

STATE OF WISCONSIN
IN SUPREME COURT
Case No. 03-1690-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

TYRONE L. DUBOSE,
Defendant-Appellant-Petitioner.

**NON-PARTY BRIEF OF THE WISCONSIN
INNOCENCE PROJECT OF THE FRANK J.
REMINGTON CENTER, UNIVERSITY OF
WISCONSIN LAW SCHOOL**

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INTRODUCTION

Every study to date has demonstrated that eyewitness error is the leading cause of wrongful convictions. In the first study of postconviction DNA exonerations, the U.S. Department of Justice examined 28 cases and found that every one involved eyewitness error. U.S. Dep't of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial* 15 (1996). A subsequent study of the first 67 DNA exoneration cases revealed that 84% involved eyewitness error. Scheck, Neufeld & Dwyer, ACTUAL INNOCENCE 246 (2000). Many involved show-ups. Benjamin N. Cardozo School of Law, *The Innocence Project*, at www.innocenceproject.org/causes/mistakenid.php. Another study of 328 wrongful convictions between 1989 & 2003 found that 64% involved eyewitness misidentification. Samuel Gross, et al., "Exonerations in the United States: 1989-2003," available at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf>.

The pattern holds in Wisconsin. At least four Wisconsin men—Steven Avery, Eugene Glenn, Anthony Hicks, and Francis Philip Hemauer—have been convicted based on eyewitness evidence and later released based on evidence of innocence. See Wisconsin Innocence Project, *Wrongful Convictions in Wisconsin*, at <http://www.law.wisc.edu/FJR/innocence/wrongconvwisc.pdf>. No doubt many more, whose innocence has not been exposed, have similarly been misidentified.

Courts have long recognized the fallibility of eyewitness testimony. Recently, scientific research has

contributed significantly to our understanding of how eyewitness identification works, how it can go wrong, and what can be done to improve it. Unfortunately, the judicial response has been ineffectual, because the standards adopted by the U.S. Supreme Court fail to reflect the scientific research. Furthermore, the standards fail to incorporate appropriate incentives for conducting identification procedures that minimize the risks of misidentification.

Indeed, the current due process analysis has been an utter failure at distinguishing fair and reliable identifications from improperly produced and unreliable identifications. In most of the wrongful convictions in which witnesses misidentified innocent persons, courts applying the governing due process standard rejected challenges to the admissibility of the identification.

In Steven Avery's case, for example, in which a single eyewitness's misidentification led to 18 years of wrongful imprisonment, the court of appeals held that, under prevailing standards, the identification procedure was not impermissibly suggestive. *State v. Avery*, No. 86-1831-CR, Slip op., 1987 WL 267394 at ***5 (Ct. App. 1986)(unpublished opinion). Avery claimed that the identification was improper for a variety of reasons: a sheriff told the witness prior to viewing the photo array that "there was a chance that the suspect might be in there and that she should look at them and attempt to determine if in fact he was"; Avery was the only person presented to the witness both in a photo array and subsequent live-person lineup; Avery was the youngest, fairest and shortest person in the lineup and the only one with straight hair; other participants in the lineup were well-dressed; and one participant turned toward him during most of the lineup. *Id.* Despite the profound suggestiveness of

these procedures (and now, with hindsight, the knowledge that the procedure did indeed lead the witness to select an innocent man), the court of appeals ruled that “the photo array constitutes one of the fairest ones this court has seen.” *Id.*

Because current admissibility standards ignore scientific research and produce an unacceptable risk of wrongful convictions, it is time to adopt a new standard in Wisconsin.¹ We propose a standard that, like the standard proposed by Dubose, focuses primarily on the suggestiveness of an identification procedure, because that is a factor that can be assessed by courts and controlled by law enforcement. However, we believe that it is impossible to create a workable standard in which courts purport to determine the reliability of an identification procedure. Hence, we propose that the current two-pronged standard be simplified to one prong: Was the identification procedure unnecessarily suggestive? If so, the identification must be suppressed. This is the standard adopted in Massachusetts and New York. *See Commonwealth v. Johnson*, 650 N.E.2d 1257, 1260 (Mass. 1995); *People v. Adams*, 423 N.E.2d 379 (NY 1981).

