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STATE OF WISCONSIN

IN SUPREME COURT

APPEAL NO. 2017AP1894 CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

STEPHAN I. ROBERSON,

Defendant-Respondent-Petitioner.

ON REVIEW OF THE DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT IV, REVERSING THE ORDER GRANTING A MOTION SUPPRESS EVIDENCE, ENTERED IN WOOD COUNTY CIRCUIT COURT, HON. NICHOLAS J. BRAZEAU, PRESIDING.

REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

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STANDARD OF REVIEW

Appellate review of a motion to suppress, employs a two-step analysis. Appellate courts will uphold findings of evidentiary or historical fact unless they are clearly erroneous. A finding of fact is clearly erroneous if it is against the great weight and clear preponderance of the evidence. The second step is an independent review of the application of relevant constitutional principles to those facts. Question of law are reviewed de novo review, but with the benefit of analyses of the circuit court and court of appeals.[1]

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[1] *State v. Eason,* 2001 WI 98, ¶ 9, 245 Wis. 2d 206, 222; *State v. Kieffer,* 217 Wis. 2d 531, 541, 577 N.W.2d 352, 356-57 (1998); *State v. Arias,* 2008 WI 84, ¶ 12, 311 Wis. 2d 358; *State v. Vorburger,* 2002 WI 105, ¶ 32, 255 Wis. 2d 537. (citations omitted).

ARGUMENT

A. The same rationale this Court used in Dubose, supports adopting the necessity test for out-of-court, single-photo identifications.

The State is asking the Court to ignore the social science research underpinning the *Dubose*[2] decision although the research is stronger today than it was in 2005. The State would rather return to 1970s-era law instead of recognizing the detectives violated Roberson's due process rights. They further argue not only that *Dubose* does not apply to single-photo identifications, but that *Dubose* should not apply under any circumstances. For the reasons discussed within this brief, the *Dubose* test should remain the law and in addition, the Court should hold there is no appreciable difference between presenting a single in-person suspect and a single photograph of a suspect.

In 2012, the U.S. Supreme Court decided *Perry v. New Hampshire* in which Justice Sotomayor wrote the following in dissent:

> It would be one thing if the passage of time had cast doubt on the empirical premises of our precedents. But just the opposite has happened. A vast body of scientific literature has reinforced every concern our precedents articulated nearly a half-century ago, though it merits barely a parenthetical mention in the majority opinion. Over the past three decades, more than two thousand studies related to eyewitness identification [and its malleability] have been published. One state supreme court recently appointed a special master to conduct an exhaustive survey of the current state of the scientific evidence and concluded that "[t]he research ... is not only extensive," but "it represents the 'gold standard in terms of the applicability of social science research to law.' " *State v. Henderson,* 208 N.J. 208, 283, 27 A.3d 872, 916 (2011). "Experimental methods and findings have been tested and retested,

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[2] *State v. Dubose*, 2005 WI 126, 285 Wis. 2d 143.

> subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings." *Ibid.;* see also Schmechel, O'Toole, Easterly, & Loftus, Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence, 46 Jurimetrics 177, 180 (2006) (noting "nearly unanimous consensus among researchers about the [eyewitness reliability] field's core findings").
>
> The empirical evidence demonstrates that eyewitness misidentification is " 'the single greatest cause of wrongful convictions in this country.' " Researchers have found that a staggering 76% of the first 250 convictions overturned due to DNA evidence since 1989 involved eyewitness misidentification. Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues; that jurors routinely overestimate the accuracy of eyewitness identifications; that jurors place the greatest weight on eyewitness confidence in assessing identifications even though confidence is a poor gauge of accuracy; and that suggestiveness can stem from sources beyond police-orchestrated procedures.[3]

The State does not directly argue the science is wrong, but it does not acknowledge its validity either. Instead it cites to Wisconsin cases using the suggestibility-reliability test from *Biggers*[4] and which also failed to convince the Court the particular procedures police used violated the defendants' due process rights. The cases predate *Dubose* and concerned the way police conducted the lineups and photo arrays, not whether a single suspect or single suspect photo was used in lieu of conducting photo arrays or lineups. In this case however, the issue is not a challenge to the method police used during a photo array or lineup, instead whether police can simply use a single suspect

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[3] *Perry v. New Hampshire,* 565 U.S. 228, 262-63, 132 S.Ct. 716, 738-39 (2012) (Sotomayor, J., dissenting) (footnotes omitted).

[4] *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375 (1972).

photo as a substitute for a photo array without showing why doing so was necessary.

