STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2004AP2936-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

BRIAN HIBL,

Defendant-Respondent.

ON PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS

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

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INTRODUCTION

Both the dissenting and concurring opinions in ***State v. Dubose*** agree that due process interests in eyewitness identification cases reflect, at bottom, a concern about reliability. 2005 WI 126, ¶47, __ Wis.2d __, 699 N.W.2d 582 (Butler, J., concurring); and ¶79 (Roggensack, J., dissenting). But ***Dubose*** recognizes that assessing the reliability of an identification after the fact is a tricky business that courts do not handle well. *Id*. at ¶30. Accordingly, ***Dubose*** wisely addresses reliability by approaching the problem from the front end, by requiring that police employ non-suggestive procedures whenever they can, instead of relying on unnecessarily suggestive procedures and then asking courts to forgive the flawed procedures by making hindsight guesses about reliability. ***Dubose*** thus addresses reliability by creating incentives for utilizing the best possible procedures to prevent mistaken identifications before they occur.

The path charted in ***Dubose*** has three implications here. First, because ***Dubose*** is concerned with enhancing reliability by creating incentives to utilize non-suggestive identification procedures, it creates a framework that governs all identification procedures, not just showups. Second, when the State has previously forgone the opportunity to conduct a reliable identification procedure, it cannot present identification evidence obtained through a later suggestive encounter made inevitable by State action—even when the identification was unexpected. Third, when a truly chance encounter between a witness and suspect occurs—which could not be anticipated or controlled by the State—then the ***Dubose*** demand to avoid unnecessarily suggestive procedures has no effect. Under those rare circumstances, where courts

cannot demand non-suggestive procedures, there is no option but to address reliability directly. But in doing so, courts should not rely on the "reliability" factors set forth in ***Neil v. Biggers***, 409 U.S. 188 (1972), and ***Manson v. Brathwaite***, 432 U.S. 98 (1977), because those factors are empirically unsound. Instead, courts should rely on other factors that developing social science identifies as diagnostic of reliability. We address each of these points in turn.

I. *Dubose* created a new admissibility standard that applies to all eyewitness identification procedures, not just showups.

The dissent in the court of appeals and now the State argue that ***Dubose*** is inapplicable here because it applies only to showup procedures. *See* ***State v. Hibl***, 2005 WI App 228, ¶21, __ Wis.2d __, 706 N.W.2d 134 (Brown, J., dissenting); State's Brief at 32.[1] But neither the language nor rationale of ***Dubose*** supports such a narrow reading of that decision.

The court of appeals got it right: ***Dubose*** fundamentally altered the generally applicable standard for determining the admissibility of eyewitness evidence. Although some language in ***Dubose*** specifically references showups (because ***Dubose*** was a case involving showups),

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[1] The State also makes a curious argument that, under an expansive reading of ***Dubose***, courts would have to suppress on-the-scene sequential lineups because they would be equivalent to a series of showups. State's Brief at 34. But of course a sequential lineup—whether in the stationhouse or on the scene—is not at all the equivalent of a series of showups. A showup is suggestive because *only one* suspect is presented to the witness. A sequential lineup presents a *series* of individuals, not just one person, albeit *one at a time*. Unlike a showup, a sequential lineup is not suggestive because the witness is shown more than one individual, and is explicitly told that the procedure will involve presenting a series of individuals or photographs.

the Court made clear that it was creating a new standard applicable to all identification procedures. This Court broadly declared: "[W]e adopt standards for the admissibility of out-of-court identification evidence similar to those set forth in … *Stovall v. Denno*, 388 U.S. 293 (1967)." ***Dubose,*** ¶2. Indeed, while ***Stovall*** was a showup case, there has never been any question that ***Stovall*** established a due process standard applicable to *all* eyewitness identification procedures. As this Court noted in ***Dubose***, "In *Stovall*, the United States Supreme Court considered … whether, and under what circumstances, *out-of-court identification procedures* could implicate … due process." *Id*. ¶17 (emphasis added).

There is good reason that ***Dubose*** applies to more than just showups. The ***Dubose*** Court was concerned generally with the problem of eyewitness error. This Court recognized that "[t]he research strongly supports the conclusion that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined." ***Dubose***, ¶30. After reviewing the scientific literature, this Court concluded that eyewitness testimony is often "'hopelessly unreliable.'" *Id*.

