an unnecessarily suggestive procedure is worthless precisely because of the means used.

2005 WI 126, ¶ 32 n.8 (quoting Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal*, 79 Ky. L.J. 259, 291 (1991)).

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[14] *See* Wells et al., *supra*, at 620, 631 (noting "biased lineups, biased instructions, or suggestions to the eyewitness as to which person is the suspect serve to elevate eyewitnesses' certainty in their identifications" and that there is "consistent evidence to indicate that the confidence that an eyewitness expresses in his or her identification during testimony is the most powerful single determinant of whether or not observers of that testimony will believe that the eyewitness made an accurate identification" (citations omitted)).

[15] *See generally* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 292 (2006).

Accordingly, *amici* urge this Court to hold that photo showup evidence must be suppressed when the procedure is used to identify an unknown suspect. The U.S. Supreme Court has recognized that "[a] primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place. Alerted to the prospect that identification evidence improperly obtained may be excluded . . . police officers will 'guard against unnecessarily suggestive procedures.'" *Perry v. New Hampshire*, 565 U.S. 228, 241-42 (2012) (citations omitted). Suppression of photo showup evidence would deter law enforcement from using improperly suggestive procedures.

**a. None of the Exigencies That Justify a Live Showup Exist With a Photo Showup.**

Relying on scientific research on the dangers of showups, *Dubose* appropriately held that showup evidence is admissible only if the procedure was "necessary," *i.e*., when the police lack probable cause to make an arrest, or when they "could not have conducted a lineup or photo array" due to exigent circumstances. 2005 WI 126, ¶ 33. But these circumstances do not apply and cannot justify *photo* showup procedures.

Wisconsin's Model Policy spells out factors that might establish exigency, including the geographic proximity of the suspect to the crime, the temporal proximity of the suspect to the crime, and the current and future availability of the witness. *See* Model Policy, *supra*, at 24. Similarly, courts have recognized that showups may be justified under certain extraordinary circumstances, such as severe injury that threatens the availability of a witness, public safety where there is an urgent need to detain

dangerous suspects, or preventing the wrongful detention of an innocent suspect.[16]

None of these justifications applies to a photo showup because such procedures are entirely unnecessary. When the police have orchestrated a single photo showup, they have necessarily investigated the crime sufficiently to identify a suspect, obtain a photograph of the suspect, and arrange a meeting with the witness for the police to show the photograph. When the police undertake these steps, exigency cannot justify the use of a single photo showup over a properly constructed photo array.[17] The time required to conduct a photo showup cannot materially differ from the time required to conduct an array — and as this Court has recognized, a photo array is "generally fairer than a showup, because it distributes the probability of identification among the number of persons arrayed, thus reducing the risk of a misidentification." *Dubose*, 2005 WI 126, ¶ 33.

The Seventh Circuit came to this very conclusion in *United States v. Gonzalez*, 863 F.3d 576 (7th Cir. 2017), where an officer showed photographs of a single suspect to a robbery victim instead of creating a photo array. *See id.* at 584-85. The officer testified that it would have taken only twenty minutes to compose a six-person photo lineup. *See id.* at 585. The court found that "there was no exigency justifying such a suggestive procedure."

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[16] *See, e.g.*, *State v. Cooper*, 2008 WI App 17, ¶¶ 17-18, 307 Wis. 2d 446, 745 N.W.2d 89 (considering imminent danger to the victim and the ease of a lineup as an alternative to a showup); *State v. Dodd*, 2008 WI App 160, ¶¶ 2, 10, 314 Wis. 2d 506, 758 N.W.2d 224 (finding exigent circumstances justified a live showup where the witness who came within ten to fifteen feet of the robbers was in the military and was leaving the area the next morning).

[17] Nathan R. Sobel & Dee Pridgen, *Eyewitness Identification: Legal & Practical Problems* § 5:12 (2d ed. 2019) ("Given the general availability of photographs of various types of people in most police files, there are usually no exigent circumstances that justify this practice.")