We depart from the standard proposed by Dubose in that we do not believe courts, beyond assessing unnecessary suggestiveness, can also engage profitably in analysis of an identification’s reliability. In cases where there is no unnecessary suggestiveness, the reliability inquiry is best left to juries, aided by expert testimony and scientifically informed jury instructions. The court’s goal, rather than guessing about reliability, should be to ensure that identification evidence is free of contamination from

¹ We agree with Dubose that the Court should do so either under the Due Process clause of the Wisconsin Constitution or under the Court’s superintending authority.

unnecessary suggestiveness.

This standard does not render show-ups *per se* inadmissible. Rather, it recognizes that show-ups can sometimes produce significant benefits. But it confines show-ups to those circumstances where they are necessary and conducted in as fair a manner as possible.

ARGUMENT

**SHOW-UP IDENTIFICATION EVIDENCE
SHOULD BE INADMISSIBLE IF IT IS
COLLECTED USING “UNNECESSARILY
SUGGESTIVE” PROCEDURES, AND THE
RELIABILITY PRONG SHOULD BE
ELIMINATED.**

**A. Jurors tend to misjudge eyewitness accuracy
and traditional safeguards are insufficient to
counteract this tendency.**

A rule of admissibility is necessary to guard against unreliable eyewitness evidence. People generally overestimate eyewitness accuracy and fail to understand the factors that affect it. Gary Wells & Elizabeth Olson, “Eyewitness Testimony,” 54 *Annual Rev. of Psych.* 277, 284-85 (2003)(hereinafter Wells, “Eyewitness”). Unfortunately, expert testimony, cross-examination, and jury instructions are unlikely to be effective safeguards. Expert testimony is not routinely admitted. J.C. Bucci, “Revisiting Expert Testimony on the Reliability of Eyewitness Identification,” 7 *Suffolk J. Trial & App. Adv.* 1 (2002). Cross-examination generally fails to increase jurors’ sensitivity to the factors that affect eyewitness accuracy. Michael Leippe, “The Case for Expert Testimony about Eyewitness Memory,” 1 *Psych. Pub. Pol.*

and L. 909, 923-925 (1995). Finally, the most commonly used jury instruction on eyewitness evidence, adapted from *United States v. Telfaire*, actually reinforces misconceptions about eyewitness evidence. 469 F.2d 552, 558 (D.C. Cir. 1972) *See* discussion about misconceptions in section B, *infra* .

Moreover, these measures for testing the reliability of an identification at trial all come too late—after the misidentification has already been made. They merely attempt to mitigate the damage caused by a suggestive identification procedure. For a system designed to discover the truth, the goal ought to be to prevent the misidentification before it happens, by creating incentives for utilizing procedures that have the best chance of obtaining a reliable identification. A rule that suppresses identifications produced by *unnecessarily* suggestive procedures produces those incentives.

B. Admissibility should turn on whether an identification was the product of an unnecessarily suggestive procedure.

Researchers have explained that eyewitness evidence is similar to other kinds of trace evidence in that collection procedures affect the reliability of the evidence. Gary Wells, et al., “Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads,” 22 *L. & Hum. Behav.* 14, 24 (1998)(hereinafter Wells, “Recommendations”). Suggestive collection methods can contaminate this form of “trace” evidence, and produce mistaken identifications.

To address the problem of suggestive identification procedures, the Supreme Court initially created an

admissibility standard in *Stovall v. Denno* that considered whether a pretrial identification procedure “was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law.” 388 U.S. 293, 302 (1967). That standard simply and reasonably required analysis of whether police unnecessarily injected suggestiveness into the identification procedure. Subsequently, the court modified the standard to examine, first, whether the identification procedure was “*impermissibly* suggestive,” and, if so, whether the identification was nonetheless sufficiently reliable to be admitted. *Neil v. Biggers*, 409 U.S. 188, 199 (1972); *Manson v. Brathwaite*, 432 U.S. 98 (1977).

By shifting from an inquiry into *unnecessary* suggestiveness to a vaguer inquiry into *impermissible* suggestiveness, and then forgiving even impermissible suggestiveness if the identification was nonetheless reliable, the Court moved from a test that evaluates the fairness of the process to a test that purports to gauge the reliability of the identification itself. But that analysis was doomed from the outset, in part because, as the history of wrongful convictions has demonstrated, courts simply cannot distinguish between reliable and unreliable identifications, and because the factors prescribed by the Supreme Court for evaluating reliability are not in fact correlated to reliability.