This Court also recognized that the prevailing federal due process standard under ***Biggers*** and ***Brathwaite*** was hopelessly flawed, because that standard allowed police to utilize even unnecessarily suggestive procedures, as long as a court later found that the resulting identification was nonetheless reliable. ***Dubose***, ¶27. This Court recognized that, especially in light of recent scientific research, the factors courts relied upon to assess reliability were not significantly correlated to reliability, and that courts are not

well-equipped to assess reliability after the damage of an unnecessarily suggestive identification procedure has already been done. *Id*. ¶31.

Accordingly, this Court fashioned a remedy designed to eliminate suggestive procedures that contribute to eyewitness error. In this context, this Court held that "evidence obtained from an out-of-court show-up is inherently suggestive and will not be admissible unless, based on the totality of the circumstances, the procedure was necessary." ***Dubose***, ¶33. This Court explained that "[s]uch a strict requirement help[s] ensure that the police … take precautions … [and] conduct the procedure in a non-suggestive manner." *Id*. ¶33

Dubose dealt specifically with showups because that was the specific procedure presented in that case. But a showup is just one type of suggestive procedure. There is no reason to limit the ***Dubose*** framework to that one suggestive procedure; *any* suggestive procedure threatens the same interests this Court sought to protect in ***Dubose.*** The purpose of the ***Dubose*** test is to create incentives for the State to use the best possible identification procedures.

II. *Dubose* applies when the State forgoes an opportunity to conduct a reliable identification procedure and then creates a situation in which a suggestive encounter is likely.

The concerns underlying ***Dubose***—about enhancing reliability by discouraging unnecessarily suggestive procedures—lead to the conclusion that the incentives to utilize non-suggestive procedures ought to exist whenever the State creates circumstances that might produce an identification. The State is correct that the ***Dubose*** incentives

do not come into play when identifications result from truly chance encounters between witnesses and suspects, because the State cannot control those encounters. But the ***Dubose*** concerns do apply when the encounter was not purely chance, but was created by the State. Subpoenaing a witness to a hearing at which the witness and defendant will unavoidably encounter one another results in an inevitable, not a chance, encounter, with potential for an identification. In such circumstances, the State should be given every incentive to create a proper, non-suggestive identification procedure.

The State contends that the court of appeals' decision conflicts with ***State v. Marshall***, 92 Wis.2d 101, 284 N.W.2d 592 (1979), which held that the due process rule against admitting unreliable identification evidence is inapplicable if the identification encounter was "not part of a police procedure directed toward obtaining additional evidence …." *Id*. at 118.

On its facts, however, ***Marshall*** does not conflict with the approach urged herein or adopted by the court of appeals in this case. In ***Marshall***, police attempted a proper out-of-court identification procedure before the unplanned courtroom identification. Before trial, the witness was shown a series of photographs, including one of the defendant, but identified another man. *Id*. at 109. Only after that did the witness then see the defendant in the courtroom and identify him. In ***Marshall***, therefore, the State did attempt a proper pretrial identification, and therefore did what it could to obtain a proper identification. That is precisely the process that *amicus* suggest should have been followed here.

Marshall demonstrates the importance of demanding that police conduct proper identification procedures before

bringing eyewitnesses and suspects together for courtroom encounters. Although the witness in ***Marshall*** ultimately made an identification, that identification stood on a very different footing than the identification made in ***Hibl***. Because police first attempted a photo identification in ***Marshall***, and the witness picked a different man, the defense could challenge the courtroom identification with evidence that, when presented with a fair photospread, the witness had excluded the defendant. That evidence was critical to a fair assessment of the weight to be accorded the ultimate identification. A proper pretrial identification procedure enhances the truth-seeking functions of the proceedings either by producing a valid and probative identification, or by demonstrating the witness's inability to identify the suspect.

