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**STATE OF WISCONSIN
SUPREME COURT**

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OF WISCONSIN**

Appeal No. 2017AP1894-CR

Wood County Circuit Court Case No. 2017CF76

**STATE OF WISCONSIN,
Plaintiff-Appellant-Respondent,**

v.

**STEPHAN I. ROBERSON,
Defendant-Respondent-Petitioner.**

PETITION FOR REVIEW AND APPENDIX

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PETITION

Defendant-Respondent-Petitioner Stephan I. Roberson, by his undersigned counsel and pursuant to §808.10 and §809.62(3) Wis. Stats., respectfully petitions this court for review of the adverse decision of the Wisconsin Court of Appeals, District IV, issued October 4, 2018 in the case:

State of Wisconsin v. Stephan I. Roberson

Appeal No. 2017AP1894-CR.

Publication was not recommended. The decision of the Court of Appeals reversed the Wood County Circuit Court decision to suppress the identification of Roberson by use of a single photograph law enforcement obtained from Roberson's Facebook profile and the subsequent in-court identification by the alleged victim. A copy of the decision appears in the appendix.

ISSUE PRESENTED FOR REVIEW

I. WHETHER IDENTIFICATIONS MADE OUT-OF-COURT USING A SINGLE PHOTO ARE "SHOWUPS" AND INADMISSIBLE ABSENT A SHOWING OF NECESSITY.

The Court of Appeals answered identification using a single photo was not a "showup"¹ and concluded any decision to extend the *Dubose*² necessity standard should be left to this court.

CRITERIA FOR REVIEW

The Supreme Court should clarify whether an out-of-court identification using a single photo, is akin to a "showup" or a "one on one" confrontation and inadmissible unless, based on the totality of

¹ "A showup is an out-of-court pretrial identification procedure in which a suspect is presented singly to a witness for identification purposes." *Dubose*, 285 Wis. 2d 143, ¶ 1 n. 1 (quotations and citation omitted)

² *State v. Dubose*, 2005 WI 26, 285 Wis. 2d. 143, 699 N.W.2d 582.

the circumstances, the use of that single photo was necessary.

STATEMENT OF THE CASE

The State appealed the partial granting of Roberson's Motion to Suppress Identification, and to Compel Disclosure of Confidential Informants. (R.17.) After a hearing where the alleged victim and two investigating officers testified, the parties submitted written briefs in support of their positions. (R.35, R.25, R.26.) The circuit court ordered the suppression of the alleged victim's out-of-court and in-court identifications and denied the motion to suppress identification by Sergeant Studzinski. (R.28, Pet'r's App., pp. 101-19.) The motion to compel disclosure of confidential informants was not a subject in this appeal.

The Court of Appeals reversed the decision of the circuit court and remanded the case for further proceedings. This petition seeks review of the Court of Appeal's decision.

STATEMENT OF FACTS

This case involves an suppression of an identification by the alleged victim (hereinafter, "C.A.S.,") of a black male know to him as "P," made when law enforcement showed C.A.S a single Facebook profile photo of Roberson while C.A.S was in custody on a probation hold. Roberson moved to suppress the identification and a hearing was held. (R.35, Pet'r's App., pp.101-19³.)

C.A.S. testified he met with P three times for marijuana transactions. The first time was in a Walmart parking lot where P approached C.A.S. to ask if he could provide him with marijuana. (R.35, p.10, Pet'r's App., p.135.)

³ The filed transcript of the motion hearing held on March 23, 2017, (R.35,) appears in the appendix to this petition and was modified by counsel by deleting the blank portions so that lines 1-25 appear on each respective page.

The next day, the two had telephone contact. The day after that, C.A.S. texted P and told him he could get more marijuana for him. P picked up C.A.S. along with his brother and sister and the four drove together to get the marijuana. P brought the three back home where P asked C.A.S. to sell some of the marijuana he had just purchased. (R.35, p.20, Pet'r's App., p.145.)

C.A.S. testified he went to sell a half ounce of the marijuana, but the buyer robbed him at gunpoint. After C.A.S. texted P that he had been robbed, he said P picked him while he was walking down a road. (R.35, pp.12-13, Pet'r's App., pp.137-38.)