Under the current reliability test, trial courts consider the witness’s confidence as one factor in determining admissibility. But a witness’s certainty or confidence bears little relationship to reliability. Wells, “Recommendations” at 14-21. Any relationship that might exist is destroyed when suggestiveness is introduced into the identification procedure, because confidence levels can be dramatically inflated by

suggestive feedback. Gary Wells & A.L. Bradfield, “‘Good, You Identified the Suspect’: Feedback to Eyewitnesses Distorts their Reports of the Witnessing Experience,” 83 *J. of Applied Psych.* 360, 360-76 (1998)(hereinafter Wells, “Feedback”). Even worse, confidence inflation after feedback is most dramatic for eyewitnesses who have made a false identification. Gary Wells, et al., “The Damaging Effect of Confirming Feedback on the Relation between Eyewitness Certainty and Identification Accuracy,” 87 *J. of App. Psych.* 112-20 (2002).

Most of the other factors in the *Brathwaite* analysis are similarly distorted by suggestiveness: a witness’s assessment of her opportunity to view the suspect, her assessment of her attentiveness, and even sometimes her description of the perpetrator, can be influenced by suggestive feedback. Wells, “Feedback” at 360-76. The result is that, in suggestive identification cases, the identification will almost always be deemed sufficiently reliable to overcome the suggestiveness, because the suggestiveness itself distorts the witness’s perception of the *Brathwaite* reliability factors. Wells, “Recommendations” at 24.

Although social science research has identified other factors that are more closely linked to reliability than those in the *Brathwaite* test, no other test can be constructed that adequately measures reliability of any given identification. The factors are too complex, and too variable from one situation and witness to the next. *See* Benjamin Rosenberg, “Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and Proposal,” 79 *Ky.L.J.* 259, 280 (1991). They are the types of assessments better left, as are most assessments of truth, to a jury with the benefit of expert witnesses and scientifically

informed jury instructions.

C. Unnecessary suggestiveness can be assessed objectively on the basis of factors identified in the social science research.

What courts can evaluate, with the benefit of the scientific research, and what they can address to improve the accuracy of eyewitness identification evidence, is the unnecessary suggestiveness of procedures used by police to obtain an identification. The objective, scientifically based factors that can be employed to assess the unnecessary suggestiveness of an identification procedure are readily accessible in the psychological literature, as well as in guidelines adopted by, among others, the U.S. Department of Justice,² state attorneys general,³ various police departments, and Wisconsin's Avery Task Force.⁴ Those criteria, which courts can and should consider, include the following.

1. Show-ups should be limited to those circumstances where they are necessary.

Research shows that, compared to properly conducted lineups and photo arrays, show-ups are more likely to yield false identifications. Wells, *Recommendations* at 24. Therefore, properly conducted lineups and photo arrays should generally be favored over show-ups.

² U.S. Dep't of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (1999).

³ E.g., New Jersey Attorney General's Eyewitness Guidelines, available at www.psychology.iastate.edu/faculty/gwells/njguidelines.pdf.

⁴ Avery Task Force, *Eyewitness Identification Procedure Recommendations*, available at <http://www.law.wisc.edu/FJR/innocence/EyewitnessGuidelines.htm>.

This does not mean, however, that show-ups should be *per se* inadmissible; there are times when show-ups are necessary and appropriate. For example, where police apprehend a suspect shortly after a crime but lack probable cause to detain the person for a lineup or photo array, a show-up may be necessary to prevent escape of a possibly guilty person.

Conducting a show-up in such circumstances also has benefits for innocent suspects. An innocent suspect who is excluded by a show-up avoids the indignity of further investigation by the police.

Given these considerations, the following test should guide the admissibility of show-up evidence:

Show-up identification evidence is inadmissible unless officers lacked probable cause to make an arrest and, for that reason or because of other exigent circumstances, they could not have conducted a lineup or photo array.

As a corollary, after one show-up results in an identification, other witnesses to the crime should be shown a lineup or photo array rather than a show-up, unless these subsequent witnesses would be unavailable to view a lineup. This is so because the identification from the first show-up gives rise to probable cause and erases any possibility that the suspect would have to be released if not for another show-up.

2. When necessary, show-ups should be conducted in as non-suggestive a manner as possible.

When a show-up is necessary, special care must be taken to minimize the inherent suggestiveness of the procedure. Accordingly, show-ups should not be conducted at police stations or other law enforcement buildings, where

the message conveyed to the witness is that the person is in custody, and hence likely guilty. If a suspect is detained at the police station, a proper lineup or photo array is possible and public safety would not demand a show-up. Likewise, to prevent unnecessary suggestiveness, suspects outside the stationhouse should not be presented in handcuffs or confined in squad cars, to the extent permitted by public and officer safety.