In *Kain v. State,*[5] this Court declined to find all single photo identifications either inadmissible or ipso facto impermissibly suggestive and creating a substantial likelihood of "irreparable" misidentification. But again, this was 1970 and long before this Court became educated on the research studies illustrating the fallibility of eyewitness identifications.[6]

Relying on those dated decisions diverts attention from the central inquiry of whether presentations using a single photo of a single suspect is synonymous to presentations using a single in-person suspect for the purposes of eyewitness identification. It is understandable why *Dubose* did not apply to an identification using a mugshot during a jury trial, (*Zielger*[7],) a spontaneous identification by a subpoenaed witness in the courthouse immediately before the jury trial, (*Hibl*[8],) or a jury instruction based on two law review articles, (*Trammell*[9]). However, what *Dubose* did not contemplate nor address, is whether the same risk of misidentification occurs when police use a single photo of a suspect instead of a photo array or lineup. The suppressed identifications in this case occurred not only pretrial, but before Roberson was charged. The out-of-court identification was as highly suggestive as had detectives shown Roberson singly in-person. The in-court identification by CAS cannot be separated from the tainted first identification.

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[5] *Kain v. State,* 48 Wis. 2d 212, 219, 179 N.W.2d 777 (1970).

[6] *See also Holmes v. State,* 59 Wis. 2d 488, 208 N.W.2d 815 (1973).

[7] *State v. Ziegler,* 2012 WI 73, 342 Wis. 2d 256.

[8] *State v. Hibl,* 290 Wis. 2d 595, 714 N.W.2d 194 (2006).

[9] *State v. Trammell,* 2019 WI 59, 387 Wis. 2d 156.

The definition of showup from *Dubose* can be read as including single photo identifications.

> A "showup" is an *out-of-court pretrial identification* procedure in which *a suspect is presented singly to a witness* for identification purposes. *Dubose,* n.1 (emphasis added).

Plain reading of, "presenting a suspect singly," does not limit the manner of presentation to a single in-person suspect. Likewise, it is incorrect to read the definition as explicitly excluding the act of showing the witness a single photo of a single suspect.

The *Dubose* holding includes yet more evidence supporting presenting suspects singly using one photo, if not inherently covered in the definition of showup, so analogous to presenting a single in-person suspect as to have no appreciable difference.

> A showup will not be necessary, however, unless the 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,* ¶33 (emphasis added).

Thus, the question: When police lack probable cause to arrest or the circumstances do not allow police to conduct a lineup or photo array, are single suspect in-person identifications justified, while single suspect photo identifications exempted from such justification? In other words, if using a single photo of a single suspect suffices, why ever use a photo array?

B. The jury evaluates admissible evidence, while the trial has discretion of what evidence is admissible.

The State argues the jury should determine what is and is not highly suggestible, urging the Court to overturn *Dubose*. That approach invites the use of trial experts, which often confuse jurors and lengthen the duration of the trial. The State again cites *Hibl*, which again was about a

spontaneous non-law enforcement identification just outside courtroom, minutes before the trial began. The State considers cross examination and jury instructions, which are indeed constitutional safeguards, sufficient to assist the jury in evaluating the reliability of eyewitness identification. The comments to JI–Criminal 141[10], indicate the instruction is not a substitute for challenging improper law enforcement activity.

> Jury instructions are one part of the response to perceived special problems with eyewitness identification testimony. Wisconsin cases addressing these issues are summarized below. The potential importance of a jury instruction on eyewitness identification, in the context of other safeguards, was recognized by the United States Supreme Court in *Perry v. New Hampshire,* 565 U.S. 228, 132 S.Ct. 716 (2012). The issue was whether rules regarding pretrial screening of allegedly suggestive identification procedures applied where police were not responsible for the suggestiveness. The court concluded they were not, in part because of the availability of other safeguards:
>
> When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

The Committee also wrote:

> We recognize the dangers inherent in identification testimony when the identity of the criminal is an important issue in a case. In such an instance, we recommend the use of the more detailed instruction to avoid subsequent challenges to the accuracy of such jury instructions. We do not, however, require that the more detailed instruction be given in all

[10] WIS JI-Criminal 141 Where Identification of Defendant Is In Issue (Wisconsin Jury Instructions - Criminal (2018).

> situations where the accuracy of the eyewitness identification is an issue. Such a holding would remove some of the circuit court's discretion in giving instructions. Rather, we conclude that the circuit court should determine whether to give the more detailed instruction, basing its decision on factors such as the significance of the identification issue, the nature of other instructions and *the danger of misidentification*. This determination is not subject to reversal unless the circuit court abuses its discretion.[11](emphasis added.)