*Id.*; *see also, e.g.*, *United States v. Montgomery*, 150 F.3d 983, 992-93 (9th Cir. 1998) (holding single-photograph identification procedure was "unnecessarily suggestive" because "[t]he Government had ample time to prepare a non-suggestive photographic array"); *Commonwealth v. Moon*, 405 N.E.2d 947, 952 (Mass. 1980) (affirming suppression of photo showup evidence where "[t]here was no reason why [the police] could not have awaited an opportunity to show the victim an array of photographs").

**b. Photo Showup Evidence Should Be Admissible, if at all, for Purely Confirmatory Identifications.**

To the extent evidence from photo showups is ever admissible, an exception should be available only where the State can show, by a preponderance of the evidence, that the identification was purely confirmatory, *i.e.*, merely confirmed the identity of a suspect that the witness has already identified, rather than identifying an unknown culprit. Similarly, where the witness knows the suspect so well that no amount of police suggestiveness could possibly taint the identification, there is a very low risk that a photo showup could lead to a misidentification.[18]

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[18] *See, e.g.*, *State v. Molina*, 770 S.W.2d 272, 274 (Mo. Ct. App. 1989) (holding single-photograph identification evidence must be suppressed unless photograph is used solely to confirm the identity of a suspect known to the witness); *People v. Johnson*, 521 N.Y.S.2d 512, 513 (App. Div. 1987) (procedure "should have been avoided," but "did not create any danger of misidentification" where witness knew the suspect from the neighborhood); *State v. Franklin*, 121 P.3d 447, 453 (Kan. 2005) (procedure not impermissibly suggestive where witness identified her assailant by name, and police thereafter showed the witness the suspect's photograph to confirm that the police had identified the correct suspect);*Green v. United States*, 580 A.2d 1325, 1327 (D.C. 1990) (noting that cases disapproving the use of single photographs for identification do not "have any relevance to cases . . . where the person to whom the photograph is shown . . . has already given police the *(cont'd)*

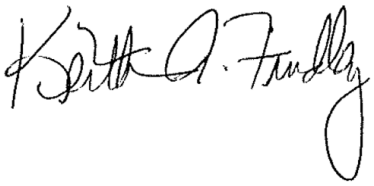
For this limited exception to apply, *amici* suggest that the trial court conduct a hearing to determine (1) the level of familiarity between the witness and the suspect, and (2) whether such familiarity renders the identification procedure purely confirmatory, so as to justify the use of an inherently suggestive procedure that implicates the suspect's due process rights.[19]

## CONCLUSION

For the reasons set forth above, *amici* respectfully urge this Court to adopt a rule that presumes that identifications resulting from photo showups be suppressed, unless the State can establish, at a hearing and by a preponderance of the evidence, that they are purely confirmatory.

Dated this 23rd day of July, 2019.

Respectfully submitted,



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name of the criminal—a relative, neighbor, or close acquaintance"); *cf. People v. Collins*, 456 N.E.2d 1188, 1191 (N.Y. 1983) ("But in cases where the prior relationship is fleeting or distant it would be unrealistic to ignore the possibility that police suggestion may improperly influence the witness in making an identification.").

[19] *See, e.g.*, *People v. Rodriguez*, 593 N.E.2d 268, 269, 272-73 (N.Y. 1992) (adopting this approach).

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## CERTIFICATION

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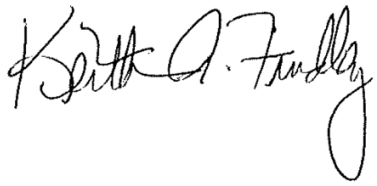

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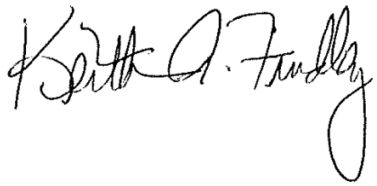

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