In Dubose's case, police unnecessarily introduced suggestiveness in the already suggestive show-up procedure by displaying Dubose first while confined in the squad car, and then subsequently while detained at the police station. Such suggestiveness was unnecessary, and irreparably tainted the reliability of the identification.

3. Witnesses must be instructed appropriately.

Any time an eyewitness identification procedure is conducted, the eyewitness should first be told that the real perpetrator might or might not be present and that the investigation will continue whether or not the witness makes an identification. Although this might seem to require stating the obvious, studies show that giving the instruction can reduce mistaken identification rates by as much as 41.6% without affecting the rate of accurate identifications. Wells, "Eyewitness" at 286-87. Without such an instruction, witnesses tend to assume the suspect must be present, and strive to pick someone, even if the actual perpetrator is not present. *Id.* Such an instruction is simple, cost-free, and takes almost no time.

Unfortunately, in Dubose's case, the Court of Appeals reached the opposite conclusion, stating: "We see nothing wrong with a police procedure where officers indicate an

individual is a possible suspect.” 2004 WI App. 88, ¶33. This conclusion turns the science on its head. Not only did the officers in this case fail to give a non-biased instruction, they gave a biased, suggestive instruction that effectively asked the witness to simply give the police confirmation of what they already knew. This instruction alone created significant and wholly *unnecessary* suggestiveness that tainted the identification procedure.

4. No suspect should ever be shown to a witness more than once.

In this case, as in Steven Avery’s case, police presented Dubose to the witness in more than one identification procedure. Multiple identification procedures, in which the same suspect is presented to the same witness more than once, should never be used. Each viewing of a suspect unalterably changes a witness’s memory of the suspect, and reinforces the notion that the person she has seen on each repeated showing was the perpetrator. Doing so taints any identification, and does so unnecessarily.

5. For non-show-up identifications, double-blind sequential photo array and lineup procedures should be used whenever possible.⁵

For reasons too complex to explain within the word limitations of this brief, lineups and photo arrays should be conducted using a double-blind, sequential procedure, whenever possible. The “double-blind” procedure simply refers to the principle that, to avoid even unintentional taint,

⁵ The double-blind sequential procedure applies to photo arrays and lineups, not show-ups. This factor is presented here simply to describe fully the identification standard proposed in this brief.

the person administering the lineup should not know which person is the suspect.

The sequential procedure draws upon social science demonstrating that showing photographs or individuals to a witness sequentially, rather than simultaneously, significantly reduces the rate of false positives by minimizing the tendency for witnesses to compare individuals in a lineup and pick the one—even when no one in the lineup is the true perpetrator—who looks most like their memory of the perpetrator.

For a description of these procedures and the underlying science, see Wells, “Eyewitness” at 288-90; Avery Task Force at <http://www.law.wisc.edu/FJR/innocence/EyewitnessGuidelines.htm>. Failure to employ these procedures, when possible, should be considered evidence of unnecessary suggestiveness.

6. In a lineup or photo array, appropriate non-suspect fillers must be chosen.⁶

This factor is universally acknowledged. It requires no further discussion here, other than to state that if police select fillers in a lineup or photo array who do not match the description of the perpetrator (as in the Avery case), or if the suspect stands out unduly, that suggestiveness spoils the fairness and reliability of the procedure. Again, because use of inappropriate fillers is ordinarily preventable, in most cases use of inappropriate fillers constitutes *unnecessary* suggestiveness that ought to lead to suppression of the ensuing identification.

⁶ Selection of fillers also applies only to lineups and photo arrays, not show-ups.

CONCLUSION

For the reasons stated, this court should hold that eyewitness identifications will be suppressed if obtained through procedures that were unnecessarily suggestive. In making that assessment, courts should be guided by the growing and well-grounded body of social science research in this field, including the factors such as those set forth above in this brief and recognized by authoritative bodies elsewhere. Once *unnecessary* suggestiveness is found, courts should make no attempt to divine the reliability of such evidence. Show-ups, in particular, are inherently suggestive, and hence show-up identifications should be admissible only where the show-up was necessary—because police otherwise lacked probable cause that would permit an arrest and proper lineup or photo array, or other exigent circumstances required an immediate identification procedure—and when conducted in a manner designed to scrupulously avoid additional suggestiveness.

Dated this 10th day of February, 2005.

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I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2996 words.

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