The instruction would require significant redrafting by the trial court to address what could otherwise be determined at a pretrial suppression hearing. Can we rightfully expect jurors to quickly grasp all that social science research has taught the legal community about factors affecting accuracy and reliability of eyewitness identification, when their levels of education, vocations, and life experiences differ so widely? The Committee also wrote:

> The Committee considered adding something to the instruction to address cross-racial identifications but decided that a generally applicable statement could not be drafted. The propriety of an instruction on this factor, and any other relating to influences on the identification process, depends on there being an evidentiary basis for the existence of the factor and for the effect it is accorded.

In this case, the instruction would require yet further amending by the trial court in order to properly charge the jury about how to evaluate identification evidence. However, it seems clear that the instruction is for identifications made without police-conducted lineups or showups however defined. When police present a suspect to a witness singly, challenges to the procedure are not only questions of facts, but questions of constitutional

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[11] *See State v. Waites,* 158 Wis. 2d 376, 383-84, 462 N.W.2d 206 (1990)

law, which are within the trial court's discretion to answer.

C. Suppressing the in-court identification by CAS was not clearly erroneous given the trial court's lack of confidence in both the out-of-court identification procedure and the uncertainty expressed by CAS about the characteristics of African Americans.

Analysis of whether prior illegal activity tainted an in-court identification requires a two-part inquiry and is a constitutional question of fact and law. After establishing a constitutionally defective identification procedure took place, the admissibility of in-court identifications rests on State-provided clear and convincing evidence the identifications were based on observations of the subject and not the tainted procedure.[12]

This case is not similar in facts to *State v. (David) Roberson,* not only because it concerned in-court identifications during trial, but because the testimony came from two drug task force members describing their observations of the defendant outside a liquor store during a daytime drug buy. Both had been trained to carefully observe suspects' facial features in order to be able to identify suspects by their face. One officer used binoculars to view the defendant and that during his unobstructed and continuous view, he had no trouble seeing the suspect's face and clothing. The other officer was undercover and made the drug buy personally. In contrast, CAS was just robbed at gunpoint by another person, admitted he got high after the alleged incident, and expressed uncertainty in his ability to tell one black person from another.

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[12] *State v. Roberson,* 2006 WI 80,¶¶ 25, 34, 25 292 Wis. 2d 280 *See also State v. McMorris,* 213 Wis. 2d 156, 164–66, 570 N.W.2d 384 (1997) (citations omitted).

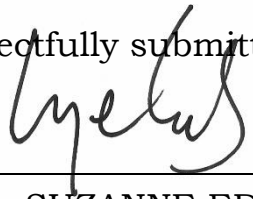
Also distinguishable is the 1987 Court of Appeals case *State v. Larsen*[13], where although the pretrial identification procedure consisted of a single photograph and a one-person lineup, the witness was Larsen's robbery accomplice, had recruited him for the job, and identified him by name before being shown his photograph. In addition, another accomplice who had known him for two years prior to the robbery identified Larsen as a participant in the robbery.

CONCLUSION

Due process challenges based on highly suggestive identification procedures are minimized when police use methods which reduce the risks of misidentification. This Court should clarify that *Dubose* applies to single suspect photo identifications conducted by law enforcement and require a showing of necessity, because they are highly suggestive. Such holding would not expand either state or federal due process rights per se, rather it would align single suspect photo identifications with single in-person identifications since both situations carry the same inherent risks of misidentification. Using the *Dubose* standard merely modifies the definition of showup and does not expand due process rights beyond what *Dubose* already holds. The Court should uphold *Dubose*, reverse the decision of the court of appeals and remand the case for further proceedings in circuit court.

Dated: July 25, 2019

Respectfully submitted,



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[13] *State v. Larsen,* 141 Wis. 2d 412, 415 N.W.2d 535 (1987).

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I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

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ELECTRONIC SUBMISSION CERTIFICATION

I hereby certify that the electronic version of Reply Brief of Defendant-Respondent-Petitioner in Case No. 2017AP1894-CR is identical to the printed version.

Dated: July 25, 2019

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CERTIFICATE OF MAILING

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I, Suzanne Edwards, a licensed Wisconsin attorney, hereby certify on July 25, 2019 that copies Reply Brief of Defendant-Respondent-Petitioner in Appeal No 2017AP1894-CR were placed in the U.S. Mail, with proper postage affixed addressed to the following as indicated below:

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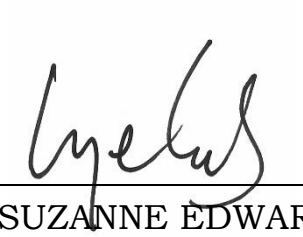

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