To the extent that language from ***Marshall*** nonetheless suggests that due process reliability concerns exist only when the State *intends* to create identification evidence, it should be withdrawn, or limited to its circumstances (where police first attempted a proper identification procedure). That language is inconsistent with the emerging recognition, reflected in ***Dubose***, of the extent of the problem of eyewitness error.[2] *Cf.*, ***Commonwealth v. Jones,*** 666 N.E.2d 994, 1000 (Mass. 1996)(reliability concerns exist even if State did not orchestrate the identification encounter); ***United States v. Bouthot***, 878 F.2d 1506, 1516 (1st Cir. 1989)("[C]ourts should scrutinize all suggestive identification procedures, not just those orchestrated by the police, to determine if they

[2] ***Marshall*** also fails to recognize that in prior cases this Court has reviewed the suggestiveness of encounters between witnesses and suspects that were at least in some respects "unplanned." *See, e.g.*, ***State v. Brown***, 50 Wis.2d 565, 570, 185 N.W.2d 323 (1971); ***Jones v. State***, 63 Wis.2d 97, 106-07, 216 N.W.2d 224 (1973); ***State v. Streich***, 87 Wis.2d 209, 216-17, 274 N.W.2d 635 (1979).

would sufficiently taint the trial so as to deprive the defendant of due process."). Moreover, that language is inconsistent with the approach taken in ***Dubose***, which focuses on creating incentives to employ the best available identification procedures.

The ***Dubose*** framework therefore should apply whenever the State forgoes an opportunity to conduct a reliable identification procedure and then creates a situation in which a suggestive encounter is likely to occur. If the State forgoes proper identification procedures because it has no faith that its witness will be able to make a valid identification, it should abide by that decision, even if an unnecessarily suggestive encounter ultimately produces an identification. If, however, the State might want to use an identification if the witness can make one, then it should ensure that it obtains that identification in a reliable, non-suggestive procedure.

III. Courts must assess reliability in those few cases where there is no state action.

What this Court said in ***Dubose*** remains true: "it is extremely difficult, if not impossible, for courts to distinguish between identifications that were reliable and identifications that were unreliable." ***Dubose,*** ¶31. ***Dubose*** was therefore correct to target unnecessary identification procedures instead. But in those instances where the State cannot control the unnecessary procedures, there is nothing left for courts to assess except reliability. The ***Dubose*** focus on suggestive State-constructed procedures does not mean that courts should simply ignore non-state-action identifications and assume they are reliable.

Therefore, the court of appeals properly recognized

that, even absent State action, courts have a responsibility to weigh the reliability of evidence, either as a matter of due process[3] or under the balancing test set forth in Wis. Stat. §904.03. As the court stressed, "evidence must be reliable enough to be probative." ***Hibl,*** ¶¶14, 17. *See also* ***State v. Moss***, 2003 WI App 239, ¶21, 267 Wis.2d 772, 672 N.W.2d 125 (courts have authority to exclude constitutionally admissible evidence if it is "so unreliable that its probative value is substantially outweighed by the danger of prejudice and confusion").

While the reliability analysis is thus necessarily flawed, it can be guided by the developing body of social science research and model guidelines such as those promulgated by the Wisconsin Department of Justice. This Court need not incorporate, as a matter of constitutional principle, whatever the prevailing social science literature teaches. Rather, the Court should establish a structure so that the tests for suggestiveness and reliability accommodate evolving scientific principles. This structure should allow fact-finders to base decisions on the best scientific information.

Social science research incorporated in model guidelines makes clear that the ***Biggers/Brathwaite*** reliability factors are not diagnostic of reliability. This Court should join experts and courts that have rejected the ***Biggers/Brathwaite*** factors because they "are based on assumptions that are flatly contradicted by well-respected and essentially unchallenged empirical studies." ***State v. Long***,

[3] *See, e.g.*, ***Jones,*** 666 N.E.2d at 1000; ***Bouthot***, 878 F.2d at 1516.

721 P.2d 483, 491 (Utah 1986).[4]

The ***Biggers/Brathwaite*** test does not include all relevant factors, and is also circular. The reliability factors are largely self-reported and are themselves corruptible by the same suggestive influences which they purport to judge. For example, although confidence in an identification might objectively correlate with accuracy, feedback or subtle cues during and after the identification can artificially inflate a witness's reported confidence and undermine the reliability determination.[5] By the same token, even factors such as the witness's opportunity to view the crime, degree of attention, and accuracy of description, can be influenced by suggestiveness in the procedures, and thus are not good indicators of reliability.[6]

To avoid the circularity problem, any analysis of reliability must be based either on objectively verifiable factors, or the witness's statements made prior to receiving any suggestive or confirming feedback. For example, to the extent a court will consider the witness's opportunity to view an incident, that factor is only meaningful if the witness's statements about his or her opportunity to view were recorded prior to the identification event or before any feedback, overt or subtle, is provided.