C.A.S. testified that P drove to a park then fired a shot from a small handgun over his head. C.A.S. said the two got into a physical altercation and while he was hitting P, he was shot in the leg. (R.35, p.14, Pet'r's App., p.139.) C.A.S. estimated this meeting began twenty (20) to thirty (30) minutes after he was robbed at gunpoint by the potential buyer. (R.35, p.20, Pet'r's App., p.145.)

After law enforcement received information C.A.S. had been shot in the leg, they went looking for him, but did not locate him. (R.35, pp.22-27, Pet'r's App., pp.147-152.) About two and a half weeks later while he was in jail on a probation hold, C.A.S. spoke with Investigator Reblin and his partner Detective Richter. (R.35, p.15, Pet'r's App., p.140.) Reblin asked C.A.S. if he would recognize P if he saw him again. C.A.S. made a hand gesture that Reblin did not fully understand. C.A.S. is white male and Roberson is black male. (R.35, pp.29-30, Pet'r's App., pp.154-55.) Next, Detective Richter showed C.A.S. Roberson's Facebook profile photograph on his cell phone. (R.19, R.35, p.27, Pet'r's App. 152.) C.A.S. said the photo was of the person who shot him. (R.35, p.28, Pet'r's App., p.153.) Later C.A.S. was asked if the person who shot him was in the courtroom and if so, to identify the person. C.A.S. replied, "[h]e's over there in

orange,” and gestured at Roberson. (R.35, p.16, Pet’r’s App., p.141.)

Reblin testified he did not think a photo array was necessary, because he had other means of identifying the shooter as Roberson. (R.35, pp.28-29, Pet’r’s App., pp.153-54.) Reblin also testified he was fairly certain Roberson was P and the person who shot C.A.S. (R.35, p.29, Pet’r’s App., p.154.)

The circuit court’s decision to suppress the identifications included an analysis of whether Reblin’s identification procedure was unnecessarily suggestive and conducive to mistaken identity using the factors delineated in *Neil v. Biggers*, 409 U.S. 188 (1972). The court also examined the issue of single photo identification using *Kain v. State*, 48 Wis. 2d 212, 179 N.W.2d 777 (1970). In addition, the court recognized the issue cross-racial/cultural identification as being a factor in its decision. (R.28, p.4., Pet’r’s App., p.122.)

In its de novo review, the Court of Appeals applied the totality of the circumstances/reliability test found in *Biggers*, 409 U.S. at 199 and cross-racial identification considerations from *State v. Hibel*, 2006 WI 52, ¶40, 290 Wis. 2d 595, 714 N.W.2d 194. It concluded the identification of Roberson by C.A.S., from the photo used in the interview, “was sufficiently reliable that a jury should see and hear the evidence of that identification” and reversed the suppression rulings of the circuit court. (Pet’r’s App., p.119.)

ARGUMENT

No Wisconsin decision is on point for whether pretrial out-of-court identifications using a single photo are admissible without a showing of necessity under the totality of the circumstances.

In *Neil v. Biggers*, 409 U.S. 188 (1972), the U.S. Supreme Court opined that *suggestive confrontations are disapproved* because they increased the likelihood of misidentification, and *unnecessarily suggestive ones are condemned* for

the further reason that the increased chance of misidentification is gratuitous. *Id.*, at 198 (emphasis added). The Court then considered the following factors in evaluating the likelihood of misidentification:

- [1] The opportunity of the witness to view the criminal at the time of the crime,
- [2] the witness' degree of attention,
- [3] the accuracy of the witness' prior description of the criminal,
- [4] the level of certainty demonstrated at the confrontation, and
- [5] the time between the crime and the confrontation. (*Biggers*, 409 U.S. at 200.)

In 1995, the Wisconsin Supreme Court decided *Wolverton*, adopting the test set forth in *Biggers* in an attempt to minimize the misidentification of defendants in Wisconsin. See *State v. Wolverton*, 193 Wis. 2d 234, 533 N.W.2d 167 (1995); *Fells v. State*, 65 Wis. 2d 525, 233 N.W.2d 507 (1974). This court upheld the admissibility of the out of court identifications by multiple witnesses who had observed Wolverton on multiple occasions before he was shown sitting in the back seat of a squad car. This court did not find the identifications in *Wolverton* admissible under standards involving due process as set forth in *Stovall v. Denno*, 388 U.S. 293, but because under the totality of the circumstances, such identifications were determined to be reliable. *Wolverton*, 193 Wis. 2d at 268. (Internal citations omitted).