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[4] *See also* Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW AND HUMAN BEHAVIOR 6 (1998); ***State v. Ramirez***, 817 P.2d 774, 781 (Utah 1991); ***State v. Hunt***, 69 P.3d 571, 576-77 (Kan. 2003); ***Brodes v. State***, 614 S.E.2d 766, 771 (Ga. 2005); ***Commonwealth v. Santoli***, 680 N.E.2d 1116, 1121 (Mass. 1997).

[5] *See* Wells & Bradford, *"Good, you identified the suspect": Feedback to eyewitnesses distorts their reports of the witnessing experience*, 83 J. OF APPLIED PSYCHOL. 360 (1998).

[6] *Id.*

There is no list of reliability factors that can replace the ***Biggers/Brathwaite*** factors in every case. Because the litigants and trial courts are best situated to assess the science at any given point in time, they should not be bound by an inflexible list of reliability factors. Even if such a comprehensive list were desirable and attainable, it would be so lengthy and complex that it would be useless as a legal standard.[7]

In this case, several objective factors appear relevant to the inquiry. Objective evidence suggests that the witness had a very limited opportunity to view the driver of the suspect vehicle. The witness observed the driver of the vehicle as they passed each other going in opposite directions at a very high combined rate of speed, and the witness was not able to provide any description except that the driver was a white male. Moreover, the witness's purported identification did not occur until 15 months later. ***Hibl*** at ¶16. Under these circumstances, it is no wonder that the State had no confidence that the witness would be able to make a meaningful identification.

Other factors, identified by the current empirical research, and already recognized by members of this Court, can also be useful diagnostic tools. In ***Dubose***, this court noted the importance of telling an eyewitness that the real suspect may or may not be present, and the importance of showing a suspect to a witness only once. ***Dubose,*** ¶35. Justice Butler has noted that the research points to factors such as "the stressfulness of the event for the eyewitness" (stress tends to limit the ability to observe); "whether the race,

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[7] Rosenberg, *Rethinking the Right to Due Process in Connection With Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 280 (1991).

gender, or age of the witness differs from the person observed"; "whether the event involved 'weapon focus'; the relative reliability of sequential versus simultaneous lineups, … the absence of a reliable relationship between the confidence of a witness and the accuracy of the identification…; whether the eyewitness is told prior to the photo array or lineup that a suspect has been detained and may be present for the identification; … whether the 'fillers' match the eyewitness's description of the perpetrator; and … whether the eyewitness is given positive feedback during or immediately following the identification." ***State v. Shomberg***, 2006 WI 9 ¶¶70-71, __ Wis.2d __, 709 N.W.2d 370 (Butler, J., dissenting)(footnotes omitted). All of these are empirically sound factors.

A proper analysis of reliability in this case might also include consideration of the speed in which the identification was made.[8] However, even this factor is more complicated than it might appear, because, as in this case, it is often self-reported and not objectively verifiable.

The State argues that because the witness in this case claimed he immediately recognized Hibl outside the courtroom, the speed of recognition makes this a reliable identification: "The immediate 'that's him' reaction reflects a recognition-memory process, *not* a relative-judgment process." State's Reply Brief at 7. But that reads too much into the witness's self-reported, post-identification assessment of his experience. We cannot know whether in fact the witness first observed numerous other people and eliminated them (through the relative judgment process) because they

[8] Weber, Brewer, & Wells, *Eyewitness Identification Accuracy and Response Latency: The Unruly 10-12-Second Rule*, 10 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: APPLIED 139-47 (2004).

were the wrong gender, race, age, or physical build, and we cannot know whether the witness's post-identification recall of an instant memory was itself free of taint from suggestive feedback.

CONCLUSION

Amicus urges this court to resolve this case consistently with principles enunciated in ***Dubose*** and emerging social science research, as set forth in this brief.

Dated this 15th day of March, 2006.

Respectfully submitted,

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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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