Ten years after *Wolverton*, the Wisconsin Supreme Court reexamined their position that evidence from an impermissibly suggestive out-of-court identification can still be used at trial if, based on the totality of the circumstances, the identification was reliable. In *State v. Dubose*, 2005 WI 26, 285 Wis. 2d. 143, 699 N.W.2d 582, this court recognized there had been extensive studies on the issue of identification evidence, research

that they found impossible to ignore. *Id.*, at ¶ 29 (internal citations omitted). They concluded, “[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.” *Id.* at ¶ 30 (internal citations omitted).

In light of such evidence, we recognize that our current approach to eyewitness identification has significant flaws. After the Supreme Court's decisions in *Biggers* and *Brathwaite*, the test for showups evolved from an inquiry into unnecessary suggestiveness to an inquiry of impermissible suggestiveness, while forgiving impermissible suggestiveness if the identification could be said to be reliable. Studies have now shown that approach is unsound, since it is extremely difficult, if not impossible, for courts to distinguish between identifications that were reliable and identifications that were unreliable. “Considering the complexity of the human mind and the subtle effects of suggestive procedures upon it, a determination that an identification was unaffected by such procedures must itself be open to serious question.” *State v. Leclair*, 118 N.H. 214, 385 A.2d 831, 833 (1978). Because a witness can be influenced by the suggestive procedure itself, a court cannot know exactly how reliable the identification would have been without the suggestiveness. *Dubose*, 2005 WI 126 at ¶ 31.

Dubose abrogated *Wolverton* by concluding that evidence obtained from an out-of-court showup is inherently suggestive and inadmissible unless, based on the totality of the circumstances, the procedure was necessary. 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.

The basis for this holding was that the Wisconsin Constitution provided greater protection in this context because new studies had

demonstrated that unreliable eyewitness identification contributed to wrongful convictions, thereby providing a compelling justification for overruling precedent. *Dubose*, 285 Wis. 2d 143, ¶¶ 29-30, 33, 699 N.W.2d 582.

In *State v. Drew*, 2007 WI App 213, 305 Wis. 2d 641, 740 N.W.2d 404, the Court of Appeals declined to extend the *Dubose* necessity standard to *photo array procedures*. Seven years later, this court distinguished a showup from an identification made *in court*, through the showing of a single mug shot to a witness, *during trial*. *State v. Ziegler*, 2012 WI 73, ¶¶ 81-82, 342 Wis. 2d 256, 816 N.W.2d 238 (emphasis added).

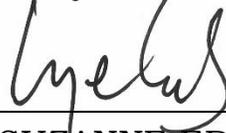
The question of whether out-of-court identifications using a single photograph are showups requiring a showing of necessity before admissible, should be decided by this court to clarify the law which affects all defendants.

CONCLUSION

WHEREFORE, for the reasons stated herein, Defendant-Respondent-Petitioner Stephan I. Roberson respectfully requests the Wisconsin Supreme Court grant this petition for review.

Dated: November 2, 2018

Respectfully submitted,



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BRIEF CERTIFICATION

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:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 1,879 words.

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 that complies with Wis. Stat. §809.19(2)(a) and that contains:

- (1) a table of contents;
- (2) relevant circuit court record entries;
- (3) the findings or opinion of the circuit court; and
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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.

ELECTRONIC SUBMISSION CERTIFICATION

I hereby certify that the electronic version of the Petition For Review and Appendix in Appeal No. 2017AP1894-CR is identical to the printed version.

Dated: November 2, 2018

A handwritten signature in black ink, appearing to read 'Suzanne Edwards', written over a horizontal line.

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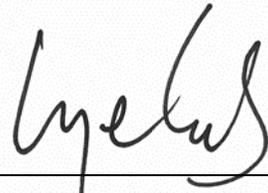
CERTIFICATE OF MAILING

STATE OF WISCONSIN)
IOWA COUNTY)

I, Suzanne Edwards, a licensed Wisconsin attorney, hereby certify that copies of Defendant-Respondent-Petitioner’s Petition For Review in Appeal No. 2017AP1894-CR were placed in the U.S. Mail, with proper postage affixed this 2nd day of November 2018, addressed to the following as indicated below:

Wisconsin Department of Justice
Criminal Appeals Unit
PO BOX 7857
Madison, WI 53707-7857

Dated: November 2, 2018



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